

Agarwal Tracom Pvt. Ltd. vs Punjab National Bank on 27 November, 2017

Equivalent citations: AIR 2017 SUPREME COURT 5562

Author: Abhay Manohar Sapre

Bench: Abhay Manohar Sapre, R.K. Agrawal

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 19847 OF 2017
(ARISING OUT OF SLP (C) No. 33514/2016)

Agarwal Tracom Pvt. Ltd. . . .Appellant(s)

VERSUS

Punjab National Bank & Ors. ...Respondent(s)

JUDGMENT

Abhay Manohar Sapre, J.

1. Leave granted.

2. This appeal is directed against the final judgment and order dated 11.05.2016 passed by the High Court of Delhi at New Delhi in LPA No.699 of 2015 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein for quashing the order dated 01.09.2015 passed by the Single Judge, which dismissed the appellant's W.P.(c) No.8314 of 2015.

3. The controversy involved in the appeal centers around the short facts and is essentially a legal one. However, few relevant facts need mention, in brief, to appreciate the controversy.

4. Respondents-Punjab National Bank(hereinafter referred to as "PNB") is a Nationalised Bank. The PNB had given loan facility to a Company called "M/s India Iron & Steel Corporation Limited" (in short, "Borrower") for their business, which they were carrying at a place called Noorpur Khirki, Village Farid Nagar, Tehsil Dhampur, District Bijnor (U.P.).

5. To secure the loan amount, the Borrower had secured their assets, which consisted of the land, factory building, plant and machinery situated at Dhampur. The Borrower, however, failed to clear their loan amount and became a defaulter in its repayment. The PNB, therefore, invoked their powers under Section 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act") and issued a public sale notice in leading English newspapers for sale of the mortgaged assets of the Borrower in the public auction fixed for 17.06.2014 (Annexure-P-1). The appellant herein was one of the bidders, whose bid was declared the highest.

6. The appellant's bid was accordingly accepted by the PNB followed by execution of memorandum of understanding between the appellant and the PNB (Annexure P-4). The PNB also sent a letter to the appellant stating that the entire plant, machinery, land and the building is auctioned in favour of the appellant. The letter also authorized the appellant to dismantle and sell the scrap plant and the machinery which was lying at the Borrower's factory's premises after depositing the necessary installment of sale amount, as agreed upon between the parties in the memorandum of understanding.

7. The appellant, however, failed to pay the regular installments towards sale money in terms of memorandum of understanding to PNB and sought extension of time to pay and remove the scrap material from the site.

8. This gave rise to the disputes between the parties, namely, PNB, appellant (auction purchaser) and the Borrower before the Debt Recovery Tribunal (DRT), Lucknow being S.A. No 310 of 2014 wherein an order was passed on 03.07.2014 (Annexure-P-11) directing the appellant not to remove any material from the factory premises. The appellant then wrote a letter to PNB requesting them to refund their money with interest. This led to another dispute between the parties which was filed in the DRT and then before the appellate authority- DRAT and finally, in the High Court at Allahabad in Writ Petition(c) No. 22246/2015 by the Borrower. This writ petition was disposed of finally on 29.05.2015 observing therein that since the appellant had failed to comply with the term of memorandum of understanding inasmuch as the appellant having failed to deposit the requisite installment of sale money, the PNB cannot proceed with the auction sale held on 17.06.2014 and nor can the appellant be permitted to remove the scrap material lying in the factory premises.

9. This led the PNB to forfeit the appellant's deposit by their letter dated 26.06.2015 (Annexure-P25). The appellant objected to the action of PNB by letters and then filed the writ petition in the High Court of Delhi challenging therein the action of PNB in forfeiting the appellant's deposit of money.

10. The Single Judge of the High Court, by order dated 01.09.2015, dismissed the appellant's writ petition on the ground of availability of alternative statutory remedy to the appellant of filing the application under Section 17 of the SARFAESI Act before the DRT to challenge the action of PNB in forfeiting the deposit money of the appellant. The Single Judge, therefore, declined to go into the merits of the case.

11. The appellant, felt aggrieved of the order of the Single Judge, filed intra Court appeal (LPA 699 of 2015) before the Division Bench. By impugned judgment, the Division Bench dismissed the appeal and confirmed the order of the Single Judge. The Division Bench was also of the view that the writ petition filed by the appellant was rightly not entertained by the Single Judge (writ Court) on the ground that the proper remedy of the appellant was to file an application before the DRT under Section 17 of the SARFAESI Act to question the action of forfeiture made by PNB and not in filing the writ petition under Article 226 of the Constitution. Felt aggrieved, the auction purchaser has filed the present appeal by way of special leave in this Court.

12. Heard Mr. Jaideep Gupta, learned senior counsel for the appellant and Mr. M.T. George, learned counsel for the respondents.

13. Mr. Jaideep Gupta, learned senior counsel appearing for the appellant (auction purchaser) while questioning the legality and correctness of the view taken by the two Courts below contended that the reasoning and the conclusion arrived at by the writ Court and the Appellate Court is not correct and hence deserves to be set aside. His main submission was that the action impugned by the appellant in their writ petition, namely, "forfeiture of the deposit of money by PNB" is not one of the measures specified under Section 13(4) of the SARFAESI Act and, therefore, provisions of Section 17 of SARFAESI Act are not attracted so far as the appellant's right to challenge such action under Section 17 before the DRT is concerned.

14. In other words, the submission was that in order to attract the rigor of Section 17 of the SARFAESI Act, it is necessary that the action complained of by the party concerned must satisfy the conditions set out in Section 13 (4). It was urged that the "forfeiture of deposit" impugned in the writ petition is not and nor it could be considered as one of the measures falling in Section 13 (4) so as to attract the rigor of Section 17 of the SARFAESI Act. It was urged that the dispute in question was essentially between the PNB (secured creditor) and the auction purchaser (appellant) and arose after the measures under Section 13(4) had been taken by the secured creditor (PNB) against the borrower and, therefore, the dispute in question fell outside the purview of Section 13(4) and, in consequence, fell out of purview of Section 17. In short, the dispute in question had nothing to do with any of the measures specified in Section 13(4).

15. It was further urged that reading of Section 17 would go to show that the application under Section 17 can be made to DRT by "any person" including borrower to challenge any of the measures referred to in Section 13(4) once taken by the secured creditor. However, since forfeiture of the amount made by the secured creditor against the auction purchaser is not one of the measures under Section 13(4) and hence, the action of forfeiture made by the secured creditor cannot be challenged by the auction purchaser under Section 17 of the SARFAESI Act by filing an application. It was urged that under these circumstances the appellant had rightly filed the writ petition under Article 226/227 of the Constitution to challenge the action of forfeiture of deposit money in the High Court, that being the only remedy available to them and, therefore, the writ petition should have been entertained for its hearing on merits by the writ court. It is these submissions, which were elaborated by the learned counsel for the appellant by pointing out relevant provisions of the SARFAESI Act.

16. In reply, learned counsel for the respondents (PNB) supported the impugned judgment and contended that the action impugned in the writ petition does attract Section 13(4) read with the Rules framed thereunder and hence the remedy of the appellant lies in approaching DRT by filing an application under Section 17 of the SARFAESI Act as was rightly held by the two Courts below.

17. Having heard the learned counsel for the parties and on perusal of the record of the case, we find no merit in the appeal. In other words, the view taken by the High Court appears to be just and reasonable and hence does not call for any interference.

18. The short question that arise for consideration in this appeal is whether the High Court was justified in holding that the remedy of the appellant (auction purchaser) lies in challenging the action of the secured creditor (PNB) in forfeiting the deposit by filing an application under Section 17 of the SARFEASI Act before the DRT or the remedy of auction purchaser is in filing the writ petition under Article 226/227 of the Constitution of India to examine the legality of such action.

19. Section 13(4) and Section 17 of the SARFAESI Act, Rules 8 and 9 of the Security Interest(Enforcement) Rules,2002(hereinafter referred to as “the Rules”) to the extent they are relevant for deciding the question involved in the appeal are quoted below:

Section 13(4)

13. Enforcement of security interest-

(1) to (3A).....

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.” Section 17 “17. Application against measures to recover secured debts-(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorized 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 forty-five days from the date on which such measures had been taken:

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,-

(a) to (c)..... (4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(4A)..... (5).....
(6).....

(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.

Rule 8

8. Sale of immovable secured assets- (1) to (8).....

Rule 9

9. Time of sale, issue of sale certificate and delivery of possession, etc.-

(1) to (4)..... (5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited to the secured creditor and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorized officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the form given in Appendix V to these rules.” (Emphasis supplied)

20. Section 13(4) is invoked by the secured creditor against their borrower when the borrower fails to discharge his liability in full within the specified time. The secured creditor then can take possession of the assets of the borrower, transfer the assets by lease or by assignment or sell the assets to recover the outstanding dues under clause

(a).

21. The secured creditor under clause (b) can also take over the management of the business of the borrower or transfer by way of lease, assignment or sale. However such power can be invoked only when the creditor holds substantial part of the borrower’s business as security and further it satisfies the condition set out in second proviso.

22. The secured creditor under clause (c) can also appoint any manager to manage the borrower’s business and lastly under clause (d), the secured creditor can ask any person to whom the money is due or become due to pay to the secured creditor instead of paying to borrower which is sufficient to satisfy the debt.

23. So far as Section 17 is concerned, it provides a remedy to a person who is aggrieved by the measures taken by the secured creditor or his authorized officer under Section 13(4) in relation to secured assets of the borrower. It says that "any person (including borrower)" may make an application to the DRT within 45 days from the date of measures taken under Section 13(4). Sub-section (2) of Section 17 was added by way of amendment w.e.f. 11.11.2004. It provides that the Tribunal, on such application being made under Section 17(1), shall consider whether the measures referred to and taken under Section 13(4) by the secured creditor are in accordance with the "provisions of this Act and the Rules made thereunder". Similarly, sub- sections (3), (4) and (7) of Section 17 which deal with the power of the DRT also use the expression “in accordance with provisions of the Act and the Rules made thereunder”.

24. Rule 8, which has 8 sub-rules, deals with the manner of sale of immovable secured assets and provides detail procedure as to how and in what manner the sale of secured assets, is to be held.

Rule 9 deals with time of sale, issue of sale certificate and delivery of possession

25. Rule 9(6) empowers the authorized officer to issue sale certificate in favour of the purchaser. Rule 9(9) then empowers the authorized officer to deliver the properties to the purchaser whereas Rule 9(10) empowers the authorized officer to mention in sale certificate that the property is free from encumbrances.

26. So far as this case is concerned, sub-rule (5) of Rule 9 is relevant. It provides that, if the auction purchaser commits any default in payment of sale consideration within the time specified, the deposit made by auction purchaser shall be “forfeited” to the secured creditor and the auctioned property shall be resold and the defaulting purchaser shall “forfeit” all claims to the property or its part of the sum for which it may be sold subsequently.

27. Reading of the aforementioned Sections and the Rules and, in particular, Section 17(2) and Rule 9(5) would clearly go to show that an action of secured creditor in forfeiting the deposit made by the auction purchaser is a part of the measures taken by the secured creditor under Section 13(4).

28. The reason is that Section 17(2) empowers the Tribunal to examine all the issues arising out of the measures taken under Section 13(4) including the measures taken by the secured creditor under Rules 8 and 9 for disposal of the secured assets of the borrower. The expression "provisions of this Act and the Rules made thereunder" occurring in sub-sections (2), (3), (4) and (7) of Section 17 clearly suggests that it includes the action taken under Section 13(4) as also includes therein the action taken under Rules 8 and 9 which deal with the completion of sale of the secured assets. In other words, the measures taken under Section 13 (4) would not be completed unless the entire procedure laid down in Rules 8 and 9 for sale of secured assets is fully complied with by the secured creditor. It is for this reason, the Tribunal has been empowered by Section 17(2),(3) and (4) to examine all the steps taken by the secured creditor with a view to find out as to whether the sale of secured assets was made in conformity with the requirements contained in Section 13(4) read with the Rules or not?

29. We also notice that Rule 9(5) confers express power on the secured creditor to forfeit the deposit made by the auction purchaser in case the auction purchaser commits any default in paying installment of sale money to the secured creditor. Such action taken by the secured creditor is, in our opinion, a part of the measures specified in Section 13(4) and, therefore, it is regarded as a measure taken under Section 13(4) read with Rule 9(5). In our view, the measures taken under Section 13(4) commence with any of the action taken in clauses

(a) to (d) and end with measures specified in Rule 9.

30. In our view, therefore, the expression “any of the measures referred to in Section 13(4) taken by secured creditor or his authorized officer” in Section 17(1) would include all actions taken by the secured creditor under the Rules which relate to the measures specified in Section 13(4).

31. The auction purchaser (appellant herein) is one such person, who is aggrieved by the action of the secured creditor in forfeiting their money. The appellant, therefore, falls within the expression “any person” as specified under Section 17(1) and hence is entitled to challenge the action of the secured creditor (PNB) before the DRT by filing an application under Section 17(1) of the SARFAESI Act.

32. Learned counsel for the appellant placed reliance on the decision of the Division Bench of High Court of Bombay in *Umang Sugars Pvt. Ltd. vs. State of Maharashtra & Anr.*, 2014(4) Mh.L.J. 113 which, according to him, supports his submission. We have gone through the decision and unable to agree with the view taken therein. Their Lordships, while holding that Section 17(1) does not apply to auction purchaser and, therefore, writ petition filed by him can be entertained in such cases, did not notice the Rules, which deal with the measures taken under Section 13(4) and nor considered its effect on the measures.

33. In *United Bank of India vs. Satyawati Tondon & Ors.*, (2010) 8 SCC 110, this Court had the occasion to examine in detail the provisions of the SARFAESI Act and the question regarding invocation of the extraordinary power under Article 226/227 in challenging the actions taken under the SARFAESI Act. Their Lordships gave a note of caution while dealing with the writ filed to challenge the actions taken under the SARFAESI Act and made following pertinent observations which, in our view, squarely apply to the case on hand:

“42. There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression “any person” used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the

remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.”

34. In the light of foregoing discussion, we are of the considered opinion that the Writ Court as also the Appellate Court were justified in dismissing the appellant's writ petition on the ground of availability of alternative statutory remedy of filing an application under Section 17(1) of SARFAESI Act before the concerned Tribunal to challenge the action of the PNB in forfeiting the appellant's deposit under Rule 9(5). We find no ground to interfere with the impugned judgment of the High Court.

35. The appellant is, accordingly, granted liberty to file an application before the concerned Tribunal (DRT) under Section 17(1) of the SARFAESI Act, which has jurisdiction to entertain such application within 45 days from the date of this order. In case, if the appellant files any such application, the Tribunal shall decide the same on its merits in accordance with law uninfluenced by any of the observations made by this Court and the High Court in the impugned judgment.

36. With these observations and liberty granted to the appellant, the appeal fails and is accordingly dismissed.

.....J. [R.K. AGRAWAL]J. [ABHAY MANOHAR
SAPRE] New Delhi;

November 27, 2017