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Before:

The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Apurba Sinha Ray

Judgment On : 01.12.2023

Apurba Sinha Ray, J. :-**Backdrop:-**

1. The brief factual matrix of the case is that the appellant took loan from the respondent No. 3 – Bank in April, 2016, for the purpose of purchasing, inter alia, three fishing vessels. Subsequently, the appellant was unable to pay the Estimated Monthly Instalments (“EMI”) and after serving letters demanding the requisite repayment upon the appellant, the bank proceeded to repossess the three vessels and attempted to sell the vessels through public auction as the appellant failed to pay the requisite due amount. Being unsuccessful, the bank sold the three vessels to the private respondents on valuable consideration by virtue of private contracts. The appellant, who filed a writ petition challenging the process of auction, withdrew the said writ petition finding that the public auction had become infructuous.

2. After selling the three fishing vessels to the private respondents, a copy of the sale certificate was delivered to the appellant who filed the present round of litigation (being WPA No. 14510 of 2022) on the ground that the Hon’ble Supreme Court has been pleased to extend the provisions of SARFAESI Act, 2002 to Co-operative Banks also, and therefore, before selling the said vessels, the respondent no. 3 – Bank should have issued notice under Section 13(2) of the said Act, 2002. But as the said notice was

not served upon the appellant, the entire process of seizing and selling the vessels was beyond the authority of the respondent – Bank.

3. The Bank and the private respondents who purchased the vessels have categorically taken the plea that by virtue of Section 31(d) of the Act, 2002 the application of the provisions of the Act, 2002 has been barred so far as the creation of security interest in respect of the vessels as defined under the Merchant Shipping Act, 1958 are concerned. The term ‘vessel’ includes fishing vessel. Moreover, the Hon’ble Supreme Court in the relevant case law has been pleased to observe that Co-operative Banks can also avail the recovery process of security interest as per mode prescribed in central legislations like SARFAESI Act, 2002, but the Hon’ble Court did not abrogate the modes of recovery of the security interest as per provision of respective State-Corporative Bank legislations. Further, the agreements concluded between the parties empowered the Bank to take appropriate steps for repossession of the vessels and selling of the same through private contracts, in case the appellant failed to pay the amount due in time.

Submission from the Bar:-

4. According to the appellant, the sole question which falls for determination in this appeal is whether the SARFAESI Act, 2002 is applicable to the Co-operative Banks created under the state legislations or not.

5. Learned counsel, Mr. S. P. Pahari appearing for the appellant has argued that the question has been finally decided by the Hon'ble Apex Court in **Pandurang Ganpati Changule Vs. Vishwasrao Patil Murgud Sahakari Bank Limited reported at (2020) 9 SCC 215**, and according to the learned counsel, the Hon'ble Supreme Court has been pleased to observe that the 'Co-operative Banks' are also within the definition of 'banks' under Section 2(1)(c) of the Act, 2002 and therefore the entire process of seizure and sale of the fishing vessels should have been undertaken in accordance with the provisions of the Act, 2002, and as the said provisions were not complied with the entire process is bad in law. It was also submitted that the Director of Fisheries, West Bengal did not accord necessary permission for transferring the ownership of the fishing vessels as per the provisions of the West Bengal Marine Fishing Regulation Act, 1993 in favour of the private respondents. No appeal was preferred against the said order.

5.1. Learned counsel has further argued that the fishing vessel defined under Section 3(12) of the Merchant Shipping Act, 1958 has been excluded from the definition of 'vessel' defined in Section 3(55) of the said Act, 1958. As per Section 22 of the Act, 1958, the term 'ship' does not include a fishing vessel. Therefore, a fishing vessel cannot be defined as an Indian Ship under Section 22 of the Act, 1958. Therefore, the submission made by the learned counsels of the bank and the private respondents for exclusion of creation of security interest in any vessel as defined in Section 3(55) of the Act, 1958 is not correct. It can be safely said that creation of security interest by way of

hypothecation of three fishing vessels comes under the purview of SARFAESI Act, 2002. Therefore, without holding any public auction, the bank could not have transferred the vessels in favour of the private respondents and the bank should have followed the provisions of the SARFAESI Act for selling the fishing vessels in public auction.

5.2. It was argued on behalf of the appellant that total outstanding dues in respect of payment of instalments calculated upto January, 2020, is to the tune of Rs. 30 lakhs in three accounts but the appellant was unable to pay the instalment due to outbreak of Covid-19. The bank transferred the three vessels illegally during Covid- 19 without serving any notice on the appellant/petitioner. As such, according to the learned counsel of the appellant, the respondent authorities may be directed to restore possession of the fishing vessels in favour of the appellant/petitioner by setting aside the sale certificate issued by the bank authorities in favour of the private respondents.

6. Learned counsel Mr. Ritwik Pattanayak, for the respondent no. 3 – Bank has submitted that Section 31(d) of the SARFAESI Act, 2002 has restricted the operation of the Act, 2002 so far as regards creation of security interest in any vessel as defined under 3(55) of the Merchant Shipping Act, 1958. It is further argued that a conjoint reading of Section 3(55) & 3(12) of the Act, 1958 will reveal that vessel includes fishing vessel.

6.1. Learned counsel has further argued that the fishing vessels of the appellant were registered under Section 435 G of the Merchant Shipping Act, 1958, and the said factum has been reflected in the relevant certificate of registration. Hence the provisions of SARFAESI Act, 2002 is not applicable in this instant case.

6.2. Learned counsel of the Bank has also drawn the attention of the court to the fact that an overdue reminder letter dated October, 29, 2018 was served upon the petitioner with regard to the three fishing vessels Loan Accounts along with other hypothecated heavy vehicles and the same was admitted by the appellant in his previous writ petition by stating that the bank informed him that the overdue amount was Rs. 34,02,021/-.

6.3. Learned counsel has argued that notices for repayment of loan instalment for the fishing vessels were served upon the petitioner on 14.12.2020. On December 18, 2020 notice of auction was issued by the respondent Bank fixing the date of auction as December 30, 2020. However as the respondent Bank did not get any bidder in respect of the fishing vessels mentioned in the auction notice, the Bank sold the said vessels through private contract to the private respondents.

6.4. On April, 2021, the petitioner was served with a notice informing him about sale of the fishing vessels to the private respondents through private contract, and the same was admitted by the appellant in the writ petition filed in the present round of litigation. According to the learned counsel, Mr.

Pattanayak, the Bank had sold the three fishing vessels by virtue of the Agreement of hypothecation and Deed of hypothecation empowering the bank to sell the hypothecated property either through public auction or private contract or otherwise. It is further submitted that the petitioner is a habitual defaulter and being a defaulter he cannot choose the process/mode by which he can be prosecuted. The delay of one year and three months in filing the present writ petition, shows that the appellant is trying to complicate issues knowing fully well that the same may give him some mileage in respect of other hypothecated vehicles. The respondent Bank prayed for dismissal of the appeal with exemplary costs.

7. Learned Counsel Mr. Saptarshi Kumar Mal appearing for the private respondents-purchasers has adopted the argument of the Bank. It was further submitted on behalf of the private respondents that the Hon'ble Apex Court in Pandurang's case (supra) suggested that co-operative Banks under State Legislations were entitled to initiate action under SARFAESI Act for recovery of its dues in addition to the recovery process which the Bank is otherwise entitled to under any other central or state legislations. It was further argued that it was not the intention of the Hon'ble Supreme Court to tether the recovery process available to Co-operative Banks, but rather, to provide for co-operative Banks to seek additional recourse under the Central Act of 2002 if it deems fit.

7.1. According to the learned counsel of the private respondents, since the subject fishing vessels/ boats were essentially “vessels” within the meaning of the Central Act of 1958 and since neither the “security interest” can be created under Section 2(zf) of the said Act, nor is the Central Act of 2002 made applicable to vessels vide Section 31(d) of the said Act, the recovery and sale proceedings by the Bank was not required to be in adherence to the prescriptions of the Central Act of 2002, and as such did not warrant any interference.

7.2. It is further argued on behalf of the private respondents that neither the West Bengal Inland Fisheries Act, 1984 nor the West Bengal Marine Fishing Regulation Act, 1993 create any embargo for the Central Act of 1958 and as such the subject fishing vessels could still be categorized as “vessels” under the Central Act of 1958.

7.3. Another facet of argument as put forward by the learned counsel of the private respondents was that although not mandatorily required, the bank had attempted to dispose of the distressed property by way of an auction sale and it is only when the auction process had failed that the same was sold to the private respondents by way of a private treaty which is permissible under law. It was also argued that as the fishing boats are depreciating assets since they sail in saline water and are susceptible to speedy deterioration, any delay in selling the vessels could reduce the financial value of the vessels. However, the appellant refused to avail of the

alternative remedies as prescribed under Rule 191-I of the West Bengal Co-operative Societies Rules 2011. Actually, no prejudice has been caused to the appellant in the eye of law by sale of the vessels in favour of the private respondents.

7.4. Furthermore, the plea that Covid-19 pandemic has prevented the appellant to pay the amount due does not have any sound factual basis nor any legal basis. Accordingly, the private respondents prayed for dismissal of this appeal with costs.

Court's View

8. Section 31(d) of the SARFAESI Act, 2002 has clearly stated that the provisions of the Act shall not apply to creation of security interest in any vessel as defined in clause (55) of Section 3 of Merchant Shipping Act, 1958.

9. Admittedly, in this case, security interest was created over three fishing boats in favour of Contai Cooperative Bank and it is further the admitted case of both parties that instalments of loans by which the said boats were purchased were not paid in time, and the appellant failed to liquidate the loan.

10. It further appears that the appellant received the demand notice for repayment of loans but he was unable to pay the same from the year 2017. After an unsuccessful attempt to sell the boats through public auction, the

Bank authorities sold the boats to the private respondents through private treaty.

11. Now the only question raised from the side of the appellant in that as the Hon'ble Supreme Court of India has been pleased to hold that SARFAESI Act, 2002 applicable to Co-operative Bank also, the respondent no. 3 Bank could not have sold the fishing boats without observing the conditions for recovery of security interest as laid down in the said Act.

12. The point which is required to be looked into is whether the Hon'ble Supreme Court by the relevant judgment pronounced in Pandurang's case (supra) deleted or abrogated the provision as laid down in Section 31(d) of the Act of 2002 or not.

13. After going through the said case law, it appears that there was no discussion on Section 31 of the Act, 2002 in the judgment nor any point was raised in connection with Section 31 or any of its sub-section which necessitated any discussion over the aforesaid Section or its sub-section. Therefore, the provisions of Section 31(d) of the act, 2002 is still subsisting and it holds the field as before.

14. The said case law has categorically considered whether the Co-operative Banks having multi-state jurisdiction or Co-operative Banks created under State Legislations can avail the benefit of speedier recovery process of Security interest as laid down in the SARFAESI Act, 2002 without

the help of courts and Tribunals. The Hon'ble Apex Court has answered the same in affirmative.

15. Another aspect of the said decision which is to be taken into account is that usually the Banks/financial institutions undertake the process of recovery of security interest under the provisions of Act, 2002. The decision rests with the banks and financial institutions. Therefore, whether the co-operative Banks would undertake the procedures laid in the said Act for recovery of security interest is entirely within the domain of discretionary power of the Co-operative Banks. The decision does not say that the co-operative Banks are to follow mandatorily the provisions of the Act of 2002 relating to recovery of security interest. The Hon'ble Apex Court opened an additional avenue for the Co-operative Banks for recovering security interest speedily without the intervention of court etc. In other words, the other legal processes of co-operative Banks were not touched by the Hon'ble Apex Court. Therefore, if the Co-operative Bank concerned chose a different legal process other than the process laid down in the Act of 2002, the same cannot be said to be illegal.

16. Another point of argument raised by the appellant is that subject fishing boats are fishing vessels and the definition of "Vessel" in Section 3 (55) does not include a fishing vessel. Therefore, it is incorrect to say that SARFAESI Act, 2002 is inapplicable to subject vessel.

17. The definition of “vessel” as per Section 3 (55) of 1958 is as hereunder:-

“Vessel” includes any ship, boat, sailing vessel or other description of vessel used in navigation.

17.1. Whereas the definition of fishing vessels is found in Section 3(12) of the Act, 1958 which is as follows:-

“fishing vessel” means a ship fitted with mechanical means of propulsion which is exclusively engaged in sea fishing for profit.

17.2. Section 3 (45) of the aforesaid Act defines the term ‘ship’ as hereunder:-

“ship” does not include a sailing vessel.

18. From the above it appears that the term “vessel” is the genus but the terms “fishing vessels” “Ship”, “Boat”, “Sailing Vessels” etc. are specis. The term “vessel” include every description of water vehicles or water craft, be it ships, boats, fishing vessels and so on which are used in navigation.

19. The learned counsel of the appellant draws the attention of this court to Section 22 of the Act, 1958 to point out “ship” does not include “fishing vessels”. This argument has no leg to stand upon since the court is considering whether term “vessels” include “fishing vessels” or not. However,

the learned counsel has omitted to note that the explanation appended to Section 22 under part V of the Act, 1958 is as follows:-

“ Explanation- for the purposes of this Section, ship does not include a fishing vessel”

20. Part V of the 1958 Act stipulates the provision for “registration of Indian ships” and Section 22 in the said part provides for obligation to register in case of Indian Ships. By inserting such explanation in Section 22 through the Act 12 of 1983, with effect from 08.05.1983 the legislature cleared the ambiguity or the confusion, and it is settled now that the “fishing vessels” are not required to be registered under Section 22 of the Act, 1958. However, be it mentioned that registration of fishing vessels is to be done under part XV-A of the 1958 Act dealing with the provisions of registration of fishing boats, vessels etc.

20.1. The learned counsel of the appellant has omitted to point out that the relevant explanation as discussed above is applicable only for Section 22 of the Act, 1958 but not for other sections.

21. Therefore, in our opinion as the term “vessel” in the Act of 1958 includes “fishing vessels” as well, Section 31(d) of the Act, 2002 bars the application of SARFAESI Act, 2002 to the fishing boats.

21.1. Now a question may arise, if the above interpretation is accepted, then it goes against the decision of the Hon'ble Court in Pandurung's Case (supra). But it is not so since Co-operative banks give loans not only for purchasing vehicles or vessels, but also other movable and immovable properties as well. Therefore, in our view, SARFAESI Act, 2002 has got no application when "security interest" is created in respect of any vessel defined in the Merchant Shipping Act, 1958. In Pandurung's Case (supra) this was not the issue. In other words Section 31(d) of the Act, 2002 was not abrogated in Pandurung's Case. The said decision is applicable in respect of all security interests not covered by Section 31 of the Act, 2002.

22. From the memorandum of appeal it transpires that the appellant has raised several allegations concerning non-issuance of any auction sale notice, non-issuance of any statement of loan accounts from the bank in spite of repeated requests made by the appellant, failure to make repayment of loan due to Covid-19 in spite of his best efforts, failure of the bank authority to supply the breakup of loans etc. which are all factual matters/issues. The writ courts are not properly equipped to deal with such factual disputes for which evidence may be required to be adduced.

23. Therefore, we do not find any cogent reason to interfere with the impugned judgment of the learned Single Bench passed on 06.09.2022 in WPA No. 14510 of 2022.

24. The appeal is dismissed on contest with a cost of Rs. 20,000/- (Twenty Thousand) to be paid by the appellant in favour of the respondent co-operative bank within one month from this date. The connected applications are disposed of.

25. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.

(ARIJIT BANERJEE, J.)

(APURBA SINHA RAY, J.)