22.12.2023
Court No. 19

CO 3359 of 2023

Jayanta Kumar Kundu and another
vs.
Asset Reconstruction Company India Limited and another

Mr. Mainak Bose
Mr. Kallol Ghoshal

... for the petitioners

The revisional application arises out of an order dated September 06, 2023 passed by the Learned Debt Recovery Tribunal - I in I.A no.1982 of 2021. I.A. No.1982 of 2021 arises out of S.A. No.03 of 2016.

By the order impugned, the learned tribunal came to the conclusion that the District Magistrate had expressed his satisfaction in the light of the decision of the Hon'ble Apex Court in the matter of ***Standard Chartered Bank vs. V. Noble Kuma and Others*** reported in ***(2013) 9 SCC 620***. There was no illegality in the order passed by the District Magistrate. I.A. 1982 of 2021 was dismissed accordingly.

The petitioners, in the capacity of a guarantor and being aggrieved by the steps taken by the opposite parties, in issuing the demand and possession notice under Section 13(2) dated August

26, 2015, and the notice under Section 13 (4) dated November 26, 2015, filed S.A. 03 of 2016 under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as SARFAESI Act, 2002).

The opposite parties filed their objection to the SARFAESI proceedings. During the pendency of the proceedings, the financial institution approached the District Magistrate, Hooghly, for an order under Section 14 (1) of the said Act. The petitioners claim to have come to know about the said fact upon receipt of notice dated September 22, 2021, issued from the office of the District Magistrate. A copy of the affidavit and the application filed by the financial institution before the District Magistrate was obtained by the petitioners under the Right to Information Act. According to the petitioners, the affidavit in the application filed by the financial institution suffered from various irregularities, which were apparent on the face of record.

The District Magistrate's order was impugned before the Learned Tribunal in the pending S.A, by way of an interim application being I.A. 1982 of 2021. The grounds for challenge of the order of the District Magistrate dated September 06, 2021 were as follows:-

(a) By a letter dated July, 10, 2019, ARCIL admitted the sanction limit of Rs.257lakhs, whereas in the affidavit under schedule A, the loan amount was mentioned at Rs.2,88,84,000/-.

(b) As serial no. 7 of the affidavit it had been stated that the borrower had availed cash credit and term loan, but no cash credit loan had ever been availed of by the borrower. The information was utterly false.

(c) As serial no. 12 of the affidavit, the date of NPA was mentioned as July 24, 2010. Although, no such date had been mentioned in the notice issued by ARCIL, under Section 13 (2) of the said Act. In an earlier notice issued by the State Bank of India, the date of NPA had been mentioned as August 24, 2010.

(d) As serial no.24 of the affidavit in respect of a question as to whether any suit or proceeding was pending in any court of law, the answer was 'No', although, the SARFAESI application being S.A. 03 of 2016 was pending before the Learned Debts Recovery Tribunal – I.

(e) As serial no.29 of the affidavit, it was mentioned that the police station or the superintendent of police be directed to render necessary police help, which was contrary to the provision of Section 14 (1) of the said Act.

(f) The total outstanding loan amount mentioned in the affidavit by the ARCIL being Rs.6,47,85,776/-, was not substantiated by filing any statement of accounts. Although, ARCIL had mentioned that possession notice had been issued and the possession was taken over on November 26, 2016, no such notice had ever been received by the petitioners.

Mr. Bose submits that the District Magistrate, while adjudicating the matter, failed to take into consideration the afore-mentioned anomalies and the irregularities. Accordingly, the learned tribunal was requested to set aside the order passed by the District Magistrate under Section 14 of the said Act. The learned Tribunal also did not take into account the deficiencies in the order of the District Magistrate. Hence, this revisional application has been filed.

Heard Mr. Bose. I find that the learned tribunal considered the objection raised by the petitioners/SARFAESI applicants and the objections raised, to the order passed by the District Magistrate.

The affidavit filed by ARCIL was also taken into consideration. The demand notice of ARCIL, the date of taking over symbolic possession, the publication of such possession notice in the newspapers, were all meticulously considered by the learned tribunal. The learned tribunal also took into account that the borrower had requested for sanction of additional loan, which was allowed. The provisions of Section 5 and Section 14 of the said Act were discussed in great detail.

Learned tribunal arrived at the conclusion that the District Magistrate had rightly considered the decision of Gujarat High Court in the matter of ***Harsora Hotel Pvt. Ltd. vs. Kotak Mahindra Bank Ltd.*** decided in ***SPECIAL CIVIL APPLICATION NO.11181 of 2014*** and also the decision of Hon'ble Apex Court in the matter of ***Standard Chartered Bank Vs. V.Noble Kumar and Others*** reported in ***(2013) 9 SCC 620***. Paragraph 24 of the said decision of the Hon'ble Apex Court, wherein, the points which were required to be taken into consideration by the District Magistrate was crystallized, had been followed by the District Magistrate in the present case.

The learned tribunal came to the following conclusion :

"The Applicant has enclosed the affidavit filed by the Authorised Officer of the Secured Creditor in this application at page 33 to 36 wherein the loan amount has been mentioned Rs. 2,88,84,000/- sanctioned on 28/07/2011. Borrower took Cash Credit and Term Loan and description of the property mentioned in para 8. Issuance of Demand Notice on 26/08/2015 and date of NPA 24/07/2010 is mentioned and outstanding amount is also mentioned Rs. 5,41,97,050/-, amount paid by the borrower- NIL, Borrower submit representation to the Demand Notice -Yes. Outstanding amount of the borrower mentioned in the affidavit -Rs. 6,47,85,776/-.

In the affidavit the Authorised officer has given all the facts as required u/s 14 first proviso. Ld. District Magistrate Hooghly expressed satisfaction and directed BDO, Chinsurah Mogra Block Development Office, Hooghly to take possession of such assets and documents relating thereto and forward such assets to the Secured Creditor"

Ld. District Magistrate has expressed satisfaction in the light of the observations of Hon'ble Supreme Court of India in the matter of Standard Chartered Bank v. V. Noble Kumar and Others and there is no illegality in the order. Hence IA/1982/2021 filed by the Applicant is liable to be dismissed. Hence, it is ordered:

Order

i) IA/1982/2021 is dismissed on contest against the Respondent, Asset Reconstruction Company (India) Ltd. & Anr.
ii) Interim order passed on 26/10/2021 is vacated.
List the SA along with other pending IAs for hearing on 12/10/2023.

In my opinion, the order impugned is an appealable order. An interlocutory application, in connection with an SA has been challenged under Article 227 of the Constitution of India. The order is neither perverse nor based on extraneous considerations. The learned tribunal allowed adequate opportunities to the parties. The case and the counter-case of the parties were elaborately dealt with and discussed. The relevant documents were perused. The evidence available before the learned tribunal was considered. The learned tribunal did not travel beyond the pleadings. The learned tribunal did not find that the District Magistrate had failed to note the statements in the affidavits filed by the financial institution. The allegation of fraud being played upon the District Magistrate by the financial institution, was not accepted. The secured creditor filed an affidavit mentioning that no stay had been granted by any court of law with regard to the mortgaged property and no amount had been paid by the borrower within 60 days from the issuance of demand notice under Section 13(2) of the SARFAESI Act. These facts were found to be correct and not fabricated.

Under such circumstances, the decision on merits of the said application filed by the petitioners is subject to an appeal. The findings of facts cannot be looked into. This court under superintending jurisdiction, cannot re-appreciate the evidence, as if, the proceedings before this court was an appeal from the order passed by the learned tribunal.

This court should not interfere with the order impugned, which has been passed by a forum having jurisdiction to decide the issue.

In the matter of ***Achutananda Baidya v. Prafullya Kumar Gayen and Ors.***, reported in ***(1997) 5 SCC 76*** , the Hon'ble Apex Court held as follows:-

> **"10.** The power of superintendence of the High Court under Article 227 of the Constitution is not confined to administrative superintendence only but such power includes within its sweep the power of judicial review. The power and duty of the High Court under Article 227 is essentially to ensure that the courts and tribunals, inferior to High Court, have done what they were required to do. Law is well settled by various decisions of this Court that the High Court can interfere under Article 227 of the Constitution in cases of erroneous assumption or acting beyond its jurisdiction, refusal to exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of authority or discretion, a patent error in procedure, arriving at a finding which is perverse or based on no material, or resulting in manifest injustice. As regards finding of fact of the inferior court, the High Court should not quash the judgment of the subordinate court merely on the ground that its finding of fact was erroneous but it will be open to the High Court in exercise of the powers under Article 227 to interfere with the finding of fact if the subordinate court came to the conclusion without any evidence or upon manifest misreading of the evidence thereby indulging in improper exercise of jurisdiction or if its conclusions are perverse.
>
> **11.** If the evidence on record in respect of a question of fact is not at all taken into consideration and without reference to such evidence, the finding of fact is arrived at by inferior court or tribunal, such finding must be held to be perverse and lacking in factual basis. In such circumstances, in exercise of the jurisdiction under Article 227, the High Court will be competent to quash such perverse finding of fact."

In the matter of ***Kishore Kumar Khaitan and Anr. v. Praveen Kumar Singh,*** reported in ***(2006) 3 SCC 312*** the Hon'ble Apex Court held as follows:-

> “**13**. <u>The jurisdiction under Article 227 of the Constitution may be restrictive in the sense that it is to be invoked only to correct errors of jurisdiction. But when a court asks itself a wrong question or approaches the question in an improper manner, even if it comes to a finding of fact, the said finding of fact cannot be said to be one rendered with jurisdiction and it will still be amenable to correction at the hands of the High Court under Article 227 of the Constitution.</u> The failure to render the necessary findings to support its order would also be a jurisdictional error liable to correction. Here the jurisdiction to grant an interim mandatory injunction could be exercised on entering a finding that on the day the order for maintaining the status quo was passed, the plaintiff was in possession and a day after the interim order was passed, he was in fact dispossessed. The interim direction to maintain status quo was an ex parte order. From the order of the Additional District Court it is not possible to come to the conclusion that on a proper advertence to the relevant materials, prima facie clear findings had been rendered by that court on these aspects. The prima facie infirmities attached to the letter said to create the tenancy cannot also be ignored, since that transaction is the foundation of the plaintiff's claim of possession.”

In the matter of ***South Indian Bank Ltd. and others vs. Naveen Mathew Phillip and Another***, reported in ***2023 SCC OnLine SC 435*** , the Hon’ble Apex Court held as follows:-

> “While doing so, we are conscious of the fact that the powers conferred under Article 226 of the Constitution of India are rather wide but are required to be exercised only in extraordinary circumstances in matters pertaining to proceedings and adjudicatory scheme qua a statute, more so in commercial matters involving a lender and a borrower, when the legislature has provided for a specific mechanism for appropriate redressal.”

In the matter of ***Varimadugu Obi Reddy vs. B. Sreenivasulu and Others***, reported in (***2023) 2 SCC 168*** , the Hon’ble Apex Court held as follows:-

> "In the instant case, although the respondent borrowers initially approached the Debts Recovery Tribunal by filing an application under Section 17 of the Sarfaesi Act, 2002, but the order of the Tribunal indeed was appealable under Section 18 of the Act subject to the compliance of condition of pre-deposit and without exhausting the statutory remedy of appeal, the respondent borrowers approached the High Court by filing the writ application under Article 226 of the Constitution. We deprecate such practice of entertaining the writ application by the High Court in exercise of jurisdiction under Article 226 of the Constitution without exhausting the alternative statutory remedy available under the law. This circuitous route appears to have been adopted to avoid the condition of pre-deposit contemplated under 2nd proviso to Section 18 of the 2002 Act."

In the decision of ***M/s Puri Investments vs. M/s Young Friends and Co. & ors.*** decided in ***Civil Appeal No.1609 of 2022***, the Hon'ble Apex Court held that in exercise of jurisdiction of Article 227 of the Constitution of India, the High Court could not act as an appellate court by going deep into the factual arena and by disagreeing with the final fact finding forum. According to the Hon'ble Apex Court, unless there was perversity in the order passed by the Tribunal, the High Court should not interfere. The order of the Tribunal or inferior court should not be tested through the lens of the appellate court, unless the order is (a) erroneous on account of non-consideration of material evidence, or (b) contrary to the evidence, or (c) based on inferences that were impermissible in law.

The revisional application is, thus, dismissed, as the same is not maintainable before this court.

The petitioners' remedy is before the appellate forum.

There will be no order as to costs.

Parties are directed to act on the server copy of this order.

(Shampa Sarkar, J.)