
(2011) 08 CHH CK 0001

In the Chhattisgarh High Court

Case No : Writ Petition (C) No's. 3112, 3110, 3113 of 2011

Ind Synergy Ltd. and Another

APPELLANT

Vs

Authorised Officer and Others

RESPONDENT

Date of Decision : 17-08-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(3), 13(3A), 13(4)

Citation : AIR 2012 Chh 1 : (2012) 2 BC 231

Hon'ble Judges : Satish K. Agnihotri, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Satish K. Agnihotri, J.—Since common facts and question of law are involved in this batch of petition viz. W.P. (C) No. 3112, 3110, 3113, 3114, 3115, 3120, 3121, 3122, 3123 of 2011, thus, they are being disposed of by this common order.

2. The petitioners seek relief to the effect that the "Income Recognition & Asset Classification Guidelines" (for short "the guidelines") framed by the Reserve Bank of India (for short "the RBI"), be quashed and set aside as the same is contrary to the provisions of Section 2(o) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Act") and further, to direct the Reserve Bank of India to re-frame and lay down the guidelines in conformity with the said Act. Secondly, classification of the account of the petitioner No. 1 as non-performing asset (for short, the NPA"), be held as illegal. In the alternative, the petitioner has sought that the account of the petitioner as non-performing asset by the respondent No. 2, be declared as illegal and contrary to the existing guidelines, framed by the RBI. The petitioner further seeks to hold that all the decisions taken pursuant to the notice u/s 13(2) of the Act, be quashed and the ground that no decision has been taken within the prescribed time under the provisions of Section 13(3-A) of

the Act. It is further prayed that the respondent No. 1 be directed to decide the objections raised by the petitioner by giving reasons.

3. Indisputably, the petitioner No. 1/Company availed the credit facilities under the Consortium Financing & Multi Banking Facilities from the respondent No. 2/Bank along with 12 other banks viz. Bank of India, Oriental Bank of Commerce, Indian Overseas Bank, Bank of Maharashtra, Punjab National Bank, Central Bank of India, Union Bank of India, United Bank of India, Canara Bank, Dena Bank and State Bank of Travancore and UCO Bank. It is further averred by the petitioners that the petitioner had availed credit facilities to the tune of Rs. 583,19,00,000/- from in all 13 banks. Due to financial crunch and non-availability of raw materials, the commercial production could not commence. However, the instalments and interest were paid to the respondent-Banks till the financial year 2007-08, in some cases and in some cases, upto the year 2008-2009.

4. It is further averred that without any notice, the account of the petitioner No. 1/ Company was declared as non-performing assets based on the guidelines issued by the RBI.

5. Learned counsel appearing for the petitioners submit that the RBI guidelines, in so far as they provide for criteria for classification of NPA, which are purely based on default for period of 90 days, cannot be said to be in conformity with the true intent, meaning and purpose of provisions of Section 2(o) of the Act. There is no dispute that no payment of installment was made for a period of 90 days. Thereafter, the account of the petitioner No. I/Company was classified as NPA. The provisions of the Act does not define the terms, sub-standard, doubtful and loss asset as used in Section 2(o) of the Act, however, it is the guidelines, issued by the RBI, which defines the aforesaid terms. It is further averred that the RBI guidelines cannot be applied mechanically without subjective decision. Indisputably, in all cases, a demand notice u/s 13(2) of the Act, was issued. The petitioners submitted detailed representation/objection. The respondent Banks, rejected the representation/objection directing the petitioner to pay the entire outstanding amount due, forthwith.

6. Learned counsel appearing for the respective respondent/Banks submit that the issue with regard to RBI guidelines has already come into consideration before the Hon''ble Supreme Court in ICICI Bank Limited Vs. Official Liquidator of APS Star Industries Ltd. and Others, in which the Supreme Court has not found any of the guidelines to be contrary to the provisions of the Act. It was further held that declaring an account of the borrower as NPA based on the guidelines of the RBI, which have been approved by the Hon''ble Supreme Court, holding that the same does not confer unguided or uncanalized powers to secure debt. Learned counsel appearing for the respective respondent/Banks further rely on a decision of the Supreme Court in United Bank of India Vs. Satyawati Tondon and Others, .

7. Heard counsel appearing for the parties, perused the pleadings and

documents appended thereto.

8. It is an admitted position that a notice u/s 13(2) of the Act was issued by the respondent Banks on 22-3-2011, 15-3-2011, 31-3-2011, 14-3-2011, 14-3-2011, 15-3-2011, 12-3-2011, 14-3-2011 and 25-3-2011 in the respective writ petitions. An objection/reply was also filed by the petitioner No. 1 company on 21-5-2011, 18-5-2011, 26-5-2011, 18-5-2011, 16-5-2011, 16-5-2011, 16-5-2011, 16-5-2011 and 26-5-2011 in the respective writ petitions. In turn, the respondent/Banks replied to the objection of the petitioner company vide communication dated 27-5-2011, 9-8-2011, 31-5-2011, 24-5-2011, 25-5-2011, 27-5-2011, 25-5-2011, 23-5-2011 and 1-6-2011 in the respective writ petition. According to the Shri Shukla, in W.P. (C) No. 3112/2011, 3113/2011, 3121/ 2011 and 3122/2011, an attempt was made to take possession of the u/s 13(4) of the Act, but the same could not take place on account of strong opposition by the petitioner Company and its people. In W.P. (C) No. 3110/2011, possession notice u/s 13(4) of the Act, was issued on 14-8-2011 and was published in the Newspaper at Nagpur and Raigarh on 15-8-2011. In W.P. (C) No. 3114/2011, notice u/s 13(4) of the Act was published in the daily newspaper at Nagpur and Raipur on 31-8-2011. In W.P. (C) No. 3120/2011, notice, as aforesaid was issued on 15-7-2011 and was published in the daily newspaper at Nagpur and Raipur on 21-7-2011. According to Shri Agrawal, in W.P. (C) No. 3115/2011 and 3123/2011, possession of the mortgaged property was taken on 27-7-2011 and 20-5-2011 respectively.

9. The guidelines as entitled as "Income Recognition & Asset Classification Guidelines" issued by the RBI deals with non-performing assets. The specific challenge is on definition clause i.e. sub-standard, doubtful and loss, used in Section 2(o) of the Act, which has been dealt with in the guidelines. The question as to whether an account still become NPA if the review/renewal of regular/ad-hoc credit limits are not done when due and what should be periodicity of review/renewal to decide the present status of an account, has been clarified in the guidelines, that regular and ad-hoc credit limits need to be reviewed/regularized not later than three months from the due date/date of ad-hoc sanction. In case of constraints, such as non-availability of financial statements and other data from the borrowers, the Bank should furnish evidence to show that renewal/review of credit limits is already on and would be completed soon. In any case, delay beyond six months is not considered desirable as a general discipline. Hence, an account where the regular/ad-hoc credit limits have been reviewed or have not been renewed within 180 days from the due date/date of ad-hoc sanction will be treated as NPA, which period was reduced to 90 days w.e.f. 31st March, 2004. In the cases on hand, there is no dispute that there was delay of more than 90 days in making the payment of installments.

10. Section 2(o) of the Act, which defines the "non-performing asset" reads as under:

2(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 classification issued by the Reserve Bank;

11. In ICICI Bank Ltd., the Supreme Court held as under:

36. The above analysis of the various provisions of the 1949 Act shows that the RBI is empowered to regulate the business of the banking companies. That, RBI is empowered to control management of banking companies in certain situations. It is empowered to lay down conditions on which the banking companies will operate. It is empowered to regulate paid-up capital, reserve fund, cash fund and above all to lay down policies in the matter of advances to be made by the banking companies, allocation of resources, etc. While laying down such policies under the said Act, RBI can lay down parameters enabling banking companies to expand its business. For example, RBI's permission is required to be obtained if a banking company seeks to deal in "derivatives". It is a business which will not fall in clauses (a) to (o) of Section 6(1) and yet RBI can lay down guidelines and directions enabling banking companies to deal in derivatives like futures and options.

39. The test to be applied is -- whether trading in NPAs has the characteristics of a bona fide banking business. That test is satisfied in this case. The guidelines issued by RBI dated 13-7-2005 itself authorizes the bank to deal inter se in NPAs. The guidelines have been issued by the regulator in exercise of the powers conferred by Sections 21 and 35-A of the Act. They have a statutory force of law. They have allowed the banks to engage in trading in NPAs with the purpose of cleaning the balance sheets so that they could raise the capital adequacy ratio. All this comes within the ambit of Section 21 which enables RBI to frame the policy in relating to advances to be followed by the banking companies and which empowers RBI to give directions to banking companies u/s 21(2). These guidelines and directions following them have a statutory force.

41. At the outset one needs to know what is NPA? When a borrower is under liability to pay to secured creditors, makes default in repayment of secured debt or any instalment thereof, the account of borrower is classified as non-performing asset (NPA). Such NPAs cannot be used for any productive purpose. Continuous growth in NPAs threatens the repayment capacity of the banks. They have an adverse impact on the financial strength of the banks which in the present era of globalization are required to conform to international standards. Thus, NPA means an asset or account receivable of a borrower, which has been classified by banks or financial institutions in terms of the RBI guidelines as

substandard, doubtful etc. These guidelines are issued to improve quality of assets of the banks. The 2005 guidelines of the RBI are not to eliminate NPAs but to restructure.

12. Thus, it cannot be held that RBI guidelines are contrary to definition of "the non-performing asset" under the provisions of the Act. Thus, the contention of learned counsel for the petitioners in this regard, is rejected.

13. Other issue with regard to not considering the representation/objection of the petitioner objectively with reasons while rejecting the representation/objection made by the petitioner/Company pursuant to the notice u/s 13(2) of the Act, has come up for consideration before this Court in *Ind Synergy Limited v. The Authorised Officer*, W.P. (C) No. 2960 of 2011, decided on 22-6-2011, wherein it was held as under:

6. The substantial relief sought for in this petition was not questioning the validity of the circular, but what was sought in the alternative is after passing of the order u/s 13(4) of the Act, 2002. The petitioners, in order to delay the recovery of amount, have sought for a declaration to the effect that the guidelines issued by the Reserve Bank of India are not in conformity with the provisions of the Act, 2002.

7. In view of the fact that order u/s 13(4) of the Act, 2002 has been passed, the issue as to illegality in the guidelines cannot be considered in the instant petition, leaving the question of law to be decided in an appropriate case.

8. The Supreme Court in *Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others*, observed as under :

21. In *Authorized Officer, Indian Overseas Bank and Another Vs. Ashok Saw Mill,)* the main question which fell for determination was whether the DRT would have jurisdiction to consider and adjudicate post Section 13(4) events or whether its scope in terms of Section 17 of the Act will be confined to the stage contemplated u/s 13(4) of the Act? On an examination of the provisions contained in Chapter III of the Act, in particular Sections 13 and 17, this Court held as under: (SCC pp. 375-76, paras 35-36 & 39).

35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the relief indicated in sub-section (3) thereof.

36. The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use

of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.

39. We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated u/s 13(4) of the Act. On the other hand, the law is otherwise and it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT.

(Emphasis supplied by us)

22. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action u/s 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action u/s 13(4) of the Act, by providing for an appeal before the DRT.

9. In view of the well settled principle of law that the efficacious statutory remedy of appeal under the provisions of Section 17 of the Act, 2002 is available to the petitioners and, as such, no interference is warranted by this Court in exercise of its power under Article 226/227 of the Constitution of India.

14. The Supreme Court, *United Bank of India Vs. Satyawati Tondon and Others*, observed as under:

43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a Code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in

future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

15. This Court, in *M/s. Stallion Steels Indore Pvt. Ltd. v. I.D.B.I. Bank*, W.P. (C) No. 2339 of 2011, decided on 3-8-2011, relying on a decision of the Supreme Court in *Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others*, , dismissed the petition holding that since appeal under the provisions of Section 17 of the Act was available, no interference was warranted. The Supreme Court, in *Kanaiyalal Lalchand Sachdev*, held as under:

22. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action u/s 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action u/s 13(4) of the Act, by providing for an appeal before the DRT.

16. Identical issue raised in this petition also came into consideration before this Court in *Ind Synergy Limited*, filed by the present petitioners, raising the same grounds. This Court, having considered the issue at length, held as under:

9. In view of the well settled principle of law that the efficacious statutory remedy of appeal under the provisions of Section 17 of the Act, 2002 is available to the petitioners and, as such, no interference is warranted by this Court in exercise of its power under Article 226/227 of the Constitution of India.

17. Applying the well settled principles of law to the facts of the cases on hand, and in view of the order passed in *Ind Synergy Limited*, the petitions are bereft of merit and are accordingly dismissed. However, liberty is reserved to the petitioners to take recourse to alternative statutory remedy, if so advised, which may be available to the petitioners under the provisions of the Act, 2002.

18. No order as to costs.