(2013) 02 RAJ CK 0081

In the Rajasthan High Court

Case No : Civil Special Appeal (Writ) No. 1475 of 2012

Kailash Chandra Sharma APPELLANT

Vs

ICICI Bank Limited and Others RESPONDENT

Date of Decision : 05-02-2013

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(12), 13(2), 38

Citation : AIR 2013 Raj 163 : (2014) 2 BC 242 : (2013) 2 WLN 255

Hon'ble Judges : Amitava Roy, C.J;Meena V. Gomber, J

Bench : Division Bench

Advocate : Rajendra Prasad, for the Appellant; Ajeet Bhandari, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Roy, C.J.—Appalled by the rejection of his impugnment of the notice dated 10.1.2012 issued u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as ''the Act'') thereby restraining him from transferring/assigning/surrendering/selling etc. the secured assets detailed in Annexure-A thereto, the appellant seeks panacean intervention of this Court in this appeal. We have heard Mr. Rajendra Prasad, learned counsel for the appellant and Mr. Ajeet Bhandari, learned counsel for the respondents.

2. For the issues raised herein, elaboration of the textual facts is inessential. Suffice it to mention that the appellant had applied for home loan from the respondent-Bank to the tune of Rs. 11,00,000/-, in response whereto, the latter had sanctioned a financial accommodation of Rs. 9,50,000/-. Construing his account to be non-performing asset, notice u/s 13(2), as above, was caused to be served on him by the respondent-Bank through its advocate, the respondent No. 4 herein. Questioning the validity thereof, he sought to invoke writ jurisdiction of this Court contending that the same being neither by the secured

creditor nor its authorized officer, as envisaged in Section 13(2) read with Rule 2(b) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as ''the Rules'') it was inoperative and null and void. The respondent-Bank in its affidavit, while questioning the maintainability of the writ proceedings on the ground of availability of alternative remedy to the appellant, endorsed the validity of the notice issued by its advocate on its instructions.

3. The learned Single Judge sustained the plea of the respondent-Bank on an interpretation of the relevant provisions of the Act and the Rules and placing reliance chiefly on the decision of the Calcutta High Court in Asset Reconstruction Company India Ltd. Vs. Amit Ventures Private Ltd. and Others,

4. Mr. Rajendra Prasad, learned counsel for the appellant, with particular reference to Section 13(2) & (12) of the Act, has urged that as admittedly the impugned notice had been issued not by the secured creditor but by the learned counsel for the respondent-Bank, it is not in compliance of the mandate of the provisions of the Act and ought to be adjudged as non est in law. Drawing the attention of this Court to Section 38 of the Act conferring the rule-making power on the Central Government as well as Rule 2(b) of the Rules defining "demand notice" to mean one to be issued in writing by a secured creditor or authorized officer to the borrower pursuant to Section 13(2) of the Act, the learned counsel has insisted that the impugned notice which constitutes an action by the respondent-Bank u/s 13(2), is apparently illegal and unauthorized and thus, the impugned judgment and order ought to be interfered with. According to him, reliance was wrongly placed by the learned Single Judge on the decision of the Calcutta High Court in Asset Reconstruction Company India Ltd. (supra). To reinforce his contentions, Mr. Rajendra Prasad has placed reliance on the decision of the Hon''ble Apex Court in Transcore Vs. Union of India (UOI) and Another,

5. In reply, Mr. Ajeet Bhandari, learned counsel for the respondents has argued that not only the notice u/s 13(2) of the Act issued by the learned counsel for the respondent-Bank on its instructions based on a decision to that effect, is valid being in sufficient conformance of the relevant prescriptions of the Act and the Rules, the SLP against the pronouncement in Asset Reconstruction Company India Ltd. (supra) having been dismissed by the Hon''ble Apex Court, the law laid down therein has become final.

6. We have cautiously considered the pleaded facts and also the competing arguments.

7. Admittedly, the notice impugned had been issued by the learned counsel for the respondent-Bank on its instructions, as is writ large on the face thereof. Noticeably, the appellant did not aver in the writ petition that no decision to issue such notice had been taken either by the secured creditor i.e. the respondent-Bank or its authorized officer. In that view of the matter, having regard to the categorical reference of its instructions in the impugned notice, we are unable to persuade ourselves that the notice had been issued by the learned counsel on

her own, in absence of any conscious decision taken by the respondent-Bank to take such a step against the appellant.

8. Section 13(2) of the Act, for ready reference, is quoted hereinbelow:-

13. Enforcement of security interest.-

(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 installment 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).

9. Rule 2(b) of the Rules of considerable significance is also extracted hereunder:-

(2) Definitions.-

(b) 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.

10. Whereas it would be plainly apparent from Section 13(2) that a secured creditor in the event of default of a borrower may require him/her by notice in writing to discharge in full his/her liabilities within a time frame of sixty days, failing which its rights under sub-section (4) would become exercisable, Section 13(12) provides that the rights of a secured creditor may be exercised by one or more of its authorized officers in that behalf, in such manner as may be prescribed.

11. "Demand notice" in terms of Rule 2(b) means notice in writing issued by a secured creditor or authorized officer, as the case may be, to any borrower pursuant to sub-section (2) of Section 13 of the Act. Thus, on a conjoint reading of the above legal provisions, it is patent that the notice u/s 13(2) of the Act ought to be issued by the secured creditor or its authorized officer, to be valid and effective in law.

12. The Hon''ble Calcutta High Court in Asset Reconstruction Company India Ltd. (supra) being seized of a similar situation, had, on an elaborate scrutiny of the provisions of the Act, propounded that a notice of demand u/s 13 issued by a solicitor on the instructions of the secured creditor was valid. There is no cogent and convincing justification and/or reason, in our comprehension, to take a different view. If such a notice is issued by a counsel representing the respondent-Bank/secured creditor/authorized officer u/s 13(2) on instructions founded on a conscious decision approving such a step, in our understanding, the same cannot be repudiated to be in contravention of the letter and spirit of the provisions of the Act and the Rules. No such legislative mandate or intendment is decipherable in the scheme of the statute and/or the Rules framed in exercise of

the powers conferred by Section 38 of the Act. The decision of the Apex Court in M/s. Transcore (supra), in the facts and circumstances of the case, does not advance the case of the appellant.

13. In the above view of the matter, we find ourselves in full agreement with the views expressed by the learned Single Judge and the findings recorded in the impugned judgment and order. The appeal fails and is dismissed. No costs.