

(2010) 09 CAL CK 0076
In the Calcutta High Court
Case No : Writ Petition No. 17769 of 2010

Hotel Payel and Another

APPELLANT

Vs

Central Bank of India and Another

RESPONDENT

Date of Decision : 02-09-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13(2), 13(3A), 13(4)

Citation : AIR 2011 Cal 54 : (2011) 3 BC 363

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : S. Sengupta, for the Appellant; V. Raja Rao and A. Rao, for the
Respondent

Final Decision : Dismissed

Judgement

Jayanta Kumar Biswas, J.—The Petitioners in this Article 226 petition dated August 19, 2010 are seeking the following principal relief:

(a) A writ in the nature of Mandamus commanding the Respondents:

(i) to act in accordance with law;

(ii) to cancel, rescind and/or set aside the impugned notices u/s 13(2) and 13(4) (a) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 issued by the Respondent bank on 29-4-2010 and 30-7-2010 respectively in respect of the properties described in the schedule of the purported notice dated 30-7-2010;

2. The Petitioners obtained credit facilities upto the limit of Rs. 40 lacs from the Malda branch of the Central Bank of India in 2003. They were in default on the loan. Under the circumstances, the bank classified the account as non-performing asset on April 1, 2006; and its authorised officer issued a notice dated January 2, 2007 u/s 13(2) of the Securitisation and Reconstruction of

Financial Assets and Enforcement of Security Interest Act, 2002 and a notice dated August 4, 2007 u/s 13(4) of the Act.

3. Questioning the actions the Petitioners moved W. P. No. 20394(W) of 2007 under Article 226. By an order dated March 4, 2008 the petition was disposed of setting aside the Section 13(4) notice on the ground that the Petitioners' objection u/s 13(3A) had not been considered and disposed of according to law. The bank was given liberty to proceed with the Section 13(2) notice according to law.

4. Instead of proceeding with the Section 13(2) notice dated January 2, 2007 the bank initiated recovery proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. During pendency of the proceedings the authorised officer of the bank issued a fresh Section 13(2) notice dated April 29, 2010. The Petitioners submitted an objection dated June 28, 2010. The authorised officer wrote a reply dated July 1, 2010 and then issued the Section 13(4) notice dated July 30, 2010.

5. Mr. Sengupta, counsel for the Petitioners, has argued as follows. The bank having waived its right to proceed on the basis of the first Section 13(2) notice, its authorised officer could not issue the second Section 13(2) notice initiating fresh proceedings, when it is not the case that after the account was regularized, the bank once again classified it as non performing asset. In any case, the authorised officer having not recorded a finding in his reply dated July 1, 2010 that the Petitioners' objections were not acceptable or tenable, it cannot be said that the Petitioners' objections have been disposed of in terms of Section 13(3A).

6. Mr. Rao, counsel for the bank, relying on Dauji Farms Limited and Others Vs. Dena Bank and Another, has argued as follows. A second Section 13(2) notice could be issued by the authorised officer of the bank. It is wrong to say that the bank's decision not to proceed with the first Section 13(2) notice amounted to waiver of its right to initiate proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The Petitioner's objections to the Section 13(2) notice were duly considered.

7. The provisions of Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 are quoted below:

13. (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).

8. A notice issued by a secured creditor under Sub-section (2) of Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is in effect a demand notice. The notice can be issued only when the borrower, who is under a liability to the secured creditor under a security agreement, is in default on the secured debt or any installment thereof, and his account respecting such debt has been classified by the secured creditor as non-performing asset.

9. The purpose of a notice under Sub-section (2) of Section 13 is to give the borrower a chance to discharge in full his liabilities to the secured creditor within sixty days from the date of the notice and thus to avoid steps against him under Sub-section (4) of Section 13. The borrower's failure entitles the secured creditor to exercise all or any of the rights under Sub-section (4) of Section 13.

10. There is no statutory prohibition against issuing more than one notice under Sub-section (2) of Section 13. The borrower's failure to comply with the secured creditor's demand does not create any obligation of the secured creditor to exercise all or any of the rights under Sub-section (4) of Section 13; it only entitles the secured creditor to exercise all or any of the rights under Sub-section (4) of Section 13.

11. The secured creditor's decision not to exercise any right under Sub-section (4) of Section 13 cannot prejudice the borrower. There is nothing wrong if the secured creditor decides to waive its right to proceed on the basis of a Section 13(2) notice and decides to issue a fresh Section 13(2) notice. A fresh notice can never be for the same liability of the borrower; it is bound to change with each passing day.

12. In this case, the measure taken by the authorized officer of the bank by issuing the Section 13(4) notice dated August 4, 2007 was set aside by this Court by order dated March 4, 2008 in the Petitioners' W. P. No. 20394(W) of 2007. Hence at the date the impugned Section 13(2) notice was issued, the position was as if the authorized officer of the bank had never taken any measure u/s 13(4).

13. Though under the first Section 13(2) notice the bank was entitled to exercise rights u/s 13(4) even in the face of the changed circumstances, it decided to issue a fresh Section 13(2) notice, evidently noticing the changed circumstances. I do not find any reason to say that the authorized officer of the bank acted without jurisdiction. The decision relied on supports the proposition that a second Section 13(2) notice under the Act is permissible in law.

14. I do not find any merit in the argument that since in his reply dated July 1, 2010 the authorised officer of the bank did not record his conclusion that the Petitioners' objections to the Section 13(2) notice were not acceptable or tenable, in law it cannot be said that the objections have been disposed of. This argument has been made for advancing the contention that keeping the Petitioner's objection to the Section 13(2) notice pending, the authorized officer of the bank

could not take the impugned measure u/s 13(4).

15. It has been specifically stated in the letter dated July 1, 2010 that the Petitioners were free to give specific proposal for repayment of the outstanding debts in terms of the Section 13(2) notice, and that the notice would be treated as redundant only if the Petitioners submitted an acceptable proposal putting down 25% on the outstanding debt in terms of the Reserve Bank of India Rules.

16. Simply because the authorized officer did not write his reply paraphrasing Sub-section (3A) of Section 13, it is not be held that he did not come to the conclusion that the Petitioners objections were not acceptable or tenable. It is wrong to say that the objections are pending. Having dealt with the objections in terms of Section 13(3A), in my opinion, the authorized officer of the bank was empowered to take the measure u/s 13(4).

17. For these reasons, the petition is dismissed. No costs. Certified xerox.