

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on : 05.05.2014

+ W.P.(C) 2789/2014, CAV.398/2014 & C.M. NOS. 5794/2014 & 5795/2014

J.S. ARORA AND ORS.

.....Petitioners

Through: Sh. Anil Sapra, Sr. Advocate along
with Ms. Manjula Gandhi, Sh. S.K. Gandhi,
Sh. Sameer Sharma and Ms. Rupali Kapoor,
Advocates.

Versus

STATE BANK OF HYDERABAD AND ORS.

.....Respondents

Through: Sh. P.K. Mittal, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VIBHU BAKHRU

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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CAV. 398/2014

Learned counsel for the caveator has put in appearance. Cav.
398/2014 accordingly stands discharged.

C.M. NO. 5795/2014

Allowed, subject to all just exceptions.

W.P.(C) 2789/2014, C.M. NO. 5794/2014 (for stay)

1. This proceeding under Article 226 of the Constitution of India questions an order of the Debts Recovery Appellate Tribunal (DRAT) dated 21.03.2014 in Appeal No.443/2010. The impugned order

rejected the petitioners' appeal against an order of the Debts Recovery Tribunal (DRT).

2. The first respondent (hereafter referred to as "the bank") had advanced amounts towards working capital (₹ 3.75 crores) and term loan facility of ₹ 95 lakhs to the second respondent (hereafter referred to as "the borrowers"). The third and fourth respondents were guarantors to these loan facilities. On 30.06.2008, the loan became a Non-Performing Asset (NPA) and the bank initiated proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDBFI), through OA No. 44/2008. It was alleged that a sum of ₹ 33.39 lakhs was outstanding as against the term loan advanced and ₹ 99.57 lakhs was due and payable in respect of the cash credit account. The latter facility, i.e. cash credit advance was secured by mortgage of a property, being K-17, Hauz Khas, New Delhi. The term loan was secured by mortgage of property no. 47-B, Kalu Sarai, Hauz Khas, New Delhi (hereafter referred to as "the suit property").

3. The petitioners claim that in May 2007, the guarantors approached them for the sale of the suit property. The total consideration agreed upon was ₹ 95 lakhs of which ₹ 5 lakhs was paid on 13.05.2007. A further amount of ₹ 15 lakhs was paid on 31.05.2007. It is alleged that the guarantors never told the petitioners that the property was mortgaged. The petitioners alleged that this information was gathered from the Manager of the bank which sanctioned them a loan of ₹ 95 lakhs. It was alleged that this loan was not disbursed on the ground that the borrower had not cleared the

outstanding dues. The petitioners alleged that the sums were appropriated and three cheques totalling ₹ 63 lakhs were issued to the borrower/vendor. In these circumstances, on 30.10.2007, by three separate sale deeds, the suit property was conveyed to the petitioners.

4. On 12.02.2008, the bank issued notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereafter called “SARFAESI Act”); a copy of this notice was served upon the first petitioner as well. In this notice, a sum of ₹ 31,16,796/- was demanded from the borrower. On 05.11.2008, the bank issued a notice under Section 13(4) of the SARFAESI Act in respect of the suit property at Kalu Sarai. In these circumstances, the petitioners approached DRT under the SARFAESI Act contending that as third-party innocent purchasers, they had perfected title over the property and that the amounts deposited and given to the borrowers were meant to be paid to the respondent bank to fully discharge the borrower’s liability. It was urged that in these circumstances, the bank could not proceed further with the action under the SARFAESI Act as far as the suit property was concerned.

5. During pendency of the proceedings, the DRT declined to grant any interim relief which led to the petitioners approaching the DRAT unsuccessfully and later this Court, by way of writ proceedings. On 18.05.2010, the Court disposed of the writ petition, noticing some of the petitioners’ contentions, especially the one to the effect that the

notices issued under Section 13(2) of the SARFAESI Act were defective.

6. After the above order, the DRT Delhi considered the pleadings and materials before it as well as the submissions of the parties and by an order of 05.10.2010, dismissed the application under the SARFAESI Act by the present writ petitioners. The latter, therefore, approached the DRAT, which by the impugned order rejected the appeal.

7. The petitioners contend that the findings of the Tribunal, i.e. the DRT and the DRAT overlooked the fact that the bank could plead and prove only the notice under Section 13(2) of the SARFAESI Act dated 12.02.2008. This notified the dues to the extent of ₹ 31,16,786/-. The claim by the bank for a larger amount of ₹ 1.29 crores (which formed the basis of its notice under Section 13(4) of the SARFAESI Act and was ultimately impugned before the DRT) was never established. Elaborating further on this argument, learned counsel urged that the sum of ₹ 31,16,786/- which was notified as due and payable on 12.02.2008 pertained only to the mortgage of the suit property and term loan facility as on the date of issuance of the notice, the balance in the term loan was only ₹ 21,55,904/-. In these circumstances, the bank could not have proceeded against the suit property claiming a larger amount.

8. Learned counsel urged that the reliance upon a subsequent notice said to have been issued under Section 13(2) of the SARFAESI

Act on 05.07.2008 was, in the circumstances of the case, entirely misplaced. It was urged that this document was never relied upon in the pleadings before the DRT, nor was it a part of the material placed on record when the SARFAESI application was moved, or for that matter in OA 44/2008. Consequently, the findings of the DRAT in this regard are contrary to the record and established facts of the case.

9. This Court notices that the DRT dealt with both the arguments made before it and found as follows:

“10. The first issue to be decided by this Tribunal is whether the notice under Section 13(2) dated 12.2.2008 issued by the bank is defective or not. In support of his contentions, Ld. Counsel for the applicants submits that as per the own case of the respondent bank in the OA No.44/2008, the account of the borrower was declared NPA only on 30.6.2008 whereas the notice under Section 13(2) was declared NPA only on 12.2.2008 i.e. prior to declaring the account NPA. Therefore, the said notice is illegal in law.

11. In opposition to the same, Ld. Counsel for the respondent bank submits that on coming to know their mistake, the respondent bank had withdrawn the said notice dated 12.2.2008 and issued another notice dated 5.7.2008 (Exb. RW-1/12). Photocopies of the postal receipts showing dispatch of the said notice to the borrowers has also been placed on record. According to the bank, the account was declared NPA on 30.6.2008 and notice under Section 13(2) was issued on 5.7.2008, therefore, there is no defect in the same.

12. I am in agreement with the respondent bank. The notice under Section 13(2) dated 5.7.2008 is totally legal and valid and there is no defect in the same.

13. As per the case of the applicants on the second point, the property-in-question is mortgaged only in term loan account and not in the cash credit account. In support of his contentions, Ld. Counsel for the applicants relied upon the notice under Section 13(2) dated 12.2.2008 issued by the bank. It has been stated that the said notice was issued for an amount of Rs.31,16,786.00 which is the amount of term loan account as per Schedule A of the said notice. It has also been stated that there is no mentioning of any amount in the cash credit account in the said notice. Ld. Counsel for the applicants also relied upon para 5(d) of the OA and submits that term loan facility of Rs.95.00 lacs was secured with the mortgage of property-in-question whereas cash credit facility of Rs.375.00 lacs was secured by the mortgage of property situated at K-17, Hauz Khas, New Delhi.

14. In opposition to the same, Ld. Counsel for the respondent bank relied upon notice under Section 13(2) dated 5.7.2008 (Exb. RW-1/12) and submits that the said notice was issued for an amount of Rs.1,29,07,815.46 (Rs.96,54,522.46 for cash credit and Rs.32,53,293.00 for term loan facility as on 5.7.2008). Ld. Counsel for the bank has also shown the Schedule A annexed with the said letter and submits that the property in question was mortgaged with the bank for securing the entire credit facilities and not only the term loan facility. As per the bank, the total amount secured against the property in question is Rs.4.70 crores and not Rs.95.00 lacs as alleged by the applicants. Ld. Counsel for the bank has also drawn my attention to para 5(f) of the OA (Page 10-15) and submits that both the properties were mortgaged to secure all the sums due on account of sanction of cash credit (Hyp.) of Rs.375.00 lacs and term loan of Rs.95.00 lacs. In furtherance to the same, Ld. Counsel for the bank has also invited my attention to the documents Exb. RW-1/3, agreement of loan for overall limit dated 23.12.2005 and submits that this document is for Rs.4.70 crores that the overall limit sanction to the borrowers and is not limited to any particular facility. The

document executed by the borrowers on 29.12.2005 titled “memorandum of deposit for creation of charge for term loan/overall limit” available at page 187 of the document in OA No.44/2008 shows that the property in question is mortgaged to secure the overall limit of Rs.4.70 crores. In addition to above, Ld. counsel for the bank also relied upon various letters written by the borrower to the respondent bank (Exb.RW-1/14 to Exb. RW-1/17). In the said letters, the borrower is requesting the bank to grant some more time for liquidating the dues of the bank. Nowhere in any of the said letters, there is a whisper about the present applicants.

15. In the light of the above discussion, I am of the considered view that the property in question is mortgaged for securing both the limits, i.e. cash credit as well as term loan. This issue is decided accordingly.”

10. The DRAT in the impugned order held as follows:

“8. In fact, the counsel for the appellants had mainly concentrated on two aspects during the course of arguments. The counsel would emphasize that there was no notice dated 5.7.2008 issued by the bank and the only notice served was dated 12.2.2008 and since the account was declared NPA only on 30.6.2008, the notice dated 12.2.2008 would be bad in law. The counsel has further emphasized that there was no pleading ever made by the bank in regard to the notice dated 5.7.2008 and this notice, in fact, was even not available on record.

9. When the pleadings in this regard are examined, it transpire that the bank though had made a mention of notice dated 12.2.2008, but had led in evidence the notice dated 5.7.2008. When asked to explain this, the counsel for the bank was very forthright in conceding that this mistake was on the part of the counsel and the date of the notice was just typographical mistake. The intention was to mention and rely upon the notice dated 5.7.2008, but

inadvertently, the date 12.2.2008 was got typed in the reply filed by the bank. Whether this explanation is genuine and can be accepted by this Tribunal is the question? While leading the evidence, the bank had produced the notice dated 5.7.2008 and not the notice dated 12.2.2008. The examination of evidence placed by the parties reveals that on record in evidence is notice dated 5.7.2008. The explanation offered by the respondent bank appears reasonable and plausible and thus cannot be rejected outrightly.”

11. The subsequent part of the impugned order observed that the notice of 05.07.2008 was taken on record and admitted as evidence without any protest on the part of the petitioners or the borrower. This Court is of the opinion that the findings of the DRAT on the notice under Sections 13(2) and 13(4) of the SARFAESI Act being valid do not require interference. The reliance placed upon the proposition that mere admission of a document in evidence would not dispense with its proof, in the circumstances of the present case, is misplaced. The borrower was a party – as also the petitioners, in the proceedings before the DRT. The notice of 05.07.2008 was never denied at the stage when objections ought to have been taken. In these circumstances, once the document was admitted, the question of further occasion for proving it does not arise. The notice of 05.07.2008 clearly states that the sum due and payable was ₹ 1.29 crores. In these circumstances, the argument of the writ petitioners with respect to an error in the approach or findings of the DRAT, has to fail.

12. So far as the question of the bank's entitlement to claim only a certain amount of money in respect of the term loan facility, and none else (since the suit property was mortgaged to the bank as security for such facility) is concerned, the Court holds the submission to be insubstantial. There is identity of borrower and creditor (i.e. the first and the second respondent) in respect of the two advances and as well as the properties mortgaged. In these circumstances, the bank was obliged in terms of Section 67A of the Transfer of Property Act to approach in one action and seek to recover the amounts due and payable to it. The Section 13(2) notice also demanded a sum of ₹ 1.29 crores which could be recovered through sale of two properties. In these circumstances, the primacy of the bank to enforce its rights is secured by Section 48 of the Transfer of Property Act which states that when someone purports to create by transfer at different times, rights over the same immovable property, those rights cannot exist together and each later right shall yield to the rights previously created.

13. This Court is furthermore of the opinion that the petitioners' arguments with respect to their being innocent third party purchasers without notice cannot be countenanced in the circumstances of the case. The pleadings and materials on record are replete with references to the knowledge of the petitioners about the prior mortgages, especially in respect of the suit property. They chose to purchase the suit property with open eyes and concededly did not insist upon clear title by discharge of the prior encumbrance, i.e. mortgage by deposit

of title deeds in the bank's favour. For these reasons, the submission made on the basis of equity cannot succeed.

14. In view of the above discussion, this Court is of the opinion that there is no merit in the writ petition; it accordingly fails and is dismissed without any order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**VIBHU BAKHRU
(JUDGE)**

MAY 05, 2014

