HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
HON'BLE Dr. JUSTICE SHAMEEM AKTHER

WRIT PETITION NOS.12375 and 12405 of 2017

COMMON ORDER: (per Hon'ble the Acting Chief Justice Ramesh Ranganathan)

The relief sought for in W.P.No.12375 of 2017 is to quash the order of the Debts Recovery Tribunal-II, Hyderabad (the "DRT" for short) in S.A.No.1097 of 2017 (Old S.A.No.394 of 2015 on the file of the Debts Recovery Tribunal-I, Hyderabad) dated 28.03.2017, as arbitrary and unconstitutional. The petitioner herein filed S.A.No.1097 of 2017 before the DRT under Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the "SARFAESI Act" for short) assailing the action of the respondent-bank in taking physical possession of the schedule property through the Advocate-Commissioner appointed in Crl.M.P.Nos.4984 to 4989 of 2015 passed by the Chief Metropolitan Magistrate, Hyderabad, vide Warrant dated 07.08.2015, in pursuance of the possession notice dated 05.09.2014, as arbitrary and illegal.

The case of the applicant as noted by the DRT, in the order impugned in W.P. No.12375 of 2017, is that they had availed various credit facilities from the respondent-bank from 2003 onwards, against security by way of mortgage of the schedule properties; because of bifurcation of the combined State of Andhra Pradesh, and due to recession in the markets, they had sustained losses in their business, and could not pay the loan instalments; a demand notice dated 31.10.2013 was issued under Section 13(2) of the SARFAESI Act calling upon the petitioner to pay Rs.7,64,99,271.42 ps. within 60 days; they filed their objections on 23.12.2014; the respondent-bank failed to reply thereto, and had thereby violated Section 13(3A) of the SARFAESI Act; contrary to the demand notice dated 31.10.2013, the respondent-bank published another demand notice dated 13.12.2013 in the newspapers on 14.12.2013; the possession notice dated 05.09.2014, under Section 13(4) of the SARFAESI Act, was published in the newspapers on 10.09.2014 showing the outstanding amount as Rs.109 crores by amalgamating the loans taken by M/s.Bhagyanagar Hotels Private Limited, and the financial facilities obtained by the petitioner from other banks i.e., the Bank of India and Punjab National Bank; the applicant did not give their consent for the liabilities of other banks to be clubbed; and the amounts shown in the demand notice, and the amounts shown in the possession notice, were different.

In its order dated 28.03.2017, the DRT held that the applicant had filed S.A.No.632 of 2014 (new S.A.No.237 of 2017) questioning the possession notice dated 05.09.2014 issued by the respondent-bank under Section 13(4) of the SARFAESI Act; the said S.A. was dismissed by a separate order; the validity of the possession notice issued under Section 13(4) could not be the subject matter of the present S.A; the cause of action for the applicant to file the present S.A. was the warrant dated 07.08.2015 issued by the Chief Metropolitan Magistrate, Hyderabad whereunder the Advocate-Commissioner had been appointed to take physical possession of the schedule properties; the applicant and M/s. Bhagyanagar Hotels Private Limited had questioned the possession notice issued by the respondent-bank in W.P.No.27281 of 2014 which ended in dismissal, leaving it open to the petitioners to avail other remedies under law; W.P.No.14761 of 2015 filed by M/s. Chiran Fort Club, claiming leasehold rights over the schedule properties, was dismissed as withdrawn on 03.06.2015; the Crl.M.P. filed by M/s.Chiran Fort Club, against the possession notice issued under Section 14 of the SARFAESI Act, ended in dismissal on 10.07.2015; W.P.No.22080 of 2015 filed by M/s.Chiran Fort Club thereagainst was dismissed as withdrawn on 16.07.2015; the objection taken by the applicant, regarding delivery of possession of the schedule properties to the respondent-bank on the ground that the tenant was in occupation, was not available as the tenant had filed a Writ Petition before the High Court which had ended in dismissal; the other objection that Syndicate Bank could not take-up proceedings under Section 14 of the SARFAESI Act on behalf of the other banks, i.e. Bank of India and Punjab National Bank, could not be countenanced for the reason that the said banks had authorised the respondent-bank to take measures under Section 13(4) of the SARFAESI Act; the error in mentioning the actual amounts due in the Crl.M.P, filed by the respondent-bank under Section 14 of the SARFAESI Act before the Chief Metropolitan Magistrate, Hyderabad ("CMM" for short), did not affect the impugned order since the C.M.M. does not adjudicate the quantum of the amounts due to the secured creditor; issuance of directions to the Advocate-Commissioner, to take physical possession of the secured asset, was consequent upon dismissal of the objection petition filed by M/s.Chiran Fort Club which was also unsuccessful in W.P. No.22080 of 2015; and the application was liable to be dismissed.

The relief sought for in W.P. No.12405 of 2017 is to quash the order of the DRT in S.A. No.237 of 2017 (old SA No.632 of 2014 dated 28.03.2017). S.A. No.237 of 2017 was filed assailing the notice issued by the respondent-bank under Section 13(4) of the SARFAESI Act read with Rules 8(1) & (2) and Rule 9 of the Security Interest (Enforcement) Rules, 2002 (the "Rules" for short) against the application schedule properties.

In the order, impugned in W.P. No.12405 of 2017, the DRT observed that the three demand notices contained details of the secured assets intended to be enforced, and the amount outstanding in the respective loan accounts as on the date when the accounts were classified as a non-performing asset; after issuance of a demand notice some payments were made, and the loan accounts were regularized; subsequently the borrower again committed default; on the basis of the earlier classification of the account as NPA, the demand notice under Section 13(2) was issued; the demand notices issued by Bank of India and Punjab National Bank, on 04.12.2013 and 14.02.2014 respectively, contained the dates on which the loan accounts were classified as NPA; both the petitioner and M/s. Bhagyanagar Hotels Pvt. Ltd had filed W.P. No.27281 of 2014 questioning the possession notice, but they did not plead non-service of the demand notice nor did they point out the alleged defects in the demand notice; what all was pleaded in the Writ Petition was for grant of eight months time to liquidate the outstanding liability; the Writ Petition ended in dismissal on 15.09.2014, leaving it open to the petitioner and M/s. Bhagyanagar Hotels Pvt. Ltd to avail the remedy under Section 17 of the SARFAESI Act; the respondent-bank had stated that the demand notice was sent to the petitioner and the guarantors by registered post with acknowledgment due; as they were not returned served, paper publication of the notice was effected in Times of India and Andhra Jyothi, English and Telugu dailies, on 14.12.2013; in W.P. No.27281 of 2014, the petitioner did not plead non-receipt of the Section 13(2) notice; the respondent placed on record sufficient material such as copies of publication of the demand notice in the Times of India and Andhra Jyothi newspapers as proof of service by paper publication; the contention that the demand notices were not served on them had no substance; the petitioner did not dispute the factual aspect that respondents 1 to 3 banks had pari-passu charge on the secured assets; the original title deeds, in respect of the application schedule properties, were deposited with the 1st respondent-bank, i.e., Syndicate Bank, as security for the credit facilities availed by the petitioner and M/s. Bhagyanagar Hotels Pvt. Ltd; Syndicate Bank had ceded charge by creating a pari-passu charge in favour of Bank of India and Punjab National Bank; both Bank of India and Punjab National Bank had categorically stated that they had authorized Syndicate Bank to take further steps, pursuant to their individual demand notices against the secured assets; the plea advanced by the petitioner that Syndicate Bank was not competent to take measures under Section 13(4), pursuant to the individual notices, had no substance; possession notice dated 05.09.2014 had been published in the Times of India and Andhra Jyothi newspapers on 10.09.2014; possession notice had also been served on the petitioner and others, apart from affixture on the secured assets; the measures taken by the respondent-bank on its behalf, and on behalf of Bank of India and Punjab National Bank, against the secured assets was in accordance with the provisions of the Act and the Rules; there was no flaw in the possession notice dated 05.09.2014 warranting interference by the DRT in the exercise of the powers conferred under Section 17 of the SARFAESI Act; and there was no valid ground to quash the possession notice dated 05.09.2014 issued under Section 13(4) of the SARFAESI Act.

Sri P. Sri Raghuram, Learned Senior Counsel appearing on behalf of the petitioners, would submit that the amount claimed in Crl.M.P. No.4984 to 4989 of 2014 was for a total sum of Rs.3,07,36,416/-; the petitioner paid the entire amount of Rs.3,07,36,416/- pursuant to the order of the High Court; the notice under Section 13(4) is vitiated, since the earlier notice issued under Section 13(2) was not served on the petitioner; while the Section 13(2) notice refers to their liability as Rs.7,64,99,271.42 ps, the Section 13(4) notice records that a sum in excess of Rs.109 crores is due and payable; the Section 13(4) notice is therefore illegal; the application filed by the respondent-bank, under Section 14 of the SARFAESI Act, records that the outstanding amount over-due was only Rs.51,22,736/-; as the petitioner has paid more than the said amount thereafter, they cannot be dispossessed under the order of the CMM in Crl.M.P.Nos.4984 to 4989 of 2015 dated 07.08.2015; the notice under Section 13(2), sent to the petitioner on 31.10.2013, was returned un-served; service of the said notice was effected by substituted service by way of publication in the Times of India on 14.12.2013; it is only after effecting service of notice, in the modes prescribed under the SARFAESI Act and the Rules, could the respondent bank have taken steps to effect service of notice by substituted service; since the notice under Section 13(2) itself is vitiated for non-service on the petitioner, no action can be taken by the respondent-bank against them thereafter; the notice dated 31.10.2013, issued under Section 13(2) of the Act, called upon the petitioner to pay Rs.7,64,99,271.42 ps, while the possession notice issued under Section 13(4) dated 05.09.2014 and 10.09.2014 records the amount due as Rs.109 Crores which is contrary to law; the petitioner has been denied the right to object as the notice under Section 13(2) was not served on them; and though the petitioner filed their objections on 23.12.2013, no reasons were assigned for its non-consideration.

Section 13(2) of the SARFAESI Act stipulates that where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of the secured debt or any instalment thereof, and his account in respect of the debt is classified by the secured creditor as a non-performing asset, then the secured creditor may require the borrower, by notice in writing, to discharge in full his liabilities to the secured creditor within sixty days from the date of the notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4). Section 13(4)(a) stipulates that, in case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor, to recover his secured debt, may 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.

It is only after a notice is issued under Section 13(2) of the SARFAESI Act, and in case the borrower fails to discharge his liability in full within the period specified in Section 13(2), can the secured creditor take recourse to the measures stipulated in Section 13(4). The respondent-bank issued the possession notice, under Section 13(4) of the SARFAESI Act, on 05.09.2014 informing the petitioners that, since they failed to repay the amount specified in the notice issued under Section 13(2), notice was being given to the owners of the property and to the public that possession of the property, described in the notice, was being taken in exercise of the powers conferred under Section 13(4) of the SARFAESI Act r/w. Rule 8 of the SARFAESI Rules.

The validity of the Section 13(4) notice dated 05.09.2014 was subjected to challenge, both by the petitioners herein and M/s. Bhagyanagar Hotels Private Limited, in W.P.No.27281 of 2014. Curiously, in the affidavit filed in support of W.P. No.27281 of 2014, the petitioners chose not to complain of violation of Section 13(2) of the SARFAESI Act by the respondent-Bank. On the other hand they specifically stated that they were ready and willing to liquidate the entire outstanding amounts but, due to slack business transactions, they were unable to pool-up the required money; though they had informed the respondent-Bank also, the latter was proceeding further with coercive action; the outstanding liability of the petitioners as on date, as per the possession notice, was to the tune of Rs.109,11,12.649.66 ps; the petitioners were willing to pay the said amount provided reasonable time of eight months was given by the Court so that the petitioners could make payment of half the amount in four months, and the remaining half in another four months; and, as the respondent-bank was proceeding with coercive action without giving reasonable time to the petitioners, they were constrained to file the Writ Petition, (i.e., W.P. No.27281 of 2014).

It is evident, from a bare reading of the affidavit filed by them in support of W.P. No.27281 of 2014, that the petitioners did not dispute their liability, to the respondent-Bank and other banks, in excess of Rs.109 Crores. They did not also put the validity of the earlier Section 13(2) notice in issue in W.P. No.27281 of 2014. As has been held by the DRT, in the impugned order, the petitioners did not plead non-receipt of the Section 13(2) notice in W.P.No.27281 of 2014. Sri A.Krishnam Raju, Learned Standing Counsel for the respondent-bank, would submit, not without justification, that, as this contention was available to be raised by the petitioners before the Division Bench of this Court in W.P. No.27281 of 2014, and as it was not so raised, it is not open to the petitioners to raise this contention in the subsequent application filed before the DRT.

In **Forward Construction Co. v. Prabhat Mandal (Regd.) Andheri**[1], (a public interest litigation Writ Petiton), the Supreme Court held that Explanation IV to Section 11 C.P.C. provided that any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit; an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as

[1] AIR 1986 SC 391

incidental to or essentially connected with the subject matter of the litigation, and every matter coming with the legitimate purview of the original action both in respect of the matters of claim or defence; the principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided; where a matter has been constructively in issue it cannot be said to have been actually heard and decided; and it could only be deemed to have been heard and decided.

In so far as the challenge to the proceedings of the Chief Metropolitan Magistrate, Hyderabad, under Section 14 of the SARFAESI Act, is concerned, it is no doubt true that, in the application filed by the respondent-bank before the Chief Metropolitan Magistrate, Hyderabad in Crl.M.P.Nos.4985 and 4986 of 2014, the respondent-bank had stated that the petitioners herein and the guarantors had failed to adhere to the terms and conditions of the loan agreement, they had defaulted in repayment of the loan amount, and the said loan account became a non-performing asset; and, consequently, a sum of Rs.51,22,736/- was outstanding overdue against the respondent-bank as on 30.11.2014 in the books of accounts maintained in the usual and ordinary course of business.

This application, under Section 14(1) of the SARFAESI Act, was filed by the respondent-bank before the Chief Metropolitan Magistrate, Hyderabad on 17.12.2014, long after the Section 13(4) notice dated 05.09.2014 was issued, and after the Division Bench dismissed W.P.No.27281 of 2014, by its order dated 15.09.2014 relegating the petitioners to approach the DRT. The petitioners, having admitted in their affidavit dated 12.09.2014 filed in support of W.P.No.27281 of 2014 that the outstanding liability, in the Section 13(4) notice of Rs.109.11 Crores, would be paid by them within a period of 8 months, half within four months and the remaining half in another four months (which period of 8 months expired on 11.05.2015 nearly two years ago), cannot now take advantage of a clerical error in the application filed by the respondent-bank under Section 14(1) of the SARFAESI Act to contend that the bank was entitled to take possession of the subject properties only if the petitioners failed to pay the said amount of Rs.51,22,736/-; and, since they had subsequently paid an amount far in excess thereof, the respondent-bank was not entitled to take possession of the subject properties under Section 14(1) of the SARFAESI Act.

Section 14(1) of the SARFAESI Act enables a secured creditor, for the purpose of taking possession or control of any secured asset, to request the Chief Metropolitan Magistrate in writing, within whose jurisdiction any such secured asset is situated, to take possession thereof; and the Chief Metropolitan Magistrate shall, on such request being made to him, take possession and forward such assets to the secured creditor. The DRT has, in the impugned order, rightly observed that Section 14 does not confer any power on the Chief Metropolitan Magistrate to adjudicate the amounts due, and the said provision only obligates him to take possession of the secured assets and hand them over to the secured creditor. While the jurisdiction of the Chief Metropolitan Magistrate can only be invoked after a notice is issued under Section 13(2), and proceedings are taken under Section 13(4) of the SARFAESI Act, a clerical error in the application, filed under Section 14(1) of the SARFAESI Act, would not disable either the respondent-bank or the Chief Metropolitan Magistrate from taking possession of the secured asset. Having admitted before this Court, in the affidavit filed by them in support of W.P. No.27281 of 2014, that a sum in excess of Rs.109 crores is due and payable by them to the respondent-bank, the petitioners cannot now be heard to contend otherwise, or to take advantage of a clerical error in the application filed by the respondent-bank, before the Chief Metropolitan Magistrate, under Section 14(1) of the SARFAESI Act.

In any event against the orders passed by the DRT, the petitioners have a right of appeal to the Debts Recovery Appellate Tribunal under Section 18(1) of the SARFAESI Act. In **Narayan Chandra Ghosh v. Uco Bank**[2], the Supreme Court observed :

> "………..**Section 18(1)of the Act confers a statutory right on a person aggrieved by any order made by the Debts Recovery Tribunal under Section 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the right conferred under Section 18(1) is subject to the condition laid down in the second proviso thereto**. The second proviso postulates that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. However, under the third proviso to the sub-section, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty-five per cent of the debt, referred to in the second proviso. **Thus, there is an absolute bar to entertainment of an appeal under Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre-deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity**.
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> It is well-settled that when a Statute confers a right of appeal, while granting the right, the Legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be said to be onerous. **Thus, we hold that the requirement of pre-deposit under sub-section (1)**

[2] (2011) 4 SCC 548

of Section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the Statute. We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said Section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement................" (emphasis supplied).

It does appear that the extra-ordinary jurisdiction of this Court, under Article 226 of the Constitution of India, has been invoked by the petitioners only to avoid compliance with the second proviso to Section 18(1) of the SARFAESI Act which requires them to deposit 50% of the amount due as a pre-condition for an appeal to be entertained.

As the petitioners have an effective remedy of an appeal, under Section 18(1) of the SARFAESI Act, against the orders of the DRT impugned in these Writ Petitions, we see no reason to entertain these Writ Petitions more so as, unlike in judicial proceedings under Article 226 of the Constitution of India where this Court would interfere only if there is an error of law apparent on the face of the record, the Debts Recovery Appellate Tribunal can examine both questions of fact and law. Suffice it, while dismissing both these Writ Petitions and relegating the petitioners to avail their statutory remedy of appeal to the Debts Recovery Appellate Tribunal, to make it clear that the DRAT shall, in case its jurisdiction is invoked by the petitioners herein, consider the appeal on its own merits uninfluenced by any observations made by us in this order, as the observations in this order merely reflect our prima-facie view on the contentions urged in these Writ Petitions, and not our conclusive opinion on its merits.

Subject to the aforesaid observations, both these Writ Petitions fail and are, accordingly, dismissed. Miscellaneous Petitions pending, if any, shall also stand dismissed. There shall be no order as to costs.

(RAMESH RANGANATHAN, ACJ)

(Dr. SHAMEEM AKTHER, J)

Date:04-05-2017.
Note: Issue C.C. tomorrow.
MRKR/CS/Jsu