

L. Ashok Chand and Others Vs Indian Bank and Another

Court: Madras High Court

Date of Decision: July 2, 2010

Acts Referred: Constitution of India, 1950 Article 226

Debts Recovery Tribunal Act, 1983 Section 19(1), 69, 69A

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) Section 13, 13(2), 13(4), 17, 22

Citation: AIR 2011 Mad 33

Hon'ble Judges: S. Tamilvanan, J

Bench: Single Bench

Advocate: C. Ravichandran, for the Appellant; C. Johnson, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S. Tamilvanan, J.

The writ petition has been filed under Article 226 of the Constitution, seeking an order to issue a writ of certiorari, calling for the records of the second Respondent pertaining to the possession notice, dated 30-08-2005 and the consequential sale notice, dated 16-11-

2005 and quash the same.

2. According to the Petitioners, the impugned order of the second Respondent was passed invoking the provisions of Section 13 of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as SARFAESI

ACT), however, the impugned possession notice, dated 30-08-2005 and subsequent sale notice, dated 16-11-2005 are totally illegal, arbitrary

and violative of principles of natural justice, hence, liable to be quashed.

3. The Petitioners have further stated that they have submitted their explanation, dated 22-01-2005 to the notice sent u/s 13(2) of SARFAESI

Act, however, without considering the same, the impugned notice was issued, hence, the same is liable to be quashed. It is further contended that

no valid mortgage has been created and a non-speaking order was passed by the second Respondent, without affording adequate opportunity to

the Petitioners and that the Respondents have failed to give credence to the order of the Debt Recovery Tribunal, dated 03-01-2005 passed in

LA. No. 406 of 2004, which was filed by the Petitioner herein, seeking a direction to the Respondent bank to return back the original documents,

however, the same was rejected on the ground that the question involved was a question of fact and the same could be decided only after a full-

fledged trial is completed. In the writ petition, the Petitioners have stated that there is no alternative remedy available to the Petitioners.

4. It is not in dispute that the Petitioners are the guarantors for the loan obtained from the Indian Bank by the principal debtor. It is a settled

proposition of law that the liability of the guarantors are joint and several and co-extensive, as that of the principal borrower.

5. Mr. C. Johnson, learned Counsel appearing for the Respondents submitted that the writ petition is not legally maintainable, in view of the

SARFAESI Act and Debts Recovery Tribunal Act as efficacious alternative remedy is available to the Petitioners. Learned Counsel appearing for

the Respondents further contended that there is no illegality in the impugned notices sent by the Respondents, being secured creditor, a

Nationalised Bank. As it is a legal action, being taken by the Respondents, it is not open to the Petitioners to challenge the, same by way of filing

the writ petition under Article 226 of the Constitution of India.

6. In support of his contention, the/learned Counsel appearing for the Respondents submitted the decisions in Transcore Vs. Union of India (UOI)

and Another, and Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., .

7. In Transcore Vs. Union of India (UOI) and Another, , the Hon"ble Supreme Court has held that withdrawal of O.A., pending before the Debt

Recovery Tribunal, under Debt Recovery Tribunal Act cannot be a pre-condition for taking ""recourse to Securitisation and Reconstruction of

Financial Assets and Enforcement of Security Interest Act and it is for the bank or financial institution to exercise its discretion. It has been made

clear by the Hon"ble Apex Court that the enactment of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest

Act is not derogation of the Debt Recovery Tribunal Act.

8. As contended by the learned Counsel appearing for the Respondents, withdrawal of O.A. in terms of the first proviso to Section 19(1) of the

DRT Act, 1983 (inserted by the Amending Act No. 30 of 2004) is not a condition precedent for taking recourse to the SARFAESI Act.

9. The writ Petitioners herein have raised the following points:

(1) The second Respondent has invoked the provisions of Section 13 of SARFAESI Act. without following the principles of natural justice.

(2) The explanations, dated 22-01-2005 given by the Petitioners for the notice sent u/s 13(2) of SARFAESI Act was not considered by the

Respondents.

(3) The Respondents sent the impugned possession notice, dated 30-08-2005 and the sale notice, dated 16-11-2005 without providing adequate

opportunity to the Petitioners.

(4) The Respondents fail to give credence to the order of the Debt Recovery Tribunal, dated 03-01-2005 made in LA. No. 406 of 2004.

10. It is a settled proposition of law that writ petition under Article 226 of the Constitution of India is not legally sustainable, if there is efficacious

alternative remedy available to the Petitioners. In the writ petition, the Petitioners have not disputed the fact that the Respondent bank is a secured

creditor and that the amount due and payable by the Petitioners are not settled. Being the secured creditor, the Respondent bank is entitled to take

legal action, as per SARFAESI Act and also initiate proceeding through the Debts Recovery Tribunal. It has been made clear by the Hon"ble

Apex Court in the decision, Transcore Vs. Union of India (UOI) and Another, that there is no bar in taking simultaneous proceedings, as the

actions being taken under both Acts are parallel and have no conflict in the proceeding under the Acts.

11. In Transcore's case (cited supra), the Hon"ble Apex Court has categorically held that the withdrawal of O.A., pending before the Debt

Recovery Tribunal under Debt Recovery Tribunal Act is not a pre-condition for taking recourse to SARFAESI Act. In the aforesaid decision, at

paragraph number 16, the Hon"ble Apex Court has/held thus:

16: On analysing the above provisions of the DRT Act. we find that the said Act is a complete Code by itself as far as recovery of debt is

concerned. It provide for various modes of recovery. It incorporates even the provisions of the second and third schedules to the income tax Act.

1961. Therefore, the debt due under the recovery certificate can be recovered in various ways. The remedies mentioned therein are

complementary to each other. The DRT Act provides for adjudication. It provides for adjudication of disputes as far as the debt due is concerned.

It covers secured as well as unsecured debts. However, it does not rule out applicability of the provisions of the TP Act, in particular Sections 69

and 69A of that Act. Further, in cases where the debt is secured by pledge of shares or immovable properties, with the passage of time and delay

in the DRT proceedings, the value of the pledged assets or mortgaged properties invariably falls. On account of inflation, value of the assets in the

hands of the bank/FI invariably depletes which in turn, leads to asset liability mis-match, These contingencies are not taken care of by the DRT and

therefore, Parliament had to enact the NPA Act, 2002.

It has been ruled by the Hon"ble Apex Court that SARFAESI Act is an additional remedy to DRT Act and as such, they constitute one remedy

together and hence, doctrine of election does not apply and therefore, SARFAESI Act is not derogation of DRT Act.

12. In the writ petition, the Petitioners have not raised any legal grounds and the grounds raised in the writ petition are so vague. The Petitioners

have stated that principles of natural justice was not followed by the Respondents, while invoking the provisions of Section 13 of SARFAESI Act

and the the explanation, dated 22-01-2005 submitted by the Petitioners for the notice sent under Section-13(2) of SARFAESI Act: was not

considered and reasonable opportunity was not provided to the Petitioners. The aforesaid grounds are legally not sustainable, in view of the

efficacious alternative, remedy available to the Petitioners.

13. The only legal point argued on the side of the Petitioners is that the Respondents are not entitled to take action both under DRT Act as well as

the SARFAESI Act.

14. The Hon"ble Apex Court in Mardia Chemical"s case (cited supra), and Transcore"s case (cited supra) have categorically held that the

Respondents could take action simultaneously under SARFAESI Act and DRT Act, as there is no conflict of interest involved in applying the

aforesaid Acts, in order to realise the amount due and payable to the financial institution under the Act.

15. A Division Bench of this Court in Digivision Electronics Ltd. Vs. Indian Bank, has held as follows:

47. We may thus summarise our conclusions: (1) Challenge to the constitutional validity of the provisions of the Securitisation Act is rejected in

view of the decision of the Supreme Court in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., .

(2) Whether the challenge is to the notice u/s 13(2) of the Securitisation Act, this challenge is rejected on the ground of alternative remedy of filing

a reply to the said notice which will be considered by the secured creditor and decided by a reasoned order.

(3) Where the challenge is to the action u/s 13(4) of the Securitisation Act, this challenge is also rejected on the ground of alternative remedy of

filing application u/s 17 of the Securitisation Act.

(4); Challenge to the fee for filing application u/s 17 is also rejected.

(5) The application u/s 17 in relation to a loan regarding which a writ petition is being disposed off by this, judgment, will be, held to be within

limitation if filed within one month from the date of this judgment. The Court fee can also be paid within this period and representation of returned

applications can also be made within one month from the date of this judgment, and if that is done the application will be treated as within limitation.

(6) As regards objections u/s 22 of the Sick Industrial Companies Act or other statutory provisions, they can also be taken in reply to the notice

u/s 13(2) or in the application u/s 17. but they will not be directly entertained by this Court without availing of these alternative remedies, provided

notice u/s 13(2) was issued to the Petitioner.

16. In the instant case, I am of the considered view that there is no violation of principles of natural justice, as pleaded by the Petitioners herein.

When the law is settled, the Petitioners cannot raise a plea, which is not legally sustainable on the ground that reasonable opportunity was not given

to them by the Respondents and the representation, dated 22-01-2005 was not properly considered by them, so as to maintain the writ petition.

17. I am of the considered view that the untenable and vague defence raised by the Petitioners are insufficient and inadequate, even to maintain the

writ petition. It cannot be disputed that the writ jurisdiction, under Article 226 is a basic structure of the Constitution, as held in the landmark

judgment, His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, by the Hon"ble Apex Court.

18. However, it is a well settled proposition of law that when there is efficacious alternative remedy available, without approaching the appropriate

forum, by raising trivial grounds, no writ petition could be maintained. It is not in dispute that the Debt Recovery Tribunal and the Debt Recovery

appellate forum have jurisdiction to decide the dispute and the appeal respectively thereon. Notice issued by the Respondents u/s 13(2) of

SARFAESI Act is only in accordance with law. It cannot be construed as an Act against any statute, as the Respondents are empowered to take

action u/s 13(2) of SARFAESI Act, being the secured creditor, despite the fact that proceeding before the Debts Recovery Tribunal is pending.

There is no statutory bar for initiating the proceeding under SARFAESI Act and therefore, it is crystal clear that the Petitioners herein have not

made out any case to maintain the writ petition under Article 226 of the Constitution of India and hence, I am of the view that the writ petition is

liable to be dismissed.

19. In the result, this writ petition is dismissed. Consequently, connected miscellaneous petitions are also dismissed. No order as to costs.