
(2009) 08 MAD CK 0288

In the Madras High Court

Case No : C.R.P. (NPD) No. 2296 of 2009 and M.P. No. 1 of 2009

Jupiter Jewel Tech. and Others

APPELLANT

Vs

Indian Overseas Bank

RESPONDENT

Date of Decision : 10-08-2009

Acts Referred:

Constitution of India, 1950 — Article 227
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(1), 13(10), 13(12), 13(2), 13(3A)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2002 — Rule 2, 3, 3(1), 3A, 9(2)

Citation : (2010) 3 BC 385

Hon'ble Judges : R. Subbiah, J; P.K. Mishra, J

Bench : Division Bench

Advocate : P. Raghunathan and Javesh Dolia, S. Sethuraman, for the Appellant; Benjamin George, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Misra, J.—Heard Mr. S. Sethuraman, learned Counsel for the petitioners and Mr. Benjamin George, learned Counsel for the respondent/Bank at the stage of admission of the present petition under Article 227 of the Constitution of India, challenging the order dated 1st July, 2009 passed by the Presiding Officer, Debts Recovery Tribunal-III, Chennai, in S.A. No. 84 of 2008.

2. The first petitioner is a partnership firm of which the petitioner Nos. 2 to 4 are partners. They had availed a cash credit limit of Rs. 1.50 crores on 30th January, 2003 and ad hoc limit of Rs. 90 lacs on 26th April, 2006 from the Indian Overseas Bank, respondent herein. The sole respondent issued a notice u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (hereinafter referred to as "SRFAESI Act") calling upon the petitioners to repay a sum of Rs. 5,46,74,088/- on the allegation that the account had been classified as NPA as on 31st December, 2007. The petitioners gave a reply which was apparently rejected by the

Authorised Officer. Thereafter, the Bank took steps u/s 13(4) of the SRFAESI Act by issuing notice regarding taking of possession. Subsequently the petitioners filed S.A. No. 84 of 2008 before the Debts Recovery Tribunal challenging the action purportedly taken u/s 13(4) of the SRFAESI Act. The main contention which was raised before the Debts Recovery Tribunal and reiterated before us, relates to the illegality of the reply given by the Authorised Officer. It is submitted that having himself issued a notice u/s 13(2) of the SRFAESI Act, the objection/reply filed by the petitioners u/s 13(3-A) of the SRFAESI Act, should have been considered by the secured creditor and not by the very same Authorised Officer. Apart from contending that such a course is not contemplated under the provisions of the SRFAESI Act and the Rules framed thereunder, it is also contended that consideration of the objection by the very same Authorised Officer who had issued notice u/s 13(2) of the SRFAESI Act is against the principles of natural justice.

3. As per Section 2(zd) of the SRFAESI Act a "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 is created for due payment by any borrower or any financial assistance.

4. Chapter III of the SRFAESI Act refers to enforcement of Security interest. As per Section 13(1) of the SRFAESI Act, any security interest created in favour of the secured creditor may be enforced by such creditor in accordance with the provisions of the SRFAESI Act. As per Section 13(2) of the SRFAESI Act, where a borrower commits any default in repayment of the secured debt and his account is classified by the secured creditor as non-performing asset, then the secured creditor may issue notice to the borrower to discharge the liability 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) of the Section 13. u/s 13(3-A) of the SRFAESI Act, if the borrower makes any representation or raises objections, 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 the reasons for non-acceptance within one week of such representation or objection. In case, the borrower fails to discharge any liability within a period specified in Section 13(2), the secured creditor may take recourse to measures indicated u/s 13(4) of the SRFAESI Act.

5. Section 13(12) provides that right of a secured creditor under the Act may be

exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed. Furthermore Section 38 empowers the Central Government to make Rules for carrying out the provisions of the Act. As per Section 38(2) in particular, without prejudice to the generality of the power u/s 38(1), such Rules may provide inter alia the manner in which the rights of the secured creditor, may be exercised by one or more of his officers u/s 13(12). In exercise of such rule-making power u/s 38(1) and Clause (b) of Sub-section (2) of Section 38 read with Sub-sections (4), (10) and (12) of Section 13 of the SRFAESI Act, the Central Government has made the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the Rules").

6. As per Rule 2 in Rules, unless the context otherwise requires, "authorised officer" means an officer not less than 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.

7. As per Clause (b) of Rule 2, "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.

8. Rule 3 is relating to the Demand Notice. Rule 3(1) refers to service of demand notice as per Section 13(2). Proviso to Rule 3(1) envisages that where the Authorised Officer has reason to believe that notice is being avoided he can issue notice by adopting a method akin to substituted service.

9. Rule 3-A being the basis of the controversy raised in the present case is extracted hereunder in extenso:

3-A. Reply to representation of the borrower-(a) After issue of demand notice under Sub-section (2) of Section 13, if the borrower makes any representation or raises any objection to the notice, the Authorised Officer shall consider such representation or objection and examine whether the same is acceptable or tenable.

(b) If on examining the representation made or objection raised by the borrower, the secured creditor is satisfied that there is a need to make any changes or modifications in the demand notice, he shall modify the notice and accordingly serve a revised notice or pass such other suitable orders as deemed necessary, within seven days from the date of receipt of the representation or objection.

(c) If on examining the representation made or objection raised, the Authorised Officer 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.

10. In the backdrop of the aforesaid legal provisions under the SRFAESI Act and the Rules, the contention of the Counsel for the petitioners is that as required under Rule 3-A(b), it is the secured creditor who is required to be satisfied as to whether there is necessity of any change or modification in the demand notice and since in the present case, the representation made by the petitioners was considered not by the secured creditor, but by the Authorised Officer who himself had earlier issued the notice u/s 13(2) read with Rule 3 of the Rules, it must be taken that the provisions had not been complied with and the action of the Bank had become vulnerable. In support of such contention the learned Counsel has placed reliance upon some observations made by the Debts Recovery Appellate Tribunal in some other case wherein it was indicated that the Authorised Officer who issues notice u/s 13(2) read with Rule 3, should not deal with the reply/objection filed by the borrower and such matter should be considered by the "secured creditor."

11. The other contention raised by the petitioners is regarding alleged violation of principles of natural justice. According to the learned Counsel for the petitioners the Authorised Officer having issued a notice u/s 13(2), reply should not be considered by him as his mind has already been prejudiced against the petitioner.

12. In our considered opinion none of the submissions made on behalf of the petitioners can be accepted. It is of course, true as has been observed in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, , that some of the provisions are not happily worded and this is one such instance where possibly, we can observe that the provisions in Rule 3-A. which were inserted pursuant to the judgment of the Supreme Court in *Mardia Chemicals Ltd. v. Union of India (supra)* case, are not happily worded to some extent.

13. The expression "Authorised Officer" has not been defined as such in the Act. But the secured creditor obviously being an artificial person is required to act through some agency or delegated authority or officers vested with discharging particular powers, functions or duties. Though in generic sense the expression "secured creditor" would only mean the Bank, financial institution, or any consortium or group of Banks or financial institutions as contemplated in Section 2(zd), invariably and inevitably such secured creditor being an artificial person has to act through some "natural person" authorised in its behalf which can be conveniently and compendiously described as the authorised officer or authorised person.

14. There are various provisions in the SRFAESI Act and the Rules which empower the "secured creditor" to exercise various powers and discharge certain duties. Since in its generic sense "secured creditor is not a natural person and obviously has to act through some person, it is precisely the reason why Section 13(12) indicates that the rights of the secured creditor may be exercised by "one or more of his officers in this behalf in such manner as may be prescribed." This itself contemplates that the secured creditor in the generic sense can authorize

one or more officers in such manner as may be prescribed so that the rights of the "secured creditor" in the generic sense would be exercised. This is a matter obviously within the administrative discretion of the persons who are in the helm of affairs.

15. The definition clause in the Rules provides that unless the context otherwise requires the "Authorised Officer" means an officer as specified. Such specification or delegation can be done by the Board of Directors or Board of Trustees of the secured creditor or by any other person or authority exercising powers of superintendence, direction and control of business or affairs of the secured creditor, to exercise the rights of a secured creditor. However, the definition itself contemplates that such an officer should not be less than a Chief Manager of a public sector Bank; or equivalent. The rule itself makes it clear that the definition is applicable unless the context otherwise requires. Therefore, the expression "Authorised Officer" may mean different officers in different contexts and obviously as specified by the persons in charge of the institution.

16. Definition clause Rule 2(b) indicates that the expression "demand notice" means the notice in writing issued by a secured creditor or Authorised Officer, as the case may be. This would only mean the officer who is authorised as per the definition in Rule 2(a) or in given situation depending on the context it may also mean the "secured creditor" in a more generic sense which may include 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. What is to be kept in view is that the expression "Authorised Officer" may mean different officers depending upon the context and obviously depending upon the delegation by the persons or authority in charge of the institution.

17. With the above prefatory observations, it would now be appropriate for us to concentrate on the specific question posed by the petitioners in the context of consideration of the representation. Section 13(3-A) inserted after the *Mardia Chemicals Ltd. v. Union of India* (supra) case itself contemplates that if any representation or objection is made and if the secured creditor comes to the conclusion that such representation or objection is not acceptable, he shall communicate the reasons for non-acceptance of the representation or objection. Rules had been framed in exercise of powers conferred by Sub-section (1) and Clause (b) of Sub-section (2) of Section 38 read with Sub-sections (4), (10) and (12) of Section 13 of the SRFAES1 Act, at a time when the Ordinance was holding the field and the Act was yet to be passed. However, subsequently, Rule 3-A was inserted obviously in compliance with the observation made in the *Mardia Chemical's Ltd. v. Union of India* (supra) case. Sections 13(4) and 13(10) refer to various powers to be exercised by the secured creditor, whereas Section 13(12) indicates the rights of a secured creditor may be exercised by one or more of his officers authorised in this behalf.

18. Rule 3-A which relates to the question of disposal of the petition/

representation made by the borrower is obviously pursuant to the observation made in *Mardia Chemicals Ltd. v. Union of India* (supra) case, which resulted in the introduction of Section 13(3-A) and Rule 3-A. Rule 3-A is only an extension of Section 13 (3-A). Three sub-clauses in Rule 3-A are to be considered as different facets of the same aspect namely, reply to the representation to the borrower. Sub-clause (a) imposes a duty on the Authorised Officer to consider the representation or objection on examining whether the same is acceptable or tenable. This is obviously in accordance with Section 13(3-A). Sub-clause (b) of Rule 3-A contemplates that if upon examining the representation it is felt that there is need for any modification, it shall be made and revised notice may be issued or other suitable orders may be passed within seven days from the date of the representation or objection. However, in these clauses, instead of using the expression "Authorised Officer" the expression "secured creditor" has been used. Sub-clause (c) of Rule 3-A contemplates that on examining the representation, if the authorised officer comes to the conclusion that such a representation or objection is not acceptable, he shall communicate the reasons for non-acceptance within one week. In other words, in our considered opinion, these two clauses only reflect two sides of same coin namely the duty to consider the representation or objection as insisted by the Supreme Court in *Mardia Chemicals Ltd. v. Union of India* (supra) and incorporated in the Act and rules in the shape of Section 13(3-A) and Rule 3-A. If the objection is acceptable, necessary correction is required to be made within "one week" and if the objection is not acceptable, the reasons for no-acceptance are to be indicated to the borrower within "seven days."

19. Therefore, in the context in which Rule 3-A has been incorporated, it must mean that the officer who is required to consider the representation and take suitable action either in rectifying the mistake, if any, or communicating the reason for non-acceptance of the representation may be one and the same. Any other meaning would make the provision unworkable. If the contention of the petitioners is accepted then the expression "secured creditor" would be interpreted in a generic sense and would mean only Board of Directors or Board of Trustees or officers at helm of officers of the Bank or the institution and it would require that the representation has to be considered at two stages by two different functionaries or authorities. The basic duty to consider is high-lighted in Rule 3-A(a) and the result of such consideration is reflected in Rule 3-A(b) or 3-A(c) as the case may be.

20. It is of course true that in many places the expression "secured creditor" has been used which may not necessarily mean the Authorised Officer in every instance. For example in Rule 9(2) the sale is to be confirmed by the Authorised Officer whereas such confirmation "shall be subject to confirmation by the secured creditor". This is an instance where the secured creditor has to be construed as different from the authorised officer.

21. The other contention of the Counsel for the petitioner is to the effect that the

consideration by the very same officer the representation made by the borrower, violates the principles of natural justice.

22. We do not think such a contention can be countenanced. Merely because a person issues notice, one cannot assume such person is biased. If such view is accepted it would mean that in Service Jurisprudence relating to disciplinary proceedings, the Disciplinary Authority who frames charges and seeks for explanation, would be considered as a biased authority and consequently should not take any decision. If such a contention is accepted, it may make the Act and Rules unworkable. It is for the secured creditor to take its own administrative decision as to whether the person who is issuing notice should also be the officer dealing with the reply.

23. Since the contention raised by the petitioner is not acceptable we do not see any reason to entertain the civil revision petition and accordingly it is dismissed at the stage of admission but without any costs. We make it clear that we have not at all dealt with any other aspect considered in the impugned order of the DRT as such other aspects can be considered by the appellate authority or any other competent authority in accordance with law at appropriate stage.

24. We place on record our appreciation for the fair manner in which submissions have been made by all the Counsel.