

Forum Diamonds, Vs. Bank of Baroda (a Banking Company Constituted Under the Banking Companies Acquisition and Transfer of Undertaking Act, 1970) Known as Fort University Branch and ors.

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Court : Mumbai

Decided On : Oct-15-2009

Reported in : 2010(1)BomCR378; 2009(111)BomLR4617

Judge : Swatanter Kumar, C.J. and ;A.K. Khanwilkar, J.

Acts : [Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act \(SARFAESI\), 2002](#) - Sections 13 to 18; DRT Act - Sections 19

Appeal No. : Writ Petition No. 1826 of 2009

Appellant : Forum Diamonds, ;asit Suresh Parikh and Rupesh Dinesh Shah

Respondent : Bank of Baroda (a Banking Company Constituted Under the Banking Companies Acquisition and Transfer O

Advocate for Def. : Jayesh Patel, Adv. for the Respondent No. 1

Advocate for Pet/Ap. : S.M. Kazami and ;B.P. Pandey, Advs.

Disposition : Petition dismissed

Judgement :

Swatanter Kumar, C.J.

1. The challenge in the present writ petition is to the order dated 21st August, 2009 passed by the Debt Recovery Appellate Tribunal at Mumbai, rejecting the prayer of the present petitioners claiming complete waiver of deposit as contemplated under Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The challenge primarily is to the order dated 7th January, 2008 passed by DRT2, Mumbai, refusing to entertain interim relief in an application purported to have been filed under Section 17 of the Act, primarily on the ground that the application was not tenable being premature, as actual physical possession of secured assets under Section 13(4) had not been taken. According to the petitioner, it cannot be compelled to surrender the possession of secured assets as a condition precedent for invoking the provisions of Section 17 of the Act. It is also contended that since the debt has not been determined, there cannot be an order for predeposit on an undetermined amount. Lastly, it is the contention that the appellate tribunal has failed to exercise its jurisdiction in accordance with law as it ought to have granted relief of waiver of the predeposit condition keeping in view the facts and circumstances of the present case.

2. In order to consider the merit or otherwise of these contentions, reference to certain basic facts would be necessary. The petitioner No. 1 is a partnership concern and petitioner Nos. 2 and 3 are its partners. They are carrying on the business of export of rough and polished diamonds of all kinds under the certificate issued by the Government of India dated 1st April, 1989. While exercising its power under Section 13 of the Act, the authorised officer viz. officer of the respondent bank had issued a possession notice on 30th November, 2007 in terms of Section 13(2) for taking possession of the secured assets. The Presiding Officer of the Debts Recovery Tribunal passed an order dated 7th January, 2008 on an application filed under Section 17 of the Act praying for restraining the bank from taking possession of the secured assets. The said authority while holding that under Section 13(4), one of the measures available to

secure creditor is of taking possession of secured assets of the borrower and the same could be challenged under Section 17. As actual physical possession had not been taken, it was held that the application was premature and was therefore dismissed.

3. The petitioner filed Writ Petition (Lodging) No. 2658 of 2007 which was disposed of vide order dated 6th December, 2007 requiring the petitioners to take appropriate legal remedy as may be available to him in accordance with law. Again, the petitioners filed Writ Petition (Lodging) No. 51 of 2008. Still another writ petition filed by the petitioner being Writ Petition No. 654 of 2009 came to be disposed of vide order dated 22nd June, 2009 where the High Court declined to go into the merits of the case and the petitioners were permitted to withdraw the petition so that they could take action as contemplated under the provisions of the Act. After all this, the petitioners filed an appeal against the order dated 7th January, 2008 passed by the Presiding Officer, Debts Recovery Tribunal on the application No. 27 of 2007 which was for the prayers as noticed above and was dismissed as premature. The appellate authority vide its order dated 21st August, 2009 condoned the delay in filing the appeal before it and thereafter, vide order of the same date and while referring to the proviso to Section 18, required the petitioners to deposit 50% of the amount of debt due from them and claimed by the secured creditor as condition precedent for entertainment and hearing of the appeal. In this order, it was noticed that the secured creditor had claimed a sum of Rs. 4,73,13,874.35 and 50% thereof should be deposited. This order, as aforenoticed, has been challenged in the present appeal.

4. The present petitioners, while challenging the order passed by the Debt Recovery Tribunal dated 7th January, 2008 before the Appellate Tribunal under the provisions of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, hereinafter referred to as 'the Securitisation Act', have taken the various grounds including that the finding recorded by the Debt Recovery Tribunal that the application under Section 17 itself was not maintainable because actual physical possession of the secured assets had not been taken yet, was erroneous in law as it was not the intent of the provisions of Section 17 of that Act. We do not consider it necessary to deal with

these contentions as they are to be dealt with by the Appellate Tribunal while dealing with the Appeal preferred by the Petitioners on merits. Admittedly, notice under Section 13(2) of the Act was served upon the Petitioners to which they had replied. In the Reply to the notice dated 5th March, 2007, the Petitioners have raised a specific dispute with regard to the amount due contending that various amounts paid by them probably had not been taken note of and the Respondent Bank had made rest of the claim without basis. This stand was repeated by the Petitioners in the application filed by them before the DRT. The demand has been raised upon the Petitioner in accordance with law was disputed. Such an amount can at least be determined under the proceedings in two different manners; i.e. (i) it may be determined prima facie at least in terms of Section 18 read with Section 13(2) of the Securitisation Act and (ii) it may be adjudicated as per procedure prescribed under Section 19 of the DRT Act.

5. Under Section 18, any person aggrieved by any order made by the Debts Recovery Tribunal under Section 17 can file an appeal before the Appellate Tribunal. There is a restriction placed upon the Appellate Tribunal to exercise its jurisdiction unless borrower has deposited with the appellate tribunal 50% of the amount of debt due from him as claimed by the secured creditor or determined by the Debts Recovery Tribunal whichever is less. Further proviso has been added to empower the appellate authority for reducing the amount but not less than 25% of the debt due, for reasons to be recorded in writing. In the application before the appellate authority, it was stated by the Petitioners that they have a cut throat competition in their business. The premises will be of no use to the bank and that the action of the bank was arbitrary. Thus, it would be evident that no special circumstances had been stated before the appellate authority for persuading it to exercise its powers under second proviso to Section 18. One thing that is clear from the record is that the petitioners have been able to delay the compliance of the order without payment of any money to the bank now for a considerable time. The writ petitions filed before this Court were disposed of. Interim Application is dismissed by the Debts Recovery Tribunal and now after passing of the order by the appellate authority requiring deposit of 50% of the amount claimed, the same has not been complied with. While relying upon the judgment of the Supreme Court in *Sangeeta Singh v. Union of India* : 2005(7) SCC 484 it was contended

that the court cannot read anything into a statutory provision which is plain and unambiguous and the language employed in a statute is the determinative factor of legislative intent. This proposition of law can hardly be disputed but the provisions of Section 18 clearly contemplate that an appeal can be entertained on deposit of 50% of the amount claimed by the secured creditor or the one determined by the Debts Recovery Tribunal.

6. While referring to the different provisions of the Act, the contention raised before us is that unless the amount is determined and its actual finding is recorded about amount is due to the Respondent Bank from the Petitioners, the provisions of Sections 17 and 18 of the Securitisation Act cannot come into play, and noncompliance to these statutory requirements would frustrate the very remedy available to the Petitioners.

7. We are not impressed by this contention. The provisions of Section 18 of the Securitisation Act contemplates that 50% or 25% of the amount has to be deposited by the appellant of the amount claimed by the secured creditors or the amount determined by DRT whichever is less. There is some element of benefit available to the applicant under these provisions but the interpretation given by the Petitioners as that itself would mean rendering the provisions of Section 13 as well as the provisions of Section 17 ineffective and inoperative, cannot be accepted. The Legislature in its wisdom has used the word 'or' and the same has to be construed and read as 'or' and not as 'and'. Either of the amounts i.e. the amount claimed by the secured creditors or the amount determined by the DRT can be the basis for determining 50% or 25% of the debts, as the case may be. The very purpose of enacting Sections 13 - 18 of the Securitisation Act was to provide an expeditious methodology for recovering public dues without any delay. Section 13 empowers the secured financial institutions to take possession of the mortgaged assets or secured assets after complying with the requirements of Section 13. In other words, the amount claimed by the secured creditors in the notice can itself be a ground for taking possession, if the notice is not complied with, which in turn would give remedy to the Applicant to invoke the provisions of Section 17 of the Securitisation Act. Once an appeal under Section 18 is filed, the applicant will have to comply with the order passed by the DRAT as regards to compliance to

the predeposit condition. There could be cases where the provisions of Securitisation Act have been invoked after institution of the proceedings under the DRT Act and where DRT either prima facie or on final determination has determined the amount payable by the Debtor. In that event the amount determined by the DRT would have to be the basis for complying with the condition of predeposit if the same is less than the one claimed by Bank. The benefit intended to be provided to the borrower is wherever the amount has been determined by the DRT and it is less than the amount claimed by the secured creditors under Section 13(2) or (4) of the Act. The Appellate Tribunal cannot insist on deposit of more than 50% of the amounts claimed by the secured creditors. But for this limited benefit, no further concession can be given to the debtors as per the provisions of Section 18 of the Securitisation Act. The very legislative purpose of enacting this provision would stand defeated if the contention of the Petitioners is accepted that unless the amount is determined by the Competent Forum the provisions of predeposit as contemplated under Section 18 cannot come into play and no order in terms thereof can be passed. This will lead to an absurd result that neither the amount would be deposited till final determination nor the secured creditors would be able to take possession of the mortgaged assets which is against the very intent of Section 13 of the Act.

8. For these reasons, we do not find any merit in the present Writ Petition and would further observe that the Petitioners have been able to delay the proceedings before the Authorities indefinitely by filing writ after writ in this Court. However, for a period of two weeks, the physical possession of the property would not be taken and the order passed by another Bench of this Court dated 7th October, 2009 while the matter was reserved for judgment, would continue and within that time the Petitioners must take appropriate proceedings before the Appellate Tribunal in accordance with law. The Appellate Tribunal shall decide the application and the Appeal without being influenced by any of the observations made in this order. The Writ Petition is dismissed without any order as to costs.