

ORISSA HIGH COURT, CUTTACK.

W.P.(C) Nos.6913 of 2008 and 7328 of 2008,
and
W.P. (C) Nos.10804 of 2012, 16174 of 2012 and 17269 of 2012

Applications under Articles 226 and 227 of the Constitution of India.

In W.P. (C) No.6913 of 2008

Smt. Manorama Mohanty ... **Petitioner**
Versus
Authorized Officer,
The Urban Co-operative Bank Ltd. and two others. ... **Opp. Parties.**
For Petitioner : M/s. Rakesh Sahu, S. Pattanaik and P.K. Sahoo
For Opp. Parties : M/s. S.C.Panda, M.K. Majumdar, R. Das Nayak, G.C. Nath, A.K. Swain and D.K. Nayak.

In W.P. (C) No.7328 of 2008

Chittaranjan Bhuyan ... **Petitioner**
Versus
The Urban Co-operative Bank Ltd., Cuttack and another ... **Opp. Parties.**
For Petitioner : M/s. B. Rout and R. Mishra.
For Opp. Parties : M/s. Sanjit Mohanty
M/s. Sudarsan Nanda and R.R. Swain.

In W.P. (C) No.10804 of 2012

Shri Pravat Bhusan Kanungo ... **Petitioner**
Versus
Urban Co-operative Bank Ltd. and two others ... **Opp. Parties.**
For Petitioner : Mr. S.K. Sangneria.
For Opp. Parties : Dr. A.K.Rath, A.K.Nath & H.Mohanty (for O.P.1).

In W.P. (C) No.16174 of 2012

Smt. Bharati Dhuper ... **Petitioner**
Versus
The Branch Manager,
Urban Co-operative Bank Ltd. and three others ... **Opp. Parties.**

For Petitioner : MR. Manoj Kumar Rajguru.

For Opp. Parties : Dr. A.K. Rath.

In W.P. (C) No.17269 of 2012

Sri Gyanendra Nath Das		...	Petitioner
	Versus		
State of Odisha and two others		...	Opp. Parties.

For Petitioner : M/s. Sidhartha Das, P.R. Singh, S.K. Mishra
and D. Rout.

For Opp. Parties : Mr. Sudarsan Nanda (for O.P. 2).

PRESENT :

THE HONOURABLE MR. JUSTICE M.M. DAS

AND

THE HONOURABLE MR. JUSTICE C.R. DASH

-
Date of Judgment : 21.12.2012

-

C.R. Dash, J. Section 13(1) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act' for short) authorizes a secured creditor to enforce a security interest, without the intervention of the Court or Tribunal, in accordance with the provisions of the said Act. Whether the Co-operative Bank can invoke provisions of the said SARFAESI Act to enforce a security interest is the common question that is involved in all the above writ applications. In view of such fact, these writ applications are disposed of by this common judgment.

2. **In W.P.(C) No.6913 of 2008**, the Urban Co-operative Bank Ltd., Tinikonia Bagicha, Cuttack has issued Demand Notice under Section

13(2) of the SARFAESI Act demanding from the petitioner Rs.24,78,399/- (twenty-four lakhs seventy-eight thousand three hundred and ninety-nine) along with accrued interest as on 31.10.2008.

In W.P.(C) No.7328 of 2008, the Urban Co-operative Bank Ltd., Tinikonia Bagicha, Cuttack has issued Demand Notice under Section 13(4) of the SARFAESI Act against the petitioner demanding payment of Rs.4,41,312/- (four lakhs forty-one thousand three hundred and twelve).

In W.P.(C) No.10804 of 2012, the Urban Co-operative Bank Ltd., Tinikonia Bagicha, Buxi Bazar, Cuttack has issued Notice dated 12.04.2012 under Section 13(2) of the SARFAESI Act demanding repayment of Rs.59,48,316/- (fifty-nine lakhs forty-eight thousand three hundred and sixteen) towards principal and Rs.27,28,014/- (twenty-seven lakhs twenty-eight thousand and fourteen only) towards accrued interest.

In W.P.(C) No.16174 of 2012, the Urban Co-operative Bank Ltd., Jagatpur Branch, Cuttack has issued Notice dated 15.03.2012 under Section 13(4) of the SARFAESI Act demanding Rs.4,87,036/- (four lakhs eighty-seven thousand and thirty-six only) towards principal and Rs.35,95,811/- (thirty-five lakhs ninety-five thousand eight hundred and eleven) towards accrued interest.

In W.P.(C) No.17269 of 2012, the Urban Co-operative Bank Ltd., Link Road Branch, Arunodaya Market, Cuttack has issued Notice under Section 13(2) of the SARFAESI Act demanding Rs.11,46,311/- (eleven lakhs forty-six thousand three hundred and eleven) from the petitioner.

The petitioners in all the writ petitions at the time of securing the loan had mortgaged immovable properties and the opposite parties- Bank now has initiated appropriate action under the SARFAESI Act to

enforce the security interest as against the petitioners for realization of the loan not repaid by them.

3. The petitioners in all the aforesaid writ petitions have assailed the action of the opposite party – Co-operative Banks on the ground that the Co-operative Banks cannot invoke the provisions of SARFAESI Act to enforce the security interest.

Learned counsels for the petitioners in all the writ petitions relied on the case of **Greater Bombay Co-operative Bank Ltd. vs. M/s. United Yarn Tex. Pvt. Ltd. & Ors.**, A.I.R. 2007 SC 1584, to substantiate their contentions.

In W.P.(C) No.10804 of 2012, it is further submitted that arbitration proceeding under Sections 68 and 70 of the Orissa Co-operative Societies Act, 1962 ('OCS Act' for short), vide Dispute Case No.62 of 2009 is pending before the Arbitrator-cum-Assistant Registrar, Co-operative Societies, City Circle, Cuttack, in respect of the demanded sum and when such arbitration proceeding is pending adjudication, no proceeding under the provisions of SARFAESI Act is maintainable in as much as in view of Section 35 of the SARFAESI Act, the said Act cannot over-ride a proceeding for arbitration continuing under Sections 68 and 70 of the OCS Act.

Mr. R.K. Sahu, learned counsel appearing for the petitioner in W.P.(C) No.6913 of 2008 submits that because the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDB Act" for short) have not been made applicable to the Co-operative Banks [see **Greater Bombay Co-operative Bank Ltd.** (supra)], the provisions of the SARFAESI Act also cannot apply, since the same are not complementary or in addition to the provisions contained in the OCS Act.

4. Learned counsels appearing for the opposite parties-Bank on the other hand submit that Co-operative Bank having been included within the definition of 'Bank' occurring in Section 2(1)(c) of the SARFAESI Act as per Central Government's Notification dated 28.01.2003 by the Ministry of Finance and Company Affairs published in the Gazette of India (Extraordinary), the Co-operative Bank can take action under the SARFAESI Act to enforce security interest and to recover the loan. They relied on the case of **Greater Bombay Co-operative Bank Ltd.** (supra), **Hafiz Zakir Hussain vs. Akola Janta Commercial Co-operative Bank Ltd.**, 2009 (1) Bank CLR 230 (MP) and A.I.R. 2008 Madhya Pradesh 193, **M/s. Rama Steel Industries and others vs. Union of India and another**, 2008 (2) Bank CLR 658 (Bom), and **A.P. Varghese and etc. etc. vs. The Kerala State Co-operative Bank Ltd. and others**, 2008 (2) Bank CLR 587 (Ker) to substantiate their contentions.

5. From the aforesaid rival submissions raised at the Bar, it is clear that the pivotal question that emerges for adjudication is whether the Co-operative Banks here in these writ petitions are entitled to take action under the SARFAESI Act against the petitioners herein to enforce the security interest as created by the petitioners while taking loan.

Submission of Mr. Sanganerla, Mr. R.K. Sahoo and other counsels appearing for the petitioners in the writ petitions is that, if the principles laid down in **Greater Bombay Co-operative Bank Ltd.** (supra) are properly understood and appreciated, there cannot be any doubt that Co-operative Bank being not a "**Banking Company**" cannot take recourse to the provisions enacted in the SARFAESI Act.

Learned counsel for the petitioners relies heavily on paragraphs- 88 and 89 of the decision rendered in **Greater Bombay Co-operative Bank Ltd.** (supra).

6. Paragraphs- 88 and 89 of the decision rendered in **Greater Bombay Co-operative Bank Ltd.** (supra) is quoted below for ready reference.

“88. For the reasons stated above and adopting pervasive and meaningful interpretation of the provisions of the relevant Statutes and Entries 43, 44 and 45 of List I and Entry 32 of List II of the Seventh Schedule of the Constitution, we answer the Reference as under:-

“Co-operative banks” established under the Maharashtra Co-operative Societies Act, 1960 [MCS Act, 1960]; the Andhra Pradesh Co-operative Societies Act, 1964 [APCS Act, 1964]; and the Multi-State Co-operative Societies Act, 2002 [MSCS Act, 2002] transacting the business of banking, do not fall within the meaning of “**banking company**” as defined in Section 5 (c) of the Banking Regulation Act, 1949 [BR Act]. Therefore, the provision of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 [RDB Act] by invoking the Doctrine of Incorporation are not applicable to the recovery of dues by the co-operatives from their members.

89. The field of co-operative societies cannot be said to have been covered by the Central Legislation by reference to Entry 45, List I of the Seventh Schedule of the Constitution. Co-operative Banks constituted under the Co-operative Societies Acts enacted by the respective States would be covered by co-operative societies by Entry 32 of List II of Seventh Schedule of the Constitution of India.”

7. From the aforesaid decision in **Greater Bombay Co-operative Bank Ltd.** (supra), it is clear beyond doubt that the Co-operative Bank being not a “Banking Company”, it cannot recover its debts or dues by taking recourse to the RDB Act. It is also clear from the decision that Co-operative Societies is not a “Banking Company” within the definition clause

and the scheme of RDB Act. The basis of the matter is therefore, whether the aforesaid decision in **Greater Bombay Co-operative Bank Ltd.** (supra) can be taken aid of by the learned counsel for the petitioners in the writ petitions to build an edifice for the conclusion that the SARFAESI Act is also not applicable. Dr. A.K. Rath and other counsels appearing for the Co-operative Banks in different writ petitions invited our attention to paragraphs-30 and 31 of the decision rendered in **Greater Bombay Co-operative Bank Ltd.** (supra) in which Their Lordships were dealing with the SARFAESI Act. For proper appreciation, we feel persuaded to reproduce the said paragraphs for better appreciation.

“30. The Parliament had enacted the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [‘the Securitisation Act’] which shall be deemed to have come into force on 21st day of June, 2002. In Section 2(d) of the Securitisation Act same meaning is given to the words ‘banking company’ as is assigned to it in clause (e) of Section 5 of the BR Act. Again the definition of ‘banking company’ was lifted from the BR Act but while defining ‘bank’, Parliament gave five meaning to it under Section 2(c) and one of which is ‘banking company’. The Central Government is authorized by Section 2(c)(v) of the Act to specify any other bank for the purpose of the Act. In exercise of this power, the Central Government by Notification dated 28.01.2003, has specified “co-operative bank” as defined in Section 5 (cci) of the BR Act as a “bank” by lifting the definition of ‘co-operative bank’ and ‘primary co-operative bank’ respectively from Section 56, Clauses 5 (cci) and (ccv) of Part V. The Parliament has thus consistently made the meaning of ‘banking company’ clear beyond doubt to mean ‘a company engaged in banking, and not a co-operative society engaged in banking’ and in Act No.23 of 1965, while amending the BR Act, it did not change the definition in Section 5 (c) or even in 5(d) to include co-operative banks; on the other hand, it added a separate definition of ‘co-

operative bank' in Section 5 (cci) and 'primary co-operative bank' in Section 5 (ccv) of Section 56 of Part V of the BR Act. Parliament while enacting the Securitization Act created a residuary power in Section 2(c)(v) to specify any other bank as a bank for the purpose of that Act and in fact did specify 'co-operative banks' by Notification dated 28.01.2003. The context of the interpretation clause plainly excludes the effect of a reference to banking company being construed as reference to a co-operative bank for three reasons: firstly, Section 5 is an interpretation clause; secondly, substitution of 'co-operative bank' for 'banking company' in the definition in Section 5 (c) would result in an absurdity because then Section 5 (c) would read thus: "co-operative bank" means any company, which transacts the business of banking in India; thirdly, Section 56 (c) does define "co-operative bank" separately by expressly deleting/inserting clause (cci) in Section 5. The Parliament in its wisdom had not altered or modified the definition of 'banking company' in Section 5 (c) of the BR Act by Act No.23 of 1965.

“31. As noticed above, “Co-operative bank” was separately defined by the newly inserted clause (cci) and “primary co-operative bank” was similarly separately defined by clause (ccv). The meaning of ‘banking company’ must, therefore, necessarily be strictly confined to the words used in Section 5(c) of the BR Act. If the intention of the Parliament was to define the ‘co-operative bank’ as ‘banking company’, it would have been the easiest way for the Parliament to say that ‘banking company’ shall mean ‘banking company’ as defined in Section 5(c) and shall include ‘co-operative bank’ and ‘primary co-operative bank’ as inserted in clauses (cci) and (ccv) in Section 5 of the Act 23 of 1965.”

8. Submission of Dr. A.K. Rath and other counsels appearing for the opposite parties-Co-operative Bank is that both the aforesaid paragraphs in fact support the contention of the opposite parties-Bank.

From the decision of Hon'ble Supreme Court in **Greater Bombay Co-operative Bank Ltd.** (supra) vis-à-vis the submissions advanced by learned counsel for the petitioners it is clear that learned counsel for the petitioners are confused on the following points :

(i) They are missing the point that the decision in **Greater Bombay Co-operative Bank Ltd.** (supra) is about the availability of remedy under the RDB Act to the Co-operative Banks covered under the State Co-operative Societies Act. In other words Hon'ble Apex Court in the aforesaid case was dealing with the question whether debts due to the co-operative banks constituted under the Co-operative Societies Act of the Maharashtra and Andhra Pradesh could be covered under the provisions of the RDB Act.

(ii) They are confused about the terms "Bank" and "Banking Company" as defined separately in Clause (c) and (d) of Section 2(1) of the SARFAESI Act and Clause (d) and (e) of Section 2 of the RDB Act.

9. The definitions of "Bank" and "Banking Company" separately in Clauses (c) and (d) of Section 2(1) of the SARFAESI Act and Clauses (d) and (e) of Section 2 of the RDB Act show that the law does not require that every bank has to be a banking company though every banking company may be a bank.

10. The definitions of "Bank" and "Banking Company" in Clauses (c) and (d) of Section 2(1) of the SARFAESI Act as reproduced below for ready reference would bring out the clear distinction between the meaning of the terms "Bank" and "Banking Company".

"(c)" "bank" means –

- (i) a Banking Company; or
- (ii) corresponding new Bank; or
- (iii) the State Bank of India; or
- (iv) a subsidiary Bank; or

(v) such other Bank which the Central Government may, by notification, specify for the purposes of this Act.”

(d) “banking company” shall have the meaning assigned to it in Clause (c) of Section 5 of the Banking Regulation Act, 1949 (10 of 1949).”

11. Section 5 of the Banking Regulation Act, 1949 (“BR Act” for short) does not define a “Bank”. The aforesaid BR Act defines ‘banking company’ in Clause (c) of Section 5. However, Co-operative Bank has been separately defined in Clause (cci) of Section 5, which has been inserted by enacting Section 56 of the BR Act.

12. Chapter-III of the Securitization Act provides for enforcement of security interest by a secured creditor. The term “secured creditor” is wider than a “bank” or a “banking company” or a “financial institution”. Clause (zd) of Section 5 of the SARFAESI Act defines “secured creditor”. This clause refers to a “Bank” but not to a “Banking Company”. The contention of the learned counsels for the petitioners regarding the applicability of the decision of Hon’ble Supreme Court in **Greater Bombay Co-operative Bank Ltd.** (supra) which deals with the applicability of RDB Act to Co-operative Bank is based on a misconception relating to scope of expressions “Bank” and “Banking Company” in the SARFAESI Act. Clause (v) of Section 2(1) of SARFAESI Act as found from the provision quoted (supra) empowers the Central Government by notification to specify any other bank for the purpose of the Act. Thus, power has been conferred on the Central Government in the SARFAESI Act for including any other bank within the definition by issuing a notification and the Central Government has issued a notification and included Co-operative Bank for the purpose of the said Act. In paragraph- 31 of the decision in **Greater Bombay Co-**

operative Bank Ltd. (supra) the discussion by Hon'ble Apex Court makes it clear that the Parliament has not intended to define Co-operative Bank as Banking Company. Such a view in paragraph- 31 in the aforesaid decision supports the contention of the opposite parties-Bank that Co-operative Banks are not Banking Companies and they having been brought under the purview of the SARFAESI Act by the Central Government's Notification dated 28.1.2003 published by the Ministry of Finance and Company Affairs in the Gazette of India (Extraordinary) in exercise of power conferred under Section 2(1)(v) of the SARFAESI Act, the Co-operative bank can enforce security interest created in favour of the bank by the loanee under Section 13 of the SARFAESI Act. In our view on this aspect we are supported by Madhya Pradesh High Court, Bombay High Court and Kerala High Court in their decisions rendered in the case of Hafiz Zakir Hussain, Rama Steel Industries and A.P. Verghese respectively (supra).

13. The contention raised by Mr. Sangneria to the effect that in view of pendency of Arbitration Proceeding under Section 68 of the O.C.S. Act, no proceeding under the SERFAESI Act is competent and contention of Mr. R.K. Sahu, learned counsel appearing for the petitioner in W.P.(C) No.6913 of 2008 to the effect that Co-operative Bank cannot invoke the provisions of the SERFAESI Act, as provisions of the R.D.B. Act have not been made applicable for recovery of the debts of the Co-operative Banks may be addressed together, as both the questions are almost similar. The basis of argument by both Mr. Sangneria and Mr. Sahu is to the effect that as the provisions of the R.D.B. Act have not been made applicable to the Co-operative Bank, the provisions of the SERFAESI Act also cannot be applied, since the same are not complementary or in addition to the provisions contained in the O.C.S. Act. It is beneficial to observe here that SERFAESI Act is an independent enactment providing remedy to a group of

creditors (defined as “secured creditors” in Clause (zd) of Section 5 of the SERFAESI Act. The provisions of the said Act authorize a secured creditor to enforce the security interest, without the intervention of the Court or Tribunal in accordance with the provisions of the said Act. A creditor seeking recovery under the provisions of the R.D.B. Act on the other hand need not necessarily have a secured interest on the basis of which he can claim realization of the debt while under the SERFAESI Act he is competent to claim liquidation of debt on the basis of the secured assets. In view of such fact, the scheme of the SERFAESI Act cannot be narrowed down or limited by taking aid of the R.D.B. Act.

14. There is distinction in the expression used in Section 37 of the SERFAESI Act and Sub-section (2) of Section 34 of the R.D.B. Act. The Sections may be usefully reproduced for ready reference as hereunder :-

“Section 37 of the SERFAESI Act : 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.”

“Sub-section (2) of Section 34 of the RDB Act : The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948, the State Financial Corporations Act, 1951, the Unit Trust of India Act, 1963, the Industrial Reconstruction Bank of India Act, 1984 [the Sick Industrial Companies (Special Provisions) Act, 1985 and the Small Industries Development Bank of India Act, 1989].”

15. It may be seen from the above provisions that the expression “or any other law for the time being in force” appearing in Section 37 of the SERFAESI Act is missing in Section 34 of the R.D.B. Act. This is crucial, because it would show that the remedy provided is an addition to the remedy under any other law for the time being in force, which includes the remedy available under the Orissa Co-operative Societies Act. We are therefore of the considered view that pendency of the Dispute Case under Sections 68 and 70 of the O.C.S. Act does not debar the Co-operative Bank from invoking the provisions of the SERFAESI Act to enforce security interest for liquidation of loan not repaid.

16. In view of the above, we do not find any merit in the writ petitions, and all the writ petitions are accordingly dismissed.

.....
C.R. Dash, J.

M.M. Das, J. I agree.

.....
M.M. Das, J.

Orissa High Court, Cuttack.
The 21st day of December, 2012. /S.K.Parida / A.K.Dhal