(2008) 06 JH CK 0055

In the Jharkhand High Court

Case No : Writ Petition (C) No. 231 of 2008

D.N. Motors — APPELLANT

Vs

State Bank of India and Others — RESPONDENT

Date of Decision : 24-06-2008

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(3A), 13(4), 17
Transfer of Property Act, 1882 — Section 69, 69A

Citation : (2008) 56 BLJR 2482 : (2008) 3 JCR 686

Hon'ble Judges : Narendra Nath Tiwari, J

Bench : Single Bench

Advocate : Rajiv Ranjan and K.S. Nanda, for the Appellant; Rajesh Kumar, Amit Kumar and Manindra Kumar Sinha, for the Respondent

Judgement

Narendra Nath Tiwari, J.—The petitioner, in this writ petition, has prayed for quashing the notice dated 23.10.2007 issued u/s 13(2) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 whereby the petitioner has been asked to discharge in full the liabilities to the tune of Rs. 10,78,529/- to the Bank within sixty days from the date of issuance of the notice. The petitioner has also prayed for a direction to dispose of the representation dated 14.12.2007 filed under the provision of Section 13(3-A) of the Act in response to the notice sent to him u/s 13(2) of the said Act.

2. The petitioner deals in motor parts and other accessories and his shop is at Ratu Road, Ranchi. For smooth running of the shop, he had applied for loan from the Respondent-Bank through its Jugsalai Branch. The loan was sanctioned by a letter dated 22.1.2004 to the petitioner whereby cash credit facility was sanctioned to the petitioner up to Rs. 10 lakhs. The said cash credit facility was secured by the securities as also by equitable mortgage of landed property of the value of Rs. 19,97,600/-. The loan was also secured by 3rd party guarantee and it was also stipulated that the advance will be made against hypothecation of all stocks stored in the shop and godown.

3. The petitioner was operating the said account regularly, but after October, 2005 the account became irregular and the required transaction could not be maintained. There was burglar in the shop and for that the petitioner has lodged an F.I.R. The Case was registered in Sukhdeo Nagar Police Station. The petitioner''s shop and articles were also insured for a sum of Rs. 11 lakhs. The petitioner, thereafter, made a claim against the Insurance Company for the loss, but the company disputed the claim and did not pay the insured amount. In the said adverse circumstances, the petitioner could not maintain the account. Though he is ready and willing to make entire payment to the respondents, for that he requires some breathing time. The respondent was well informed about all the said developments in the matter, but in stead of taking sympathetic view, the respondent-Bank has sent a notice dated 23.10.2007 u/s 13(2) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 whereby the petitioner was asked to discharge in full the liabilities to the Bank within 60 days from the date of the notice.

4. The petitioner has filed representation/objection u/s 13(3-A) of the Act and requested to consider the grievance of the petitioner. It has been stated that the representation u/s 13(3-A) of the Act was sent by the petitioner through registered post on 14.12.2007. The petitioner has enclosed a copy of the representation/objection with the photo copy of the postal registration receipt dated 14.12.2007. Before considering the said representation/objection of the petitioner u/s 13(3-A) of the Act, the respondent-bank has issued the notice dated 23.10.2007 purportedly for the contemplated action u/s 13(4) of the Act. It has been stated that the said action of the bank without complying with the provisions of Section 13(3-A) of the Act is highly prejudicial to the borrower-petitioner who has been willing to make payment of the dues. It has been contended that before proceeding under the provisions of Section 13(4) of the said Act the respondent-bank has to record a reason as to why the petitioner''s representation has not been accepted, but no such rejection or reason has been communicated to the petitioner. The Bank cannot proceed u/s 13(4) of the Act by passing the said provision and as such the action of the Bank in publishing the notice u/s 13(4) of the Act is arbitrary, illegal and without jurisdiction.

5. The respondent-bank has contested the writ petition by filing counter affidavit. It has been stated, inter alia, that the notice was issued u/s 13(2) of the said Act, but the Bank did not receive any reply to the same. The Bank has denied to have received any such representation of the petitioner dated 14.12.2007, though the petitioner has claimed that the representation u/s 13(3-A) of the Act was sent through the registered post, but no such registered article was received containing petitioner''s representation. The respondent-bank, in absence of any such representation, has proceeded u/s 13(4) of the Act in accordance with prescribed provisions and there is no arbitrariness or illegality on their part.

6. I have heard learned Counsel for the parties and considered the facts and materials on record. The petitioner has claimed that after receipt of notice u/s

13(2) of the said Act, has sent a representation on 14.12.2007. In support of the said statement, the petitioner has brought on record a copy of the representation as also a xerox copy of the postal receipt which contains the seal of the post office with the address of the respondents and with clear date of 14.12.2007. In view of the said claim of the petitioner that representation/objection was required to be considered and the creditor-bank was required to come to the conclusion as to why the representation/objection is not acceptable or tenable. The said conclusion has also to be communicated within one week after receipt of the said representation/objection. In order to appreciate the provisions, the relevant provisions of Section 13 is reproduced herein below:

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 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 nonpayment 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 secured creditor shall consider such representation 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 or the Court of District Judge u/s 17A.]

(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 realizing 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 realizing 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.

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7. From the provisions of Section 13(3-A) of the said Act, it is evident that the compliance of the provisions has been made mandatory. Step to be taken by the secured creditor comes thereafter and provisions have been prescribed u/s 13(4) of the said Act. Thus, in order to proceed u/s 13(4) of the Act, the secured creditor has to comply with the provisions u/s 13(3-A) of the Act.

8. However, in the instant case the creditor-bank has denied the receipt of the representation of the petitioner.

Mr. Rajiv Ranjan, learned Counsel appearing on behalf of the petitioner, submitted that the representation u/s 13(3-A) was sent through registered post duly addressed and properly stamped and the law presumes that it must have been reached to the destination and to the person addressed to the same.

Mr. Rajesh Kumar, learned Counsel appearing on behalf of the respondents, submitted that though the contention of the petitioner may be right that he had properly sent the representation/objection, but, as a matter of fact, the respondent-bank has not received any such representation. That fact may be enquired from the Postal Department which would go to prove that no such registered article containing the petitioner''s representation u/s 13(3-A) of the Act has been delivered to the respondent-bank.

9. In the situation where the petitioner, on the one hand, asserts that he has sent the representation u/s 13(3-A) of the Act by registered post duly stamped and addressed to the respondent and on the other hand, the bank says that it has not received and considering the object of the provisions that before proceeding u/s 13(4) of the Act, the borrower must get the opportunity of representation/objection, it is desirable in the interest of justice that the bank even at this stage considers the representation sent by the petitioner, a copy of

which has also been annexed with the writ petition and a copy of which has also been served on the bank through the writ petition.

10. In view of the above, this writ petition is disposed of directing the respondent-bank to consider the petitioner''s representation/objection filed u/s 13(3-A) of the said Act and pass appropriate order in accordance with law before proceeding further under the provisions of Section 13(4) of the Act. It has been informed that the respondent-bank has published notice u/s 13(4) of the Act. It is directed that no action shall be taken pursuant to the said notice until the representation of the petitioner is disposed of in accordance with the provisions of Section 13(3-A) of the Act.