

K. Sami Vs. Branch Manager, Bank of India and Others

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Court : Kerala

Decided On : Jul-22-2011

Judge : S. Siri Jagan

Appeal No. : O.P (DRT) No. 2013 of 2011 & W.P(C) Nos. 17843, 19544 & 19818 of 2011

Appellant : K. Sami

Respondent : Branch Manager, Bank of India and Others

Judgement :

In all these writ petitions, the one common question that arises for consideration is as to whether, without taking possession of the secured asset symbolically or actually by the bank in proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the borrower or anybody aggrieved by the action of the bank can file an application/appeal under section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The petitioners in these writ petitions are persons against whose properties, proceedings under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 have been initiated. Their grievance is that the Debt Recovery Tribunal is not entertaining applications/appeals despite the Banks initiating action to take possession through the Magistrate, which is a measure under Section 13(4) of the Act. The Debt Recovery Tribunal themselves have issued a circular,

which is produced as Ext. P5 in W.P(C) No. 17843/11, which reads thus:

"1. It is once again reiterated and brought to the notice of all concerned that following consistent decisions taken by this Hon'ble Tribunal, in true, with pronouncements of the Hon'ble Apex Courts, as far as the Securitization Application concerned, the Securitization Application filed beyond 45 days from the date on which measures, if any, (for instance, in case of possession - either symbolic or physical) taken under Section 13(4) of the SARFAESI Act, 2002 cannot be entertained. It is further clarified that Section 5 of the Limitation Act, 1963 is not applicable to the original SA Proceedings filed under Section 17(1) of the SARFAESI Act.

2. And that no Securitization Application will lie against the order passed under Section 14 of the SARFAESI Act, contemplating the possession of secured assets. In this context it is made clear that a Securitization Application can be entertained only when any of the measures has actually been taken (for instance, in case of possession - either symbolic or physical possession) pursuant to the order of the authorities under Section 14 of the SARFAESI Act, 2002. Needless to state the same position applies to any other measures stipulated under the said Section 13(4).

3. Further, as per the Hon'ble Tribunal's view in a given case when symbolic possession had already been taken and 45 days have elapsed since, then, and that subsequently in order under Section 14 of the SARFAESI Act, 2002 contemplating the physical possession taken, the securitization application cannot be entertained.

4. As such the aforesaid legal position shall be taken note of while presenting fresh Securitization Application before the Registry of this Tribunal."

(Underlining supplied)

2. In all these writ petitions, the petitioners have not been served with any notice of possession and possession has not actually or symbolically been taken by the banks concerned. The banks have straight away approached the concerned Chief

Judicial Magistrate or Additional District Magistrate, having jurisdiction under Section 14 of the Act for assistance to take possession of the respective security asset. Some of these petitioners have tried filing an application under Section 17 of the Act before the Debt Recovery Tribunal, Ernakulam. But, the registry of the Debt Recovery Tribunal refused to entertain the same on the ground that unless possession has been taken, the appeal under Section 17 is not maintainable. According to the petitioners, the same is totally wrong, insofar as the very action of filing an application before the Chief Judicial Magistrate or the Additional District Magistrate for assistance to take possession of the secured asset, is a measure under Section 13(4), against which the application under Section 17 of the Act would lie before the Debt Recovery Tribunal. Therefore, the refusal on the part of the Debt Recovery Tribunal to entertain application under Section 17 on the ground that unless possession is taken by the financial institutions, no application under Section 17 would lie, is totally arbitrary and unsustainable, is the contention of the petitioners.

3. The learned counsel for the banks would vehemently contend that unless possession is taken, no appeal or application under Section 17 would lie. Counsel for the Union Bank of India would contend that, that is exactly the law declared by the Supreme Court of India. Counsel for the bank refers me to the decisions of the Supreme Court on the subject, namely, *Mardia Chemicals Ltd. v. Union of India*, (2004) 4 SCC 311 and then *Transcore v. Union of India*, (2008) 1 SCC 125. According to him, those decisions are authorities for the proposition that no appeal would lie under Section 17 unless and until possession is taken by virtue of the provisions contained in Section 13(4). He points out that the first measure contemplated under Section 13(4) is taking possession itself and consequently, unless and until possession is taken, no appeal under Section 17 would lie, which is what has been stated in the *Mardia Chemicals* and *Transcore* decisions (*supra*). He would also take me to the decision of the Division Bench of this court in *Muhammed Ashraf v. Union of India*, 2008(4) KLT 1, wherein, this court has held that against an order under Section 14 of the Act, no appeal would lie before the Debt Recovery Tribunal under Section 17, which would go to show that unless possession is taken under Section 13(4), no appeal would lie.

4. On the other hand, the learned counsel for the petitioners would contend that the legal position has been settled by the Supreme Court itself in favour of the position of law as canvassed by them. They would take me to the decisions of the Supreme Court in *Authorised Officer, Indian Overseas Bank and Anr., Ashok Saw Mill*, 2009(8) SCC 366, *United Bank of India v. Satyawati Tondon and Ors.*, 2010 (8) SCC 110 and *Kanaiyalal Lalchand Sachdev and Ors. v. State of Maharashtra and Ors.*, 2011(2) SCC 782; all of which, according to the petitioners, would go to show that the mere act of the financial institution in approaching the Magistrate under Section 14 itself would constitute a measure under Section 13(4) and therefore an appeal would lie under Section 17(1) against that action.

5. I have considered the rival contentions in detail.

6. At the outset, I would note that although the Supreme Court has upheld the constitutional validity of the Act, it cannot be gainsaid that the Act is a very harsh legislation, which results in very disastrous consequences to the owner of the property against which a measure under Section 13(4) of the Act has been taken. That being so, the provisions regarding the remedies provided for persons aggrieved by such action should be construed liberally. No doubt, the Supreme Court has categorically held that no application/appeal would lie against any action taken by the financial institution prior to taking a measure under Section 13(4). Therefore, the right to resort to remedies under Section 17 would arise only when any one of the measures contemplated under Section 13 (4) or thereafter is initiated, is his contention. I am of opinion that it is not necessary for an aggrieved person to wait till actual or symbolic possession is taken by the financial institution before resorting to the remedy as provided under Section 17. Take for example, a case where a person against whom proceedings under the securitization proceedings have been initiated, has a case that he was not a party to the loan transaction at all, but by fraud or forgery, he has been made a borrower or a surety. In such cases, it would be nothing but sheer injustice to say that he has to wait till the financial institution takes possession and throws him out into the street before he can resort to the only remedy available to him under law, which is filing of an application/appeal under Section 17 of the Act. I am of opinion that the rigour of the provisions of the Act should not be taken to that extreme extent to deny

even the right of appeal under Section 17, which is the only remedy provided to an aggrieved person against a measure under Section 13(4). This is all the more so since the Supreme Court has time and again held that High Courts should not ordinarily entertain writ petitions challenging proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and should relegate the parties to the remedy by way of appeal under Section 17 of the Act before the Debt Recovery Tribunal. I am of opinion that despite the vehement protestations of counsel for the banks, particularly by the Union Bank of India, going by the decisions of the Supreme Court, the very fact of the financial institutions approaching the Magistrate under Section 14 itself would constitute a measure under Section 13 (4) of the Act, against which an appeal can be filed by the aggrieved person before the Tribunal under Section 17. Counsel for the banks point out that in the decisions of Mardia Chemicals case and Transcore case (supra), the Supreme Court has held that only when a measure under Section 13(4) is actually taken, an appeal would lie. No doubt, that is the legal position. But the question is when exactly a measure under Section 13(4) can be stated to be actually taken. I am not inclined to accept the contention of the counsel for the banks that that would only be when possession is actually taken by the financial institution. Any measure under Section 13(4) would constitute a cause of action for filing an appeal under Section 17. The mere decision of the financial institution to approach the Magistrate under Section 14 would also constitute a measure under Section 13 (4). Reliance by the learned counsel for the Union Bank of India on the Division Bench decision of this court in Muhammed Ashraf's case (supra) is misplaced, according to me. That decision only says that no appeal would lie against an order of the Magistrate under Section 14 or the action of the Commissioner appointed by the Magistrate to take possession. That decision does not say that the action of the bank in approaching the Magistrate under Section 14 would not constitute a measure under Section 13(4).

7. In *Authorised Officer, Indian Overseas Bank and Anr., Ashok Saw Mill*, 2009(8) SCC 366, the Supreme Court has stated thus in paragraph 37:

"37. The consequences of the authority vested in the DRT under sub-section (3) of Section 17 necessarily implies that the DRT is entitled to question the action taken

by the secured creditor and the transactions entered into by virtue of Section 13 (4) of the Act."

Again, in *United Bank of India v. Satyawati Tondon and Ors.*, 2010 (8) SCC 110, the Supreme Court has held thus in paragraph 42:

"42. There is another reason why the impugned order should be set aside. If respondent 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression "any person" used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective."

Still further, in *Kanaiyalal Lalchand Sachdev and Ors. v. State of Maharashtra and Ors.*, (2011) 2 SCC 782, the Supreme Court has categorically held that resort to the proceedings under section 14 by the bank itself will constitute a measure under section 13(4), in paragraph 22, which reads thus:

"22. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT."

In view of these decisions, I have absolutely no doubt in my mind that the very action of the financial institution in approaching the Magistrate under Section 14 itself would constitute a measure under Section 13(4), which would give rise to an aggrieved person the cause of action to resort to the remedy by way of

approaching the Debt Recovery Tribunal under Section 17 of the Act. That being so, the circular issued by the Debt Recovery Tribunal to the effect that unless possession is actually taken by the financial institution, no appeal would be entertained, is clearly against the provisions of the Act and the decisions of the Supreme Court.

8. Accordingly, Ext. P5 in W.P(C) No. 17843/2011 is hereby quashed to that extent. It is declared that all these petitioners are entitled to file appeal under Section 17 against the proceedings impugned in these writ petitions insofar as in all these writ petitions, the financial institution concerned has already approached the Chief Judicial Magistrate or the Additional District Magistrate under Section 14 of the Act, which would constitute a measure under Section 13(4) of the Act. Therefore, if these petitioners file appeals or re-present the appeal,

which has been rejected, within one week from the date of receipt of a certified copy of this judgment, the same would be accepted as one filed within time and considered on merits under Section 17 by the Debt Recovery Tribunal. If the appeal filed has not been returned, the same shall be numbered and dealt with on merits if there are no other defects. To enable the petitioners to move the Debt Recovery Tribunal and seek interim orders, I direct that further proceedings pursuant to the impugned proceedings be kept in abeyance for a period of one month. The writ petitions are disposed of as above. I place on record the able assistance given to me by Adv. Sri. K.N. Sasidharan Nair in placing before me the various decisions applicable and assisting this Court to come to a just and proper decision in these cases.

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