

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 06.10.2015

DATE OF DECISION : 13.10.2015

CORAM:

THE HONOURABLE MR. JUSTICE SATISH K. AGNIHOTRI
AND
THE HONOURABLE MR. JUSTICE K.K.SASIDHARAN

W.P.No.733 of 2015

T.Ashok Surana

..Petitioner

Vs.

Small Industries Development Bank of India,
rep by its Authorised Officer,
Overseas Towers,
756 L, Anna Salai (Opp TVS),
Chennai-600 002.

...Respondent

This writ petition is preferred under Article 226 of the Constitution of India praying for the issue of writ of declaration that the notice dated 18.11.2014 invoking the guarantee executed by the petitioner issued by the respondent bank is bad in law, illegal, unlawful, null and void, barred by application of Order 7 Rule 11(a) and (d) of the CPC along with costs.

For Petitioner : Mr.T.Ashok Surana,
Party-in-person

For Respondent : Mr.Hemkumar
for M/s.Ganesh and Ganesh

ORDER

SATISH K. AGNIHOTRI, J.

The petitioner Mr.T.Ashok Surana has filed this petition, seeking declaration that the notice dated 18th November 2014, whereunder the guarantee executed by him was sought to be invoked by

the bank, as bad in law, illegal, unlawful, null and void and barred by the provisions of Order 7 Rule 11(a) and (d) of the Code of Civil Procedure.

2 The factual matrix, as culled out from the pleadings, is that Mr.Ashok Surana, being the Managing Director of M/s.Tetrahedron Limited, executed a guarantee for the grant of three loans, i.e., a term loan of Rs.50,00,000/- under Direct Credit Scheme on 10th January, 2006, working capital term loan of Rs.75,00,000/- on 10th April, 2006 and a term loan of Rs.38,00,000/- under privileged customer scheme on 3rd January, 2008 to his company M/s.Tetrahedron Limited. A mortgage was also created on deposit of title deeds of properties owned by Surana Industries, a partnership firm, wherein Mr.Ashok Surana was one of the partners. In default of making the payment, a demand notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act") was sent to the borrower, i.e., M/s.Tetrahedron Limited and also to the guarantor, the petitioner herein on 21st April, 2011. A corrigendum, dated 3rd May, 2011 to rectify the typographical error was also served on the borrower as well as the guarantor.

3 It is stated by the petitioner that no consequential step or measure was initiated under Section 13(4) of the SARFAESI Act. According to the petitioner, the period of three years from the date of issuance of demand notice under Section 13(2) of the SARFAESI Act, has come to an end on 21st April, 2014, as stipulated under Article 137 of the Schedules to the Limitation Act. Thus, issuance of the impugned notice, invoking the guarantee is time barred against the principal borrower company as well as against the guarantor, as the liability is co-terminus.

4 It is further urged by Mr.Ashok Surana that since the dues was not secured on sale of secured assets, the balance amount, which is less than 20% of the total amount, is not recoverable under the provisions of sub-section (10) of Section 13 of the SARFAESI Act. It is further urged that under Section 31(j) of the SARFAESI Act, any amount due, which is less than 20% of the principal amount and interest thereon, as the case herein, is not recoverable under the provisions of the SARFAESI Act.

5 On facts, it is submitted that the respondent Bank had nearly recovered all dues. It is further submitted that issuance of the impugned notice is discriminatory and as such violative of the right to equality, as enshrined under Article 14 of the Constitution

of India. The action of the bank by issuing the notice to invoke the guarantee is debarred under the provisions of Order XXIII Rule 1(4) read with Rule 2 of the Code of Civil Procedure, as the bank has abandoned its proceedings under the provisions of the SARFAESI Act as the recovery of outstanding dues under the provisions of the SARFAESI Act is not an adjudicatory process, but in the nature of execution.

6 Lastly, it is contended that this court is obliged to quash the said notice, applying the provisions of Order VII Rule 11(a) and (d) of the Code of Civil Procedure.

7 In response, the respondent Bank submits that the bank is not intending to take recourse to the provisions of SARFAESI Act, particularly under Section 13(4) of the SARFAESI Act. However, the bank has full jurisdiction to recover outstanding dues under other provisions of law. The question of limitation would not arise in the instant case as no step has been initiated under the provisions of the SARFAESI Act. The impugned notice is to ensure the payment of balance amount, which is outstanding. No cause of action has arisen as on date, as the petitioner has not responded to the said notice.

8 It is further stated that the petitioner has sent a proposal through the principal borrower, seeking permission to sell a portion of the property under mortgage with the respondent and to settle the dues partly before the notice under Section 13(2) of the SARFAESI Act was issued. Accordingly, permission was granted till 10th June, 2011. But, because of his misdeeds, the proposed purchaser has filed a suit in O.S.No.105 of 2012 for specific performance. The petitioner has failed to appear to defend the said suit. Thus, the suit was decreed against the petitioner. Therefore, the writ petition deserves to be dismissed summarily with exemplary cost.

9 Heard Mr.Ashok Surana, petitioner-in-person and the learned counsel appearing for the respondent Bank, perused the pleadings and documents appended thereto.

10 The issue as to whether any amount is outstanding is not before us. According to the petitioner, nearly all payments have been made and according to the Bank, Rs.85,34,172,18 is outstanding. Needless to state that the bar to invoke the jurisdiction under the SARFAESI Act is only in case of less than 20% of the principle amount and the interest thereon. Ergo, we are not inclined to determine the outstanding dues and also whether the borrower has paid the entire loan amount or not as it is not germane and it is not a dispute in consideration before us in the instant petition. The principal

question that arises for consideration before us is whether at this stage, the High Court, while exercising its extra-ordinary jurisdiction under Article 226 of the Constitution of India should entertain the petition, wherein in fact no cause of action has arisen.

11 The SARFAESI Act was enacted with a view to regulate the securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The SARFAESI Act has come into force on 21st June, 2002.

12 Section 37 of the Act does not bar the application of other laws as it reads that "the provisions of this Act or rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force."

13 Section 13 of the SARFAESI Act, provides a mechanism for enforcement of security interest, under sub-section (2), the secured creditor is authorised to issue demand notice, requiring the borrower in writing to discharge in full his liability within sixty days from the date of the notice, failing which it is contemplated that the secured creditor shall be entitled to exercise all or any of the rights under sub section (4). Sub-section (3-A), which was inserted subsequently with effect from 11th November, 2004, contemplates filing of a representation, if any, to the notice under sub-section (2), whereunder the borrower / guarantor is granted right to raise objections, including applicability of the provisions of the SARFAESI Act, if so advised. After the receipt of the representation / objection, if any, the secured creditor is obliged to take a decision and communicate the same

14 Sub-section (4) of Section 13 of the SARFAESI Act authorises the secured creditor to take recourse to several measures, as stated therein, as under :

"(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

[(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;]

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

15 In effect, under the provisions of sub-section (4) of Section 13 of the SARFAESI Act, the possession of the secured assets of the borrower can be taken over, the possession or management of the business may also be taken over, as the case may be. In that line, Section 31 of the SARFAESI Act, which provides for non application of the provisions of the Act in certain cases, contemplates that if total outstanding amount is less than 20% of the principal amount and interest thereon, the provisions of the SARFAESI Act shall not be applicable.

16 As stated herein-above, under the provisions of Section 37 of the SARFAESI Act, recovery of dues under other statutory provisions, i.e., the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the

Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force, is not barred.

17 The respondent Bank has clearly stated that the impugned notice has not been issued under the provisions of the SARFAESI Act and as such, the question of limitation as prescribed under Section 36 of the SARFAESI Act is not applicable to the alleged dispute raised by the petitioner in the case.

18 The petitioner has referred to and relied on the following Supreme Court decisions, wherein the issue involved was different.

(i)Maganlal Chhagganlal (P) Ltd. Vs. Municipal Corpn. of Greater Bombay and others¹.

(ii)Rajender Singh and others Vs. Santa Singh and others².

(iii)State of Orissa and another Vs. Damodar Das³.

(iv)Syndicate Bank Vs. Channaveerappa Beleri and others⁴.

19 The issue involved in Maganlal Chhagganlal (P) Ltd. (supra) was whether creation of Administrative Tribunal as alternate forum in place of civil court is drastic and onerous and would attract the inhibition of Article 14 of the Constitution of India. A Bench of Hon'ble Seven Judges dismissed the writ petitions, holding that creation of alternate Administrative Tribunal is neither drastic nor onerous and was for proper expeditious disposal of disputes.

20 In Rajender Singh and others (supra), the question of limitation was raised in a suit filed by the appellants for possession. It was opposed that the suit was not within time and as such, the same deserves to be dismissed. The matter was taken to the Supreme Court and it was held that the question of limitation may be decided by the first court in the particular facts of the case.

21 In State of Orissa and another (supra), the issue arose from the arbitration disputes under the provisions of Arbitration Act, 1940.

22 In Syndicate Bank (supra), the question arose was from the Contract, wherein the suit was dismissed on the ground of limitation.

1 AIR 1974 SC 2009

2 (1973) 2 SCC 705

3 (1996) 2 SCC 216

4 (2006) 11 SCC 506.

23 All the aforestated cases are neither relevant nor applicable to the facts of the case, as in the case on hand, no step was taken by the respondent Bank to recover the money by taking recourse to appropriate forum under the provisions of law, except notice, invoking the bank guarantee, is issued. The attempt of the petitioner to preempt the bank from making recovery of balance amount is misplaced and deserves to be deprecated.

24 It is profitable to refer to the passage made by the Supreme Court in Oriental Insurance Co. Ltd. Vs. Raj Kumari (Smt) and others⁵, as under :

"13.x x x x x x Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute [and that too taken out of their context]. These observations must be read in the context in which they appear [to have been stated]. Judgments of courts are not to be construed as statutes. x x x x x x"

25 The principle of law is well settled that a case is a precedent and binding for what it explicitly decides and no more. [See : State of Orissa Vs. Sudhansu Sekhar Misra and others⁶; and Union of India and others Vs. Dhanwanti Devi and others⁷]

26 Order VII Rule 11(a) and (d) of the Code of Civil Procedure provides for rejection of plaint, wherein the plaint does not disclose a cause of action and where the suit appears from the statement in the plaint to be barred by any law. This eventuality arise when the civil case by way plaint is filed before the competent court. The said provision cannot be extended to the High Court when the petitioner is seeking declaration of the notice as bad. Order XXIII Rule 1(4) applies in a case of withdrawal of suit or abandonment of part of claim, wherein the plaintiff abandons any suit or part of claim under sub-rule (1) or withdraws a suit or part of a claim without the permission referred to in sub-rule (3). Rule 2 of Order XXIII provides that the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted. Both these provisions are not applicable in the facts of the case. If at all, the provisions may be made applicable only in the event a case is filed before the competent court / tribunal, wherein the provisions of the Code of Civil Procedure are applicable.

5 (2007) 12 SCC 768

6 AIR 1968 SC 647

7 (1996) 6 SCC 44

27 The instant case arises from the issuance of notice, invoking guarantee executed by Mr.Ashok Surana, who stood as guarantor for advancement of loan to M/s.Tetrahedron Limited company and Mr.Ashok Surana was admittedly the Managing Partner. Thus, it cannot be held that no steps can be taken by the secured creditor to recover the money first from the borrower and thereafter from the guarantor, as the liability is co-terminus. As the petitioner herein was the Managing Partner of the company, the bank is entitled to recover its dues under appropriate provisions of law, if in the facts of the case, the provisions of the SARFAESI Act for recovery of money is not available.

28 As discussed and observed herein-above, the writ petition is devoid of merits, frivolous and deserves to be dismissed. It is ordered accordingly. However, we reserve liberty to the petitioner to make a detailed representation, if so advised, in response to the impugned notice to enable the bank to take a decision and the consequential action, if necessary. No costs.

Sd/-

Assistant Registrar (CS-II)

//True Copy//

Sub Assistant Registrar

vvk

To

The Authorised Officer,
Small Industries Development Bank of India,
Overseas Towers,
756 L, Anna Salai (Opp TVS),
Chennai-600 002.

1 CC to M/s.Ganesh and Ganesh, Advocate SR.No. 56185

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SAI (CO)

PSI (20.10.2015)