

Gauri Shankar Prasad Vs. Chief Manager, State Bank of India and ors.

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SooperKanoon Citation : sooperkanoon.com/521866

Court : Jharkhand

Decided On : Aug-27-2008

Reported in : AIR2009Jhar47; 2009(57)BLJR352; [2008(4)JCR420(Jhr)]

Judge : D.G.R. Patnaik, J.

Acts : [Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act \(SARFAESI\), 2002](#) - Sections 2, 13, 13(2), 13(4), 17, 17(1), 17(2), 17(3), 17(7), 18 and 18(1); Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Amendmend) Act; Security Interest (Enforcement) Rules, 2002 - Rule 8, 13, 13(1) and 13(2); Recovery of Debts due to Bank and the Financial Institution Act, 1993 - Sections 1(4) and 3; Recovery of Debts due to Bank and the Financial Institution Rules, 1993; Debts Recovery Tribunal Act; [Constitution of India](#) - Article 226

Appeal No. : W.P. (C) No. 6584 of 2007

Appellant : Gauri Shankar Prasad

Respondent : Chief Manager, State Bank of India and ors.

Advocate for Def. : Rajesh Kumar, Adv.

Advocate for Pet/Ap. : Ashok Kumar Yadav, Adv.

Disposition : Petition dismissed

Judgement :

D.G.R. Patnaik, J.

1. The petitioner in this writ application has made the following prayers:

(a) For an order for quashing the Possession Notice dated 22.11.2007, issued by the Respondent No. 2, under Section 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (hereinafter In short 'SERFESI' Act) communicating a declaration thereby to the petitioner and the public in general that the Respondent has taken possession of the petitioner's property, mentioned in the Notice, in exercise of the provisions under Section 13(4) of the 'SERFESI' Act read with Rule 8 of the Rules, thereunder.

(b) For issuance of an appropriate writ with a declaration that Possession Notice dated 22.11.2007 in relation to the immovable properties mentioned in the impugned Notice, is bad and illegal on the ground that the said properties were never mortgaged in favour of the Respondent-Bank and, therefore, the same cannot be treated as a security for enforcement of the outstanding dues of the Petitioner against the Respondent-Bank.

(c) For an order restraining the Respondent-Bank to deal/sell away the immovable properties mentioned in the impugned Notice dated 22.11.2007 and also for a declaration to the Respondents to consider sympathetically the petitioner's proposal for settlement of his dues and to grant him 12 months' Notice to repeal the entire outstanding dues to the Respondent-Bank.

2. Petitioner's case in brief is that the petitioner was sanctioned mid-term loan of Rs. 1.17 Lakhs together with cash credit of Rs. 7.50 Lakhs by the Respondent-Bank on 18.12.2001. By way of collateral security, the petitioner deposited the S.T.D.R. of Rs. 1.40 Lakhs and also the Title deeds of Jagdamba Marketing Complex standing in the name of his wife, valued at Rs. 34 lakhs on the date of sanction of loan amount. While submitting the Title documents of the immovable property, the petitioner and his wife had executed further documents to confirm

that the possession of the immovable property was delivered to the Bank.

Almost 2 years later on 27.10.2003, the Bank informed the petitioner that the documents pertaining to the Jagdamba Marketing Complex was not a proper document as it was only an agreement to sell the property. A demand was, therefore, made by the Respondent-Bank directing the petitioner to rectify the defect in the documents, so that the same may be regularized for the purposes of affirming the property as collateral security. When the purported irregularities could not be rectified within time, the petitioner submitted Title deeds of another immovable property worth Rs. 11,23,000/-, which also stood in the name of his wife, for the purposes of creating equitable mortgage.

Though the monthly installments towards repayment of the debt used to be regularly paid by the petitioner, but in January, 2007 onwards, he could not repay monthly installments in respect of the monthly dues in time. Consequently, the Bank issued a Notice dated 22.11.2007 under the provisions of Section 13(2) of the 'SERFESI' Act, 2002. Though the second property was accepted as a collateral security on which an equitable mortgage was created in respect of the loan advanced, the Bank did not release the Title deeds of the earlier property, namely, the Jagdamba Marketing Complex, although, according to the admission of the Bank the Title deeds pertaining to Jagdamba Marketing Complex, were not proper documents and, therefore, it could not be accepted for the purposes of creating any equitable mortgage. The petitioner on account of his continuous illness, could not repay the dues as demanded in the Notice in time, upon which a second Notice dated 06.09.2007 under Section 13(4) of the Act was issued by the Bank to the petitioner. On receipt of the Second Notice, the petitioner deposited a sum of Rs. 1,17,000/- in between 10.09.2007 to 20.09.2007. Besides, accepting the above payments, the bank also adjusted the F.D.R. amount worth Rs. 2,00,000/- as payment against the outstanding dues. Later, on 12.11.2007, the petitioner deposited a further sum of Rs. 1,01,200/-.

Despite the deposits of the aforesaid amounts, the Respondent-Bank issued the impugned Notice dated 22.11.2007 under Section 13(4) of the 'SERFESI' Act declaring that it has taken possession of the immovable properties of the

petitioner.

3. The petitioner has challenged the impugned Notice on the ground that the notice has been issued in violation of the provisions of the Act as also the guidelines issued by the Reserve Bank of India.

Mr. Ashok Kumar Yadav, learned Counsel for the petitioner explains that Section 13(2) of the 'SERFESI' Act, 2002 declares that before proceeding to initiate action for recovery of the debt under the provisions of Section 13 of the Act, the Account of the petitioner had to be declared as N.P.A. (Non-performing Asset) and then only could the Bank issue notice to the petitioner regarding non-fulfillment of his liability within a period of 60 days from the date of Notice. According to the petitioner, no such notice was served upon the petitioner nor was he given any opportunity to show cause as to why his Account should not be classified as NPA.

Learned Counsel submits further that the amount demanded as the alleged outstanding dues is totally incorrect, arbitrary, and inflated. It is explained further that from the statement of Accounts as furnished by the Bank, the amount as on 31.03.2006 was Rs. 6,37,833/- as outstanding dues. The Bank had admittedly accepted the deposit of a total sum of Rs. 4,47,720/- from the petitioner after that date. Yet, without adjusting the deposited amount, the Bank has shown an outstanding balance of Rs. 7,26,106.5 as on 22.11.2007. The demand of such an amount, according to the petitioner is arbitrary and no such amount is actually due by the petitioner to the Bank. Without clarifying as to how the amount of Rs. 7,26,106.5/- has remained outstanding in spite of the payment of about a sum of Rs. 4,47,000/-, the Bank could not have proceeded to issue the Possession Notice dated 22.11.2007 or take any action under the provisions of Section 13(2) or 13(4) of the 'SERFESI' Act, 2002.

Learned Counsel further explains that furthermore, in view of the fact that the Jagdamba Marketing Complex was not accepted for the purposes of creating any collateral Security or for the purposes of creating any equitable mortgage, the Bank cannot proceed either to take possession or to sell away the aforesaid property on the claim that it was part of the mortgaged property.

4. The Respondent-Bank by its Counter Affidavit, has denied and disputed the entire claim and grounds advanced by the petitioner. A preliminary objection to the maintainability of this writ application has been taken by the Respondent-Bank on the ground that an alternative remedy of appeal before the Debt Recovery Tribunal is available to the petitioner against any action taken under the SERFESI Act, 2002. Relying upon the judgment of the Supreme Court in the case of Meradia Chemicals Ltd. v. Union of India and Anr. reported in : AIR 2004 SC2371 and also upon another judgment of the apex Court in the case of Transcore v. Union of India and Anr. reported in : AIR 2007 SC712 , learned Counsel for the Respondent asserts that the Forum of appeal against the impugned order is available to the petitioner under the provisions of Section 17 of the SERFESI Act, 2002, even though the amount of debt is less than Rs. 10 Lakhs and thus, the present writ application is liable to be dismissed in limine.

It is stated that before issuance of the Notice dated 22.11.2007 under Section 13(4) of the SERFESI Act, 2002, the petitioner was given ample opportunity to clear its dues. The first reminder was given to the petitioner on 23.06.2005, requesting him to regularize the account. This was followed by letters issued repeatedly reminding the petitioner to regularize his account. This was followed by a legal notice issued on 20.10.2006, stating that the outstanding dues of Rs. 8,69,587.92/- should be paid by the petitioner. When no positive response was received from the petitioner, then the Notice under Section 13(4) of the SERFESI Act, 2002 was issued to the petitioner. It is further stated that the petitioner's account was declared as N.P.A. (Non-performing Asset) and this fact has been admitted by the petitioner in his own letter (Annexure-11), wherein the account has been referred to as 'Product Record Assets' and, therefore, the petitioner's contention that before issuing the Notice under Section 13(4) of the Act, the account has not been declared as N.P.A., is misleading and incorrect. The petitioner's contention that his account cannot be declared as N.P.A. without affording him an opportunity to raise his objections and to explain, is also without substance since no hearing is required if an account becomes N.P.A. as defined under Section 2(o) of the SERFESI Act, 2002. It is further stated that the amount of outstanding dues as on 10.09.2007, was clearly and specifically mentioned in the Statement of Accounts (Annexure-11) and after adjusting some payments,

which was made by the petitioner, the closing balance as on 12.11.2002, it comes to Rs. 5,39,906.51 Paise.

As regards the petitioner's claim that the property, as mentioned in the Schedule of the Notice was never mortgaged to the Respondent-Bank, the stand taken by the Respondent is that the said property belongs to one Smt. Girija Devi, who is one of the proprietors of M/s. Munger Jewelers. While creating the equitable mortgage of the said property, Smt. Girija Devi gave a confirmation letter to the Bank and also deposited the Title deeds of the property alongwith the Valuation Report, up-to-date rent receipts, Mutation Papers and Lawyer's opinion, and it was on the basis of the above documents, that the said property was mortgaged with the Bank against the term loan and cash credit facility extended to the petitioner and it is on the basis of the creation of such equitable mortgage that the Respondent-Bank has taken action under the SARFESI Act, 2002 in respect of the said property and therefore such action cannot be said to be illegal or irregular.

5. In view of the rival submissions of the parties, the point which falls for consideration is whether an alternative remedy by way of appeal against the impugned order, is available to the petitioner under the provisions of the Debts Recovery Tribunal Act and if so, whether the instant writ application is maintainable?

The contention of the respondents is that against the impugned order, remedy by way of appeal before the Debts Recovery Tribunal is available to the petitioner under Section 17 of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act irrespective of the fact that the amount of loan is below rupees ten lakhs.

Relying on the judgment of the Supreme Court in the case of Maradia Chemicals (supra), learned Counsel for the respondents argues that admittedly in the instant case, the action under Section 13(4) of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act provision under Section 13(4) read with Section 17(3) of the Act lays down that if a borrower is dispossessed not in accordance with the provisions of the Act, then remedy is available to the borrower to file his appeal before the Debts Recovery Tribunal.

Learned Counsel would argue that Rule 13(2) of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act 2002 provides for fees for application and appeal under Sections 17 and 18 and lays down that where the applicant is a borrower and the amount of debt due is less than rupees ten lakhs, then the amount of fee would be rupees five hundred for every Rs. 1,00,000/- or part thereof, and where the amount of debt due is rupees ten lakhs and above, the amount of fee payable would be Rs. 5000/- + Rs. 250/- for every rupees one lakh or part thereof in excess of rupees 10 lakhs, subject to a maximum of rupees one lakh.

6. Per contra, learned Counsel for the petitioner submits that though an alternative remedy for filing an appeal has been provided under Section 17(1) of the Act, but the said provision is restricted by the provision of Section 17(7) of the Act which lays down that the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts due to Bank and the Financial institution Act, 1993 (Act 51 of 1993) and the Rules made thereunder. An obvious inference according to the learned Counsel is that an appeal shall be entertained in accordance with the provisions of the Recovery of Debts due to Banks and Financial Institution Act, 1993, unless any specific provision is not saved by the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002.

Learned Counsel argues that there is no such provision whereby it can be said that an appeal shall also be entertained in the case where the debt amount is less than rupees ten lakhs. On the contrary, Section 1(4) of the Recovery of Debts due to Bank & Financial Institutions Act, 1993 lays down that the Act shall not apply where the amount of debt due to Bank or financial institution or consortium of Banks or financial institution is less than rupees ten lakh or such other amount being not less than rupees one lakh, the Central Government may by notification specify. Since there is no notification of the Central Government that the provision of the Act shall also apply to cases where the amount due is less than rupees ten lakhs, the remedy under Section 17 of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act would not be available to the petitioner in view of the fact that the petitioner's debt amount is less than

rupees 10 lakhs.

Learned Counsel argues further that even otherwise, the mere availability of an alternative remedy does not ipso facto oust the writ jurisdiction of this Court, since in cases where the impugned orders passed are in gross violation of the principles of natural justice, this Court can invoke its writ jurisdiction under Article 226 of the [Constitution of India](#).

7. Section 17 of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act provides a right to appeal and the right is as under:

Section 17: Right to appeal:

(1) Any person (including borrower) aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorized officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measure had been taken;

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower;

(2) The Debt Recovery Tribunal shall consider whether any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor for enforcement of the security are in accordance with the provisions of the Act and the rules made thereunder.

It is manifest from the above provision that the right to appeal is available to the borrower and he may make an application along with such fee as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within the stipulated period of limitation. The provision also lays down the prescribing of different fees for making applications by the borrowers.

Rule 13 of the Security Interest (Enforcement) Rules, 2002 provides for fees for application and appeals under Sections 17 and 18 of the Securitization &

Reconstruction of Financial Assets & Enforcement of Security Interest Act.

Rule 13(1) lays down that every application under Sub-section 1 of Section 17 or an appeal to the Appellate Tribunal under Sub-section 1 of Section 18 shall be accompanied by a fee provided in the Sub-rule (2), and such fee may be remitted through a crossed demand draft drawn on a bank.

Sub-rule (2) prescribes the amount of fee payable as under:

Nature of application	Amount of fee payable
Where the applicant is a borrower and the amount of debt due is less than Rs. 10 lakhs	Rs. 500/-
Where the applicant is a borrower and the amount of debt due is more than Rs. 10 lakhs	Rs. 5000/- + Rs. 250/- for every Rs. 1 lakh or part thereof in excess of Rs. 10 lakhs subject to a maximum of Rs. 1,00,000/-

8. The Debts Recovery Tribunal has been constituted under Section 3 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993.

Section 1(4) of the Recovery of Debts Due to Banks & Financial Institutions Act, 1993 lays down that the provisions of the Act shall not apply where the amount of debt due to any bank or financial institution or consortium of bank or financial institution is less than rupees ten lakhs or such other amount being not less than rupees ten lakhs, as the Central Government may by notification specify.

9. Learned Counsel for the petitioner argues that no such notification has been issued by the Central Government. Learned Counsel for the respondents controverts by explaining that by introducing the amended provision to Section 17(1) of the securitization Act, and by prescribing the fees in respect of the application made to the Debt Recovery Tribunal under Section 17(1) of the Act in respect of the debts less than rupees ten lakhs, the Central Government has impliedly specified that the provision of recovery of Debts due to Bank and Financial Institution Act, 1993 shall also apply to the debts the amount of which is less than rupees ten lakhs.

10. I find force in the submission of the learned Counsel for the respondents.

Section 17 of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act provides to a borrower a right to appeal against the action taken by the secured creditor under Section 13(4) of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act and by the Amended Act 30 of 2004 the right has been explained to elaborate that an application under Section 17(1) may be made to the Debts Recovery Tribunal along with such fee as may be prescribed. The fees for filing application/ appeal, as has been prescribed under Sections 17 and 18 of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act 2002, clearly and categorically indicates that where an application is filed under Section 17(1) of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act and relates to debt amount less than rupees ten lakhs, the amount of fee payable is Rs. 500/- for every rupees one lakh and, where the amount of debt due is rupees ten lakh and above, the fee is Rs. 5000/- plus Rs. 250/- or part thereof in excess of rupees ten lakhs.

11. The provisions of Section 17(2) of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act enables the Debts Recovery Tribunal to consider whether any measures referred to in Section 13 taken by the secured creditors, are in accordance with the provisions of the Act and the Rules made thereunder.

It is apparent from the above provision that remedy is available to the petitioner under Section 17(1) of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act to file an application before the Debt Recovery Tribunal against the impugned order of the respondent Bank and the Debt Recovery Tribunal is also empowered to consider whether the measures referred to in Section 13(4) of the Act taken by the creditors are in accordance with the provisions of the Act and Rules made thereunder.

12. Considering the fact that an alternative remedy is available to the petitioner, the present writ petition, in my opinion, is not maintainable. Accordingly, this writ application is dismissed. The petitioner may prefer an application under Section 17(1) of the Act and raise all the grounds as may be available to him against the

impugned notice of the respondent Bank.

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