BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 13.06.2016

CORAM :

THE HONOURABLE MR.JUSTICE NOOTY.RAMAMOHANA RAO
and
THE HONOURABLE MR.JUSTICE S.S.SUNDAR

Writ Petition (MD) No.10327 of 2016
and
W.M.P(MD)No.8077 of 2016

Rex Henry ... Petitioner

Vs.

1.The Debts Recovery Tribunal,
Rep by its Registrar,
III and IV, Kalyani Towers,
4/162, Madurai – Melur Road,
Uthangudi, Madurai 625 107.

2.The Indian Bank,
Rep by its Authorised Officer,
Nagercoil Branch,
Nagercoil. ... Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Declaration to declare the instruction of the 1st respondent insisting the petitioner to pay the Court fee as per Rule-13(2)(b) of the Security Interest (Enforcement) Rules-2002 is contrary to the provisional of the SARFAESI Act 2002 and Security Interest (Enforcement) Rules-2002 and direct the 1st respondent to accept the S.A.Sr.No:1842/2016 along with the Court fee as per Rule - 13(2)(d) of the Security Interest (Enforcement) Rules-2002 and number the S.A.Sr.No:1842/2016.

For Petitioner : Mr.D.Muthukumar

ORDER

(Order of the Court was made by **NOOTY.RAMAMOHANA RAO,J**)

This writ petition is instituted for declaring the instruction of the first respondent insisting the petitioner to pay the Court fee as per Rule 13(2)(b) of the Security Interest (Enforcement) Rules, 2002 as contrary to the provisions of the SARFAESI Act, 2002 and Security Interest (Enforcement) Rules, 2002 and consequently to direct the first respondent to accept the S.A.SR.No.1842 of 2016 along with the Court fee as per Rule 13(2) (d) of the Security Interest (Enforcement) Rules, 2002 and to number the said appeal and thus render justice.

2.It appears that a partnership firm bearing the name M/s.Zion Agencies, a proprietary concern of Sri Babu Henry John, has availed certain financial assistance with the Indian Bank of its Nagercoil branch. The borrower committed default in repayment of the loan. Consequently, the bank has initiated proceedings under Section 13 of the SARFAESI Act, 2002. A notice of demand was drawn under sub-section (2) of Section 13 of the SARFAESI Act, 2002 and delivered to the borrower and as well as the guarantor on 12.10.2015. Since the demanded amount of Rs.68,46,472/- remained unpaid, the bank has initiated the follow up action as provided for under sub-section (4) of Section 13. Under which provision, the secured creditor is entitled to take possession of the secured asset of the borrower including the right to transfer by way of lease, assignment or sale of the same for realising the secured asset. In that context, a notice under Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 has been drawn by the bank on 29th January 2016. Unfortunately, it appears that I the meantime, the proprietor of the principal borrower died on 12.11.2015.

3.In that view of the matter, the notice under sub-rule (1) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 has been drawn calling upon the firm M/s.Zion Agencies, the original borrower and also the guarantor. But, however, the notice proceeded further by informing the legal representatives of Shri.Babu Henry John, namely, the wife of the said individual, his two sons and a daughter. They are also included in the said notice being the legal representatives of the deceased Shri.Babu Henry John.

4.It is, in that context, the petitioner herein has moved Debts Recovery Tribunal by filing SARFAESI Appeal under Section 17 of the SARFAESI Act, 2002. While scrutinizing the said appeal, the Debts Recovery Tribunal has noticed that the said appeal has not been accompanied by proper fee and therefore directed the petitioner to pay the fee payable in terms of entry-1 (a) (b) or (c) of the table incorporated under sub-rule (2) of Rule 13 of the Security Interest (Enforcement) Rules, 2002. Hence, this writ petition is instituted by one of the two sons of Shri.Babu Henry John.

5.The objection of the writ petitioner is that his case falls under the entry-1 (d) of the said table under sub-rule (2) of Rule 13 of the said Rules and hence, he is liable to pay a maximum of Rs.50,000/- as Court fee or at the rate of Rs.1,250/- + Rs.125/- for every 1 lakh or part thereof in excess of Rs.10 lakhs, whereas, the Debts Recovery Tribunal has pointed out that wherever the amount due is Rs.10 lakhs and above, the fee payable on an appeal preferred by a borrower under Section 17 of the Act is Rs.5,000/- + Rs.250/- for every 1 lakh or part thereof in excess of Rs.10 lakhs subject to a maximum of Rs.1 lakh. Therefore, the entire scrutiny now revolves around as to whether the petitioner herein is to be treated as borrower or a third party insofar as the secured asset is concerned.

6.Shri.D.Muthukumar, learned counsel for the writ petitioner would contend before us that the expression "borrower" has been defined under Section 2(1)(f) of the SARFAESI Act, 2002 in the following terms:-

> *"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;"*

and since it did not include any legal representatives of a borrower a legal representative of a deceased borrower cannot be treated as a borrower for purposes of the Act. But, instead, he should be treated only as an aggrieved person of the action of the bank.

7.It is true that the expression borrower as defined by Section 2(1)(f) of the Act did not in so many words include the legal representative (s) of a deceased borrower. At the same time, there is no provision under the SARFAESI Act, 2002 which declares the loan transaction or consequences arising out of any default committed in repayment thereof on death of the borrower to have abated either. Therefore, there is no bar for the secured creditor in proceeding further with measures of securitisation as provided for under Section 13 of the Act.

8.In that view of the matter, it stand to reason to believe that the debt continues to remain due and payable and consequently, the estate of a dead borrower becomes liable to be proceed against by the secured creditor, apart from proceeding to realise the secured asset, for liquidating the debt due. It is, therefore, a choice left to the petitioner to feel aggrieved or not by the actions of the secured creditor of a firm of which his deceased father was the sole proprietor. If the petitioner, as a legal representative of the proprietor of the borrower firm does not wish to step into the shoes such a proprietor of the borrower, upon his death, choice is that of the petitioner. The respondent Bank is as much entitled to proceed against the estate of the deceased for the purpose of getting the debt due liquidated by realising the secured asset. Perhaps, if the Bank is proceeding independently against the estate of the deceased which is not the secured asset, then a legal representative of a deceased borrower can be treated as an 'aggrieved person', but not when the secured creditor is proceeding against the secured asset. If on the other hand, the petitioner seeks to challenge the actions of the secured creditor vis-a-vis, the firm of which his father was the sole proprietor which was the principal borrower, then he can do so by duly stepping into the shoes of the borrower. In such an event, the fee payable for an appeal preferred under Section 17 of the said Act is as per the entry found in 1(b) of the table incorporated under sub-rule 2 of Rule 13 of the Security Interest (Enforcement) Rules, 2002. If on the other hand, when we treat him as an “aggrieved party other than being a borrower” then alone the fee payable as per entry 1(d) of the table under rule 13(2) of the Rules, maximum of which has been fixed at Rs.50,000/-, would become applicable. For one, according to our view, to fall within the ambit of “aggrieved party other than the borrower” he should be a third party clearly unconnected with the rights, obligations, or liabilities on the part of the borrower *per se,* vis-a-vis the secured asset. In other words, a party who has no concern with any of the rights and liabilities, vis-a-vis, the borrower alone would fall within the sweep of expression “aggrieved party other than the borrower” . Since the petitioner herein has preferred appeal under Section 17 of the SARFASESI Act, 2002 challenging the very obligation of the borrower to liquidate the outstanding liability vis-a-vis, the secured asset in the hands of the respondent bank, the secured creditor, he will not fall within the expression “aggrieved party other than the borrower”. Therefore, he cannot be an aggrieved party by himself, in that sense.

9.We, therefore, leave it open to the petitioner herein either to present the appeal preferred by him under Section 17 of the SARFAESI Act, 2002 which is since returned for payment of deficit Court fee by duly complying with the objections raised by the Debts Recovery Tribunal, Madurai or in the alternative desist from preferring any such appeal and go before the competent authority seeking allowance for misused stamps under Section 52 of the Indian Stamp Act, 1899.

10.This writ petition is disposed of accordingly. No costs. Consequently, W.M.P(MD)No.8077 of 2016 is closed.

Sd/-
Assistant Registrar (CS-I)

/True Copy/

Sub Assistant Registrar

sms

To,
1.The Registrar,The Debts Recovery Tribunal,
III and IV, Kalyani Towers,
4/162, Madurai - Melur Road,
Uthangudi, Madurai 625 107.

2.The Indian Bank,
Rep by its Authorised Officer,
Nagercoil Branch, Nagercoil.

+1CC to Mr.D.Selvanayagam, Advocate Sr.No.29969

GJM/DB/27.6.16-5p-4c

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