In The High Court At Calcutta

Civil Appellate Jurisdiction

Appellate Side

Present:

The Hon'ble Justice Md. Shabbar Rashidi

C.O. No. 1767 Of 2018

Central Bank of India & Another

Vs

Maya Sarkar & Others

For The Petitioner	:	Mr.Bishwambher Jha, Adv. Mr. Harshwardhan Jha, Adv. Ms. Munmun Mishra, Adv.
For The Opposite Party No. 1	:	Mr., Prabal Kr. Mukherjee, Sr. Adv. Mr. Asit Kumar De, Adv. Mr. Shantanu Datta, Adv. Ms. Shebatee Datta, Adv. Ms. Sushmita Senapati, Adv.
Heard On	:	December 13, 2024
Judgment On	:	December 23, 2024

Md. Shabbar Rashidi, J.

1. Order dated April 6, 2018 passed by the Debts Recovery Appellate Tribunal, Kolkata in Appeal No. 33 of 2017 filed by the opposite party, is under challenge in the present proceedingat the behest of the petitioner Bank.

2. By the impugned judgment and order, the Debts Recovery Appellate Tribunal, allowing the appeal, set aside the judgment and order dated March 3, 2014 passed by Debts Recovery Tribunal in claim petition being SA 413 of 2012. The Debts Recovery Appellate Tribunal, in the impugned order, declared the entire proceeding undertaken in terms of SARFAESI Act, 2002 including notice issued under Section 13 (2) of the said Act as invalid. The appellate tribunal also directed handing over of the possession of the property sold in auction, to the appellant therein (Opposite party herein), forthwith and to return the sale proceeds of such auction sale to the purchaser with interest.

3. Learned advocate for the petitioner bank submitted that the learned appellate tribunal, while passing the impugned order, did

not take into consideration the fact that the loan availed by the opposite party was restructured on the prayer of the borrower.

4. Relying upon **(2018) 15 Supreme Court Cases 99**(***ITC Ltd., Vs. Blue Coast Hotels Ltd., and Anr***.), it has been submitted on behalf of the petitioner that the opposite party borrower was defaulter in the repayment of loan, availed by her and she has the only intention of getting an extension of time.

5. Learned advocate for the petitioner further submitted that by her conduct, the opposite party borrower has waived the notice required to be served under Rule 8(6). In support of such contention learned advocate for the petitioner relied upon **(2013) 10 Supreme Court Cases 83** (**Sri Siddeshwara Cooperative Bank Ltd. v. Ikbal and Others**).

6. Leaned Advocate for the petitioner also submitted that the sale notice was issued several times and it was never challenged by the borrower that such notice was not served.

7. On the other hand, learned senior advocate appearing for the opposite party borrower, has challenged the classification of the loan account of the opposite party as Non-Performing Assets (NPA). It was submitted that the opposite party prayed for

restructuring of her loan account which was allowed by the petitioner bank and her account was restructured. With such restructuring the earlier classification of the loan account as NPA vanished. The time period for making payment of the first instalment after restructuring of the account was fixed on a future date. Petitioner bank ought to have waited until such date and upon failure of opposite party in making the payment of restructured debt; the bank could have classified the account as NPA.

8. It was further stated that since the account of the opposite party was not classified as NPA, the petitioner bank was not justified in taking recourse to Section 13 of SARFAESI Act, 2002.

9. For such reasons, according to the opposite party borrower, the Learned Debt Recovery Appellate Tribunal was quite justified in passing the impugned order setting aside the entire proceedings taken up by the petitioner bank under Section 13 of the SARFAESI Act, 2002.

10. Opposite party no. 1 along with her partners were running a business under the name and style of M/s M.R.S. &

Company. Upon an application by the opposite party, a term loan of ₹. 78, 44,000/- was sanctioned by the petitioner bank on October 11, 2008. Opposite party no. 1 and her partners executed loan documents with regard to such loan on October 21, 2008 in favour of the bank. As per the terms of loan, the opposite party no. 1 and her partners also created an equitable mortgage in respect of immoveable property by deposit of title deeds. A term loan account and a cash credit account was opened in relevant branch of the petitioner bank in the name of opposite party no. 1 holding the borrowers liable for liquidating the outstanding amount. An acknowledgement, in respect of the loans/facilities was also executed by opposite party no. 1 and her partners on March 31, 2010.

11. Later on, opposite party no. 1 and her partners applied for restructuring of the loans/facilities before the petitioner bank. In pursuance of such request, the Regional Office of the petitioner bank, by sanctioned letter dated October 30, 2010, restructured the loan account.

12. The opposite party availed loan facilities since the date when the credit facilities were extended by the petitioner bank

but failed to pay the dues/services interests as per the terms and conditions of sanction. The opposite party failed to comply the terms of the sanction letter of restructured loan dated October 30, 2010 as well. The outstanding dues as stood on March 30, 2011 were ₹. 150.19 Lakh.Assuch, the loan account of the opposite party was classified as NPA on March 31, 2011.

13. Following the classification of the loan account as NPA on March 31, 2011, the petitioner bank issued notice under Section 13(2) of SARFAESI Act on December 16, 2011. The notice was served upon the partnership firm M/s M.R.S. & Company as well as all the partners/guarantors including opposite party no. 1. Inspite of such notice, opposite party no. 1 and her partners and guarantors failed to discharge their liability as demanded in the notice and also did not prefer any objection or representation against such notice under Section 13(2) of the SARFAESI Act, 2002. Consequently, the petitioner bank served a notice under Section 13(4)(a) of the SARFAESI Actupon the company, its partners and guarantors at their registered addresses, through post. Such notices however returned undelivered with postal endorsement as“address not available hence return”.

14. Thereafter, the petitioner bank took physical possession of the mortgaged properties on March 5, 2012. Possession notice was served upon opposite party no. 1 and her partners. Itwas received by the husband of opposite party no. 1 on her behalf. Possession notice was also published in two leading newspapers on March 10, 2012. A copy of notice was also affixed at the mortgaged property.

15. After taking such possession of the mortgaged properties, petitioner bank published auction sale notices on several dates, however, the auction on such dates failed on account of non-availability of bidders. Finally, an auction sale notice was published on March 10, 2013 again, in two leading newspapers fixing the date of auction sale on April 12, 2013.

16. A 30 days notice dated November 14, 2012, was sent at the registered addresses of the mortgagors on November 17, 2012, intimating the proposed sale. Such notice was accompanied by the copies of paper publication of sale notice dated October 19, 2012. However, such notice also returned unserved with postal endorsement “incomplete address”. Ultimately, a sale was conducted on April 12, 2013 with reserve

price of ₹. 121.00 lakhs. Opposite party no. 3 M/s Sarkar Products and Trading Pvt. Ltd. emerged as the highest bidder with a bid value of ₹. 128.35 lakhs. Upon compliance of all necessary formalities, a sale certificate was issued in favour of the auction purchasers M/s Sarkar Products and Trading Pvt. Ltd.

17. Since the opposite party partnership firm including the opposite party no. 1 and her partners failed to make payment of credit facilities, the petitioner bank undertook proceedings under SARFAESI Act, 2002. Challenging such proceeding, opposite party no.1 approached Debts Recovery Tribunal through a claim case being SA No. 413 of 2012. The said proceeding was however, dismissed.

18. Challenging the order of dismissal of SA No. 413 of 2012, opposite party no.1 carried an appeal to theDebts Recovery Appellate Tribunal by way of Appeal No. 33 of 2017. The said appeal filed by opposite party no. 1 was allowed in by the impugned order setting aside the entire proceeding in terms of the provisions of SARFAESI Act, 2002. The petitioner bank was directed to restore possession of the mortgaged property to

opposite party. Auction sale of the mortgaged property was also cancelled and the petitioner was directed to return the sale proceeds thereof to the purchasers with interest.

19. In the instant case, it is evident that the loan account of opposite party no. 1 was restructured on her prayer on March 31, 2011. Such prayer for restructuring was approved by the Regional Office of the petitioner bank, whereby, the term loan of ₹. 78,44,000/- was renewed and the cash credit limit of ₹. 70, 00,000/- was funded as fresh term loan. The due date of payment of first instalment against such restructured loan was provided as November 30, 2011.

20. However, the account was declared as NPA on March 31, 2011 itself. Such restructuring of the account of the opposite party no. 1 sanctioned by the Regional Office of the petitioner bank coupled with renewal of the loan account and conversion of cash credit limit into a fresh loan indicates that the bank still had enough faith in the borrower and visualised fair chances of the recovery of the loan.

21. The Learned Tribunal has held that the classification of the loan account of opposite party no. 1 as NPA on March 31,

2011 i.e., the date of restructuring itself, was not justified as the date for depositing the first instalment of the loan account was on November 30, 2011. The Learned Tribunal also held that without waiting for the due date of payment, the petitioner bank could not have come to the conclusion that the loan account was irregular.

22. In the facts of the case at hand, since the due date for making payment of the instalment was on a future date, the petitioner bank could have waited until such date for issuance of a notice under Section 13(2) of the SARFAESI Act, 2002.

23. Learned Appellate Tribunal also held in the impugned order that the notice of sale required under Rule 8(6) of the Rule of 2002was not served upon the borrowers. According to the Learned Appellate Tribunal, such notice of at least 30 days was mandatory in terms of the Rules. Nothing has been brought to the notice of this Court that such notice was specifically waived by opposite party no. 1 and her partners.

24. It would be convenient to reproduce Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 which reads as follows**:-**

8. Sale of immovable secured assets.-

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***(6)** The Authorised Officer shall serve to the borrower a notice 30 days for the sale of the immovable secured asset under sub-rule (v).*

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice into leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale which shall be :-

(a)……………………

25. A plaint reading of Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 goes to show that the notice of 30 days upon the borrower is mandatory. In addition, publication in at least two daily newspapers with required information detailed in the proviso attached to Rule 8(6) is required to be made. This provision gives an understanding that publication in

the newspaper is complimentary to the provisions of Rules 8(6) and not supplementary. The averments made on behalf of the petitioner bank in the petition under Article 227 of the Constitution of India discloses that after issuance of notice under Section 13(2) of the SARFAESI Act, 2002, the petitioner bank published several sale notices dated May 30, 2012, July 11, 2012, October 19, 2012 and on March 10, 2013. In the last publication dated March 10, 2013, the date of sale was fixed on April 12, 2013.

26. It has been averred on behalf of the petitioner bank that in order to comply the provision of Rule 8(6) and Rule 9 of the Rule of 2002, the petitioner banks served a 30 days notice of sale on November 14, 2012 which enclosed copy of publication of the sale notice dated October 19, 2012. However, such notice is admitted to have returned undelivered with postal endorsement "incomplete address".

27. The petitioner bank has not been able to give explanation as to why the last sale notice published on March 10, 2013 was not sent for service upon the borrowers/mortgagors. According to the petitioner bank the last notice was sent to the borrower on

November 14, 2012 with the copy of publication of sale notice dated October 19, 2012. The sale was actually held on April 12, 2013. Apparently no notice with regard to such sale was sent to the borrower**.** That too**,** the earlier notice of sale sent returned undelivered, nevertheless, the petitioner bank proceeded with the sale proceeding on the basis of publication, notice of which was not sent for service upon the borrowers/mortgagors.

28. Under the aforesaid circumstances, I find no reason to disagree with the finding of the Appellate Tribunal holding that no sale notice was served upon the borrower in terms of Rule 8(6) of the Rule of 2002.

29. It has also been submitted on behalf of the petitioner bank that the opposite party borrower did not raise any objection as to the sale notice published in the newspapers. Such omission on the part of the borrower amounted to waiver of mandatory notice. In ***Ikbal*** (supra) it was observed by Hon'ble Supreme Court that,

> *"19. There is no doubt that Rule 9(1) is mandatory but this provision is definitely for the benefit of the borrower. Similarly, Rule 9(3) and Rule 9(4) are for the benefit of the secured creditor (or in any case for*

the benefit of the borrower). It is settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made. The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for that matter for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their right. These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not depends on the facts of each case and no hard-and-fast rule can be laid down in this regard."

30. In the instant case, however, the materials on record disclose that sale notice in terms of Rule 8(6) of the Rule of 2002 was actually not served upon the borrower. The said provisions are to be construed beneficial to the borrower. The opposite party borrower has challenged the service of such notice. If that be so, no question of its waiver does arise at all. In the aforesaid case it was noted by the Hon'ble Supreme Court that the question whether there is waiver or not depends on the facts of each case and no hard and fast rule can be laid down in this

regard. In such circumstances I am not in a position to return a finding that the opposite party borrower wilfully waived the service of notice as contemplated under Rule 8(6) of Security Interest (Enforcement) Rules, 2002.

31. The ***ITC Limited*** (supra) has been cited by learned advocate for the petitioner bank. In the aforesaid case it was laid down by the Hon'ble Supreme Court that powers under Article 226 of the Constitution of India should be sparingly used on the touchstones of judiciousness and reasonableness. It has also been held that allegation of infringement of legal right has to be seen coupled with the conduct of the petitioner in getting a relief. The powers of the Supreme Court under Article 226 of the Constitution of India is a discretionary one and a relief sought by a person who approaches the Court with unclean hands or blameworthy conduct should not be granted.

32. In the present proceeding, however, I am not exercising a jurisdiction under Article 226 of the Constitution of India, rather, a jurisdiction under Article 227 of the Constitution of India has been invoked. Therefore, the ratio laid down in the case of ***ITC***

Limited (supra) cannot be applied in the facts and circumstances of the present case.

33. It is settled position of law that interference under Article 227 of the Constitution of India can be made only on limited grounds i.e., if the order suffer from any jurisdictional error or if there is palpable procedural impropriety or the impugned order suffers from manifest perversity. I am afraid, the petitioner has not been able to bring the impugned order of the Debt Recovery Appellate Tribunal under any of the aforesaid categories, in order to justify an interference under Article 227 of the Constitution of India. If two plausible views are possible in the facts and circumstances of a case and a particular view has been taken by the court in passing the impugned order, it would not be proper to substitute another view by the revisional Court. Upon consideration of the facts and circumstances of the present case, I am of the opinion that the impugned order does not warrant any interference under the jurisdiction of Article 227 of the Constitution of India.

34. Accordingly, the revisional application being C. O. No. 1767 of 2018 is hereby dismissed without any order as to cost and thus, disposed of.

35. With the disposal of the main matter nothing survives. Connected applications if any shall also stand disposed of.

36. Urgent photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all formalities.

[MD. SHABBAR RASHIDI, J.]