

*IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH*

WRIT PETITION No.1638 of 2016

Between:

Nafees Sultana,

W/o Late Mohd. Narsullah Khan

and four others.

... Petitioners

And

The Authorized Officer/General Manager-

T.Somanadham, Rajadhani Co-Op Urban

Bank Ltd., Hyderabad and three others.

... Respondents

JUDGMENT PRONOUNCED ON 14.9.2016

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

AND

HON'BLE SRI JUSTICE G.SHYAM PRASAD

1. Whether Reporters of Local newspapers : Yes/No
may be allowed to see the Judgment?
2. Whether the copies of judgment may be
marked to Law Reporters/Journals? : Yes/No
3. Whether Their Ladyship/Lordships wish to
see the fair copy of the Judgment? : Yes/No

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE G.SHYAM PRASAD

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> Head Note:

! Counsel for the petitioners: Mr. N.Vinesh Raj

^ Counsel for respondent No.1: Mr. Subrahmanyam Kurella

? Cases Referred:

(2008) 1 SCC 125

HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY
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Counsel for the petitioners: Mr. N.Vinesh Raj

Counsel for respondent No.1: Mr. Subrahmanyam Kurella

The Court made the following:

ORDER: (per Hon'ble Sri Justice C.V.Nagarjuna Reddy)

Respondent No.4-Rajadhani Co-Operative Urban Bank Limited is the secured creditor of the petitioners. As the petitioners failed to repay the loan amounts, the bank has initiated arbitration proceedings. After hearing both sides, the Arbitrator/Deputy Registrar/Divisional Co-Operative Officer, Hyderabad has passed his award, dated 25.8.2010, in A.R.C.No.12 of 2010. The said award was questioned by the petitioners before the Co-Operative Tribunal at Hyderabad, vide C.T.A.No.27 of 2012. By order, dated 11.6.2015, the said award was set aside by the Tribunal *inter alia* with the following observations:

“We have verified the Statement of Accounts and it is evident that though the loan account is in the name of Hyline Restaurant, the amounts actually were transferred to A/c No.CA71 and monthly credits were transferred from account No.CA71 which according to the appellants pertains to respondent Nos.3 and 4. Respondent No.2 has not denied the above fact and we feel that the allegation levelled by the appellants herein needs to be examined carefully by the Arbitrator, but it is found that the Arbitrator was silent and appears to have passed the arbitration award mechanically without application of mind. The Tribunal, therefore, feels that the Award deserves to be quashed and the matter remanded back to the Arbitrator for fresh inquiry.”

Post disposal of the afore-mentioned appeal by the Tribunal, the bank has issued demand notice to the petitioners under Section-13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act') besides issuing the possession notice under Rule-8(1) of the Security Interest (Enforcement) Rules, 2002, on 06.01.2016.

Feeling aggrieved by these proceedings, the petitioners filed the present Writ Petition for issuance of *Mandamus* to restrain respondent No.1 from initiating any action under the provisions of the SARFAESI Act.

At the hearing, Mr. N.Vniesh Raj, learned counsel for the petitioners, strenuously contended that as per the observations of the Co-Operative Tribunal (reproduced above), a serious doubt about the liability of the petitioners is arising and that, instead of inviting a finding on the aspects raised by the Tribunal from the arbitrator, respondent Nos.1 and 4 shied away from participating in the arbitration proceedings and initiated the measures under the SARFAESI Act. He has further argued that when the arbitration proceedings are pending, it is not permissible for respondent Nos.1 and 4 to initiate measures under the SARFAESI Act for recovery of the alleged debt. In support of this plea, the learned counsel for the petitioners has

placed before the Court order, dated 10.3.2015, of the Supreme Court in Civil Appeal Nos.2874-75 of 2015 (*V.Krishnaswamy and Ors Vs. Karnataka Rajya Kaigarika Sahakari Bank Niyamita and Ors*).

Mr. Subrahmanyam Kurella, learned counsel for respondent Nos.1 and 4, submitted that his clients have option to recover the loan amounts from the petitioners by initiating the proceedings under the SARFAESI Act even in the absence of adjudication by the Arbitrator. He has further submitted that his clients are not interested in pursuing the arbitration proceedings and therefore, they have initiated the measures under the SARFAESI Act, which is permissible under that Act. In support of his submission, he has placed reliance on the judgment of the Supreme Court in *Transcore Vs. Union of India and another*¹.

We have carefully considered the submissions of the learned counsel for the parties.

The sheet anchor of the petitioners' case is that without pursuing the arbitration remedy after remand of the case by the Co-Operative Tribunal, respondent No.1 has resorted to the provisions of the SARFAESI Act, which is not permissible in law.

The Co-Operative Tribunal in its order, the relevant portion of which is extracted herein before, has made an

¹ (2008) 1 SCC 125

observation relating to crediting and the transferring of the loan amounts from the loan account of Hyline Restaurant to the loan A/c No.CA71 standing in the name of respondent Nos.2 and 3 in this Writ Petition. The Tribunal further observed that this aspect was not examined by the Arbitrator.

Even if certain views were expressed by the Tribunal on the above noted aspect, which was directed to be examined, while remanding the case to the Arbitrator, in our opinion, the same would not deter respondent Nos.1 and 4 from initiating the measures under the SARFAESI Act.

It is not the pleaded case of either party that the proceedings under the SARFAESI Act are based on the award of the Arbitrator which was set aside by the Co-Operative Tribunal.

The right of a secured creditor to recover the dues from the borrower/co-obligant/guarantor stems under the SARFAESI Act independent of any judgment, decree or certificate issued by the Courts, Tribunal or statutory authorities. Under Section-37 of the SARFAESI Act, its provisions or the Rules made thereunder shall be in addition to and not in derogation of the Companies Act, 1956 and other statutory enactments mentioned therein or also any other law for the time being in force.

In *Transcore* (1 supra), after exhaustive consideration of the provisions of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short ‘the Debts Recovery Act’) and the SARFAESI Act, the Supreme Court has discussed the doctrine of election and made the following observations:

“In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to American Jurisprudence, 2d, Vol. 25, page 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the [NPA Act](#) is an additional remedy to the [DRT Act](#). Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Equity (Thirty-first Edition, page 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application.”

In paragraph-66 the Supreme Court held as under:

“We have already analysed the scheme of both the Acts. Basically, the [NPA Act](#) is enacted to enforce the interest in the financial assets which belongs to the bank/ FI by virtue of the contract between the parties or by operation of common law principles or by law.

The very object of [Section 13](#) of NPA Act is recovery by non-adjudicatory process. A secured asset under [NPA Act](#) is an asset in which interest is created by the borrower in favour of the bank/ FI and on that basis alone the [NPA Act](#) seeks to enforce the security interest by non-adjudicatory process. Essentially, the [NPA Act](#) deals with the rights of the secured creditor. [The NPA Act](#) proceeds on the basis that the debtor has failed not only to repay the debt, but he has also failed to maintain the level of margin and to maintain value of the security at a level is the other obligation of the debtor. It is this other obligation which invites applicability of [NPA Act](#). It is for this reason, that [Sections 13\(1\)](#) and [13\(2\)](#) of the NPA Act proceeds on the basis that security interest in the bank/FI; needs to be enforced expeditiously without the intervention of the court/tribunal; that liability of the borrower has accrued and on account of default in repayment, the account of the borrower in the books of the bank has become non-performing. For the above reasons, [NPA Act](#) states that the enforcement could take place by non-adjudicatory process and that the said Act removes all fetters under the above circumstances on the rights of the secured creditor.”

In the light of the reasoning assigned in the afore extracted paragraphs, the Supreme Court held that withdrawal of an O.A. already filed by the secured creditor for recovery of the debts under the Recovery of debts due to Banks and Financial Institutions Act is not a pre-condition for taking recourse to SARFAESI Act.

In our opinion, the judgment in *Transcore* (1 supra) fully supports the plea of respondent Nos.1 and 4 that mere pendency of the arbitration proceedings would not disentitle the said respondents from recovering the amounts due under the SARFAESI Act.

As regards the observations expressed by the Co-Operative Tribunal, the petitioners still have an opportunity of raising all the pleas legally available to them, including the aspect on which the Tribunal has made its observations, by availing the remedy under Section-17 of the SARFAESI Act against the measures initiated by respondent Nos.1 and 4 before the Debts Recovery Tribunal.

Subject to the liberty given to the petitioners as above, the Writ Petition is dismissed.

As a sequel to dismissal of the Writ Petition, interim order, dated 21.01.2016 is vacated and WPMP.Nos.2062 and 17359 of 2016 are dismissed as infructuous.

JUSTICE C.V.NAGARJUNA REDDY

JUSTICE G.SHYAM PRASAD

14th September 2016

Note:

LR copies to be marked.

B/o

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