

(2014) 04 KL CK 0006
In the High Court Of Kerala
Case No : W.P. (C) No. 2372 of 2013

Bobby Sebastian

APPELLANT

Vs

Authorised Officer

RESPONDENT

Date of Decision : 11-04-2014

Acts Referred:

Income Tax Act, 1961 — Section 156
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 2(a), 2(zd)

Citation : AIR 2014 Ker 139 : (2015) 1 BC 60 : (2014) 2 KHC 482 : (2014) 2
KLJ 875 : (2014) 2 KLT 837

Hon'ble Judges : A.V. Ramakrishna Pillai, J

Bench : Single Bench

Advocate : Praveen K. Joy, Advocate for the Appellant; Lal K. Joseph, A.A. Ziyad
Rahman, V.S. Shiraz Bava and K.K.M. Sherif, Advocate for the Respondent

Final Decision : Allowed

Judgement

A.V. Ramakrishna Pillai, J.—The competency of Ext. P1 notice is under challenge in this Writ Petition. The 1st and 2nd petitioners are the borrowers in a loan transaction. They got a housing loan of Rs. 1,00,00,000/- from the respondent bank mortgaging an apartment owned by them. The petitioners allege that they have remitted nearly Rs. 76,00,000/- in repayment and; even after the aforesaid payment, the respondent bank was threatening that huge amounts are due from them. Though the petitioners disputed the amount, the respondent bank caused Ext. P1 lawyer's notice to be issued on the petitioners under the SARFAESI Act, hereinafter referred to as "the Act". The petitioners allege that a lawyer is not competent to issue such a notice as he is not an authorized officer of the respondent bank. Thus, the petitioners have approached this Court.

2. Arguments have been heard.

3. While the learned counsel for the petitioners would argue that the lawyer, who issued the notice on the petitioners, is not an authorized officer within the

meaning of S. 2(a) of the Security Interest Rules, 2002, the learned counsel for the respondent bank would contend that Ext. P1 notice is legally competent.

4. Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 deals with the enforcement of security interest. Sub-section (2) of S. 13 reads as follows:

(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).

5. Rule 2(b) of the Security Interest (Enforcement) Rules, 2002 defines "demand notice" as follows:

(b) demand notice means the notice in writing issued by a secured creditor or authorised officer, as the case may be, to any borrower pursuant to sub-section (2) of section 13 of the Act.

Therefore, a notice to be valid and effective in law ought to be issued by a secured creditor or an authorised officer.

6. In the instant case, the notice was issued by the counsel representing the respondent bank. Now, the question is, if such a notice is issued by the counsel representing the bank (secured creditor), can it be repudiated, branding it as one issued in contravention of the letter and spirit of the provisions of the Act and Rules?

7. The learned counsel for the respondent bank would submit that the notice issued by the counsel representing the bank is a notice of demand, which constitutes an action, thereby providing for an opportunity to the borrower to make a representation to the secured creditor and therefore, it is legally competent.

8. The learned counsel for the petitioner, per contra, would submit that as the statute and rules made thereunder specify a particular mode, the same has to be complied with, especially, because, it involves the taking away of the property belonging to the borrower. S. 13(2) of the Act makes it clear how the right of a secured creditor has to be enforced, which has to be by a notice. R. 2(b) makes it clear that it has to be by the secured creditor or its authorised officer.

9. Section 2(zd) of the Act defines "secured creditor" as follows;

(zd) "secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes-

(i) debenture trustee appointed by any bank or financial institution; or

(ii) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be; or

(iii) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance;

10. Rule 2(a) defines "authorised officer" as follows:

(a) "authorised officer" means an officer not less than a chief manager of a public sector bank or equivalent, as specified by the Board of Directors or Board of Trustees of the secured creditor or any other person or authority exercising powers of superintendence, direction and control of the business or affairs of the secured creditor, as the case may be, to exercise the rights of a secured creditor under the Act.

11. The Calcutta High Court in *Asset Reconstruction Company India Ltd. Vs. Amit Ventures Private Ltd. and Others*, , which considered a similar situation, observed that a notice of demand under S. 13(2) of the Act, issued by a solicitor on the instruction of the secured creditor, is valid. A similar view was expressed by the Rajasthan High Court in *Kailash Chandra Sharma Vs. ICICI Bank Limited and Others*, following the decision of the Calcutta High Court. However, the Apex Court in *Transcore Vs. Union of India (UOI) and Another*, has observed that a notice under S. 13(2) is not a mere show cause notice, but, it is similar to a demand notice under S. 156 of the Income Tax Act. I would regretfully, but, most respectfully, note that neither the decision of the Calcutta High Court nor the decision of the Rajasthan High Court deals with the proposition of R. 2(a), which defines "authorised officer". On a plain reading of R. 2(a) and 2(b), it can be seen that only an officer of the bank, as specified by the Board of Directors, can issue a notice of demand under S. 13(2) of the Act as contemplated under R. 2(b) of the Security Interest Rules, 2002. I, therefore, respectfully disagree with the views rendered by the High Courts of Calcutta and Rajasthan.

In the result, the Writ Petition is allowed.

Ext. P1 notice is set aside.

This judgment, however, will not preclude the respondent bank from taking action in accordance with the provisions of the Securitisation Act.