Union Bank Of India vs Ashok Saxena on 7 December, 2016

16

W.A. No.334/2016

07.12.2016

Shri A.S. Kutumble, learned Senior Counsel with Shri Abhinav P. Dhanodkar, learned counsel for the appellants.

Shri Abhishek Tugnawat, learned counsel for the respondents.

They are heard.

By this writ appeal, the appellants - Banks are praying for setting aside of order dated 27/07/2016, passed in W.P. No.4969/2012 whereby the learned writ court directed the appellants to refund the amount of Rs.29,80,150.80/- to the respondents alongwith interest at the same rate which the Bank is charging from its borrowers and the interest shall be paid from the date the amount has been received by the Bank on account of the auction, till the amount is actually paid to the respondents.

2. Brief facts of the case are that the respondent No.1 - Ashok Saxena was a guarantor in respect of loan obtained by the respondent No.2 - M/s Mayunk Industries. The account of respondent No.2 was classified as NPA and the proceeding for auction of mortgaged property was initiated under the provisions of Secularization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short .... "the SARFAESI Act") and, therefore, the auction took place on 11/02/2010 and the property of the respondent No.1 (guarantor) was sold by the appellants - Bank for a sum of Rs.82,21,551/-. The total outstanding dues in respect of M/s Mayunk Industries were Rs.52,30,101/-. An appeal was preferred before the DRT and the same was dismissed on 30/09/2011.

3. The grievance of the respondent No.1 before the writ court that his property was sold for Rs.82,21,551/- and after adjusting the total amount i.e., Rs.52,30,101/-, the Bank is still having surplus amount of Rs.29,80,150.80/- and he is entitled to receive the entire surplus amount lying with the Bank along with the interest in light of Section 13(7) of the SARFAESI Act, 2002.

4. The appellants - Bank has admitted the fact of disposing of the property for a sum of Rs.82,21,551/- and they have also adjusted the amount due i.e., Rs.52,30,101/-. In respect of surplus amount, the stand of the Bank is that the respondent No.1 is proprietor of M/s Anita Steel Wire Works and in the account of M/s. Anita Steel Wire Works there are outstanding dues to the tune of Rs.26,48,571/- and the surplus amount which was received by selling the property of respondent No.1 has been adjusted in respect of outstanding dues of M/s. Anita Steel Wire Works.

5. The stand of the Bank that they are having general lien on the surplus amount and, therefore, they have exercised the aforesaid power by adjusting the aforesaid surplus.

6. The learned writ court after considering the provisions of Section 171 of the Indian Contract Act, 1872 came to the conclusion that the account of M/s. Anita Steel Wire Works of which the petitioner is a Proprietor is a separate account and there is an independent contract between the respondent No.1 and the Bank in respect of account of M/s. Anita Steel Wire Works. Similarly in respect of account of M/s. Mayunk Industries, there was a separate contract between the Bank and M/s. Mayunk Industries and the respondent No.1 was guarantor in respect of loan granted M/s. Mayunk Industries.

There were two separate account altogether and by no stretch of imagination, the surplus amount by taking the shelter of Section 171 of the Indian Contract could have been appropriated with the outstanding amount of M/s. Anita Steel Wire Works and directed the Bank to refund the amount in question along with interest.

7. Learned Senior Counsel for the appellants has drawn our attention to the ex-parte order dated 11/10/2010, passed in O.A. No.124/2010 and order sheets dated 5/12/2016 and 16/11/2016 of DRT and submitted that the order of attachment has been passed and, therefore, they are entitled to adjust the surplus amount of respondent No.1 in respect of outstanding dues of M/s. Anita Steel Wire Works.

8. Per Contra, Shri Abhishek Tugnawat, learned counsel for the respondent has drawn our attention to Section 171 of the Indian Contract Act, 1872 and Section 2(7) of the Sale of Goods Act, 1930 and submitted that the surplus amount cannot be appropriated. Section 171 of the Indian Contract Act and Section 2(7) of The Sales of Goods Act, 1930 reads as under :-

> Section 171 of the Indian Contract Act:
>
> 171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers.--

Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect."

Section 2(7) of The Sales of Goods Act, 1930 :-

> (7) "goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;

9. Learned counsel for the respondent No.1 also submitted that as per Section 171 of the Indian Contract Act, 1872, in mercantile system the Bank has a general lien over all forms of securities in respect of goods bailed to them. He submitted that as per Sub-section 7 of Section 2, the actionable claims and the surplus amount are not goods within the meaning of Section 2(7) of the Sale of

Goods Act, 1930 and Section 171 of the Indian Contract Act, 1872 and the issue involved in this writ appeal is squarely covered by the decision of the Apex Court in the case of Axis Bank Vs. SBS Organics Private Ltd. & Anr., passed in Civil Appeal No.4379/2016 decided on 22/04/2016. Para 21 to 24 are relevant which reads as under :-

> 21. We are also conscious of the fact that such a pre-condition is present in several statutes while providing for statutory appeals, like The Income-

Tax Act, 1961, The Central Excise Act, 1944, The Consumer Protection Act, 1986, The Motor Vehicles Act, 1988, etc. However, unlike those statutes, the purpose of the SARFAESI Act is different, it is meant only for speedy recovery of the dues, and the scheme under Section 13(4) of the Act, permits the secured creditor to proceed only against the secured assets. Of course, the secured creditor is free to proceed against the guarantors and the pledged assets, notwithstanding the steps under Section 13(4) and without first exhausting the recovery as against secured assets referred to in the notice under Section 13(2). But such guarantor, if aggrieved, is not entitled to approach DRT under Section 17. That right is restricted only to persons aggrieved by steps under Section 13(4) proceeding for recovery against the secured assets.

22. The Appeal under Section 18 of the Act is permissible only against the order passed by the DRT under Section 17 of the Act. Under Section 17, the scope of enquiry is limited to the steps taken under Section 13(4) against the secured assets. The partial deposit before the DRAT as a pre-condition for considering the appeal on merits in terms of Section 18 of the Act, is not a secured asset. It is not a secured debt either, since the borrower or the aggrieved person has not created any security interest on such pre- deposit in favour of the secured creditor. If that be so, on disposal of the appeal, either on merits or on withdrawal, or on being rendered infructuous, in case, the appellant makes a prayer for refund of the pre- deposit, the same has to be allowed and the pre-deposit has to be returned to the appellant, unless the Appellate Tribunal, on the request of the secured creditor but with the consent of the depositors, had already appropriated the pre-deposit towards the liability of the borrower, or with the consent, had adjusted the amount towards the dues, or if there be any attachment on the pre-deposit in any proceedings under Section 13(10) of the Act read with Rule 11 of The Security Interest (Enforcement) Rules, 2002, or if there be any attachment in any other proceedings known to law.

23. We are also unable to agree with the contention that the Bank has a lien on the pre- deposit made under Section 18 of the SARFAESI Act in terms of Section 171 of The Indian Contract Act, 1872. Section 171 of The Indian Contract Act, 1872 on general lien, is in a different context:

> "171. General lien of bankers, factors, wharfingers, attorneys and policy- brokers.-- Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect."

24. Section 171 of The Indian Contract Act, 1872 provides for retention of the goods bailed to the bank by way of security for the general balance of account. The pre-deposit made by a borrower for the purpose of entertaining the appeal under Section 18 of the Act is not with the bank but with the Tribunal. It is not a bailment with the bank as provided under Section 148 of The Indian Contract Act, 1872. Conceptually, it should be an argument available to the depositor, since the goods bailed are to be returned or otherwise disposed of, after the purpose is accomplished as per the directions of the bailor.

10. The Apex Court in the case of Allahabad Bank vs Canara Bank & Another[LAWS (SC)-2000-4-120, decided on 10 April, 2000 has held that in 'execution',the jurisdiction of the Recovery Officer is exclusive. Now a procedure has been laid down in the Act for recovery of the debt as per the certificate issued by the Tribunal and this procedure is contained in Chapter V of the Act and is covered by Sections 25 to 30. It is not the intendment of the Act that while the basic liability of the defendant is to be decided by the Tribunal under Section 17, the Banks/Financial institutions should go to the Civil Court or the Company court or some other authority outside the Act for the actual realisation of the amount. The certificate granted under Section 19(22) has, in our opinion, to be executed only by the Recovery Officer. It is also observed that the adjudication of liability and the recovery of the amount by execution of the certificate are respectively within the exclusive jurisdiction of the Tribunal and the Recovery Officer and no other Court or authority much less the Civil Court or the Company Court can go into the said questions relating to the liability and the recovery except as provided in the Act.

11. Considering the aforesaid, we are unable to agree with the contention of the learned Senior Counsel for the appellants that the Bank has a lien over the surplus amount of Rs.29,80,150.80/-. The writ court has rightly directed the appellant - Bank to refund the amount to the respondent No.1 along with interest. No case to interfere with the order dated 27/07/2016, passed by the learned writ court, as prayed is made out.

12. We have also gone through the application for contempt filed by the respondent No.1 for drawing contempt proceedings against the officers of the appellant - Bank for non-compliance of the order datd 9/09/2016, 26/11/2016 and 22/11/2016.

13. Admittedly, the amount was deposited in the account of respondent No.1 only on 18/11/2016 and, thus, we direct the office to register the application for drawing contempt petition against the appellants as per rules, separately and fix the matter in the first week of January, 2017.

14. With the aforesaid, all the IAs except the application for drawing contempt petition are dismissed. The interim order passed on 9.09.2016 stands vacated. Consequently, the writ appeal also stands dismissed. No costs.

(P.K. Jaiswal)
Judge

(Virender Singh)
Judge

pn/