

(2007) 07 KAR CK 0034

In the Karnataka High Court

Case No : Writ Petition No"s. 23813 of 2005 and 7659 of 2007

V. Krishnaswamy and Another

APPELLANT

Vs

The Karnataka Rajya Kaigarika Sahakara Bank Niyamitha and
Another

RESPONDENT

Date of Decision : 12-07-2007

Acts Referred:

Banking (Regulation) Act, 1949 — Section 5 (cc), 56
Securitization and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 — Section 13, 14, 2 (a)

Citation : AIR 2008 Kar 20 : (2007) ILR (Kar) 4740

Hon'ble Judges : Ajit J. Gunjal, J

Bench : Single Bench

Advocate : C.S. Kothavale and Nandgopal, for Iyengar and Company, for the
Appellant; R. Chandranna, for R1 and R2, Venkatesh R. Bhagat and B.N. Prasad,
HCGP for R2, for the Respondent

Judgement

Ajit J. Gunjal, J.—Both these writ petitions are disposed of by this common order.

2. In both these writ petitions the petitioners are questioning the action of the respective respondent banks in initiating the proceedings under the provisions of the Securitisation and Reconstitution of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Securitisation Act")

3. The facts in W.P. 23813/05 are that one M/s Hi-tech Industries is a registered partnership firm. It is stated to have borrowed monies from first respondent Karnataka Rajya Kaigarika Sahakara Bank Niyamitha, Bull Temple Road, Basavanagudi, Bangalore (for short "Co-operative Bank"). The case of the first respondent bank is that the said firm has committed default in payment of loan amount and consequently a notice u/s 13(2) of the Act dated 1.1.2004 was issued. Suffice it to say that an order u/s 13(4) of the Act was passed, a copy of which is produced at Annexure-B, which was the subject matter of W.R No. 6537/04. This court allowed the writ petition and has quashed the order u/s

13(4) of the Act and directed the bank to consider the reply/objections filed by one of the partners of M/s Hi Tech Industries to the notice issued u/s 13(2) of the Act. It appears, thereafter the property belonging to the petitioner was brought to sale pursuant to an auction notice dated 22.9.2005. Incidentally it is the specific case of the petitioner that he is not a partner of the firm and in no way concerned with the firm. It appears, Annexure-F is issued by the bank calling upon the petitioner to hand over possession of the property. The said notice is the subject matter of the writ petition.

4. In W.R No. 7659/07, it is the case of the petitioner that he is a doctor by profession having acquired a Post Graduate Diploma in Gynaecology from Kasturba Medical College. He submits that he had availed loan from respondent No. 1 Sirsi Urban Co-operative Bank (for short "the Co-operative Bank") for establishing a hospital. The initial loan advanced was Rs. 20 lakhs. Since the loan availed by the petitioner was not paid, proceedings were initiated for recovery of the same, both under Securitisation Act as well as u/s 70 of the Karnataka Co-operative Societies Act. It is not in dispute that the petitioner has suffered an award u/s 70 of the Co-operative Societies Act; which is the subject matter of an appeal in Appeal No. 769/05 before the Karnataka Appellate Tribunal.

5. During this interregnum, after conclusion of the proceedings u/s 13(4) of the Act, an order is passed u/s 14 of the Act directing the competent authority to take possession of the property and hand it over to the bank. The said order of the 2nd respondent Deputy Commissioner is questioned in this petition.

6. In both these petitions respective learned counsel would contend that the Securitisation Act is not applicable to a loan obtained from the Co-operative Bank.

7. Mr. C.S. Kothavale, learned counsel appearing for the petitioner in W.P. 23813/05 contends that having regard to the definition of the banking institution under the Banking Regulation Act, the said definition cannot be imported in Securitisation Act and permit the Co-operative Banks to initiate action u/s 13 of the Act. In support of his contention he would rely on a ruling of the Apex Court in the case of Greater Bombay Co-op. Bank Ltd. Vs. United Yarn Tex. Pvt. Ltd. and Others, . He also submits that the petitioner is not a partner of the firm hence he is not liable to satisfy the claim.

8. Mr. B. Nandagopal, learned counsel appearing for the " petitioner in the companion writ petition submits that in view of the ruling of the Apex Court that Securitisation Act is not applicable to the banks governed by the Co-operative Societies Act, all action taken by the bank are to be reverted and a direction is required to be issued to hand over possession and assets which they have possessed u/s 14 of the Act.

9. Mr. Chandranna, learned counsel appearing for the bank submits that the fact that whether the petitioner in W.P. No. 23813/05 was a partner in the firm is a mixed question which is required to be adjudicated in a proceedings initiated by the petitioner u/s 70 of the Co-operative Societies Act. He submits that on the

scanty material produced an inference cannot be drawn that the petitioner is not a partner of the firm.

10. Mr. Bhagat, Learned Counsel appearing in the companion writ petition would submit that after issuance of notice u/s 13(2) of the Securitisation Act and receiving the reply u/s 13(4) of the Securitisation Act, possession of the property has already been taken by the bank pursuant to the order passed by respondent-2 Deputy Commissioner u/s 14 of the Act. He submits that the decision of Apex Court is not applicable, in as much as, that was rendered while examining the question whether the Securitisation Act is applicable to the proceedings initiated by the Co-operative Bank before the Debt Recovery Tribunal. He submits that the Apex Court has not dealt with the applicability of Securitisation Act vis-a-vis the Co-operative Bank. Hence the decision is not applicable.

11. I have given my anxious consideration to the rival submissions of the learned counsel for the parties.

12. Before considering the submissions of the learned counsel appearing for the parties, it is necessary to know the definition of the banking company under the Securitisation Act. The "bank" is defined u/s 2(a) of the Securitisation Act, which would mean that banking company or a corresponding new bank or the State Bank of India or a subsidiary bank or such other bank which the Central Government may by notification specify for the purpose of this Act. Pursuant to an amendment to Banking Regulation Act, 1949, (for short "Regulation Act"), Part V has been introduced by Act No. 23/1966 with effect from 1.3.1966. Section 56 of the Regulation Act would apply to the Co-operative Societies subject to certain modification. Section 56(a) states that unless the context otherwise requires, references to a banking company or the company or such company shall be construed as references to a Co-operative Bank. Further in Section 56(1) after clause (cc) clause (cci) was inserted. Clause (cci) would define what is "Co-operative Bank". Clause (ccii) defines Co-operative Credit Society means a Co-operative Society, the primary object of which is to provide financial accommodation to its members and includes a Co-operative land mortgage bank. The question is whether a Co-operative Bank as defined under the Banking Regulation Act vis a vis Securitisation Act is applicable when proceedings are sought to be initiated by Co-operative Bank for recovery of the amount. While dealing with this question, the Apex Court in the case of Greater Bombay Co-op. Bank Ltd. Vs. United Yarn Tex. Pvt. Ltd. and Others, has observed thus:

The Parliament has enacted the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the Securitisation Act") which shall be deemed to have come into force on 21st day of June 2002. In Section 2(d) of the Securitisation Act same meaning is given to the word "banking company" as is assigned to it in clause (c) Section 5 of the B.R. Act. Again the definition of "Banking Company" was lifted from the BR Act but while

defining "Bank", Parliament gave five meanings to it u/s 2(c) and one of which is "Banking Company". The Central Government is authorised by Section 2(c)(v) of the Act to specify any other bank for the purpose of the Act. In exercise of this power, the Central Government by Notification dated 28.01.2003, has specified "Co-operative Bank" respectively from Section 56 Clauses 5(cci) and (ccv) of Part V. The Parliament has thus consistently made the meaning of "Banking Company" clear beyond doubt to mean "a company engaged in banking, and not a Co-operative Society engaged in banking" and in Act No. 23 of 1965, while amending the BR Act, it did not change the definition in Section 5(c) or even in 5(d), to include Co-operative Banks; on the other hand, it added a separate definition of "Co-operative Bank" in Section 5 (cci) and "primary Co-operative Bank" in Section 5(ccv) of Section 56 of Part V of the BR Act. Parliament while enacting the Securitisation Act created a residuary power in Section 2(c)(v) to specify any other bank as a bank for the purpose of that Act and in fact did specify "Co-operative Banks" by Notification dated 29.01.2003. The context of the interpretation clause plainly excludes the effect of a reference to Banking Company being construed as reference to a Co-operative Bank for three reasons: firstly, Section 5 is an interpretation clause; secondly, substitution of "Co-operative Bank" for "banking company" in the definition in Section 5(c) would result in an absurdity because then Section 5(c) would read thus: "Co-operative Bank" means any company, which transacts the business of banking in India; thirdly, Section 56(c) does define "Co-operative Bank" separately by expressly deleting/inserting clause (cci) in Section 5. The Parliament in its wisdom had not altered or modified the definition of "Banking Company" in Section 5(c) of the BR Act by Act No. 23 of 1965.

(Emphasis supplied by me)

The Apex Court has further observed that:

"Co-operative Bank" was separately defined by the newly inserted clause (cci) and "Primary Co-operative Bank" was similarly separately defined by clause (ccv). The meaning of "Banking Company" must, therefore, necessarily be strictly confined to the words used in Section 5(c) of the BR Act. If the intention of the Parliament was to define the "Co-operative Bank" as "Banking Company, it would have been the easiest way for the Parliament to say that "Banking Company" shall mean banking company as defined in Section 5(c) and shall include "co-operative bank" and "Primary Co-operative Bank" as inserted in clauses (cci) and (ccv) in Section 5 of the Act 23 of 1965.

13. The observation made by the Apex Court would make it abundantly clear that the definition of bank under the Securitisation Act which adopts Banking Regulation Act, the Co-operative Banks cannot be termed as banking company. Indeed it is no doubt true that what fell for consideration before the Apex Court is the applicability of Securitisation Act to Co-operative Bank when the proceedings are initiated before the Debt Recovery Tribunal. While dealing with the said question, the Apex Court has also dealt with the scope of Securitisation

Act and the applicability thereof to a loan advanced by "the Co-operative Bank. Apparently once it is held that the banking company as defined u/s 5(cc) of the Banking Regulation Act does not include or encompass the Co-operative Bank, I am of the view that the proceedings could not have been initiated by the Co-operative Bank in both these petitions under the Securitisation Act. The Apex Court while dealing with the said question has further observed that the dues of Co-operative Bank and recovery proceedings thereof are self regulated, in as much as, under the Karnataka Co-operative Societies Act any amount due by a borrower to the Co-operative Bank, a dispute can be raised u/s 70 of the Co-operative Societies Act for recovery of the said amount. It is also to be noticed that even the Co-operative Societies involved in the activities of banking which involves lending and borrowing which are incidental to their main Co-operative activity which is a function in public domain. The meaning of Banking Company" must, therefore, necessarily be strictly confined to the words used in Section 5(c) of the BR Act. Indeed, it would have been the easiest thing for Parliament to say that "Banking Company" shall mean "Banking Company" as defined in Section 5(c) and shall include "Co-operative Bank" as defined in Section 5(cci) and "Primary Co-operative Bank" as defined in Section 5 (ecv). This would necessarily lead to a logical conclusion that there was a conscious exclusion of the Co-operative Bank from the purview of the Securitization Act. Indeed, the reason for excluding Co-operative Banks seems to be that Co-operative Banks have comprehensive, self-contained and less expensive remedies available to them under the Co-operative Societies Act, while other banks and financial institutions did not have such speedy remedies and they have to file suits in civil courts. The Apex Court has summarised as to the functions of the Co-operative Bank and applicability of the Securitisation Act in the following terms:

Hence, the Co-operative Banks performing functions for the public with a limited commercial function as opposed to Corporate Banks cannot be covered by Entry 45 of List I dealing with "Banking". The subject of Co-operative societies is not included in the Union List rather it covers under Entry 32 of List II of Seventh Schedule appended to the Constitution.

14. Having regard to the fact that the Securitisation Act is not applicable to the loans advanced by Co-operative Banks, I am of the view that W.P. No. 23813/05 is liable to succeed. Consequently, the communication/notice at Annexure-E stands quashed. So also Annexure-D. Indeed, it is also brought to my notice that the Bank has raised a dispute u/s 70 of the Co-operative Societies Act for recovery of the amount and the Co-operative Bank shall pursue the remedy available to them under the Act. Indeed, Mr. Kothavale, Learned Counsel appearing for the petitioner has raised several other contentions regarding merits, in as much as, the petitioner is not a partner of the firm and he is not liable to satisfy the claim. But, however, a finding on that contention cannot be recorded in this writ. petition. Ultimately it is always open for the petitioner to place such material before the competent authority to buttress his contention that indeed he is not a partner of the firm and is not answerable to the claim of

the Bank. All contentions urged by the petitioner as well as the bank are left open to be agitated in the dispute raised.

15. In so far as the companion W.P. No. 7659/07, the subject matter is the order passed by respondent-2 u/s 14 of the Act, the property of the petitioner is sought to be taken over by the petitioner. Indeed, if it is once held that the Securitisation Act is not applicable to the banks under the Co-operative Societies Act, the logical corollary would be that the proceedings initiated by the Co-operative Bank right from the inception i.e., from issuance of notice u/s 13(2) and the proceedings u/s 13(4) as also taking possession u/s 14 of the Act are vitiated. The question is what relief can be granted to the petitioner in this proceeding. Obviously the order passed by the Deputy Commissioner u/s 14 of the Act is liable to be quashed.

16. Indeed the entire proceeding culminating in possessing the property pursuant to an order u/s 14 of the Act is void ab initio, the property possessed by the respondent Bank is required to be returned to the petitioner. But however that will have to be on certain terms; notwithstanding the fact that it has been held that the possessing of the property by the bank u/s 14 of the Act is void ab initio. It is also not in dispute that the petitioner has suffered two awards and both the awards are the subject matter of appeals pending before the Karnataka Appellate Tribunal in appeal Nos. 712/05 and 769/05. The amount due under the awards is around Rs. 98 lakhs with interest. Indeed, the Co-operative Bank is also required to survive. The petitioner will have to be put on terms if he wants to repossess the property. Having regard to the fact that the amount is due to the bank, I am of the considered view that the possession of the property shall be handed over by the respondent bank to the petitioner on his depositing a sum of Rs. 25 lakhs.

Consequently both the writ petitions are disposed of in the following terms:

i) W.P. No. 23813/05 is allowed. Annexures E and D are quashed. All contentions on merits are left open to be urged in the dispute raised by Bank u/s 70 of the Karnataka Co-operative Societies Act.

ii) W.P. No. 7659/07 is allowed. Annexure-F is quashed. The petitioner shall deposit a sum of Rs. 25 lakhs. On such deposit, the property possessed by Bank shall be handed over to the petitioner. Petitions disposed of accordingly.