

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

THE HON'BLE MR. JUSTICE L. NARAYANA SWAMY

AND

THE HON'BLE MR. JUSTICE R.DEVDAS

WRIT PETITION NO.22137 OF 2019 (GM-DRT) DATED:27-06-2019

TRISHUL DEVELOPERS, A PARTNERSHIP FIRM REGISTERED UNDER THE INDIAN PARTNERSHIP ACT, 1932 VS. . L & T HOUSING FINANCE LIMITED, A NON-BANKING FINANCE COMPANY, MUMBAI-400 001 AND OTHERS

ORDER

DEVADAS J,

The petitioner-Partnership Firm availed financial assistance from the first respondent-Financial Institution to the tune of Rs.20,00,00,000/- (Rupees twenty crores), for the purpose of completion of construction of projects, as per sanction letter dated 07.08.2015. On default, when the first respondent initiated proceedings under the provisions of The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002, (SARFAESI Act), the petitioner herein approached the Debt Recovery Tribunal (hereinafter referred to as ' DRT ' for short), challenging the demand notice on the ground that the notice was issued by an unconcerned party, from whom the petitioner had not borrowed any amount. Possession notice was also sought to be quashed.

2. By order dated 23.03.2018, the DRT allowed the appeal S.A.No.76/2018 and quashed the demand notice dated 14.06.2017 and possession notices dated 09.11.2017 and 10.11.2017. When the first respondent approached the Debt Recovery Appellate Tribunal (for short ' DRAT '), at Chennai, the DRAT allowed the appeal, by order dated 16.04.2019. As a result, the petitioner is before this Court assailing the order dated 16.04.2019 passed by the DRAT and to uphold the order dated 23.03.2018, passed by the DRT- 1, Bengaluru, in S.A.No.76/2018.

3. Sri Udaya Holla, learned Senior Counsel appearing for the petitioner submits that the DRT- 1 as well as the DRAT, have concurrently held that the demand notice dated 14.06.2017 was issued on the letter head of " L & T Financial Services " and the authorized signatory has signed the notice on behalf of " L & T Finance Ltd. ". It is pointed out from the order of the DRAT at paragraph-11, that the DRAT has given a finding that the first respondent herein has committed a mistake in serving the notice in the name of ' L & T Finance Ltd '. It is admitted that ' L & T Finance Ltd. ' is not the secured creditor from whom the petitioner herein has borrowed the amount. It is also admitted that the secured creditor is ' L & T Housing Finance Ltd '. That being the admitted position, it is contended that the DRAT could not have upset the decision of the DRT.

4. The learned Senior Counsel has relied upon Chandra Kishore Jha Vs. Mahavir Prasad and Others reported in (1999) 8 SCC 266, to contend that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. In Chimanlal Vs. Mishrilal, reported in (1985) 1 SCC 14, it was pointed out that the Hon'ble Supreme Court has held that a valid notice, as per statute, is a pre-requisite for maintaining proceedings thereon. The learned Senior Counsel further relies upon the decision in the case of Pradip Kumar Das & Ors. Vs. Asstt. General Manager, Union Bank & Anr., reported in 2010 SCC OnLine Cal. 1629, to buttress his argument that a defective notice under Section 13 (2) of SARFAESI Act, 2002, is not tenable. Similarly, in Mathew Varghese Vs. M.Amritha Kumar and Others reported in (2014) 5 SCC 610, it was held that while interpreting the provisions of SARFAESI Act, 2002, it is mandatory to observe strict compliance with prescribed procedure.

5. Per contra, Sri Shashikiran Shetty, learned Senior Counsel appearing for respondent No.1 submits that the petitioner, in its reply dated 08.08.2017, issued to the demand notice dated 14.06.2017, though addressed to ' L & T Finance Limited ', does not protest that it has not secured any loan from ' L & T Finance Limited '. The petitioner, knowing fully well that it has borrowed loan from ' L & T Housing Finance Limited ', admitted of having borrowed loan, but contested the claim of repayment on grounds such as violations/breaches committed of the terms and conditions of the Financing Documents; non-issuance of NOCs for sale of flats inspite of making statement before the High Court; magnitude of outstanding loan amount and other incidental issues. It was pointed out from the reply that the petitioner has, in fact, admitted that they have secured a loan and it was never their intention to avoid payment of any legitimate dues. The learned Senior Counsel therefore contends that the petitioner knew and understood that the demand notice was indeed issued by ' L & T Housing Finance Limited ', in the letter head of ' L & T Finance Services ' which is the letter head used by ' L & T Housing Finance Ltd ', as seen in the ' footer ' of the demand notice. The learned Senior Counsel further submits that the DRAT, having noticed these aspects carefully, rightly concluded that the petitioner should not be permitted to take advantage of a mistake committed by the first respondent, who is a secured creditor.

6. The learned Senior Counsel relies upon the decision of the Uttaranchal High Court in the case of Pooran Lal Arya and Others Vs. State of Uttaranchal and Others reported in 2005 SCC OnLine Utt. 50, wherein the Division Bench has held that a technical error in annexure 4 notice requiring the petitioners to clear off the dues within a fortnight from the date of issuance of notice, should be treated as substantial compliance with the statutory provision since factually, the petitioners were given the required time as provided in Section 13 (2) and no injustice was done to the petitioners. Similarly, in the case of Mayunk Industries, Indore Vs. Union Bank of India & Ors. reported in 2010 SCC OnLine DRAT 37, the Chairperson of DRAT, Allahabad has held that a typographical error in mentioning the outstanding dues or mere technical violation are not sufficient to hold that there is violation of the provision of the rules. In the case of State Bank of India Vs. Hon'ble Debts Recovery Appellate Tribunal & Ors. in W.P. (C) No.9090 of 2009 and connected matters, a Division Bench of

the Delhi High Court has held that when no prejudice is caused to the mortgagor, he should not be allowed to take advantage of a technical defect.

7. The learned Senior Counsel for respondent No.1, would further point out from the reply given by the first respondent to the letter dated 08.08.2017 written by the petitioner herein, that the demand notice was indeed issued by ' L & T Housing Finance Ltd ' and not ' L & T Finance Ltd '. It is further submitted that it is this clarification which was given by the first respondent in the reply dated 01.09.2017, is taken advantage by the petitioner .In the reply dated 01.09.2017, the first respondent has taken exception to the reply dated 08.08.2017 caused by the petitioner and addressed to ' L & T Finance Ltd '. The first respondent has therefore clarified that it is indeed ' L & T Housing Finance Ltd. ' which is the secured creditor and the secured creditor has issued the demand notice.

8. We have heard the learned Senior Counsels appearing for the petitioner and the first respondent. We have gone through the writ papers and the orders passed by the DRT and DRAT.

9. The DRT and DRAT have noticed the fact that the demand notice is issued on the letter head of ' L & T Finance Ltd. ' and signed by the authorized signatory of ' L & T Finance Ltd. ' Although it is contended that at the footer of the demand notice it is printed as ' L & T Housing Finance Ltd ', both the DRT and DRAT have held that the demand notice was indeed issued by ' L & T Finance Ltd '. However, the DRAT has termed this as a ' mistake '. In other words, the DRAT is of the opinion that this is a mistake and the mistake is curable. The DRAT proceeds to hold that since it has been clarified in the reply dated 01.09.2017 given by the first respondent, the ' mistake ' stands cured.

10. The questions that arise for consideration are:

i) whether the demand notice dated 14.06.2017 can be held as a valid demand notice as provided in Section 13 (2) of SARFAESI Act, 2002?and;

ii) If the demand notice is defective, whether the defect is curable?

11. Section 13 (1) and (2) of the SARFAESI Act, 2002, reads as follows:

13. Enforcement of security interest.

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from

the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

[Provided that

(i) the requirement of classification of secured debt as non-performing asset under this sub section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee;]

12. The Hon'ble Supreme Court, in the case of Mathew Varghese Vs. M. Amritha Kumar (supra) and in many other decisions has held that enforcement of the provisions of SARFAESI Act, should be in strict conformity with the provisions of the Act. While dealing with Section 13 (1) of the Act, in Mathew Varghese, it has been held that free hand is given to the secured creditor for the purpose of enforcing any security interest created in favour of secured creditor, without the intervention of the Court or Tribunal. The only other relevant aspect contained in the sub-section is that such conferment should be in accordance with the provisions of the Act. A reading of Section 13 (1), therefore, is clear to the effect that while on the one hand any secured creditor may be entitled to enforce the secured asset created in its favour on its own without resorting to any Court proceedings or approaching the Tribunal, such enforcement should be in conformity with the other provisions of the SARFAESI Act.

13. Section 13 (2) empowers the ' secured creditor ' to issue a demand notice. There is no dispute that the petitioner herein is the borrower from ' L & T Housing Finance Ltd '.It need not be over emphasized that ' L & T Housing Finance Ltd ' is the secured creditor. It is an admitted fact that ' L & T Housing Finance Ltd ' and ' L & T Finance Ltd ' are two separate and distinct entities. This is evident from the reply notice dated 01.09.2017 issued by the first respondent, through its Advocates and Legal Consultants. It is specifically stated, " it is not addressed to our clients who has issued the said notice dated 14/06/2017 to your clients from whom the advances were availed but is addressed to another corporate body purposely at another address with malafide intention for the reason best known to your clients ".

14. With that admitted position, we now proceed to see whether, by way of a clarification issued in the reply dated 01.09.2017, whether the demand notice can be construed as a notice issued by L & T Housing Finance Ltd ' and whether the defect found in the demand notice can be construed to have been cured.

15. As noted earlier, the provisions of the Act are required to be construed strictly. On the face of the records, it is clear that the demand notice was issued by ' L & T Finance Ltd ' and signed by its authorized signatory. The contention of the first respondent is that the petitioner herein did not raise any objection in the reply notice dated 08.08.2017 as regards the proper secured creditor.It is the contention of the first respondent that

since no such objection was raised by the petitioner, it has to be construed that the petitioner has waived or acquiesced the objection by way of its conduct. It is also contended that the petitioner having waived or acquiesced, cannot be allowed to raise an objection at a later stage.

16. In the case of Kanwar Singh Saini Vs. High Court of Delhi reported in 2012 4 SCC 307, the Apex Court has held that there can be no dispute regarding the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes order/decreed having no jurisdiction over the matter, it would amount to nullity as the matter goes to the root of the cause. Such an issue can be raised at any belated stage of the proceedings including in appeal or execution. Acquiescence of a party should equally not be permitted to defeat the legislative animation. The court cannot derive jurisdiction apart from the statute.

If that is the position in matters of statutory jurisdiction, we are of the opinion that in matters of contract where there is a defect which goes to the root of the matter, then such a defect can never be presumed to have been condoned, but such condonation should be by express consent. The well settled principles that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner, applies forcefully in this matter, having regard to the fact that Section 13 (2) of the Act would empower only the secured creditor to initiate action against the borrower.

17. We are of the opinion that the defect in the demand notice dated 14.06.2017 goes to the root of the matter. We uphold the contention of the petitioner that as on date there is no valid demand notice issued by the secured creditor i.e., L & T Housing Finance Ltd '. We also hold that the petitioner is legally entitled to raise the issue of locus, de hors such issue not being raised in the reply notice issued by the petitioner to the demand notice dated 14.06.2017. Another reason for holding so is that it is possible that the petitioner did not notice the defect in name of the entity closely, moreso, because of the similarity in the two names, and once the same was noticed, the petitioner proceeded to contest the issue on the grounds stated above. The argument of the first respondent that no apparent prejudice is caused to the petitioner, cannot be countenanced for the reason that the demand notice being invalid, having not been issued by the secured creditor, a demand made by a person or legal entity who is not the secured creditor is definitely prejudicial to the interest of the petitioner.

18. The decisions relied upon by the learned Senior Counsel for the first respondent are matters where there were either typographical errors or short notice and therefore it was held that such errors could be rectified and the same would not vitiate the entire proceedings. Those decisions will not come to the rescue of the first respondent.

19. For the reasons stated above, we proceed to pass the following:

ORDER

The petition is allowed. The impugned order dated 16.04.2019 passed by the Debt Recovery Appellate Tribunal, Chennai, in R.A (SA) No. 108/2018 is hereby set aside. Consequently, the order dated 23.03.2018 passed by the Debt Recovery Tribunal- 1, Bengaluru in S.A.No.76/2018 is upheld and the demand notice dated 14.06.2017 and possession notices dated 09.11.2017 and 10.11.2017 are quashed and set aside.