

(2011) 09 AHC CK 0210

Allahabad High Court

Case No: Writ C no. 7779 of 2009

State Bank of Patiala

APPELLANT

Vs

The Chair Person Drat and
Others

RESPONDENT

Date of Decision: Sept. 21, 2011

Acts Referred:

- Constitution of India, 1950 - Article 226
- Financial Assets and Enforcement of Security Interest Act, 2002 - Section 13(4)
- Limitation Act, 1963 - Section 5
- Penal Code, 1860 (IPC) - Section 193, 196, 228

Citation: (2011) 11 ADJ 567 : AIR 2012 All 1 : (2012) 1 AWC 1055 : (2012) 2 BC 212

Hon'ble Judges: Sudhir Agarwal, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Sudhir Agarwal, J.

Petitioner State Bank of Patiala Branch, Rudrapur, Head Office at The Mall, Patiala, through its Branch Manager has come to this Court under Article 226 of Constitution of India assailing the order dated 3.1.2008 of Debt Recovery Tribunal (hereinafter referred to as "DRT") and the appellate order dated 16.10.2008 passed by Debt Recovery Appellate Tribunal (hereinafter referred to as "DRAT") rejecting the appeal.

2. The facts giving rise to the present dispute in brief are as under.

3. The Respondent no. 3 M/s Namrata Enterprises Pvt Ltd. sought for credit facility which was allowed by Petitioner Bank to the extent of Rs. 95 Lac in 2001; increased to 121.7 Lac on 29.10.2002. Respondents no. 4,5,6 and 7 stood guarantor to the said facility extended to Respondent no. 3. Respondents no. 6 and 7 in addition to personal guarantee also mortgaged their property situated at Kanpur by depositing

original title deed and thereby creating an equitable mortgage of property no. 543/9 Block K, Kidwai Nagar, Kanpur.

4. On 30.6.2005 Non Performance Assets of Respondent no. 3 became to the tune of Rs. 93,13,344/plus interest etc. which was not regularised by Respondent no. 3. The Bank issued notice dated 22.7.2005 U/s 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Act 2002") to borrowers, mortgagors and guarantors requiring them to salvage outstanding dues within sixty days failing which further steps u/s 13(4) of the Act would be taken. The Respondents did not react whereafter the Bank took possession of secured assets u/s 13(4) of Act 2002 on 28.11.2005.

5. Respondents no. 6 and 7 challenged Bank's action before DRT in SA no. 1 of 2006, appending a copy of demand notice dated 22.7.2005. DRT passed an ex part interim order. The Bank withdrew demand notice dated 22.7.2005 and also the possession notice on 15.9.2006 as a result whereof SA no. 1 of 2006 filed by Respondents no. 6 was dismissed on 30.10.2007.

6. The Bank issued fresh demand notice on 15.9.2006. Respondents no. 6 and 7 filed writ petition no. 57023 of 2006 challenging the said notice. The writ petition was dismissed on 8.3.2007 observing that notice challenged in the writ petition was issued to M/S Namrata Enterprises Pvt. Ltd. which has not come to the Court to challenge the same and the writ petition at the instance of others, namely, Respondents no. 6 and 7 was not maintainable. The Court also observed that no cause of action had arisen within territorial jurisdiction.

7. Thereafter Bank served possession notice dated 8.3.2007 upon mortgagors and published the same in newspapers on 10.3.2007. It is said that no objection/representation was filed by mortgagors before the Bank u/s 13(3) of the Act 2002. However, alleged representation/objection given on 8th March 2007 was rejected by the Bank on 22nd March 2007. The borrowers thereafter filed another writ petition no. 282 of 2007 in Uttarakhand High Court in which a conditional interim order was passed on 21.3.2007.

8. When the above writ petition was ending, Respondents no. 3 to 7 filed S.A. no. 74 of 2007 before DRT seeking following reliefs:

i. That, the Hon"ble Tribunal may be pleased to quash the proceedings u/s 13(4) of the SARFAESI Act 2002 initiated by Opp. Party no. 1/State Bank of Patiala as being wrong, illegal, premature and infructuous.

ii. That, the Hon"ble Tribunal be pleased to direct the Respondent Bank not to charge the interest, penal interest, cost and expenses etc for the intervening period i.e. from the date of N.P.A. till the date of payment.

iii. That, the Hon"ble Tribunal may be pleased to direct the Respondent Bank to issue No Dues Certificate and release the mortgaged property in favour of the

applicants.

iv. That, any other relief, which the Hon"ble Tribunal may deem fit and proper in the circumstances of the case.

9. The said application (SA no. 74 of 2007) was filed on 9.8.2007 along with an application for condonation of delay. The Bank opposed application contending that Section 5 of Limitation Act, 1963 (hereinafter referred to as the "Act 1963") does not apply to proceedings u/s 17 of the Act 2002. The DRT passed order dated 3.1.2008 condoning delay and granting interim order directing the Bank to maintain status quo with regard to secured assets of the applicants till further orders. The Bank filed appeal against order dated 3.1.2008 before DRAT which has been dismissed by impugned order dated 16.10.2008 (Annexure 10 to the writ petition).

10. Sri M.P. Saraf, Advocate has advanced submissions on behalf of the Petitioner Bank and Sri S.S. Nigam has appeared on behalf of Respondents contesting parties.

11. It is evident from the application filed by Respondents no. 3 to 7 before DRT that SA no. 74 of 2007 was beyond time by 109 days. This is evident from para 88 of the application filed by them u/s 5 of the Limitation Act which reads as under:

8. That there is delay of about 109 days in filing the instant application. However, it is pointed out that the present application is being filed on the direction of the Hon"ble High Court of Uttarakhand at Nainital passed in Civil Misc. Writ Petition no. 282 (M/B) of 2007.

12. In my view, as also agreed by learned Counsel for the parties, the only but crucial question, up for consideration in this case, is, whether Act 1963, and in particular Section 5 and Section 14 would apply to an application filed u/s 17 of Act 2002.

13. Section 17(1) and (7) relevant for the purpose of our case reads as under:

17. Right to appeal.(1) Any person (including borrower), aggrieved by any of the measures referred to in subsection (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within fortyfive days from the date on which such measures had been taken.

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation - For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under subsection (1) of section 17.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993(51 of 1993) and the rules made thereunder.

14. The limitation for filing appeal u/s 17 is 45 days from the date from which any of the measures referred to in Section 13(4) is taken by the secured creditor or his authorized officer.

15. Section 36 of Act 2002 applies Limitation Act, 1963 for the purpose of taking action u/s 13(4) and reads as under:

36. Limitation. No- secured creditor shall be entitled to take all or any of the measures under subsection (4) of section 13, unless his claim in respect of financial asset is made within the period of limitation prescribed under the Limitation Act, 1963 (36 of 1963).

16. Section 37 provides that application of other laws is not barred and reads as under:

37. Application of other laws not barred. The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.

17. The word "Debt Recovery Tribunal" mentioned and used in Section 17 of Act 2002 has been defined in Section 2(i) of Act 2002 and says:

(i) Debts Recovery Tribunal" means the Tribunal established under subsection (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)

18. From the above provisions it is clear that a secured creditor has right to proceed against financial assets of a debtor u/s 13(4) unless limitation to proceed prescribed in the Act 1963 is available. In other words, Act 2002 does not empower the secured creditor to validate its action against assets of the debtor though it is barred by time and if a suit would have been filed the same would have been beyond limitation. It also shows when a matter is taken up before DRT, the procedure prescribed in the Recovery of Debts due to Banks and Financial Institutions Act 1993 shall be followed by DRT except to the extent it is inconsistent with provisions of Act 2002. It takes this Court to have a glance over the provisions of Act 1993 and the procedure in which DRT functions therein.

19. Section 22 of Act 1993 provides the procedure and powers of the Tribunal as under:

22. Procedure and Powers of the Tribunal and the Appellate Tribunal.- (1) The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) reviewing its decisions;
- (f) dismissing an application for default or deciding it ex parte;
- (g) setting aside any order of dismissal of any application for default or any order passed by it ex parte;
- (h) any other matter which may be prescribed.

(3) Any proceeding before the Tribunal or the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code (45 of 1860) and the Tribunal or the Appellate Tribunal shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

20. Similarly Section 24 thereof applies Limitation Act, 1963 to an application before DRT and reads as under:

24. Limitation.- The provisions of the Limitation Act, 1963 (36 of 1963), shall, as far as may be, apply to an application made to a Tribunal.

21. In my view considering Section 17(7) of Act 2002 and Section 24 of Act 1993 there ought to be no difficulty in answering the issue raised above that the Limitation Act, 1963 shall apply to the Tribunal which would include Sections 5 and 14 also.

22. Having said so, I proceed to consider the decision cited by Sri Saraf, Advocate on behalf of the Bank rendered by Appellate Tribunal in State Bank of India v. Sudarshan Doors (P) Ltd. II (2008) BC 72 (DRAT) In my view, the said decision renders no assistance to the Petitioner to advance his submission in respect to

Section 17 of 2002 Act. The Appellate Tribunal having confronted with a situation which arose due to Section 24 of Act 1993 has held that the said provision is applicable only to a DRT and, therefore cannot be extended to Appellate Tribunal. The Appellate Tribunal has referred to the definition of "Tribunal" u/s 2(o) of Act 1993 and held that this Tribunal is one which is established u/s 3(1) of Act 1993 though the Appellate Tribunal is established u/s 8(1), hence Section 24 has no application to the Appellate Tribunal. The decision, therefore, having considered specifically only the applicability of Limitation Act, 1963 vis a vis appeal preferred u/s 18 of Act 2002, which is not the question up for consideration in this case, has no application to this case. I do not find any reason to discuss the above judgment any more for the simple reason that the said decision apparently has no application to an application filed u/s 17 of Act 2002. On the contrary, the basis whereupon the Appellate Tribunal has excluded Section 24 of Act 1993 to Appellate Tribunal supports the contention of Respondents that Limitation Act, 1963 shall apply to an application filed before the Tribunal, i e, DRT u/s 17 of Act 2002.

23. Now I may refer to decisions of some High Courts which favours the view I am taking with respect to application of Act 1963 to an application filed before DRT u/s 17 of Act 2002.

24. Madras High Court in Ponnusamy and Anr. v. D.R.T., Coimbatore and Anr. 2009 (3) Bankers" Journal 401 which has considered this issue. The Tribunal at Coimbatore rejected an application filed u/s 5 of Act 1963 seeking condonation of delay of 47 days in filing appeal u/s 17(1) of Act 2002 on the ground that such an application is not maintainable. The Madras High Court held that Act 1963 shall apply to appeal filed u/s 17 of Act 2002. In taking this view the Court has given the following reasons:

- (i) Act 2002 does not expressly exclude application of Limitation Act 1963.
- (ii) Section 36 of Act 1963 applies with reference to Section 13(4) of Act 2002. It shows that the Limitation Act is not considered an antidote.
- (iii) Section 17(7) applies the Act 1993 to the Tribunal and Section 24 of Act 1993 brings it Act 1963 which shows that Act 2002 provides inclusion by necessary implication.
- (iv) Application of Section 5 of Act 1993 neither defeats the rights of secured creditor nor cause irreparable hardship to the secured debtor.

25. Same view was taken by Bombay High Court in UCO Bank v. Kanji Manji Kothari C.D.J. 2008 BHC 313 and Gujarat High Court in Union Bank of India v. Chairperson, DRAT and Ors. 2010 (1) Bankers" Journal 666. I do not find any reason nor Sri Saraf, learned counsel for the Petitioner could advance any substantial argument to pursue this Court to take a different view than that expressed by the three High Courts as referred to above. I am in respectful agreement with the view expressed

in the above decisions.

26. Considering the authorities above, wherein various judgments of the Apex Court and other High Courts cited on behalf of the parties to argue that Act 1963 ought not be applied to the proceedings u/s 17(1) have been discussed threadbare, and distinguished, with which I find myself in complete agreement. I do not find any reason to repeat the same thing hereat and suffice it to mention that decisions in respect of different special Acts having been rendered considering provisions contained therein would not be relevant in the context of application to Act 2002 whereto statutory scheme is totally different. Unless two Special Acts are shown in all respect *pari materia*, a decision rendered considering statutory scheme of one such Act by itself may not apply to another Act. I, therefore, hold that Limitation Act 1963 would be attracted and an application u/s 5 would be maintainable for the purpose of Section 17(1) of Act 2002.

27. Now the second aspect raised before this Court is that Uttarakhand High Court has not permitted Respondents to file an appeal u/s 17(1) of the Act and therefore, delay condoned by DRT by referring to the alleged discretion of Uttarakhand High Court is perverse and contrary to record. I have gone through the order dated 26.7.2007 passed by Uttarakhand High Court making it clear that pendency of writ petition would not preclude the party concerned from approaching the Tribunal under Act 2002. It cannot be said that here is a direction of the High Court which may amount to condoning the delay in filing appeal u/s 17(1) of Act 2002 but the fact remains that the Respondents are/were pursuing remedy before the High Court. The writ petition filed by Respondents was entertained by the High Court, an interim order was passed and the matter is pending thereat. In the circumstances, it cannot be said that the Respondents were not pursuing a valid remedy. Once it is shown that they were pursuing the remedy which was not frivolous, lacked bona fide, in my view this factor could have been taken into account by DRT for the purpose of condoning delay particularly by applying principles of Section 14 of Act 1963.

28. In the totality of circumstances once I find that Act 1963 would apply to Section 17(1) of Act 2002, I find no reason thereafter justifying interference of this Court with the orders impugned in this writ petition. In the result, writ petition being devoid of merit deserves to be dismissed.

29. The writ petition is accordingly dismissed with cost which I quantify to Rs. 10,000/- (Ten Thousand) only.