

(2009) 02 GUJ CK 0034

In the Gujarat High Court

Case No : S.C.A. No's. 9445, 13369 and 15491 of 2008

Kirandevi Bansal

APPELLANT

Vs

D.G.M., Small Industries Development Bank of India

RESPONDENT

Date of Decision : 19-02-2009

Acts Referred:

Companies Act, 1956 — Section 529(1), 529A
Constitution of India, 1950 — Article 14
Consumer Protection Act, 1986 — Section 13(2)
Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 — Section 13(3A)
Industrial Disputes Act, 1947 — Section 17(1)
Prevention of Food Adulteration Rules, 1955 — Rule 7(3), 9
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(13), 13(2), 13(3A), 13(4), 17
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 3A
Transfer of Property Act, 1882 — Section 69, 69A

Citation : AIR 2009 Guj 100

Hon'ble Judges : K.S. Radhakrishnan, C.J.; Akil Kureshi, J

Bench : Division Bench

Advocate : U.I. Vyas and M.B. Gohil, for Petitioner Nos. 1-4, for the Appellant; Pranav G. Desai, for the Respondent

Judgement

K.S. Radhakrishnan, C.J.—The question, we have, been called upon to decide on a reference made by the learned Single Judge, is "whether the time-limit of one week provided in Sub-section (3A) of Section 13 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Securitisation Act") for communicating the non-acceptance of the representation/objections made by the borrower in response to a notice issue under Sub-section (2) of Section 13, is mandatory or directory?

2. A learned Single Judge of this Court in Special Civil Application No. 4045 of 2007 took the view that the same is a mandatory requirement, and non-compliance of that mandatory requirement within one week of the receipt of the

representation/objections filed by the borrower would vitiate the proceedings initiated by the secured creditor u/s 13(4) of the Securitisation Act. When this case came up for hearing before another Judge, learned Judge took the view that the obligation cast upon the secured creditor is only to consider the objections filed by the borrower and take appropriate decision before taking any action u/s 13(4) of the Act. Learned Judge took the view that when there is substantial compliance of the provisions of Sub-section (3A) of Section 13 of the Securitisation Act read with Rule 3A of The Security Interest (Enforcement) Rules, 2002 (for short "the Rules"), it cannot be said that merely because 7 days have expired or the decision was not taken within a period of 7 days and was taken at a later date, further action u/s 13(4) of the Securitisation Act would not be vitiated.

3. We have heard learned Counsel for the parties at length.

4. Securitisation Act was enacted to regulate Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest and matters connected thereto. The Act enables the Banks and Financial Institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. The Act further provides for setting up of asset reconstruction companies which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured assets and take over the management of the business of the borrower.

5. The constitutional validity of the above Act came up for consideration before the Apex Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, The Apex Court upheld the validity of the provisions of the Act except that of Sub-section (2) of Section 17 of the Act which was declared ultra vires of Article 14 of the Constitution of India. The Apex Court observed that in cases where a secured creditor has taken action under Sub-section (4) of Section 13 of the Act, it would be open to borrowers to file appeals u/s 17 of the Act within the limitation as prescribed therefor. The Apex Court also observed that the borrower, after service of notice under Sub-section (2) of Section 13 of the Act, raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. The Court also observed that the reasons so communicated shall only be for the purposes of information/knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal u/s 17 of the Act.

6. The Parliament felt that in view of the various observations made by the Supreme Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, and also to discourage the borrowers to postpone the repayment of their

dues and also enable the secured creditor to speedily recover their debts, if required, by enforcement of security or other measures specified in Sub-section (4) of Section 13 of the Act, it had become necessary to amend the provisions of the Act. Consequently, Sub-section (3A) was inserted by The Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 (30 of 2004) with effect from 11.11.2004.

7. The relevant provisions which are necessary for our consideration are extracted hereunder:

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 falling 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 non-payment 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, to 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.

(5) to (7) xx xx xx xx (8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to Sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realized from the sale of secured assets shall be distributed in accordance with the provisions of Section 529A of the Companies Act, 1956 (1 of 1956): Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realize his security instead of relinquishing his security and proving his debt under proviso to Sub-section (1) of Section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of Section 529A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of Section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that Section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the

liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation.- For the purposes of this sub-section,-

(a) "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking, any of the measures specified in Clauses (a) to (d) of Sub-section (4) in relation to the secured assets under this Act.

(12) The rights of the secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in Sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.

The scope of Sections 13(2), 13(4), etc., has been elaborately considered by the Apex Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, Hence it is not necessary to further deliberate upon those provisions.

8. We are, in this case, concerned with the only question as to whether the one week's time stipulated in Sub-section (3A) of Section 13 is mandatory or directory. The Apex Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, has clearly laid down law as under:

Under Sub-section (2) of Section 13 it is incumbent upon the secured creditor to

serve 60 days notice before proceeding to take any of the measures as provided under Sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower.... The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal u/s 17 of the Act....

The view expressed by the Apex Court has been incorporated in Sub-section (3A) to Section 13 of the Act, and therefore it is obligatory on the part of the secured creditor to consider the representation/objections submitted by the borrower on receipt of notice under Sub-section (2) of Section 13 of the Act, and to communicate the decision to the borrower. If the representation/objections is/are not acceptable or tenable to the secured creditor, communication of the reasons for non-acceptance of the representation/objections to the borrower is a mandatory requirement.

9. In this connection, it is relevant to note that Sub-section (2) of Section 13 gives 60 days time to the borrower to discharge its full liabilities on receipt of notice u/s 13(2) of the Act. Non-discharge of full liabilities within 60 days time under Sub-section (2) of Section 13 would enable the secured creditor to exercise all or any of the rights conferred on it Under Sub-section (4) of Section 13 of the Act. In the mean time, if any representation/objections is/are made by the borrower to the notice received under Sub-section (2) of Section 13 of the Act, the same has to be considered by the secured creditor, and if the representation/objections is/are not acceptable, the reasons therefore shall be communicated to the borrower. Therefore, communication of reasons for non-acceptance of the representation/objections preferred by the borrower in response to the notice received under Sub-section (2) of Section 13 is a mandatory requirement.

10. Statute too has provided one week's time to communicate to the borrower the reasons for non-acceptance of his representation/objections, but in our view, time-limit of one week prescribed under Sub-section (3A) to Section 13 is only directory. But, before any further proceeding is initiated under Sub-section (4) to Section 13, it is obligatory on the part of the secured creditor to communicate the reasons for non-acceptance of the representation/objections submitted by the borrower in response to the notice issued to him under Sub-section (2) of Section 13 of the Act.

11. A Division Bench of Madras High Court in Industrial Development Bank of India Ltd., Chennai v. Kamaldeep Synthetics Ltd. AIR 2007 Mad 173 took the view that even a possession notice issued under Sub-section 13(4) would not be vitiated by the delay in communicating the reasons for rejection of the representation or objections, if the borrower could not demonstrate prejudice or

loss caused to him due to delay in communicating the rejection of the representation. SLP (Civil) No. 9548 of 2007 filed against that judgment was dismissed, by the Apex Court.

12. A learned Single Judge of this Court in *Tensile Steel Ltd. and Anr. v. Punjab & Sind Bank and Ors.* AIR 2007 Guj 126 : 2007 CLC 80 directed to restore the possession of the secured assets to the borrower since the Bank had failed to comply with the mandatory requirement under the provisions of Sub-section (3A) of Section 13 due to non-communication of the reasons for rejection of the objections. The above judgment was confirmed by Division Bench in Letters Patent Appeal No. 865 of 2006. Similar view has been taken by the Karnataka High Court In *Mrs. Sunanda Kumari and Anr. v. Standard Chartered Bank* (2007) 135 Comp Cas 604 : 2007 CLC 1515 (Kant).

13. Therefore, only when the Bank proceeds to take further action u/s 13(4) of the Act, without communicating any reasons for rejection of representation/objections of the borrower to the notice issued u/s 13(2) of the Act, it can be said that any prejudice or loss is caused to the borrower. Failure to communicate reasons for rejection of the representation/objections within one week's time as stipulated in Sub-section (3A) of Section 13 of the Act would not cause any prejudice or loss to the borrower. But, in a given case, suppose no action is being taken by the secured creditor u/s 13(4) of the Act for a considerable long period, in spite of the objection or representation filed by the borrower against the notice under Sub-section (2) of Section 13 of the Act received by him, it may be possible to infer that the secured creditor is not desirous of proceeding further on the notice issued under Sub-section (2) of Section 13 of the Act. Further, it may also be noticed that as per Sub-section (13) of Section 13, no borrower shall, after the receipt of notice under Sub-section (2) of Section 13, transfer by way of sale, lease any of his secured assets, without prior consent of the secured creditor. It is, therefore, imperative that the secured creditor shall not unduly delay the proceedings once action has been initiated by issuing notice u/s 13(2).

14. In our view, the Legislation has fixed the time-limit of one week in Sub-section (3A) of the Act is to see that the proceedings Initiated u/s 13 of the Act be expedited. Every prescription of a period within which an act must be done is not the prescription of a period of limitation, with painful consequence, if the act is not done within that period. This principle was laid down by the Apex Court while examining the scope of Rule 9(j) of the Prevention of Food Adulteration Rules, 1955 in *Dalchand Vs. Municipal Corporation, Bhopal* and Another, The Court held that Rule 9(j) prescribing a period of 10 days is directory and not mandatory. Same view has been taken by the Apex Court in *T.V. Usman Vs. Food Inspector, Tellicherry Municipality, Tellicherry*, interpreting Rule 7(3) of Prevention of Food Adulteration Rules, which requires a copy of the result of the analysis to be provided to the Local Health Authority within a, period of 45 days. The Court held that the time-limit is only directory.

15. We may also refer to another judgment of the Supreme Court in *The*

Remington Rand of India Ltd. Vs. The Workmen, wherein interpreting Section 17(1) of the Industrial Disputes Act, 1947, the Court held that time-limit fixed for publishing the award is only directory and non-compliance of the time-limit would not render the award invalid.

16. The Apex Court in *Topline Shoes Ltd. Vs. Corporation Bank*, while considering the scope of Section 13(2)(a) of Consumer Protection Act, 1986 whether or not the State Consumer Disputes Redressal Commission can grant time to the respondent beyond a total period of 45 days, held that the limit prescribed was only directory. The Court further held that the intention to provide a timeframe to file reply is really meant to expedite the hearing of such matters and to avoid unnecessary adjournments to linger on the proceedings on the pretext of filing reply.

17. We are, therefore, of the view that the time-limit of one week prescribed u/s 13(3A) is to expedite the matters so that there may be some finality in the action initiated for enforcement of security interest under Sub-section (2) of Section 13.

18. In view of the above mentioned circumstances, we hold that the period of one week stipulated In Sub-section (3A) of Section 13 is only a directory provision, and the non-compliance of the time-limit, as such, will not vitiate the proceedings initiated u/s 13(4) of the Act, provided the reason for rejection of the objection is communicated to the borrower, before taking action u/s 13(4) of the Act.

19. Reference is answered accordingly and the cases, will go back to the learned Single Judge, for disposal.