
(2011) 01 AHC CK 0141

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 49759 of 2010

UCO Bank & Anr.

APPELLANT

Vs

District Magistrate, Allahabad & Ors.

RESPONDENT

Date of Decision : 03-01-2011

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 14, 17

Citation : (2011) 01 AHC CK 0141

Hon'ble Judges : Ashok Bhushan, J and Shyam Shankar Tiwari, J

Final Decision : Allowed

Judgement

Shyam Shankar Tiwari, J.

Heard Sri Vipin Kumar Saxena, learned counsel for the petitioners, Sri P.C. Srivastava, learned counsel for respondents no. 2 & 3 and Sri Vishnu Pratap, learned Standing Counsel appearing for respondents no. 1.

Counter affidavit has been filed by the respondents no. 2 & 3 to which rejoinder affidavit has also been filed. Counter and rejoinder affidavits have been exchanged. With the consent of learned counsel for the parties, the writ petition is being disposed of finally.

By this writ petition, the petitioners have prayed for quashing of the order dated 25.3.2010 passed by the District Magistrate by which he had stayed his earlier order dated 15.2.2010 on an application dated 5.3.2010 submitted by the respondents no. 2 & 3.

Brief facts of this case which have emerged from the parties are; that the petitioner no. 1 has been extending finance facility to the customers from its various branches including petitioner no.2. Cash credit facility was granted to the respondent no. 2 for an amount of Rs.4, 00, 000/. The respondent no. 2 created security interest in favour of the bank by depositing partition deed of shop no. 99 at Sabzi Mandi, Chawk, Allahabad and partition deed as property no. 134 as well

as hypothecating the stock. The bank, on default being committed, issued a notice under Section 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter called "Act, 2002") on 21.09.2004. The possession notice was issued in exercise of power under Section 13(4) of the Act, 2002 on 31.01.2006. The respondent no.2 under Section 17 of the Act, 2002 approached the Debt Recovery Tribunal by filing SA No. 18 of 2006. The Debt Recovery Tribunal disposed of the application by the order dated 15.5.2006. The SA no. 18 of 2006 was dismissed by the Tribunal. The bank, after passing of the said order of the tribunal, filed an application under Section 14 of the Act before the District Magistrate, Allahabad for taking possession. The District Magistrate passed an order on the application submitted by the bank on 15.2.2010 directing for taking possession of the Shop no.99 and to use necessary police force. The said order passed by the District Magistrate was challenged by the respondent no.2 by writ petition no. 10587 of 2010 which writ petition was dismissed by the order dated 26.2.2010 by the Division Bench of this Court. Subsequent to order dated 26.2.1010 dismissing the writ petition filed by the respondent no. 2, an application dated 5.3.2010 has been filed before the District Magistrate by which prayer was made to recall the earlier order dated 15.2.2010. On the said application an interim order was passed by the District Magistrate on 25.3.2010 which has been challenged in the present writ petition. By this writ petition, following prayers have been made:

"1. Writ, order or direction in the nature of Certiorari quashing the order dated 25.03.2010 passed by the District Magistrate, Allahabad in case no.44 of 2010.

2. Writ, order or direction in the nature of mandamus commanding the respondent no. 1 to dispose off the application dated 05.03.2010 filed by the respondent no. 2 as well as the objections filed by the petitioners on 29.04.2010 on the next date fixed in the case.

3. Issue, any other suitable writ, order or direction as this Hon"ble Court may deem fit and proper under the facts and circumstances of the case.

4. Award the cost of the petition in favour of the petitioner."

A detailed counter affidavit has been filed by respondents no.2 and 3 to which rejoinder affidavit has been filed.

Learned counsel for the petitioners submits that application and appeal of respondents no. 2 and 3 filed under Section 17 of the Act, 2002 having already been dismissed, the bank rightly invoked the power of the District Magistrate under Section 14 of the Act on whose application an order was issued by the District Magistrate on 15.2.2010 for handing over possession of the property to the bank, against which writ petition filed by respondent no. 2 having been dismissed the respondents no. 2 and 3 had no authority to make any application for recall of order dated 15.2.2010 nor the District Magistrate had jurisdiction to hear the application again entering into various issues which has been raised by respondent no. 2 in his application. It is submitted that jurisdiction under Section

14 of the Act, 2002 is limited and under this section the District Magistrate is not required to adjudicate various issues which have been raised in the application filed by respondents no. 2 and 3.

Sri Saxena has placed reliance on decisions of Division Bench of this Court reported in 2007(3) ADJ 357 (DB) in M/s. Syndicate Bank Body Corporate vs. State of U.P. and others, Judgment of Bombay High Court in case of Trade Well vs. Indian Bank reported in 2007BCR1783 and decision of Madras High Court in case of Indian Overseas Bank vs. M/s. Sree Aravindh Steels Ltd. and others reported in AIR 2009 Madras 10. It is submitted by Sri Saxena that the questions which are now raised in the application filed by respondents no. 2 and 3 after the District Magistrate had passed the order dated 15.2.2010 are the questions which are in domain of the Debt Recovery Tribunal. He submits that order passed by the District Magistrate dated 25.3.2010 was without jurisdiction. He submits that objections have already been filed by the bank on 29.4.2010 which objections have not been decided.

Sri P.C. Srivastava, learned counsel appearing for respondents no. 2 and 3 submits that the present writ petition filed by the bank is premature since the proceedings are still pending before the District Magistrate. He submits that under Section 14 of the Act, 2002 the District Magistrate has power only with regard to "Secured Assets". He submits that property in question i.e. shop no. 99 is not a "secured asset" and the District Magistrate has no jurisdiction to pass any order under Section 14 of the Act, 2002 and he submits that on subsequent application given by respondents no. 2 and 3 enquiry was got made which revealed that the shop no. 99 belongs to Nagar Mahapalika, Allahabad and respondents no. 2 and 3 are not the owner of the shop. He submits that order of the District Magistrate dated 25.3.2010 is within the jurisdiction of the District Magistrate and he submits that in his writ petition no. 10587 of 2010 the question that shop in question is not a secured asset was not raised and not decided, hence dismissal of the writ petition has no bar in making an application before the District Magistrate.

Sri Vishnu Pratap, learned Standing Counsel submits that the District Magistrate has jurisdiction to enquire as to whether the property for which possession is sought to be claimed, is secured asset or not and the bank has no jurisdiction or authority to sell the shop no. 99 which belongs to Nagar Mahapalika, Allahabad, hence the District Magistrate has rightly entertained the application and proceeded to hear the same.

Learned counsel for the petitioners replying the submission of the learned counsel for the respondents in the rejoinder affidavit has reiterated his submissions and submitted that the stock of the shop was hypothecated and the property no 134 and shop no. 99 were both mortgaged to the bank and partition deed was submitted which is mentioned in the notice under Section 13(2) of the Act, 2002 and the submissions made by the respondents no. 2 and 3 were rejected by the Debt Recovery Tribunal and after 15.3.2010 no further appeal

was filed.

We have considered the submissions of the learned counsel for the parties and perused the record.

The preliminary objection which has been taken by the learned counsel for the respondents is that the present writ petition is premature and need not be entertained. From the prayer of the petitioners as quoted above, it is clear that the first prayer is to quash the order dated 25.3.2010 by which the District Magistrate had stayed his earlier order dated 15.2.2010. The order has already been passed by the District Magistrate on 25.3.2010 entertaining the application submitted by the respondents no. 2 and 3 and has stayed its earlier order, hence it cannot be said that the writ petition is premature. The petitioners bank in whose favour order dated 15.2.2010 was already passed by the District Magistrate against which the writ petition filed by respondents no. 2 and 3 has been dismissed had every right to challenge the order dated 25.3.2010, hence the submission that the writ petition is premature and can not be entertained, can not be accepted.

The principal submission which has been made by the learned counsel for respondents no. 2 and 3 in support of their application filed before the District Magistrate is that shop no. 99 is not a "secured asset" and that shop no. 99 could not have been mortgaged, since respondents no. 2 and 3 are not owners of the shop and the shop belongs to Nagar Mahapalika, Allahabad.

Section 2 of the Act, 2002 defines secured assets and security interest. Section 2 (zc) and 2(zf) are quoted below:

"2(zc) "Secured asset" means the property on which security interest created."

"2(zf) "Security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31."

The bank has invoked power under Section 13(4) of the Act, 2002 after giving a notice under section 13(2) of the Act, 2002. Section 13(4) of the Act, 2002 is quoted as below:

13(4) In case the borrower fails to discharge his liability in full within the period specified in subsection (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

Provided that the right to transfer by way of lease, assignment or sale shall be

exercised only where the substantial part of the business of the borrower is held as security for the debt;

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

The power of the District Magistrate has been invoked under Section 14 of the Act, 2002 which section is also relevant and is quoted below:

"14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset. (1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him

(a) take possession of such asset and documents relating thereto; and

(b) forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of subsection (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority."

A copy of notice under Section 13(2) of the Act, 2002 has been filed as annexure 1 to the writ petition. Schedule "C" of the notice is as follows:

"SCHEDULE "C"

PART1

(Please mention all the hypothecated properties, viz Current Assets including

Stocks, Book, Debts, Receivables, Consumable Stores & spares and hypothecated Movable Plant & Machinery etc, mentioned in the documents.)

(Schedule "B")

Hypothecation of stock of crockery goods.

PARTII

(Please state the particulars of the immovable properties mortgaged to the Bank as stated in the documents having reference to the mortgage documents/deeds)

(Schedule "B")

Partition Deed of property no. 134 Bahadurganj and shop no. 99 at Sabzi Mandi block, Chawk registered in Bahi No. 1 Zild 2445 Pages 39 to 49 at SI No. 945."

A perusal of the above schedule indicates that in partI, hypothecation of stock of consumable goods was mentioned and in part II the particulars of the immovable properties mortgaged to the Bank was mentioned.

The submission is that respondents no. 2 and 3 not being owner of the shop no. 99, the said property could not have been mortgaged. The fact remains that notice of the bank mentions the said property as immovable property mortgaged to the bank. After notice under Section 13(2) of the Act, 2002 the possession notice was given by the bank on 31.01.2006 (Annexure 2 to the writ petition). In possession notice the description of the property by which the possession was sought to be taken was mentioned in the bottom of the possession notice which are quoted below:

"Description of Property

PartI

Hypothecation of Stock of Crockery Goods.

Part II

All that part and parcel of Partition deed of Property No. 134 Bahadur Ganj in respect of Shop No. 99, Situated at Sabzi Mandi, Block Chawk, Allahabad. Property equitably mortgaged by Sri Ram ji Jaiswal S/o Shri Milo Narain Jaiswal R/o 134, Bahadur Ganj, Allahabad.

Property bounded by

East House of Shri Ganga Prasad

West House of Shri Ram Lal

North Road

South House of Shri Ram Lal."

Section 17 of the Act provides a right of appeal to the aggrieved by any of the

measures referred to in subsection (4) of section 13. Respondents no. 2 and 3 has availed the remedy under Section 17 of the Act, 2002 by filing an appeal before the Debt Recovery Tribunal. The appeal has already been dismissed by the order dated 15.5.2006 by the Tribunal. A perusal of the order dated 15.5.2006 indicates that several submissions were raised by respondents no. 2 and 3 including submission that respondents no. 2 and 3 never took any financial assistance from the bank. When the remedy of appeal is provided against any measure under Section 13(4) of the Act, 2002, it is open for the aggrieved to submit an application before the Debt Recovery Tribunal which is a statutory forum and raise all the pleas available to the aggrieved party.

The question which is now sought to be raised before the District Magistrate under Section 14 of the Act, 2002 is that the shop no. 99 is not a secured asset, which question ought to have been raised before the Tribunal and was required to be decided therein. Section 14 of the Act, 2002 empowers the secured creditor to take assistance of Chief Judicial Magistrate or the District Magistrate for taking possession of the secured asset. The scope and ambit of the section 14 has been considered by the Division Bench of this Court as well as Bombay High Court and Madras High Court as mentioned above. In para 4 and 8 of the decision of Division Bench of this Court in M/s. Syndicate Bank Body Corporate vs. State of U.P. following has been laid down

"4. There is a specific legislation namely Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which permits the petitioner to take action against the borrowers who have defaulted in payment of loan extended to them. The said Act empowers the petitioner not only to take physical possession of the assets but also to transfer the assets and realize the dues. In aid to the said action, which the petitioner is empowered to take, Section 14 commands respondent no. 2 to assist the petitioner in taking possession of the secured assets. There is no provision under the Act, which empowers respondents no. 2 to 5 to decide as to whether the asset is secured asset and pursuant to that the premises can be sealed. There is no power of adjudication conferred upon respondents no. 2 to 5 under the Act of 2002 to decide whether to seal a factory premise or not to seal the factory premise? Even otherwise there is no provision, known in law under which respondents No. 2 to 5 can issue a direction to release the seal, which has been put in exercise of statutory power conferred upon the petitioner. The petitioner was not given deliberately a copy of the alleged plaint by respondent no.6 though the petitioner specifically demanded the same. There is no material on the record on which it can be said that the premises in question are under the lease of respondent No. 6. On the contrary it is respondent No. 7 in whose favour a lease agreement was executed by one M/s. S.S.A. Laminators Pvt. Ltd. with respect to industrial property NO. A1, Sector59 Noida. None of the documents supplied by the petitioner has been taken into consideration by the respondents before passing the order dated 8.2.2006. Respondents No. 2 to 5 cannot vest themselves with a jurisdiction, which is not directed under the Act. As such, the action taken by

respondents No. 2 to 5 is contrary to the provisions contained under the Act of 2002. The action of respondent no. 5 is clearly malafide. Till 31.1.2006 Respondent no. 5 was acting within the purview of Section 14 of the Act of 2002 and immediately thereafter respondent no. 5 on the behest of respondent no. 6 which shows that it is the business concerned running by the family members of respondent no. 7 and respondents no. 6 and 7 are the sister concerns. This has specifically been stated by the petitioner in its reply dated 4.2.2006. Respondent No. 7 in a similar manner has fully squandered Rs.25 Crores which it had obtained from Punjab National Bank and a CBI inquiry has been registered against the Directors of respondent no. 7 which is still pending. Respondents No. 6 and 7 are involved in an agreement with an intention to run away with the huge loan amount, which was disbursed, to them. In such a situation respondent no. 5 should have taken into consideration all these factors but he is siding respondents No. 6 and 7 who are involved in bank frauds."

"8. The Securitization Act does not permit respondents No. 3 to 5 to adjudicate any dispute of any nature between the bank and its borrower or to declare any action under the Securitization Act to be bad or in any manner restrain the bank in exercising its right under the Act for the purpose of dispute which may also include a third party. The Act contemplates a remedy in the form of an appeal to be preferred by that person under Section 17 of the Act. Subsections (2) and (3) of Section 17 deal with the scope of the proceeding of the appellate forum namely Debt Recovery Tribunal. Hence respondents No. 3 to 5 are complete strangers to pass an order in the nature as they have passed. The aforesaid exercise on the part of respondents No. 3 to 5 is totally without jurisdiction and contrary to the specific provisions contained under the Act. Even otherwise no law permits the respondents No. 3 to 5 to pass an order releasing the said premises in favour of third person. The order authorizes illegal grabbing of public property and it is for this reason that the respondent No.5 has been implicated in his personal capacity. In the counter affidavit filed on behalf of respondent No. 5, the respondent No. 5 has not given any source of power under which he was authorized to pass an order contained in Annexures 1, 2 and 11 to the writ petition."

A Division Bench of Bombay High Court in Trade Well vs. Indian Bank has also got occasion to consider the scope and ambit of Sections 13, 14 and 17 of the Act, 2002. The Division Bench took a view that Chief Judicial Magistrate or District Magistrate is not entitled to adjudicate rival claims while deciding application under Section 14 of the Act, following are laid down in para 81 and 82 :

(81) We find no substance in this submission. In this connection, it is necessary to have a look at section 14(2) and (3). It reads thus:

"14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset. (2) For the purpose of securing compliance with the provisions of subsection(1), the Chief Metropolitan Magistrate or the

District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary. (3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority."

(82) SUBSECTION (3) is preceded by subsection (2) under which for securing compliance of subsection (1), that is for taking possession, the CMM/DM can take such steps and use or cause to be used, such force, as may in his opinion, be necessary. Subsection 3 grants immunity to the CMM/DM as regards steps taken by him or force allowed to be used by him for providing assistance for taking possession. Since as stated by us adjudication of rival claims is absent at that stage, there is no question of his dealing with rival claims and giving a reasoned judgment as regards the merits of the case and obviously there is no question of such a reasoning assuming finality. In any event, if a party has any grievance as regards contents of that order, his remedy would be to voice them in the application under section 17 before the DRT after measures under section 13(4) are taken."

Whether the asset is a "secured asset" or not has to be looked into from the notice issued by the bank under Section 13(2) of the Act, 2002 and action taken under Section 13(4) of the Act, 2002. The Chief Judicial Magistrate or the District Magistrate on being satisfied that the property of which possession is sought, is the secured asset, may take possession of the property under Section 14 of the Act, 2002. For example, in case the secured asset mentioned in the notice of the bank is property "A", the bank cannot make an application under Section 14 of the Act, 2002 for taking possession of the property "B". But the question is as to whether the asset has been properly mortgaged or the mortgage is valid or not, are not the questions which need to be adjudicated by the District Magistrate. The said questions have to be adjudicated by the statutory forum under Section 17 of the Act, 2002 and thereafter if there is any grievance, the aggrieved person may file further appeal under Section 18 of the Act, 2002.

In view of above, we are of the view that although Section 14 of the Act, 2002 empowers the District Magistrate to look into as to whether the possession sought is of the same property which is secured or not but the question as to whether the secured assets have been properly mortgaged by a valid mortgage deed or not are not the questions which can be gone into by the District Magistrate.

Learned Standing Counsel has expressed his apprehension that property in question i.e. shop no 99 which belongs to Nagar Mahapalika, Allahabad, can be sold by the bank. The possession notice which has been brought on record as annexure 3 to the writ petition does not mention any order of sale or auction of shop no. 99. The notice is for taking of possession and possession can be taken by the bank for different purposes as mentioned under Section 13(4) of the Act, 2002. The apprehension that the bank may sell the property of Nagar Mahapalika, Allahabad to which it has no jurisdiction, is a question which has not

cropped up today as to enter into for adjudication at this stage.

Whether the measures taken by the bank under Section 13(4) are valid or not, is a question which has to be raised under section 17 and further Section 18 of the Act, 2002. In the present case. Respondents no. 2 and 3 have already filed an appeal under Section 17 of the Act, 2002 which was decided on 15.5.2006 and no further appeal is claimed to have been filed by the respondents no. 2 and 3.

As noted above, the District Magistrate has passed an order dated 15.2.2010 on the application of the bank. The said order was challenged by respondents no. 2 and 3 in this court by filing a writ petition no. 10587 of 2010 which writ petition was dismissed on 26.2.2010 by the following order:

"Argument of the petitioner is that the shop could not have been mortgaged for taking the loan as under the family settlement the petitioner is owner of the shop in question.

It is further argued that District Magistrate is not competent authority to pass the impugned order and thus petitioner's dispossession from the shop in question is not justified.

After hearing the arguments of learned counsel for the petitioner this Court is of view that under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to recover the loan Bank can take recourse.

Claim of the petitioner that since the aforesaid shop came to his share in family settlement, and, therefore, it could not have been mortgaged, cannot be accepted unless it is established by the petitioner that the property was received by him in family settlement for which this Court is to observe that this can be concern of civil proceeding or otherwise.

The matter was taken to D.R.T. and there is proceeding accordingly.

The District Magistrate has rightly taken cognizance of the matter as empowered under the Act and thus order passed by him suffers from no illegality.

The writ petition fails and is dismissed."

This court dismissed the writ petition by rejecting the arguments raised by respondents no. 2 and 3. In the said writ petition argument was noticed by the Division Bench of this Court that the shop could not have been mortgaged. The Division Bench has observed that the question is as to whether the shop could have been mortgaged or not, can be decided in civil proceedings or otherwise. The application which has been filed by respondents no 2 and 3 subsequent to dismissal of the writ petition dated 26.2.2010 raised same issues that the shop could not have been mortgaged. It was prayed by the respondents no. 2 and 3 that they are tenants of the shop which belongs to Nagar Mahapalika, Allahabad. As observed above, the said issue was open to be raised under Sections 17 and 18 of the Act, 2002. The District Magistrate was to look into as to whether the

possession sought by the petitioners is of the same property which is secured asset and the remedy to all the aggrieved persons including owner of the property is to challenge the action of the bank under Sections 17 and 18 of the Act, 2002. Moving application before the District Magistrate dated 5.3.2010 does not appear to be justified in facts of the present case. The District Magistrate having already allowed the application on 15.2.2010 against which writ petition filed by the respondents no. 2 and 3 was dismissed on 26.2.2010, it was not open to the respondents no. 2 and 3 to again move an application before the District Magistrate for recalling of its order dated 15.2.2010 which had received approval of this Court vide order dated 26.2.2010. The course adopted by the respondents no. 2 and 3 for moving application on 5.3.2010 after dismissal of the writ petition was wholly unjustified and the District Magistrate committed error in entertaining the application and in proceeding with the enquiry. Learned counsel for the respondents submits that the proceedings are still pending before the District Magistrate and the petitioners themselves in relief no. 2 have prayed a direction for the District Magistrate to dispose of the application dated 5.3.2010. We having taken the view that the application before the District Magistrate was unjustified after dismissal of the writ petition, we do not see any justification in permitting the said application to proceed any further.

In view of the foregoing discussion, the order dated 25.3.2010 passed by the District Magistrate on application dated 5.3.2010 filed by respondent no. 2 is held to be unjustified and is set aside. The application dated 5.3.2010 need not be proceeded any further.

The writ petition is allowed to the extent indicated above.