

(2008) 02 CAL CK 0051

In the Calcutta High Court

Case No : G.A. No. 1190 of 2007 and W.P. No. 256 of 2004

Core Ceramics Ltd. and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-02-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 20
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 1, 13, 13(2), 13(3A), 13(4)

Citation : AIR 2008 Cal 88

Hon'ble Judges : Soumitra Pal, J

Bench : Single Bench

Advocate : Samit Talukdar, I.P. Mukherjee and D. Banerji, for the Appellant;
Jishnu Chowdhury and K. Sen, for the Respondent

Final Decision : Dismissed

Judgement

Soumitra Pal, J.—In the writ petition the petitioner has prayed for a declaration that the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "Act") is arbitrary and ultra vires the Constitution of India and has challenged the notice under the Act issued by the Punjab National Bank ("Bank" for short) on several grounds. The matter was moved on 19th February, 2004 when order was passed directing the parties to maintain status quo till 25th February, 2004. Thereafter, interim order was extended. On 25th February, 2004 directions were issued for filing of affidavits. Interim order, already granted was directed to continue until further orders. Affidavits have since been exchanged.

2. It is to be noted that during the pendency of the writ petition, petitions were moved before the Apex Court challenging the validity of the Act. The Supreme Court in the judgment of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., had upheld the validity of the Act and its provisions except Sub-section (2) of Section 17 of the Act which was declared ultra vires Article 14 of

the Constitution of India. Therefore, the challenge to the said Act fails. However, the learned senior advocate for the petitioner submitted that the writ petition is still maintainable since the notice does not fulfil the conditions precedent u/s 13(2) for invoking the provisions of the Act. In the instant case the notice dated 3rd November, 2003 issued under the Act is vague as it neither gives the details nor does it comply with the requirements under the Act. Though intricate questions of fact cannot be gone into in the writ jurisdiction, however, since the drawal was within the sanctioned limits and the account credited was much more than the interest debited there was no question of the account becoming non-performing asset (for short "NPA") and, thus, there was lack of jurisdiction on the part of the bank in issuing the notice impugned. Argument was fast track concept does not mean that it should be dehors the provisions of law. Though the bank was under a legal obligation to classify the asset as NPA, the notice under challenge does not disclose the basis of such declaration as in that event the asset should have been "out of order". Unless classification is done in accordance with the Reserve Bank of India (for short "RBI") guidelines, the writ Court has the jurisdiction to intervene as there is no provision for preferring appeal against the decision making process and the decision. In such an event, the question of adhering to the alternative remedy under the Act does not arise. The learned advocate for the petitioner had relied on the following decisions of the Supreme Court:

- 1) Chaube Jagdish Prasad and Another Vs. Ganga Prasad Chaturvedi,
- 2) Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others,
- 3) Board of Technical Education, U.P. and others Vs. Dhanwantri Kumar and others,
- 4) Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others,
- 5) Syed Dastagir Vs. T.R. Gopalakrishnasetty,
- 6) Food Corporation of India v. State of Punjab reported in (2001) 1 SCC 291 : AIR 2001 SC 250.
- 7) Commissioner of Central Excise, Bangalore Vs. Brindavan Beverages (P) Ltd. and Others,
- 8) Transcore Vs. Union of India (UOI) and Another,
- 9) ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others,
- 10) Sri-La-Sri Subramania Desika Gnanasambanda Pandarasannadhi Vs. State of Madras and Another,
- 11) State of Orissa Vs. Dr. (Miss) Binapani Dei and Others,
- 12) Srikant Kashinath Jituri and others Vs. Corporation of the City of Belgaum,

13) In the Matter of the Appropriate Authority and Another Vs. Smt. Sudha Patil and Another,

3. Learned Counsel for the bank submitted that interpretation of the provisions should be made taking into account the object of the Act. Since the petitioners were chronic defaulters, notice u/s 13(2) was issued. However, save and except Nupur Sharma, the guarantor, other petitioners chose not to challenge the notice. The property in question, solely financed by the bank, was mortgaged by deposit of title deeds. Though in the writ petition it has been stated that RBI guidelines are vague and uncontrolled, yet during submissions said guidelines have been relied on. Referring to the statement of accounts annexed to the affidavit in reply affirmed on 15th May, 2007 submission was made that as the asset had become NPA, interest was charged. Moreover, submissions were contrary to the averments in the petition since in the reply dated 31st December, 2003 to the notice it was admitted by the petitioner that 50 per cent of the amount was outstanding. Accordingly, the writ petition is without merit. The argument that the notice dated 3rd November, 2003 is vague as it is bereft of details, is not tenable as the petitioner had understood the purport and had replied. Since the petitioner had represented or objected by letter dated 31st December, 2003 to the notice, the bank is ready to consider the written objection in accordance with the provisions of the Act and The Security Interest (Enforcement) Rules, 2002. Learned advocate on behalf of the bank had relied on the following judgments in support of his submission:

- 1) Nihar Ranjan Bhattacharjee v. Union of India reported in AIR 2007 Gauhati 132.
- 2) Smt. Mamoni Choudhury and Another Vs. Pradip Kr. Choudhury and Others,
- 3) Punjab National Bank Vs. O.C. Krishnan and Others,
- 4) Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.,
- 5) Transcore Vs. Union of India (UOI) and Another,
- 6) Bharat Bhari Udyog Nigam v. Jessop and do. Ltd. reported in (2003) 4 C LJ 333 (Cal).
- 7) D. Ravichandran Vs. The Manager, Indian Overseas Bank, Idigarai Branch and The Authorised Officer, Indian Overseas Bank, Idigarai Branch,
- 8) A. Venkatramani Vs. LIC Housing Finance Limited,
- 9) Sushil Kumar Agarwalla v. State of Assam reported in (2006) 134 CompCas 14 (Gau).
- 10) Barak Valley Tea Co. v. Union of India reported in (2006) 133 CompCas 937 (Gau).
- 11) Pooran Lal Arya v. State of Uttaranchal reported in (2006) 133 Comp Cas 348 : 2005 CLC 1314 (Utt).

12) Digvision Electronics Ltd. v. Indian Bank reported in (2005) 126 Comp Cas 630 : 2005 CLC 978 (Mad).

13) Paramjit Lal Badhwar v. Prem Spinning and Weaving Mills Co. Ltd. reported in (1986) 60 Comp Cas 420 : 1983 Tax LR 2506 .

14) Noorbari Tea Co. P. Ltd. v. UCO Bank reported in (2007) 139 Comp Cas 395 : AIR 2007 SC 135 (Gau).

4. The issue to be decided whether the bank had correctly applied the norms laid down by the RBI in holding that the asset had become non-performing. If not, whether bank had jurisdiction to issue notice under the Act.

5. In order to appreciate the points canvassed and issues raised, it is necessary to refer to and deal with Section 2(1)(o), Sub-section (2), (3), (3A), (4) and Sub-sections (1), (2), (3) and (4) of Section 17 of the Act.

Section 2(1)(o) is as follows:

2. Definitions-

(o) "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset.-

(a) in case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body.

(b) in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank:

The relevant portion of Section 13 is as under:

13. Enforcement of Security Interest.

(1) ...

(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 instalment 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).

(3) The notice referred to in Sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(3A) If on receipt of the notice under Sub-section (2). the borrower makes any

representation or raises any objection, the setation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal u/s 17 of the Court of District Judge under Section

(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 realising 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 realising 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.

6. I find in order to issue notice u/s 13(2) two conditions require to be fulfilled. First, a borrower under a liability to a secured creditor under a security agreement should be in default in repayment of secured debt. Second, as a consequence his account in respect of such debt is classified as non-performing asset or stressed asset. If these two conditions are satisfied the secured creditor is at liberty to issue notice under the sub-section and, in that event, it is for the borrower to discharge his liabilities within sixty days from the date of such notice. That the fulfilment of conditions is mandatory as qualified by the word "then" appearing in the sub-section. The question is how classification of "such debt" as non-performing asset is to be carried out. The answer is in Section 2(o) wherein it has been postulated it should be either in accordance with the

directions or guidelines relating to asset classifications issued by such authority or body or "in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank". Therefore, undisputedly the secured creditor has been empowered to classify such debt as non-performing assets. The authority of the secured creditor cannot be questioned. The language of the provisions, as referred to, is unambiguous. Subsequently upon receipt of the notice which should contain details of the amount payable, the borrower, if dissatisfied, u/s 13(3A) is entitled to make a representation or raise objection. If representation is filed or objection is raised the secured creditor, if it comes to the conclusion that representation or objection is not acceptable or tenable, shall communicate within one week of the receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower. It is pertinent to note that proviso to Sub-section (3A) to Section 13 lays down that the reasons communicated or the action likely to be taken by the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal (hereinafter referred to as "DRT) u/s 17, or the Court of District Judge u/s 17A. The legislative intent in creating such bar on the borrower from approaching the Tribunal or the District Judge, is to fortify the action of the secured creditor in issuing notice consequent to the classification of assets as non-performing. The action of the secured creditor, at that stage, is taken to be unimpeachable and failure of the borrower to discharge his liability entitles the secured creditor to take recourse to one or any of the "measures" enumerated under Sub-section (4) of Section 13.

7. The question is does the Act provide remedy to a person aggrieved by the measures taken under Sub-section (4) of Section 13 by the secured creditor. Section 17, the relevant portion of which is extracted hereunder, provides the remedy:

17. Right to appeal.--(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 authorised 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.

(Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.)

(Explanation.--For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under Sub-section (1) of Section 17.)

(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 of the secured assets to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in Sub-section (4) of Section 13 taken by the secured creditor as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under Sub-section (4) of Section 13.

(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.

8. Section 17(1) enables "any person including borrower", being aggrieved by measures taken u/s 13(4), to file an application to the DRT within the time prescribed. The bar on the borrower in moving the Tribunal under the proviso to Sub-section 3A of Section 13 stands removed once measures are taken. The question to be decided what is the extent of the jurisdiction of the DRT. Upon an application being filed, the DRT u/s 17(2) shall consider whether any of the "measures" under Sub-section (4) of Section 13 taken by the secured creditor are in accordance with the provisions of the Act and the Rules. Thus DRT is empowered to go into the question whether the action in classifying the debt as non-performing asset is in accordance with the RBI guidelines. Consequently Sub-section (3) of Section 17 confers power on the DRT to examine the facts and circumstances of the case and the evidence produced by the parties. If the DRT upon examination comes to the conclusion that any of the measures taken by the secured creditor are not in accordance with the provisions of the Act and the rules and require restoration of the management of the secured assets or restoration of possession of the secured assets to the borrower, it may by order declare that recourse to any one or more measures referred to in Section 13(4) as invalid and restore possession of the secured assets or the management of the secured assets to the borrower. From a reading of Section 17, particularly Sub-sections (2) and (3), I find that DRT has been conferred with wide powers to

examine facts and circumstances of the case and the evidence produced and whether measures taken u/s 13(4) conform to and in accordance with the provisions of the Act and the rules which includes consideration whether classification of debt as non-performing asset is in accordance with the RBI guidelines. If the measures are found to be invalid u/s 17(3) the DRT has been conferred with the power to nullify a measure taken and order restoration of possession of secured assets to the borrower or restore the management of the secured assets to the borrower. From a reading of Section 17 and its sub-section it is evident that the decision making process u/s 13(2) can be put to test by filing an application u/s 17 after measures are taken u/s 13(4). The legislative intent and purpose is clear. The Act has to be given a schematic interpretation. There is no ambiguity. Any other interpretation shall defeat the very purpose and object of the Act.

9. It is to be noted that in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, the main thrust of argument was that financial institutions have been vested with drastic powers with regard to sale of the property or taking over of the management or the possession of the secured assets without affording any opportunity to the borrower. Argument was the mechanism provided for recovery of the debt u/s 13 does not provide for any adjudicatory forum to resolve any dispute regarding the liability of the borrower. The Apex Court in *Mardia Chemicals* (supra) held that "in the present-day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues." (Paragraph--34). In paragraph 37 of the said judgment repelling the contention that it is on the whims and fancies of the financial institution it was held that the norms of the RBI are the guidelines for classifying the assets as non-performing assets. It was further held "44...Even the guidelines of Reserve Bank of India in relation to classifying NPAs, while stressing the need of expeditious steps in taking a decision for classifying and identification of NPAs says, a system be evolved which should ensure that the doubts in asset classification are settled through specified internal channels (emphasis supplied) within the time specified in the guidelines. It is thus clear that while recommending speedier steps for recovery of the debts it is envisaged by all concerned that within the legal framework, such provisions may be contained which may curtail the delays. Nonetheless, dues or disputes regarding classification of NPAs should be considered and resolved by some internal mechanism. In our view, the above position suggests the safeguards for a borrower, before a secured asset is classified as NPA. If there is any difficulty or any objection pointed out by the borrower by means of some appropriate internal mechanism it must be expeditiously resolved.

45. In the background we have indicated above, we may consider as to what forums or remedies are available to borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under Sub-section (2) of Section 13 of the Act is that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under Sub-section (4) of

Section 13 in case of non-compliance with notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objection raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under Sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under Sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfilment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy...." In paragraph 66 it has been held "....Therefore, wherever public interest to such a large extent is involved and it may become necessary to achieve an object which serves the public purposes, individual rights may have to give way. Public interest has always been considered to be above the private interest. Interest of an individual may, to some extent, be affected but it cannot have the potential of taking over the public interest having an impact on the socio-economic drive of the country.... "However", it was held that "to a very limited extent jurisdiction of the Civil Court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable which may not require any probe whatsoever...." (Paragraph 51). After the judgment in *Mardia Chemicals* (supra), Section 13(3A) was inserted by amending Act of 2004 whereby the borrower is permitted to file representation and/or objection to the secured creditor against classification of his account as NPA. u/s 13(3A) if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable it shall communicate within one week of such receipt of such representation or objection the reasons for such non acceptance of the representation or objection to the borrower.

10. In this context it is pertinent to note that in *Transcore Vs. Union of India* (UOI) and Another, the Supreme Court dealt with the provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the NPA Act held that the "NPA Act proceeds on the basis that the liability of the borrower to repay has crystallised; that the debt has become due and that on account of delay the account of the borrower has become substandard and non-performing. The object of DRT Act as well as the NPA Act is recovery by non-adjudicatory process." It is significant that the Apex Court in *Punjab National Bank Vs. O.C. Krishnan and Others*, while dealing with the issue whether proceeding under Articles 226 and 227 of the Constitution of India was maintainable against an order u/s 20 of the Recovery of Debts Due to Banks and Financial Institutions Act

1993, held that such fast track procedure cannot be derailed by taking recourse to proceedings under Articles 226 and 227 of the Constitution of India.

11. The endeavour in highlighting the provisions contained in Sections 13 and 17, as noted hereinbefore, and the passages in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, and *Transcore Vs. Union of India (UOI) and Another*, is to underscore the authority of the bank conferred by the statute in classifying the account as non-performing asset. However, there must exist a specified internal channel which should settle the doubts in asset classification. After the introduction of Section 13(3A) such internal channel has been given a complete shape. To be precise, under 13(3A) the borrower is given the opportunity to represent or object against the notice u/s 13(2) which is in conformity with the principles of natural justice and fair play.

12. In the instant case I find that the authorities of the bank had issued notice dated 3rd November, 2003 classifying the account as non-performing asset as per RBI guidelines. Whether there is any doubt or question that under the guidelines of the RBI the accounts are non-performing assets or not, is a matter to be settled through the internal specified channels of the bank. Once bank authorities u/s 13(2) classifies the account as non-performing asset and issues notice, as has been done in the instant case, the writ Courts have little or no role to play in deciding such issue. Therefore, since it is clear from a reading of the judgments in *Mardia Chemicals (supra)* and *Transcore (supra)* that Apex Court had approved the concept of greater or complete autonomy of the banks and financial institutions in setting doubts in asset classification and in recovery of their dues without the intervention of the Court or Tribunal and had stressed on the appropriate internal mechanism for speedy resolution of disputes, the law laid down in the judgments in *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, *In the Matter of the Appropriate Authority and Another Vs. Smt. Sudha Patil and Another*, *Chaube Jagdish Prasad and Another Vs. Ganga Prasad Chaturvedi*, *ABL International Limited (supra)*, *State of Orissa Vs. Dr. (Miss) Binapani Dei and Others*, and *Srikant Kashinath Jituri and others Vs. Corporation of the City of Belgaum*,) relied on by the petitioner are not applicable. The argument on behalf of the petitioner that the notice dated 3rd November, 2003 is vague as it does not make a mention of the Section, that is Section 13(2), is not tenable, as it has been stated in the notice impugned that the account has been classified as non performing asset as per RBI guidelines. That the petitioner had understood the purport of the notice dated 3rd November, 2003 is evident from reply , dated 31st December, 2003 and, therefore, challenge to the impugned notice fails. The principles of law laid down in the judgment of the Allahabad High Court relied on, on behalf of the bank in *Paramjit Lal Badhwar 1983 Tax LR 2506 (supra)* are applicable to the facts of the case. The judgments of the Apex Court relied on by the petitioner in *Board of Technical Education, Board of Technical Education, U.P. and others Vs. Dhanwantri Kumar and others*, *Food Corporation of India v. State of Punjab and Ors. AIR 2001 SC 250 (supra)* and *Commissioner of Central Excise, Bangalore v.*

Brindavan Beverage (P) Ltd. and Ors. AIR 2007 SCW 7747 (supra) in this regard are not applicable to the facts of the case.

13. Hence, the writ petition is dismissed. Interim order is vacated.

14. The application being G.A. No. 1190 of 2007 is disposed of. Since, I find the petitioner by letter dated 31st December, 2003 had furnished a representation and/or objection, the authorities of the Punjab National Bank are directed to treat and consider the same as a representation or objection u/s 13(3A) of the Act within a week from the date of presentation of the certified copy of this order.

15. No order as to costs.

16. Urgent xerox certified copy of this order, if applied for, be given to the appearing parties on priority basis.