

WP(C) 446(AP)/2015

BEFORE

HON'BLE MR. JUSTICE MANOJIT BHUYAN

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

28.1.2016

M Bhuyan, J.

Heard Mr. Subu Tapin, learned counsel representing the petitioners as well as Mr. N. Ratan, learned CGC, representing Respondent No.1 i.e. the Union of India. Also heard Mr. A. K. Singh, learned counsel representing Respondent Nos.2 & 3 as well as Ms. G. Deka, learned Senior Government Advocate, representing the State Respondent No.4.

2. The petitioners assail the Possession Notice dated 29.07.2015 and the E-Auction Notice dated 29.07.2015 issued under the hand of the Authorized Officer, Central Bank of India, in exercise of powers under the Securitization and Reconstruction of Financial Assets & Enforcement of Security Interest (SARFAESI) Act, 2002.

3. The facts briefly are that the petitioners had availed a housing loan of an amount of Rs.7,50,000/- under the "Cent Home Loan" Scheme from the Central Bank of India, Itanagar Branch, Naharlagun, way back in the year 2005. For availing the said loan, the petitioner No.2 stood as the Guarantor. In course of time and due to the failure on the part of the petitioners to repay the amounts as per the schedule of payment, a Demand Notice under Section 13(2) of the SARFAESI Act was issued on 12.01.2015. The said Demand Notice dated 12.01.2015 was duly received by the petitioners. Pursuant thereto, the petitioner No.1 had also addressed a letter to the Branch Manager, Central Bank of India on 05.03.2015 indicating that it was not possible on his part to make timely repayment. A request was made that he may be allowed to repay the outstanding amount on monthly basis with effect from March 2015.

4. In view of the default in repayment of the amount, a Possession Notice was issued under Section 13 (4) of the Act, confirming taking over all

the immovable property so secured. What followed thereafter was the issuance of the E-Auction Notice under the Act and in the said E- Auction Notice the details of the issuance of the Demand Notice, the amount outstanding and the date of issuance of the Possession Notice was indicated. The intention to sell the mortgaged properties by E-Auction in exercise of power under Sub-Section (4)(12) of Section 13 of the SARFAESI Act read with Rules 8 & 9 of the Security Interest (Enforcement) Rules, 2002 was clearly indicated. The aforesaid two Notices i.e. the Possession Notice dated 23.07.2015 and the E-Auction Notice dated 08.09.2015 are assailed in the present writ petition.

5. The case laid out by the petitioners is that the said two Notices cannot stand the scrutiny of law, in as much as, the same were not preceded by any opportunity of hearing. Further, the details of the amount outstanding etc. were not intimated to the petitioners prior to issuance of the said Notices.

6. The petitioners rely upon the case of ***Jaideep Singh & Ors -vs- Union of India & Anr.*** reported in ***2008 (2) GLT 91*** as well as in the case of ***J. Rajiv Subramaniam & Anr -vs- Pandiyas & Ors*** reported in ***(2014) 5 SCC 651***, to say that while a secured creditor is entitled to enforce the secured asset created in its favour of its own without the intervention of the Court, however, such intervention should be in conformity with the other provisions of the SARFAESI Act. It is contended that ownership of property being a Constitutional right protected under Article 300(A) of the Constitution of India, a secured creditor cannot deal with the secured asset in any manner it likes. The said asset can only be disposed of in the manner prescribed under the SARFAESI Act. The submission is that the Bank ought to have ensured that the petitioners were clearly brought to notice of the proceedings in order to provide opportunity to the petitioners for retrieving their property. On a pointed query as to the maintainability of the writ petition in view of Section 17 of the SARFAESI

Act, the learned counsel for the petitioners refers to the judgment in ***Jaideep Singh and Ors (Supra)***.

7. Mr. A.K. Singh, learned counsel representing the Bank submits that the Demand Notice had been duly served upon the petitioners and, in fact, the receipt of the same was duly acknowledged by the petitioners. In addition, the petitioner No.1 had also addressed a letter dated 05.03.2015 requesting permission to make repayment on monthly basis with effect from March 2015. It is also contended by Mr. Singh that although it was open for the petitioners to make any objection or file representation against the Demand Notice dated 12.01.2015, no such representation/objection had been made. Alleging that the writ petition suffers from suppression of material facts, it is also submitted that in view of Section 17 of the SARFAESI Act, this writ petition is not maintainable. Another factual aspect brought to the notice of this Court is that the Possession Notice dated 23.07.2015 had also been duly served upon the petitioners, receipt of which was also duly acknowledged.

8. Having noticed the facts above, it clearly appears that while initiating the proceeding under the provisions of SARFAESI Act, there was no infirmity in the action of the Respondent Bank. The provisions under Section 13(2), 13(3A) and 13(4) were duly complied with. The only point that has been raised by the petitioner is that they were not provided with the details of the repayment and that no opportunity was afforded to them prior to issuance of the said Notices.

9. As regards Section 17 of the SARFAESI Act, the legislature has categorically provided the right to appeal by any person including the borrower who may be aggrieved by any measures taken under the provisions of Section 13 of the Act. The said provision under Section 17 stipulates the making of an appeal before the Debts Recovery Tribunal having jurisdiction in the matter within 45 (forty five) days from the date on which measures had been taken. Under the provisions of the Act, where an alternative remedy is statutorily envisaged, the foremost consideration

would be as to the maintainability of the writ petition. To this end, reference is made to the case of ***Mardia Chemicals & Ors -vs- Union of India & Ors***, reported in ***(2004) 4 SCC 311*** wherein, the Apex Court held that although some of the provisions under the Act may be a bit harsh, however, the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debts Recovery Tribunal. In the same vein, reference can also be made to the case of ***United Bank of India vs. Satyawati Tondon & Ors.***, reported in ***(2010) 8 SCC 110*** where the Apex Court observed 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, cess, fees, other types of public money and the dues of banks and other financial institutions. In the view of the Apex Court, while dealing with petitions involving challenge to action taken for recovery of the public dues etc., the High Court must keep in mind that the law enacted by Parliament and State Legislatures for recovery of such dues are a 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 grievances of any aggrieved person. The Apex Court held that in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute. Last but not the least, in the said case the Apex Court also observed that it is a matter of serious concern that despite repeated pronouncements the High Court continues to ignore the availability of statutory remedies under the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. The Apex Court concluded with the hope and trust that in future the High Court will exercise their discretion in such matters with greater caution, care and circumspection. Reference may also be made to the case of ***Authorised Officer, Indian Overseas Bank and Anr. -vs- Ashok Saw Mill,***

reported in **(2009) 8 SCC 366**, where the Apex Court held that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny before the Debts Recovery Tribunal and the said Tribunal can not only set aside the action but even status quo ante can be restored by the Debts Recovery Tribunal.

10. The law with regard to the availability of an efficacious and alternative remedy under Section 17 of the Act having been clearly pronounced by the Apex Court and in view of the provisions under Article 141 of the Constitution of India, this Court has no option but to hold that this writ petition in the present form is not maintainable.

11. It may be added that the cases relied upon by the petitioner do not come to their aid, inasmuch as, the available materials of the case do not disclose that there was any infirmity in the proceedings adopted by the Bank while exercising power under Section 13 of the Act. However, this is a tentative view of this Court and in the event of an appeal being preferred by the petitioner, any observation made in this order shall not influence the mind of the Tribunal. Liberty is granted to the petitioner to approach the Tribunal within **2 (two) weeks** from today.

12. In view of the clear prescription of law and the pronouncement of the Apex Court, this writ petition does not merit consideration as being not maintainable and the same is dismissed at the threshold. No costs.

JUDGE

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