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Court : Kolkata

Decided On : May-21-2010

Judge : Bhaskar Bhattacharya and; Tapan Kumar Dutt, JJ.

Acts : [Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act \(SARFAESI\), 2002](#) - Sections 13, 13(4) and 17; ;[Constitution of India](#) - Articles 12 and 226

Appeal No. : M.A.T. No. 97 of 2009, C.A. Nos. 1426, 3180 of 2009 and M.A.T. No. 2919 of 2006, C.A.N. 9417 of 2006

Appellant : Pradip Kumar Das and ors.

Respondent : Asstt. General Manager, Union Bank and anr.

Advocate for Def. : A.K. Routh,; S. Dasgupta,; Sudeep Pal Chowdhury, Adv

Advocate for Pet/Ap. : Asoke Kumar Banerjee and; Jaharlal Roy, Advs.; D.K. Mond

Disposition : Appeal allowed

Judgement :

Bhaskar Bhattacharya, J.

1. These two appeals were heard together as these have been preferred against a common judgment dated 12th February, 2009 passed by a learned Single Judge of this Court by which His Lordship disposed of the two writ applications being W.P. No. 30868 (W) of 2008 and W.P. No. 556 (W) of 2007.

2. The appellants before us filed a writ-application under Article 226 of the [Constitution of India](#) being W.P. No. 556 (W) of 2007 thereby challenging the notice of auction dated 27th September, 2006 issued by the Assistant General Manager, Union Bank of India, Overseas Branch, under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the SARFAESI Act) as well as the notification dated 14th December, 2006 published in the Bengali newspaper 'Aajkal' and earlier notice dated 12th July, 2006 issued by the Assistant General Manager of the Bank.

3. The case made out by the writ-petitioners may be summed up thus:

(a) The writ-petitioners took loan from the Respondent-Bank by mortgaging moveable and immovable properties including Premises Nos. 244 and 266/4, Netaji Subhash Chandra Bose Road. In spite of fact that the petitioners made payment of major part of the loan taken, the Bank issued notice under the SARFAESI Act and such notice was challenged by the respondent No. 2 of the writ-application, namely, the developer appointed by the writ-petitioners, who constructed a new building on Premises No. 244, NSC Bose Road.

(b) The writ-petitioners having failed to pay back the total amount of Rs. 33 lakh, the Bank threatened the developer as well as the writ-petitioner to take possession of the property for realization of the loan amount. The developer moved a writ-application being W.P. No. 21820 (W) of 2005 challenging the notice issued by the Bank under Section 13 of the SARFAESI Act. In the said writ-application, the writ-petitioners were also made parties. Although the learned Single Judge did not pass any interim order, on an appeal, a Division Bench of this Court on 3rd August, 2006 passed an ad interim order of injunction in favour of the appellants therein as the appellants deposited three postdated cheques amounting to Rs. 29,40,000/- and the writ petitioners were directed to pay further amount of Rs.

3,60,000/-.

(c) As the Appellate Court had given liberty to the Bank to realize further dues from the writ-petitioners, the Bank issued another notice to the writ petitioners for taking possession of Premise No. 266/4, NSC Bose Road for realization of the remaining part of the due amount. According to the writ petitioners, the amount claimed by the Bank to be due was an exaggerated amount and the amounts already paid on behalf of the writ-petitioners were not adjusted. Hence the writ-application.

4. So far the other writ-application being W.P. No. 30868 (W) of 2008 was concerned, the same was filed by the Union Bank of India against the State of West Bengal and the prayer of the Bank was for restraining the respondents from harassing the officials of the Bank and for a direction not to take any further step on the basis of complaint lodged by the respondent No. 5 therein alleging nonexecution of sale certificate in favour of the said respondent No. 5 for purchase of Premise No. 266/4 NSC Bose Road.

5. Both the writ-applications were heard together and the learned Single Judge by the order impugned in these two appeals disposed of those applications by holding that the writ-application filed by the appellants being W.P. No. 556 (W) of 2007 was liable to be dismissed as a Writ-Court should not generally entertain a petition when there is efficacious alternative remedy available and particularly, when it was found that the writ-petitioners even after obtaining an order of injunction did not make full payment of the amount due and payable to the Bank. His Lordship further directed the appellants to pay costs of Rs. 50,000/- to the auction-purchaser who made payment although he did not get any property.

6. So far the other writ-application filed by the Bank is concerned being W.P. No. 30868 (W) of 2008, according to His Lordship, the other writ-petition filed by the appellant having been dismissed, there would be no impediment for the Bank to take expeditious step to complete the transaction with the auction-purchaser and the Bank was given liberty to apply before the appropriate forum in respect of criminal complaint lodged against it for due discharge in accordance with law.

7. Being dissatisfied, the appellants have preferred the present two appeals.

8. After hearing the learned Counsel for the parties and after going through the materials on record, this Court although found that the entire loan amount had not been paid off, yet, had some doubt in its mind as to the overstated demand of the Bank.

9. This Court is quite conscious of the position of law that generally there being efficacious alternative remedy by way of Section 17 of the SARFAESI Act available to the aggrieved party, a writ-application challenging a notice under Section 13 thereof should not be entertained; but law is equally settled that once direction for affidavit has been given and the parties have exchanged affidavits, there was no justification of dismissing the writ-application on the ground of efficacious alternative remedy at the time of final hearing. The learned Single Judge, as it appears from the order impugned, also accepted such position of law but dismissed the writ-application filed by the appellants with costs of Rs. 50,000/- for the simple reason that the entire amount had not been paid.

10. In our opinion, in order to give a notice under Section 13 of the SARFAESI Act, 2002, it was the duty of the Bank to disclose the real amount of due payable by the person who has taken loan. If a Bank based on an inflated claim gives notice and such fact is, prima facie, established, the Writ-Court should not dismiss the writ-application simply on the ground that the entire loan amount had not been paid but should direct the Bank to demand the exact amount payable.

11. Therefore, in the case before us, the learned Single Judge, on mere finding that the entire amount of loan was not paid, should not have dismissed the writ-application when the claim of the Bank is also an overblown one.

12. In view of the allegations and counter-allegations made in this proceeding regarding the actual amount of dues payable, this Court from time to time directed the parties to affirm various supplementary affidavits because inconsistent statements were made by the Bank at different times. Ultimately, this Court appointed a Chartered Accountant as a Special Officer for verifying the claim of the Bank after adjustment of all the payments made on behalf of the appellants.

13. On the basis of such order, the Special Officer has given report before us stating that a sum of Rs. 2,07,526.94p. is due and payable by the appellants for full satisfaction of the dues payable to the Bank as on 31st May, 2009 whereas it appeared that the Bank was insisting on payment of more than Rs. 9 lakh.

14. Mr. Routh, the learned advocate appearing on behalf of the Bank, has fairly submitted before us that his client does not dispute the report given by the Special Officer assessing the actual dues payable by the appellants. Mr. Banerjee, the learned Senior Advocate appearing on behalf of the appellants, has also accepted the report of the Special Officer.

15. Such being the position, it has now been established that the amount really disclosed in the notice under Section 13 of the SARFAESI Act to be due and payable by the appellants was not the real due and on that basis the Bank proceeded to sell the property mortgaged.

16. A Nationalised Bank, a State within the meaning of Article 12 of the [Constitution of India](#), should be cautious in taking step under Section 13(4) of the SARFAESI Act. While taking step under the said provision, the borrower should be informed of the actual amount of due payable. By claiming an exaggerated amount, if notice is given notwithstanding the fact that the real due is much less, the borrower is really defrauded and in the process, may lose his property for the unjust action of the Bank. In the case before us, the Bank resorted to Section 13(4) by asserting much higher amount of dues, which was not correct and thus, illegally took step for sale of the property. If the real amount of due was disclosed to the appellants, they might have paid the entire amount and there would not have been any occasion for even giving notice under Section 13(4) of the SARFAESI Act.

17. We, therefore, set aside the notice and all the consequent steps taken by the Bank on condition that the appellants should pay a sum of Rs. 2,07,526.94p. found to be due and payable by the Special Officer till 31st May, 2009 by the end of May, 2010. In default of such payment within the said period, the appeal will stand dismissed.

18. Although Mr. Routh prayed for direction for payment of interest for the last one year, we are not impressed by such submission. Having regard to the harassment caused to the appellants by facing various unnecessary litigations for the unjust and exaggerated claim of the Bank, as a measure of imposing costs of the litigation, although we do not impose any separate costs, we hold that no interest will be payable by the appellants on the aforesaid amount of Rs. 2,07,526.94p. for one year. We cannot lose sight of the fact that the learned Single Judge awarded costs of Rs. 50,000/- against the appellants although it has now come out that the real dues of the Bank was much less than the amount demanded by the Bank. If the real dues were demanded at the relevant time, there might not be any occasion for issuing the notice and the consequent auction for sale of the mortgaged property.

19. As regards the other appeal against the observations of the learned Single Judge about the pending criminal proceeding, we are of the view that this Court should not pass any direction upon the Criminal Court. We also do not make any observation on the merit of the criminal case. If any offence is found to have been committed, the law will take its own course. However, we having set aside the notice under Section 13 of the SARFAESI Act, and the consequent sale, the direction for expeditious sale in favour of the auction-purchaser is set aside and the appeal is allowed to that extent.

20. The Bank is directed to release all the securities on payment of the aforesaid amount to the concerned borrowers or the guarantors, as the case may be. We further make it clear that in these proceedings, we have not gone into any question as to the extent of the liability that may arise out of the transaction between the borrowers and their developer and if any such dispute arises in future, the same should be agitated in the appropriate proceedings in accordance with law.

21. Both the appeals are, thus, allowed to the extent indicated above.

Tapan Kumar Dutt, J.

22. I agree.

