2013 PLRonline 0110 (Drat.)

Debts Recovery Appellate Tribunal

Sapna Awasthi & Ors. v. Bank Of Maharashtra & Ors.,

Appeal No. R 110-2013
18.9.13

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Dead person - Sale - . The proceeding conducted against a dead person is bad in law - LRs of borrowers/respondent not brought on record - Notice to one LR is not notice to all.

25. Thus, the word "borrower" also includes a person who becomes borrower of a Securitisation Company or Reconstruction Company consequent upon acquisition by it of any rights or interest of any Bank or Financial Institution in relation to such financial assistance. Therefore, the notice under Section 13(2) was required to be issued to the borrowers. The Tribunal in its judgment has given a passing remark that the notice to one legal heir is sufficient notice to all legal heirs and the Tribunal has nowhere stated that as to on what basis the Tribunal came to the finding that the law is settled that the notice to one legal heir is sufficient notice to all the legal heirs. After the death of the original borrower, the legal heirs are entitled to claim rights in accordance to the proposition of their rights but the Tribunal presumed that the law stands settled of serving the notice to one legal heir is sufficient service to all the legal heirs.

R.K Gupta, Chairperson:— The Counsel for the parties are heard, the present appeal has been preferred by the appellant challenging the order passed by the Debts Recovery Tribunal on 11th April, 2013. Bythisorder, the Securitization Application preferred by the appellants has been dismissed.

2. The relevant facts for adjudication of the present case are that the present appellants are the legal heirs of the deceased borrower and are not the original borrowers. Since the dues were not repaid of the Bank by the original borrower and the legal heirs inherited the property left by the original borrower therefore, the Bank issued notice under Section 13(2) of the SARFAESI Act, 2002 to the appellant No. 1. Since the appellant No. 1 did, not pay the dues therefore, the possession of the secured asset was taken through Collector who passed an order under Section 1.4 of the SARFAESI Act, 2002 therefore, the appellants preferred the Securitization Application under Section 17 of the Act. While filing the Securitization Application before the Tribunal, various grounds were raised by the appellants to challenge the notice issued under Section 13(2) of the SARFAESI Act, 2002 and also to the order passed under Section 14 of the Act.

3. It was the case of the appellants that only appellant No. 1 was issued notice under Section 13(2) of the SARFAESI Act, 2002 and other legal heirs were not issued any notice. Therefore, without issuance of any notice to all the appellants the Bank has no right to proceed with the action under Section 13(4) of the Act. It is submitted that the order passed by the District Collector under Section 14 of the Act was also liable to be set aside in Securitization Application.

4. It was the case of the respondent Bank before the Tribunal that the settled position of law is that if the demand notice issued to

the one legal heir then that is sufficient notice to all other legal heirs. It is further submitted by the Counsel for the Bank that in the Securitization application filed under Section 17 of the SARFAESI Act, 2002, the order passed by the District Magistrate under Section 14 of the said Act cannot be challenged as no Appeal lies under Section 17 against the order of District Magistrate passed under Section 14 of the SARFAESI Act, 2002.

5. The Tribunal accepted the submission so made on behalf of the Bank and dismissed the Securitization Application preferred by the appellants. The Tribunal held that the judgment passed by the Apex Court in Union Bank of India v. Satyawati Tandon, III (2010) BC 495 (SC) : VI (2010) SLT 52 : (2010) 8 SCC 110 : AIR 2010 SC 3413, is being misinterpreted because in the said decision the Hon'ble Apex Court has not struck down the provision under Section 14(3) of the Act, 2002 by which statutory bar is imposed on the Courts and other authority from interfering with the order of the Collector under Section 14.,??? No application under Section 17 of the SARFAESI Act, 2002 lies against the order passed by District Collector in exercise of its powers conferred under Section 14 of the Act. The Tribunal further held that if the notice under Section 13(2) is issued to one of the legal heirs then it will be sufficient service on the other legal heirs. The Tribunal further held that since in the present case the dues have not been liquidated therefore, the Bank has every right to proceed in the matter.

6. In this reference, this is to be seen that the Tribunal has failed to appreciate the judgment passed by the Apex Court in Union Bank of India v. Satyawati Tandon (supra) and misunderstood the same that the. Tribunal has no authority and the judgment passed by the Apex Court does not decide the law correctly and on this basis it is submitted that against the order passed by the District Collector under Section 14 of the SARFAES Act, 2002 a Securitisation Application would not be maintainable,.

7. In this reference, this is to be seen that the judgment passed by the Apex Court in Union Bank of India v. Satyawati Tandon (supra) Para 17 in relied upon which is quoted hereinbelow:

"17. There is another reason why the impugned order should be set aside. If respondent No. 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 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. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, chess, fees, other types of public money and the dues of Banks and other Financial Institutions. In our view, while dealing with the petitions involving challenge to the action-taken for recovery of the public dues, etc., the High Court must keep in mind that the legislation enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for

recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies availably under the relevant statute."

8. The aforesaid judgment has further been considered by the Apex Court in Kanhiya Lal v. State of Maharashtra, II (2011) SLT 188 : I (2011) BC 698 (SC) : (2011) 2 SCC 782, and in para Nos. 22 and 23 following ratio is held down:

"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.

23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well-settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See Sadhana Lodh v. National Insurance Co. Ltd., Surya Dev Rai v. Ram Chander Rai S.B.I v. Allied Chemical Laboratories)."

9. On the basis of the aforesaid, it is clear that ratio of the Apex Court in the aforesaid two judgments is that after when the order is passed, by the District Magistrate under Section 14 and on the basis of the same a measure is taken by the secured creditor and such a measure is under Section 13(4) of the SARFAESI Act, 2002 and under the circumstances as aforesaid, the Apex Court in the aforesaid two judgments has conscienably held that an application under Section 17 of the Act shall be maintainable against the order passed by the District Magistrate under. Section 14 of the said Act.

10. In this reference, this is to be seen that the aforesaid law has further been taken into account by the various High Courts. The Allahabad High Court in UCO Bank v. District Magistrate, Allahabad, 2011 (1) DRTC 631 (All.) has held that when the District Magistrate on being satisfied that the property of which possession is sought, is secured and passes an order then the District Magistrate need not to adjudicate the question as to whether asset has been properly mortgaged or mortgage is valid or not and measure which is governed by Section 14 i.e action taken under Section i 3(4) by the Bank under whether are valid or not, is a question which has to be raised under Section 17.

11. The Bombay High Court in Asset Recovery Corporation India Ltd. v. State of Maharashtra, IV (2012) BC 733 (DB) : 2012 (1) DRTC 159 (Bom.), had held that the order of the District Magistrate under Section 14 being in aid of measure that secured creditor seeks to take under Section 13(4) of the Act and the remedy of borrower is under Section 17 of the Act.

12. The Hon'ble Chhattisgarh High Court in Deepak Panch v. Sent Bank Home Finance Ltd., 2011 (2) DRTC 27 (Chhartis.), has held that the proceeding initiated by the appellant borrower by filing a writ in the High Court to challenge the action taken under Section 14 of the Act is not liable to be entertained as the alternative remedy of filing an application before the Tribunal under Section 17 available and not before the High Court.

13. The Gujarat High Court in Bharatbhai Ramniklal Sata Proprietor of Satyajeet

Trading Co. v. Collector and District Magistrate, II (2010) BC 293 : 2010 (1) DRTC 670 (Guj.) has held that when an order is passed under Section 14 of the Act it being art assistance to a secured creditor to take measure under Section 13(4) of the Act it is open for the borrower to challenge the same under Section 17 the SARFAESI Act, 2002.

14. Again the Bombay High Court in Trade Well v. Indian Bank, II (2007) CCR 349 (DB) : 2007 Cr. LJ 2544 (Bom.) has held that if the, order is passed by the District Magistrate for taking over of possession then no notice is required to be served to the borrower against such an order and the remedy is application under Section 17 which is to be resorted by the borrower as well as the third party.

15. The Hon'ble High Court of Madras in K.R Chandrasekaran v. Union of India, III (2012) BC 527 : 2012 (2) DRTC 52 (Mad.), has held that the constitutional validity of the SARFAESI Act, 2002 has been upheld by the Supreme Court in Mardia Chemicals Ltd. v. Union of India, 110 (2004) DLT 665 (SC) : II (2004) BC 397 (SC) : II (2004) SLT 991 : 2004 (2) CTC 759 (SC). The principle of sub silentio even though no express opinion made by Supreme Court about Section 14 but its validity is not open to be challenged and, therefore, held that if the order is passed under Section 14 of the Act then a remedy to a person aggrieved would be the remedy as available under Section 17 of the Act.

16. On the basis of the aforesaid, it is clear that the two judgments of the Hon'ble Apex Court have been followed by the various High Courts to mean that when the order is passed for taking possession of the property by the District Magistrate under Section 14 of the Act then if any person who is affected by such an order may file an application under Section 17 of the Act and not elsewhere.

17. The Tribunal has ignored the said judgments and has gone to the extent that the judgment passed by the Apex Court in Satyawati Tandon case (supra) does not apply to hold that the order passed by the District Magistrate under Section 14 of the Act can be challenged in Securitization Application filed under Section 17 of the Act; therefore, the judgment passed by the Tribunal is not acceptable. The Tribunal has held that the Apex Court has not struck down the Sub-section (3) of Section 14. and, therefore, it held that the order passed by the District Magistrate under Section 14 cannot be challenged under Section 17 of the Act.

18. The Tribunal in the present case has acted as Supreme to the Hon'ble Supreme Court and did not consider the binding effect of the judgment passed by the Hon'ble Apex Court. The law is laid down to be followed by every Court including the Hon'ble High Court but the Tribunal has denied to follow the same. In this reference Sub-section (3) of Section 14 runs as under:

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any Court or before any authority.

19. In Sub-section (3) of Section 14 it is provided that no act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any Court or before any authority. The word "Court" and "authority" have not been defined in SARFAESI Act, 2002 but the word "Debts Recovery Tribunal" have been defined by virtue of Section 2(i) according to which the Debts Recovery Tribunal means the Tribunal established under Sub-section (1) of Section 3 of the RDDBFI Act, 1993. Thus, it is to be seen that why the Legislature has purposely in Sub-section (1) of Section 3 used the word Tribunal" and

has not used the word "Court" and "authority". The word Tribunal" since has also been defined under the RDDBFI Act, 1993 then the Legislature purposely has inserted in Section 1(3) to include the word Tribunal", therefore, under Sub-section (3) of Section 14 of SARFAESI Act, 2002 it is provided that no act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any "Court" or before any "authority" then this is to be seen that it does not include the word Tribunal" as defined and considered under the RDDBFJ Act, 1993 or in the SARFAESI Act, 2002. This goes to show that the Tribunal may entertain any application or Appeal against the order passed by the Chief Metropolitan Magistrate or District Magistrate by virtue of Sub-section (3) of Section 14 and it cannot be said that the jurisdiction of the Tribunal is also barred for challenging the order passed by the Chief Metropolitan Magistrate or District Magistrate but what the Legislature intended by inserting Sub-section (3) of Section 14 of the Act, there will be a bar to the jurisdiction of any Court i.e Civil or Criminal Court or any other Court having hierarchy and the word "authority" means the Officers above Chief Metropolitan Magistrate or District Magistrate i.e revenue authorities. Thus, the jurisdiction of the Tribunal cannot be said to have been excluded by the interpretation of Sub-section (3) of Section 14 of the SARFAESI Act, 2002 and, therefore, the intention of the Legislature was that the Tribunal will. only have the jurisdiction to entertain the Appeal under Section 1, 7 of the Act against the order passed by the District Magistrate under Section 14 of the Act. For the aforesaid reasons, the Apex Court in two judgments reported in Union Bank of India v. Su???awati Tandon (supra) and Kanhiya Lal v. State Bank of India (supra) has held that against the order passed by the District Magistrate under Section 14 of the Act, the remedy is available under Section 17 of the SARFAESI Act, 2002. Thus, there was no need for the Apex Court to strike down Section 14(3) of the Act. The Tribunal in fact, rather than following the ratio of the two judgments passed by the Apex Court, unnecessarily held that the order passed by the District Magistrate as per Sub-section (3) of the under Section 14 of the Act is not challengeable before the Tribunal under Section 17 of the SARFAESI Act, 2002, and this could not have been held in view of the aforementioned two judgments passed by the Apex Court.

20. The Apex Court in Markio Tado v. Takam Sorang, II (2012) SLT 86 : I (2012) CLT 280 (SC) : (2013) 7 SCC 524, has held that the Constitution of India as per Article 141 the decision passed by the Apex Court is binding and its noncompliance by the subordinate Courts amount to judicial impropriety and indiscipline. The relevant para Nos. 30 and 31 run as under:

"30. Before we conclude, we may state that it is unfortunate that such acts of judicial impropriety are repeated in spite of clear judgments to this Court on the significance of Article 141 of the Constitution. Thus, in a judgment by a Bench of three Judges in Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engg. Works (P) Ltd. this Court observed—(SCC P. 463, Para 32).

32. When a position, in law, is well-settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the lest, for the subordinate Courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate Courts in

not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops.'

31. We may as well refer to Para 28 of State of W.B v. Shivananda Pathak, wherein this Court observed—(SCC P. 524)

'28. If a judgment is overruled by the Higher Court, the judicial discipline requires that the Judge whose judgment is overruled must submit to the judgment. He cannot, in the same proceedings or in collateral proceedings between the same parties, rewrite the over ruled judgment.

21. Thus, in the present case also the judgment of the Tribunal is a glaring example of judicial impropriety because of the reasons of the Tribunal that the judgment passed by the Supreme Court in Union Bank of India v. Satyawati Tandon (supra) has no application to entertain the Appeal under Section 17 of the Act 2002.

22. In view ofthe aforesaid law, this Tribunal is hopeful that the Debts Recovery Tribunal shall at least now follow the ratio of the judgment rather than to ignore the same.

23. Taking into account the law as aforesaid, the order passed under Section 14 is to be perused then it will be seen that the order under Section 14 is passed presuming that the property in question is a mortgaged property but had not adjudicated whether on the property as such the security interest was and whether his jurisdiction for the order under Section 14 could be invoked. Thus prima facie there is a basic flaw in the order passed by the District Magistrate under Section 14.

24. With regard to the another aspect raised on behalf of the appellant which was to the aspect that no notice was given to all the legal heirs. The notices under Section 13(2) was given to the appellant No. 1 only and the appellants tried to demonstrate that the appellant No. 2 was also major therefore, in the absence of the notice to all the legal heirs who inherited the property, no proceedings under Section 13(4) could have been initiated. In this reference, the definition of the word "borrower" as defined in Section 2(f) of the SARFAESI Act, 2002 is relevant which is as under:

"2(f) 'borrower' means any person who has been granted financial assistance by any Bank or Financial Institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any Bank or financial institution and includes a person who becomes borrower of a Securitisation Company or Reconstruction Company consequent upon acquisition by it of any rights or interest of any; Bank or Financial Institution in relation to such financial assistance."

25. Thus, the word "borrower" also includes a person who becomes borrower of a Securitisation Company or Reconstruction Company consequent upon acquisition by it of any rights or interest of any Bank or Financial Institution in relation to such financial assistance. Therefore, the notice under Section 13(2) was required to be issued to the borrowers. The Tribunal in its judgment has given a passing remark that the notice to one legal heir is sufficient notice to all legal heirs and the Tribunal has nowhere stated that as to on what basis the Tribunal came to the finding that the law is settled that the notice to one legal heir is sufficient notice to all the legal heirs. After the death of the original borrower, the legal heirs are entitled to claim rights in accordance to the proposition of their rights but the Tribunal presumed that the law stands settled of serving the notice to one legal heir is sufficient service to all the legal heirs.

26. In view of the aforesaid, I am inclined to set aside the order passed by the Debts Recovery Tribunal and the order passed by

the Tribunal is set aside and the case is remanded back to the Tribunal for its afresh adjudication in the light of the law as observed here in this judgment. The amount of 25% deposited by the Appellant for maintaining the Appeal be returned to the Bank as the dues of the Bank are pending and the Bank shall adjust the same towards the total dues. Appeal is partly allowed.

27. Before parting with the judgment, I may further observe that if the Tribunal went to give any citation to any of the judgments, then it has only written "AIR 2030 SC 3413 : 2007 AIR SCW 389 : 2010 (2) DRTC 189 : 2012 (2) BC 5". In fact this is not the way and manner of referring the judgment and then Tribunal seems to be unaware of the same. The Tribunal should also write the names of the parties for proper location of the case, which is the real way to refer the judgment and it is expected that the Tribunal in future will also write the names of the parties while referring any previous judgments and the direction as such shall be followed.

28. It is also directed that till the Tribunal decides the case finally, the status quo with regard to the property as direct by this Tribunal shall be main tained.

29. A copy of this judgment be supplied to the parties as well as to the DRT concerned, along with the original records, if summoned earlier, as per law.

30. Appeal partly allowed