
(2012) 01 GUJ CK 0008
In the Gujarat High Court
Case No : Civil Application No. 798 of 2012

Loyal Chemicals Pvt. Ltd.

APPELLANT

Vs

Bank of India

RESPONDENT

Date of Decision : 23-01-2012

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(3), 13(3A), 13(4)
Transfer of Property Act, 1882 — Section 69, 69A

Citation : (2012) 2 BC 226

Hon'ble Judges : R.M. Chhaya, J

Bench : Single Bench

Advocate : Avani S. Mehta, for the Appellant;

Judgement

1. By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed for the following reliefs :

(A) Your Lordships may be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other appropriate writ, order or direction, quashing and setting aside the Notice dated 15.10.2011 issued u/s 13(2) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Annexure "A");

(B) A writ of mandamus, a writ in the nature of mandamus or any other writ, order or direction directing the respondent not to initiate any action in pursuance to the Possession Notice dated 4.1.2012 at Annexure "C"

(C) Pending admission, hearing and final disposal of this petition, Your Lordships may be pleased to direct the respondent, their agents and servants not to initiate any action in pursuance to the Notice dated 15.10.2011 issued u/s 13(2) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Annexure "A") and Possession Notice dated 4.1.2012 at Annexure "C" of the petitioner till the final disposal of this petition;

(D) Your Lordships may be pleased to pass such other and further order or direction that may be deemed fit and proper in the facts and circumstances of the case.

It is clear from the prayer clause that what is challenged is notice dated 15.10.2011 issued by the respondent Bank under the provisions of Section 13(2) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Act" for the sake of brevity). Ms. Mehta, learned Counsel appearing for the petitioner has contended that in fact there is no default on the part of the petitioner and the notice at Annexure "A" to the petition is wrongly issued by the Bank. She further states that the petitioner Firm has been regularly paying instalment which fall due and payable on different dates and that no default has been made by the petitioner Firm. However, without considering these facts the impugned notice is given whereby the petitioner is called upon to discharge in full of its liability by paying to the respondent Bank for the sum of Rs. 4,69,63,849/- with monthly interest @ 15% from the date of the notice.

2. Before considering the submissions made by the learned Counsel for the petitioner it would be proper to quote Section 13 of the Act, which reads as under:

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 thereto, 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).

(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.]

3. The Hon'ble Apex Court in the case of Kanaiyalal Lalchand Sachdev and Others v. State of Maharashtra and Others, II (2011) SLT 188=1 (2011) BC 698 (SC)=(2011) 2 SCC 782, has observed as under:

15. Section 13 of the Act deals with enforcement of security interest, providing that notwithstanding anything contained in Section 69 or 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the Court's intervention, by such creditor in accordance with the provisions of the Act. Section 13(2) of the Act provides that when a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt, and his account in respect of such debt is classified as non-performing asset, then the secured creditor may require the borrower, by notice in writing, to discharge his liabilities within sixty days from the date of the notice, failing which the secured creditor shall be entitled to exercise all or any of the rights given in Section 13(4) of the Act. Section 13(3) of the Act provides that the notice u/s 13(2) of the Act shall give details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the Bank.

16. Section 13(3-A) of the Act was inserted by Act 30 of 2004 after the decision of this Court in Mardia Chemicals (supra), and provides for a last opportunity for the borrower to make a representation to the secured creditor against the classification of his account as a non-performing asset. The secured creditor is required to consider the representation of the borrowers, and if the secured creditor comes to the conclusion that the representation is not tenable or acceptable, then he must communicate, within one week of the receipt of the communication by the borrower, the reasons for rejecting the same.

17. Section 13(4) of the Act provides that if the borrower fails to discharge his liability within the period specified in Section 13(2), then the secured creditor, may take recourse to any of the following actions, to recover his debt, namely-

13.(4)(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising 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 realising 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, the secured creditor shall take over the management

of such business of the borrower which is relatable to the security for 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.

Section 14 of the Act provides that the secured creditor can file an application before the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction, the secured asset or other documents relating thereto are found for taking possession thereof. If any such request is made, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor. (See: *United Bank of India v. Satyawati Tondon*). Therefore, it follows that a secured creditor may, in order to enforce his rights u/s 13(4), in particular Section 13(4)(a), may take recourse to Section 14 of the Act.

Section 17 of the Act which provides for an appeal to the DRT, reads as follows:

17. Right to appeal.-(1) Any person (including borrower), aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his Authorised Officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation.-For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under [Sub-section (1) of Section 17].

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder....

4. In view of the above observations of the Hon''ble Apex Court, the present petition challenging the notice u/s 13(2) of the Act is not maintainable as the petitioner has alternative efficacious remedy by way of filing of proceeding u/s 17 of the Act.

5. However, considering the submissions made by Ms. Mehta that the petitioner Firm is not a defaulter and that has been regularly paying instalments that are due and payable and also considering the provision of Section 13 of the Act, the respondent Bank has to consider the applications that are filed before and after the issuance of the impugned notice. Ms. Mehta, learned Counsel appearing for the petitioner, states that the petitioner desires to file further detailed representation on the basis of the grounds that are raised in the present petition to the respondent Bank and it would be open for the petitioner to file such representation giving details as well as the* grounds that are raised in the present petition. If such a representation is filed on or before 2.2.2012, the respondent Bank shall consider the same in accordance with law without being influenced by the fact that this petition has not been entertained. It is further made clear that this Court has not examined the merits of the impugned notice and the petition is dealt with only on the ground of availability of alternative efficacious remedy as per the ratio laid down by the Hon"ble Apex Court in the case of Kanaiyalal Lalchand Sachdev and Others (supra). Hence, if any proceedings are initiated before the competent Forum, the competent Forum shall consider the same independently without influenced by this order. With this observation, the petition is disposed of with no order as to costs.