Devinder Singh and ors. Vs. Presiding Officer, Debt Recovery Tribunal-i and ors.

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Court : Punjab and Haryana

Decided On : Jul-09-2007

Reported in : (2007)148PLR370

Judge : M.M. Kumar and; Ajay Kumar Mittal, JJ.

Acts : Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), 2002 - Sections 13, 13(2), 13(4) and 18; Recovery of Debts Due to Banks and Financial Institutions Act, 1992 - Sections 19; Recovery of Debts Due to Banks and Financial Institutions Act, 1993; Constitution of India - Article 226

Appeal No. : C.W.P. No. 9864 of 2007

Appellant : Devinder Singh and ors.

Respondent : Presiding Officer, Debt Recovery Tribunal-i and ors.

Advocate for Pet/Ap. : Amit Rawal, Adv.

Disposition : Petition dismissed

Judgement :

M.M. Kumar, J.

1. This petition filed under Article 226 of the Constitution prays for quashing notice dated 5.6.2007 (P-14), issued by the Authorised Officer, Union Bank of India, Branch Office, Majitha Mandi, Amritsar (respondent No. 3), which refers to the demand notice dated 27.7.2003, issued under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the SRFAESI Act') calling upon the petitioners to discharge in full a sum of Rs. 4,89,57,433/-(Rupees Four crores eighty nine lacs fifty seven thousands four hundreds thirty three only) along with interest thereon, which has not been paid and possession of various properties mortgaged with the Union Bank of India (respondent No. 2) was proposed to be taken. A further prayer has also been made for quashing order dated 13.6.2007 (P-15) passed by the Debts Recovery Tribunal-I, Chandigarh (for brevity, 'the Tribunal') and order dated 19.6.2007 (P-17) passed by the Debts Recovery Appellate Tribunal, New Delhi (for brevity, 'the Appellate Tribunal'), imposing the condition of deposit of Rs. 1.25 crores by 10.7.2007. Still further another prayer made is for issuance of direction to the Tribunal to hear Securitisation Appeal No. 16 of 2007, filed by the petitioners, pending for 10.7.2007 as well as O.A. No. 597 of 2001, filed by the Union Bank of India (respondent No. 2) against the petitioners and borrowers. As an interim measure prayer for injunction has been made staying final adjudication of the appeal i.e. S.A. No. 16 of 2007 and O.A. No. 597 of 2001 and that the Union Bank of India- respondent Nos. 2 and 3 be restrained from proceeding under the SRFAESI Act.

2. Brief facts of the case are that M/s Vikrant Overseas is a proprietary concern of Shri Devinder Singh (petitioner No. 1), who was carrying on the business in Amritsar. Sarvshri Surjit Singh and Arjinder Singh (Petitioner Nos. 2 and 3) representatives of Late Smt. Bhagwant Kaur, Pritam Singh and Tejinder Singh (Petitioner Nos. 4 and 5) are stated to be the guarantors to secure various credit facilities those have been sanctioned by the respondent Union Bank of India to M/s Vikrant Overseas somewhere in 1997. The respondent Bank sanctioned to M/s Vikrant Overseas the following credit facilities:

(i) Packing Credit Limit: Rs. 25.00 lacs (ii) FDBP: Rs. 180.00 lacs (iii) Cash Credit Pledge: Rs. 100.00 lacs(iv) ILC: Rs. 150.00 lacsTotal Rs. 455.00 lacs

3. The loan was not repaid by M/s Vikrant Overseas and the respondent Bank filed an application bearing O.A. No. 597 of 2001, under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1992, before the Tribunal, seeking recovery of an amount of Rs. 4,20,22,586/-. The petitioners are stated to have filed written statement in the aforementioned original application taking various grounds as detailed in the petition. It has also been claimed that M/s Vikrant Overseas has discharged the entire liability. However, on 9.1.2007 (P-7 to P-11), respondent No. 3, in reference to the earlier notice dated 24.7.2003 (P-6) under Section 13 of the SRFAESI Act, issued further notices to the petitioners for taking possession of the assets/properties belonging to the petitioners and lying mortgaged with the respondent Bank, to discharge the full amount of Rs. 4,89,57,433/-without prejudice to O.A. No. 597 of 2001. The petitioners have also filed appropriate application before the Tribunal. Since the Presiding Officer was on leave, therefore, the petitioners filed C.W.P. No. 1917 of 2007 in this Court in which initially notice of motion and dispossession of the petitioners was stayed. The said writ petition was later on disposed of vide order dated 2.3.2007 on an application filed by the respondent Bank, inasmuch as, by that time the Tribunal had started functioning and there was no room to continue their grievance before this Court. On 23.3.2007, Securitization Application No. 16 of 2007 (P-12), which was filed by the petitioners, was taken up by the Tribunal and it ordered that in case the respondent Bank decides to take possession of the properties in question, it would serve seven days advance notice through the Tribunal (P-13). No reply to the aforementioned application is stated to have been filed by the respondent Bank. On 5.6.2007, another notice was sent by respondent No. 3 to the petitioners (P-14), which has been impugned in the instant petition. The petitioners filed an application before the Tribunal seeking ad- interim stay, inasmuch as, the respondent Bank has not served notice of 7 days through the Tribunal. The Tribunal, however, did not grant interim relief and declined the same vide impugned order dated 13.6.2007 (P-15). Against the order dated 13.6.2007, the petitioners filed an appeal No. 104 of 2007, under Section 18 of the SRFAESI Act, before the Appellate Tribunal (P-16). The Appellate Tribunal passed a conditional order dated 19.6.2007 directing the petitioners to deposit a sum of Rs. 1.25 crores for considering the appeal on merit. The aforementioned amount was

required to be deposited by 10.7.2007 (P-17). In these circumstances, the petitioners have filed the present petition impugning notice dated 5.6.2007 (P-14), order dated 13.6.2007, passed by the Tribunal (P-15) and order dated 19.6.2007, passed by the Appellate Tribunal (P-17).

4. Mr. Amit Rawal, learned Counsel for the petitioners has argued that although Hon'ble the Supreme Court in the case of Transcore v. Union of India : AIR 2007 SC712 , has laid down by reversing the view taken by this Court in the case of Kalyani Sales Co. v. Union of India , that doctrine of election for choosing the remedies does not apply to the proceedings initiated under the SRFAESI Act and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for brevity, 'the DRT Act') and that both the remedies can be pursued parallel to each other yet there are myriad of situation in which a different view could be taken. In that regard learned Counsel has referred to para 46 to 56 of the judgment in Transcore's case (supra) and argued that Hon'ble the Supreme Court considered only those propositions which were raised before their Lordships but the situation like the one raised in the present petition has not been dealt with. According to the learned Counsel, in the present case the right of the bank to recover the possession of an undetermined amount without waiting for the outcome of the original application would pose a serious challenge and, therefore, the judgment in the Transcore's case (supra) would not be applicable. Substantiating his argument, learned Counsel in nut shell has submitted that the bank in the absence of any amount determined by proper adjudication before the Tribunal, cannot effect recovery under the SRFAESI Act by naming any arbitrary amount. He has maintained that it would be impossible for the bank to proceed with regard to taking of possession of the mortgaged properties which may be worth manifold than the recovery to be effected, causing extreme inconvenience to the persons like the petitioners. It is in these circumstances, learned Counsel has reiterated the prayer that in the absence of any determination of the amount payable by the petitioners, the respondent bank (respondent Nos. 2 and 3) should be restrained from taking possession as it cannot be ascertained whether all the properties belonging to the petitioners are required to be taken over for effecting recovery or only few of those properties would be sufficient.

5. We have thoughtfully considered the submissions made by the learned Counsel and feel unable to accept the same because the question concerning doctrine of election has been considered in detail by their Lordships. Two questions amongst others, which were posed for determination by Hon'ble the Supreme Court, have been answered in favour of the financial institutions and against the borrowers like the petitioners. Their Lordships have determined the following two questions amongst others:

(i) Whether the banks or financial institutions having elected to seek their remedy in terms of the DRT Act, 1993 can still invoke the NPA Act, 2002 for realizing the secured assets without withdrawing or abandoning the O.A. filed before the DRT under the DRT Act.

(ii) Whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the NPA Act comprehends the power to take actual possession of the immovable property.

6. In respect of the first question, it has been categorically held that there are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies; and a choice of one of them. It has been found that if any of the three elements is missing, the doctrine of election would not be applicable and that the SRFAESI Act is an additional remedy to DRT Act, which in fact, constitute one remedy. Therefore, the doctrine of election has been held not applicable. The views of their Lordships are discernible from paras 46 and 47, which reads as under:

46. In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to American Jurisprudence, 2D, vol. 25, page 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Equity (thirty-first edition, page 119), the doctrine of election of remedies is

applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application.

47. In our view, the judgments of the High Courts which have taken the view that the doctrine of election is applicable are erroneous and liable to be set aside.

7. Likewise, on question No. (ii) it has been held that the word 'possession' is a relative concept and the dichotomy between symbolic and physical possession does not find place in the Act. Their Lordships have further found conceptually a distinction between securities by which the creditor obtains ownership of or interest in the mortgaged property and securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt/charges. It has been found that the SRFAESI Act deal with the formal type of securities under which the secured creditor, namely, the bank or the financial institution obtains an interest in the property concerned. It is for the aforementioned reason that the SRFAESI Act ousts intervention of the Courts/Tribunals.

8. In the light of the aforementioned principles the prayers made by the petitioners have to be considered which are for virtually quashing notice issued by the Union Bank of India (respondent Nos. 2 and 3) under Section 13(2) of the SRFAESI Act, on 27.7.2003, which has eventually led to the passing of impugned order dated 5.6.2007 (P-14), calling upon the petitioners to pay a sum of Rs. 4,89,57,433/-, that has remained unpaid. Thereafter notices under Section 13(4) were issued on the application filed by the petitioners seeking stay of dispossession. The Tribunal declined the prayer as is evident from the impugned order dated 13.6.2007 (P-15). The aforementioned answers to the two spinal questions rendered in the judgment of Hon'ble the Supreme Court in Transcore's case (supra) in terms go against the petitioners and, therefore, this petition is liable to be dismissed. If we accept the prayer made by the petitioners then it would amount to advancing towards the doctrine of elections which has been held inapplicable to the SRFAESI Act and DRT Act in Transcore's case (supra). It would also, in our view, negate the law laid

down in Transcore's case (supra) that both remedies are different and can go parallel to each other. Merely because the prices of mortgaged properties have gone up, which is a fortuitous circumstance, would not constitute a basis for us to accept that the judgment in Transcore's case (supra) would be rendered inapplicable to the facts of present case. It is well settled that law cannot be made inapplicable by virtue of a fortuitous circumstance.

9. We are further of the view that the prayer made by the petitioners, if accepted, would amount to rehabilitating the view taken by a Division Bench of this Court in the case of Kalyani Sales (supra), which has been specifically reversed. In fact, a perusal of various paras of the judgment, especially under question No. 2, would show that the submissions made before Hon'ble the Supreme Court on the basis of Kalyani Sales's case (supra) are very close to the one which have been urged before us and obviously we cannot accept these contentions as Kalyani Sales's case (supra) stands specifically reversed. Examined from various angles the submissions made by the petitioners cannot be accepted.

10. For the reasons aforementioned, we do not find any merit in the instant petition and the same is dismissed summarily.