
(2016) 11 CAL CK 0004
In the Calcutta High Court
Case No : Writ Petition No. 862 of 2015

Metsil Exports Private Ltd.

APPELLANT

Vs

Punjab National Bank

RESPONDENT

Date of Decision : 10-11-2016

Acts Referred:

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

Citation : (2017) ACD 273 : (2017) 169 AIC 578 : (2017) AIR(Calcutta) 1 : (2017) 2 BC 73 : (2017) 1 CalLJ 210 : (2017) 1 CalLT 250 : (2016) 199 CompCas 480 : (2017) 1 DRTC 780

Hon'ble Judges : Dipankar Datta, J.

Bench : Single Bench

Advocate : Mr. Joy Saha, Senior Advocate, Mr. V. Raja Rao, Advocate and Ms. Aparajita Rao, Advocate, for the Respondent; Mr. Sabyasachi Chowdhury, Advocate, Mr. S.E. Huda, Advocate, Mr. Awadhesh Kumar Rai, Advocate, for the Petitioner

Final Decision : Disposed Off

Judgement

Dipankar Datta, J. - This writ petition dated July 8, 2015, mounts a challenge to a demand notice dated March 17, 2015 issued under section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereafter referred to as "the Act") by the Authorised Officer, Punjab National Bank (hereafter the second respondent), and the rejection of the petitioners' objection dated May 16, 2015 to such demand notice by the second respondent by his letter dated May 30, 2015.

2. At the time the writ petition was first considered by this Bench, it was found to be unusual that the demand notice under section 13(2) of the Act, apart from being served on the petitioners, was also published in two daily newspapers (the respective editions of Ananda Bazar Patrika and the Times of India, dated April 5, 2015) with the photograph of, inter alia, the second petitioner, a director of the

first petitioner. Such publication also contained photographs of two other directors of the first petitioner.

3. The demand notice published in the newspapers at the instance of the second respondent revealed that he had reasons to believe that the "borrowers/directors of the borrowing company are avoiding service of demand notice issued to them". Queerly, the impugned rejection letter dated May 30, 2015 referred to receipt of the demand notice by the petitioners on March 18, 2015 (as per track report of the postal department). It also revealed invocation of power by the second respondent conferred on him by rule 3 of the Security Interest (Enforcement) Rules, 2002 (hereafter the Rules). Since the proviso to rule 3(1) ordains "reason to believe" that the borrower or his agent had been avoiding service as a precondition for publication of a demand notice issued under section 13(2) of the Act in two newspapers having wide circulation, by an order dated July 22, 2015 the Bench had called upon Ms. Rao, learned advocate for the respondents to show how the second respondent had formed the opinion that publication of the demand notice in its entirety in two daily newspapers with the photographs of the directors of the first petitioner was necessary to take the proceedings initiated under the Act to its logical conclusion. On July 29, 2015, Ms. Rao submitted that there was no record from which formation of opinion could be discerned. Such submission was recorded in the order that was passed on that day. Having regard thereto, Mr. Huda, learned advocate for the petitioner was also requested to obtain instructions from the petitioners as to whether an apology of the first respondent (hereafter the PNB), printed in the same newspapers, would satisfy them or not. On the next date i.e. August 12, 2015, Mr. Joy Saha, learned senior advocate for the respondents regretted the respondents' inability to apologize. Hearing progressed and the writ petition was heard-in-part. The Bench having been prima facie satisfied that publication of the demand notice under section 13(2) of the Act together with the photograph of the second petitioner in the newspapers was not in accordance with law, the Chairman and Managing Director of the first respondent (hereafter the CMD) was requested to consider the desirability of adequately compensating the petitioners for the perceived irresponsible act of the second respondent. The CMD, after seeking an adjournment, filed an affidavit. Relevant portion thereof is quoted below:

"2. Preliminary Submissions - With due respect to this Hon'ble Court and its judgement rendered in the matter of Ujjal Kumar Das v. State Bank of India, the Deponent wishes to state, after legal consultation, the following submissions:

(a) That the bank renders financial assistance to the borrowers and expects the borrowers/guarantors to honour their commitment as per the contractual terms.

(b) That the Banking Industry underwent substantial changes with the nationalisation of banks but thousands of crores of public money got locked up in litigations while seeking to recover debts from the borrowers/guarantors.

(c) That this Hon''ble Court is fully aware of the fact that a claim for damages is a claim in tort for violation of the rights of an individual. In the present case, in view of conflicting judgments of different High Courts, as also the fact that the judgement of this Hon''ble Court rendered in 2013 is also a subject matter of appeal, the issue of publishing of photographs of the defaulting borrowers has to be finally decided by the Hon''ble Apex Court.

(d) That though a formal Affidavit in defence to the writ petition is being separately filed by the respondent bank, it is most humbly submitted that the writ petition itself is based on disputed question of facts, which make it not maintainable. As such, at this stage, it is the humble submission of the Deponent that payment of any compensation and its desirability cannot be considered unless other issues are decided against the respondents so as to make out a case for payment of any compensation and the ingredients connected therewith are fulfilled and satisfied.

3. That, without prejudice to the legal submissions made herein above, the following facts may also be taken into consideration by this Hon''ble Court:

(a) That the petitioner no. 1 was sanctioned various credit facilities by Punjab National Bank under consortium with State Bank of India as the Lead Bank. The account of the petitioner No. 1 with Punjab national Bank was classified as "NPA" on 28th February 2015. The present outstanding in the account is Rs.3,95,25,425.00 (Rupees Three Crore Ninety Five Lacs Twenty Five Thousand Four Hundred and Twenty Five only), charges and further interest at the agreed rate w.e.f. 1.03.2015 till the date of realization.

(b) That State Bank of India had issued notice under Section 13(2) of the SARFAESI Act, 2002 to the petitioner Company on 2.1.2015 for recovery of their dues of Rs. 34,23,09,312.11 as on 02.01.2015, while Punjab National Bank issued notice to the petitioner Company on 17.03.2015 under Section 13(2) of the SARFAESI Act, 2002. Although State Bank of India did not publish photographs, the obligants have filed writ petition against State Bank of India as well, making it very clear that the petitioners have filed the writ petition only to delay the recovery proceedings.

(c) That as is manifest from the writ petition itself, there is no denial on merit to the claim of the bank. As a matter of fact, disbursement and acceptance of loan/facility and the failure to repay the same stands admitted in the writ petition.

(d) That it is given to understand that, in order to avoid repayment of the dues of the bank, the company has created many sister concerns and have shifted their business to other line of products. The sale proceeds are not routed through the loan accounts and thereby did not adhere to financial discipline.

(e) That as per the CIBIL report, the Directors of the Company have raised House Building Loans of Rs. 1.06 crore from INDIABULLS HFC at original tenure of 120 months, out of which they have repaid a sum of Rs. 1.00 crore between

2012 and 2015. Between the years 2012 and 2015, the loan account of the petitioner with the bank turned into stressed asset indicating that the credit facility granted by the bank for business purposes has been wilfully diverted by the Directors/guarantors to acquire personal assets.

(f) That huge amount of public money is due and recoverable from the petitioners and the petitioners are trying to delay recovery proceedings.

(g) That on a perusal of the writ petition, it is clear that the allegations therein do not centre around the matter concerning the publication of photographs of the guarantors.

(h) That the writ petition contains no submission or claim or pleadings to the effect that, by reason of publication of the photographs, the guarantors have suffered any damages or injury or loss to their reputation and goodwill and have not prayed for any damages or compensation. The petitioners are fully aware that they have not paid the amounts due to Punjab National Bank as per the terms they had agreed to while availing the loan and they are not worthy of any compensation.

(i) That petitioner No. 2 is guarantor in the account and hence is jointly and severally liable to pay the entire outstanding amount in the loan account. Out of the three guarantors whose photographs were published, only Petitioner No. 2 has filed the writ petition.

(j) That the High Courts of Bombay, Madhya Pradesh, Madras, Chhattisgarh & Gujarat have held that the Banks can publish the photographs of defaulters.

(k) That the order of Calcutta High Court in the case of Ujjal Kumar Das v. State Bank of India 2013(2) Cal LT 639 is under challenge before the Division Bench of this Hon"ble Court.

(l) That the Supreme Court did not admit the SLP filed by the party against the judgment of Bombay High Court.

(m) That in view of the foregoing, it is respectfully submitted that if compensation is imposed in the present case, such an order will send a wrong signal to the borrowers and guarantors and may even have the effect of encouraging such borrowers and/or guarantors to commit default in repayment of bank dues without fear of any retribution.

(n) That having regard to the above, it is once again submitted that this Hon"ble Court be graciously pleased to accept the contentions as submitted above and drop the issue of payment of any compensation at this stage."

4. The said affidavit was taken on record and, thereafter, the parties were called upon to exchange their respective affidavits touching the merits of the claim raised in the writ petition. The affidavits having been exchanged, the writ petition was finally listed for hearing.

5. After hearing progressed to some length, it was made clear to Mr. Chowdhury, learned advocate for the petitioners that the merits of the order of rejection would not be examined by the writ court and that the petitioners may work out their remedy in accordance with the provisions of law, should the respondents decide to take measures under section 13(4) of the Act. It was also made clear that the scrutiny of the Bench would be confined to the aspect of publication of the demand notice together with the photograph of the second petitioner in the two newspapers. Mr. Chowdhury agreed to address the Bench on such point and Mr. Saha was called upon to counter the submissions of Mr. Chowdhury.

6. This Bench in its decision reported in (2013) 2 CAL LT 639 (HC) : Ujjal Kumar Das & anr. v. State Bank of India & ors., held that neither the Act nor the Rules empowers a secured creditor to publish the photograph of a defaulting borrower as a mode for recovery of its dues. The circumstance that the said decision was pending in appeal has been referred to by the CMD in her affidavit. However, it requires to be noted that the appeal against the decision of this Bench in Ujjal Kumar Das (supra) has since been finally decided by an Hon'ble Division Bench of this Court and its decision is reported in 2016 (3) CHN (CAL) 703 : State Bank of India & ors. v. Ujjal Kumar Das. The Hon'ble Division Bench, after having noted that opinions of several high courts on the point vary, arrived at the following opinion:

"From the above discussion and information it is very clear so far as the Act and the rules, there is neither positive direction nor negative indication so far as publication of photographs. Definitely rule 8 is intended to alert the public that the property is encumbered and one should know such encumbrance if anyone intends to deal with such property. Correspondence between the Indian Bank Associations to Reserve Bank of India, and Reserve Bank of India to the chairman State Bank of India Credit Policy and Procedures Department Mumbai in 2007 and the guidelines issued by RBI as updated on 07.01.2015 clearly indicate how and under what circumstances a borrower could be categorized as a wilful defaulter and how the information has to be disseminated to the credit information companies. This clarifies the position that as a matter of routine procedure, one should not resort to publication of photographs of defaulters unless and until there are special circumstances where the borrower with mala fide intention is committing any of the Acts envisaged in the guidelines of RBI which would categorize him as a wilful defaulter. In those circumstances the authority can act for public good/public interest for good reasons by publication of photographs, names and addresses of defaulting borrower(s)/guarantor(s). If publication of photographs is otherwise implemented as a routine, there is bound to be serious impact on economy because if a genuine borrower becomes defaulter for various reasons other than the reasons to treat him as "wilful defaulter" in terms of guidelines of RBI, such genuine defaulter would be faced with situation where no one would come forward to assist him to come out of the financial crisis. There should not be publication of photograph before proceeding with further course of action under SARFAESI Act only with a view to pressurise

the defaulter/guarantor to repay the loan. In other words it would amount to undue influence or pressure coming in the way of rights of the borrower attracting Article 21 A of the Constitution of the India i.e. right to live with dignity."

(underlining for emphasis)

7. Insofar as this Court is concerned, the point is, therefore, decided that while seeking to recover its dues under the Act and the Rules, a secured creditor is not entitled to publish the photographs of defaulting borrowers in a routine manner for pressurising a defaulting borrower to repay the dues and it is only photographs of wilful defaulters that could be published.

8. The Reserve Bank of India (hereafter the RBI) has framed guidelines which are required to be followed by lender banks before defaulting borrowers can be classified and declared as "wilful defaulters". It is, therefore, axiomatic that unless in an appropriate case a defaulting borrower is declared a "wilful defaulter" in adherence to the guidelines framed by the RBI, photograph of a defaulting borrower cannot be published in a newspaper in a routine manner.

9. The decisions of the other high courts, which have held that publication of photographs of defaulting borrowers is not unauthorized, may now be examined in some detail since the CMD has relied on them heavily to defend the respondents. The relevant decisions are of the Bombay High Court in the case of D.J. Exim v. State Bank of India, the Chattisgarh High Court in the case of Shri Mohan Products v. State Bank of India, and the Delhi High Court in the case of M/s. K.V. Wall Mount Pvt. Ltd. v. State Bank of India.

10. This Bench notes that although the decision of this Bench in Ujjal Kumar Das (supra) was placed before the relevant Benches of the Bombay and the Chattisgarh High Courts, Their Lordships did not quite agree with the same on the specious ground that rule 8 permits publication of photographs. The decision of a high court is at best a persuasive precedent, which another high court is free not to follow. That applies to this Court too. The decisions of other high courts, even though rendered by an Hon"ble Division Bench, is not binding on a Single Bench of this Court. This is the easy route for not following a decision of another high court. However, it is not proper to side track a decision of another high court on the same point by saying that it is not binding. After all, it is a decision of a high court and every decision of high courts deserve due and meticulous consideration. Should a Bench feel not to be persuaded by a persuasive precedent, some reason ought to be assigned. That is exactly the law laid down by the Supreme Court in the decision reported in (2008) 14 SCC 283 : Pradip J. Mehta v. Commissioner of Income Tax, Ahmedabad. In paragraph 23 of the decision, the Supreme Court stressed the need for the high courts to either record its agreement or dissent with the decision of any other high court that is placed before it. It was also stressed that the high court, which differs with the view taken by the other high court, in all fairness, must record its dissent with

the reasons therefor. Being bound thereby, this Bench treads the path of assigning reasons for not being *ad idem* with the decisions in D.J. Exim (*supra*), Shri Mohan Products (*supra*) and K.V. Wall Mount Pvt. Ltd. (*supra*).

11. In D.J. Exim (*supra*), a demand notice under section 13(2) of the Act was issued on October 1, 2013 where after by a letter dated October 10, 2013, the secured creditor threatened to publish the photographs of the directors and the guarantors in the newspapers. It was at that stage that the writ petition was presented challenging the letter dated October 10, 2013. The threatened action of the secured creditor was sought to be sustained, *inter alia*, by referring to rule 8 of the Rules. With respect to the Hon'ble Division Bench, rule 8 has no manner of application at the stage a demand notice under section 13(2) of the Act is issued. It comes into play when measures have been initiated against the borrower under section 13(4) of the Act, after extending to the borrower the right of making representation/objection to the demand notice and after considering and disposing of such representation/objection. Without exhausting the procedure prescribed in sub-sections (2), (3) and (3A) of the Act, the secured creditor cannot initiate coercive steps against a defaulting borrower. Taking the aid of rule 8 to decide the authority of a secured creditor to publish the photograph of the defaulting borrower when action under section 13(4) of the Act has not yet been initiated, to the mind of this Bench, is an erroneous approach. That apart, whether rule 8 at all permits publication of names of wilful defaulters is indeed debatable. That a secured creditor cannot declare any defaulting borrower as a "wilful defaulter" except in accordance with the provisions of the Master Circular of the RBI, is settled law. It is thus difficult to comprehend the procedure that a secured creditor may be required to follow while publishing the photograph of a borrower, whom the secured creditor perceives to be a "wilful defaulter" but who has not been declared so in accordance with law. In any event, in view of the last sentence of paragraph 13, the decision must be read as turning on its own facts. Notwithstanding the fact that special leave to appeal against the said decision was not granted by the Hon'ble Supreme Court, it is difficult to accept that the decision lays down good law worthy of being followed.

12. The decision in Shri Mohan Products (*supra*) [as well as the decision in D.J. Exim (*supra*)] seems to have overlooked the provisions of section 13(1) of the Act (the fundamental guiding principle for recovery of debts in terms of the provisions of the Act) as well as the applicability of the Latin maxim "*expressio unius est exclusio alterius*". That apart, the difference in wording of rule 6(2) and rule 8(2) of the Rules also went unnoticed. Rule 6, providing for the manner of sale of movable secured assets, expressly enables *vide* sub-rule (2) disclosure of the name and address of a borrower, whereas rule 8(2) does not expressly so enable. Disclosure of the name and address of a borrower when immovable secured assets are to be sold could at best be construed as an implied power flowing from clause (f) under the proviso, and not as a right that clearly flows from rule 8 (as held in paragraph 19 of the decision). There being absolutely

nothing in the parent enactment conferring authority on the secured creditor to publish the photograph of a defaulting borrower, it would amount to stretching the Rules to absurd limits to read into it the authority of a secured creditor to do so. It is well-known that a subordinate legislation supplements and cannot supplant the enactment to which it owes its origin. The Act being a self-contained code, it would be disastrous to read it and the Rules in a manner that would confer on authorised officers unfettered, unbridled and unchartered power while issuing sale notices. The rule framing authority must have been conscious of the consequences if an express power to publish photographs of defaulting borrowers were conferred on the authorised officers, and bearing the same in mind must be presumed to have chosen not to confer such power. By judicial fiat, a power cannot be conferred which is not expressly or even impliedly conferred by legislation. In any event, this decision dealt with a situation where rule 8 could be invoked unlike the present case and is, therefore, distinguishable on facts too.

13. The Delhi High Court in the case of K.V. Wall Mount Pvt. Ltd. (supra) simply followed the decision in D.J. Exim (supra) upon noting that the special leave petition filed there against had been dismissed, without assigning any independent reason. This decision too does not aid the respondents.

14. For the aforesaid reasons, this Bench is of the clear and firm view that publication of the photograph of the second petitioner cannot be justified by the CMD by referring to the said decisions.

15. The decisions of the Madhya Pradesh High Court reported in AIR 2007 Madhya Pradesh 45 : Kumari Archana Chauhan v. State Bank of India, Jabalpur and the Madras High Court reported in (2007) 136 Comp. Cases 568 (Mad) : K.J. Doraiswamy v. The Assistant General Manager, State Bank of India, were distinguished by this Bench in Ujjal Kumar Das (supra).

16. For the reasons aforesaid, the version of the CMD as reflected in the affidavit filed by her does not commend to be acceptable and her effort to create an impression of the law being unsettled to save her subordinate from being hauled up for exercising non-existent powers, is abortive.

17. However, this Bench proposes to give the benefit of doubt to the CMD as well as the respondents on the ground that the law may have been unsettled insofar as publication of photographs along with a notice issued either under rule 6 or 8 is concerned. At the same time, there cannot be any escape from the conclusion that the points involved in this writ petition are different and the CMD, while being under an obligation to comply with the request of the Bench, simply failed to notice it.

18. Turning to the facts giving rise to the writ petition, it appears that while the first petitioner availed of credit facility extended to it by the first respondent, the second petitioner, inter alia, stood as guarantor. The demand notice dated March 17, 2015 was duly responded to by the first petitioner by lodging an objection dated May 16, 2015. However, in the interregnum, April 5, 2015 to be precise,

the newspapers carried the demand notice, inter alia, with the photograph of the second petitioner. Such paper publications were attacked by the first petitioner in such objection by terming it to be illegal, wrongful, and arbitrary, and in abuse of the process of law. That apart, several contentions were raised by the first petitioner and it was ultimately prayed that each and every point raised may be dealt with and should the second respondent be not agreeable to accept the points of objection, rescheduling/restructuring may be worked out for putting things in order. The second respondent while rejecting the objection of the first petitioner by his letter dated May 30, 2015, observed as follows:

"The said demand notice addressed to Shri Susil Kumar Pal, Director of the Company was returned undelivered by the postal authorities. As such, the said demand notice was published in the newspapers "Times of India" and "Ananda Bazar Partika" on 05.04.2015."

19. Referring to the above extract, Mr. Chowdhury contended that nonacceptance of the demand notice under section 13(2) of the Act by the said Sushil Kumar Pal could not have afforded any ground to the respondents to publish the demand notices in two newspapers having wide circulation without formation of necessary opinion in that regard, as mandated by the proviso to rule 3(1) of the Rules. He even brought to the notice of this Bench that surprisingly enough, the photograph of the said Sushil Kumar Pal was not published and photographs of those directors/guarantors of the first petitioner, who had received the demand notice, were published. He, thus, contended that absolutely no justification has been provided in the counter affidavit in regard to the brazen irresponsible conduct on the part of the second respondent and an attempt has been made to shield his misdeeds by referring to untenable pleas. It was, accordingly, prayed that the petitioners may be adequately compensated not only to provide some relief to the petitioners but also to send a message to devious authorised officers that any transgression of their powers would be seriously viewed by the writ court and appropriate directions given to undo the gross wrongs committed by them while recovering the dues.

20. Per contra, Mr. Saha contended that the writ petition is not maintainable. According to him, all points that are available to the petitioner in law should be allowed to be agitated before the tribunal under section 17 of the Act. It was further contended by him that the petitioners sought to make a mountain out of a molehill. Despite conceding that the second respondent may not have exercised discretion wisely in having the photograph of the second petitioner published, Mr. Saha contended that no case has been set up by the petitioners for grant of compensation and that the Bench may refrain from adjudicating the point of publication of photographs at this stage. He also contended that bare perusal of the writ petition would not reveal the attack of the petitioners being targeted at publication of photographs of the guarantors; on the contrary, the focal challenge is directed against initiation of proceedings under the Act by issuing demand notice and rejection of the objection in terms of section 13(3A)

of the Act. According to him, only a negligible portion of the writ petition pertains to publication of photographs and that there is no specific pleading indicating the extent of loss of reputation and damage or injury to goodwill by reason of publication of the photographs of the guarantors.

21. Mr. Saha placed before this Bench circular letters dated March 22, 2013 and August 21, 2015, issued by the PNB on the issue of publication of photographs of defaulting borrowers and contended that the sentiments expressed by this Bench earlier had been noted with due care and seriousness and instructions had been issued not to publish photographs of defaulters in the print media. He also submitted that since the instructions were being duly followed since then, the petitioners are not entitled in law to cash on a slip on the part of an authorised officer and seek compensation by invocation of public law remedy. Several decisions were cited by him to support the contention that the petitioners ought to approach the civil court claiming compensation, if at all, and that the writ court is not the appropriate forum for such purpose.

22. Based on the relevant pleadings and the arguments that were advanced, the limited points that have emerged for decision are :

(i) what is the legal position regarding publication of a demand notice under section 13(2) of the Act in two newspapers having wide circulation with the photograph of a director/guarantor?

(ii) whether the second respondent transgressed his powers or not in having such demand notice published with the photograph of the second petitioner? and

(iii) what relief the petitioners are entitled to, on facts and in the circumstances?

23. All the points are taken up together for consideration, in the light of the arguments that have been advanced by the parties.

24. Once the law [read: section 13(1) of the Act] ordains that a security interest may be enforced in accordance with the provisions of the Act, it is only those acts which are expressly authorised that can be performed and no act can be performed on the premise that such act has not been expressly prohibited by the Act. If indeed such a construction were permissible, section 13(1) of the Act would be rendered nugatory.

25. The stage of issuance of demand notice under section 13(2) is reached when a borrower under liability to a secured creditor makes a default in repayment of a secured debt or any instalment thereof and his account in respect of such debt is classified as "non-performing asset". By issuing such notice, the secured creditor urges the defaulting borrower to discharge in full his liability to the secured creditor within sixty days failing which the secured creditor shall be free to exercise all or any of the rights under section 13(4). At such stage, the demand is merely a demand. It is issued to apprise a borrower what he owes to the secured creditor and must repay. Natural justice is not involved at such stage. Anyone having interest in the history of legislation may recollect that the Act in

its original form permitted a secured creditor to enforce the provisions contained in section 13(4) thereof immediately upon expiry of the sixty day period without such borrower/guarantor being conferred a right of representation/objection. The Act did not provide for any internal mechanism for consideration and disposal of any valid objection that a borrower/guarantor could raise against such demand. It was as a result of the decision reported in (2004) 4 SCC 311 : Mardia Chemicals Ltd. v. Union of India, that sub-section (3A) came to be incorporated in section 13 providing for a right of representation/objection. The law as it now stands makes it imperative for a secured creditor to consider and dispose of, upon application of mind, any representation/objection that it might receive from a borrower/guarantor and it is only thereafter that recourse could be taken to provisions contained in section 13(4). Invocation of power is, thus, not at the fancy and whims of a secured creditor. The guidelines flowing from judicial pronouncements have to be scrupulously followed. Reading a power to publish photograph along with the demand notice in a newspaper before a stage is reached where the secured creditor is legally authorised to enforce the security interest without intervention of the court or tribunal, would not only be anomalous but in clear derogation of the limited rights that are available to a defaulting borrower/guarantor.

26. The first point is thus answered by holding that the statute does not conceive conferring power on a secured creditor/its authorised officer to publish a demand notice in a newspaper without having "reasons to believe" that such publication is imperative having regard to the facts and circumstances before it and that at such stage, there is no question of reading a power of publication of photograph in the newspapers along with the demand notice. The manner of service of the demand notice is provided by rule 3 of the Rules. Rule 3 reads as follows:

"3. Demand Notice. -

(1) The service of demand notice as referred to in sub-section (2) of section 13 of the [Act] shall be made by delivering or transmitting at the place where the borrower or his agent, empowered to accept the notice or documents on behalf of the borrower, actually and voluntarily resides or carries on business or personally works for gain, by registered post with acknowledgement due, addressed to the borrower or his agent empowered to accept the service or by Speed Post or by courier or by any other means of transmission of documents like fax message or electronic mail service:

Provided that where authorised officer has reason to believe that the borrower or his agent is avoiding the service of the notice or that for any other reason, the service can not be made as aforesaid, the service shall be effected by affixing a copy of the demand notice on the outer door or some other conspicuous part of the house or building in which the borrower or his agent ordinarily resides or carries on business or personally works for gain and also by publishing the contents of the demand notice in two leading newspapers, one in vernacular language, having sufficient circulation in that locality.

(2) Where the borrower is a body corporate, the demand notice shall be served on the registered office or any of the branches of such body corporate as specified under sub-rule (1).

(3) Any other notice in writing to be served on the borrower or his agent by authorised officer, shall be served in the same manner as provided in this rule.

(4) Where there are more than one borrower, the demand notice shall be served on each borrower."

27. Publication of the demand notice in the newspapers was made by the second respondent upon invocation of such power.

28. It is settled law that if the statute requires a particular act/thing to be performed/done in a particular manner, it has to be performed/done in that manner alone or not at all. This Bench need not burden this judgment with authorities on the point. Suffice it to record, if a demand notice under section 13(2) of the Act is served on the borrower/guarantor in the manner statutorily provided for and there is no reason at all to believe that service has not been effected, question of publication thereof in the newspapers does not and cannot arise. It is only when an opinion could reasonably be formed that the borrower is evading service of the demand notice and that alternative modes of service have been exhausted without seemingly positive result in view thereby making it imperative to proceed for the last option i.e. publication in newspapers, that recourse thereto could be taken. The requirement of formation of opinion, which must be available in the record, is the "sine qua non" and the law cannot be observed in the breach.

29. As has been recorded in the order dated July 29, 2015, referred to above, there appears to be no record maintained by the respondents in relation to having "reasons to believe" that publication of the demand notice in the newspapers has become absolutely essential for making the borrower/guarantor aware of what is required of him/them. The "sine qua non" is thus conspicuous by its absence. That apart, no answer could be given by Mr. Saha as to why the photograph of the second petitioner was published despite the admitted fact of he having received the demand notice. Evasion of notice by the said Sushil Kumar Paul, if at all, could not have given rise to any situation warranting publication of the photograph of the second petitioner. There cannot thus be any doubt that the second respondent has conducted himself in a manner not authorised by law by publishing the demand notice in the newspapers with the photograph of the second petitioner.

30. Interestingly, the second respondent had the photograph of the second petitioner published in the newspapers not at the stage of taking measures under section 13(4) of the Act but at a point of time when at the end of the PNB itself, the right to invoke measures under section 13(4) had not even crystalized.

31. Over and above all these, it appears that the second respondent did not also

care to abide by the circular letter dated March 22, 2013 issued by another senior officer of the PNB. The relevant instruction contained in such circular letter reads as follows:

"In view of the nature of constitution of the Companies/Trust/Society etc., photographs of the authorised persons/official(s) concerned viz. Directors/Chairman/Secretary/Treasurer/Trustee etc. should not be published. However in case of Partnership Firm, the photographs of the partners can be published." (bold and underlining in original)

It would, therefore, appear that the second respondent has acted in breach of the circular letter dated March 22, 2013.

32. Considering the overall facts and circumstances, it appears to be crystal clear that the second respondent has grossly abused his authority.

33. The second point having been decided, it would now be appropriate to look at the pleadings to ascertain whether the petitioner is at all entitled to be compensated or not having regard to the conduct of the second respondent. In paragraph 43 of the writ petition it has been pleaded as follows:

"43. In the meantime, the respondents in utter disregard of the law for the time being in force and in violation of various orders passed by the Hon"ble Courts of law, the respondents published the notice under section 13(2) of the SARFAESI Act, 2002 in the English daily "Times of India" on 28th March, 2015 along with the photographs of the petitioner no. 2. A copy of the said paper publication dated 28th March, 2015 is annexed hereto and marked with the letter "P-26". While publishing the Notice in the newspaper as well as letters to the petitioners, the respondents has wrongly claimed the properties of the petitioners which are exclusively charged with SBI. Further PNB have failed to:-

a) Describe how they arrived at the outstanding amount of Rs.3,95,25,425/-.

b) How while issuing notice under Section 13(2) of the SARFAESI ACT 2002, how the petitioners have not complied with the provisions of Section 13(9) of the said Act.

c) How as per their Notice dated 17.03.2015 under Section 13(2) of SARFAESI ACT 2002 table given in page 2, claiming facilities availed by Petitioner from Respondent Branch. The statement of accounts, documents and earlier correspondences from Respondent No. 1 contradicts schedule of facilities claimed were made available to petitioner. Their Notice is defective to that extent."

34. Insofar as the grounds urged in support of the relief claimed in the writ petition are concerned, it appears that Grounds XXIII and XXIV pertain to the action of the respondents in publishing the photograph of the second petitioner. These are all in the writ petition with regard to publication of the photograph of the second petitioner in the two newspapers.

35. Mr. Saha's submission that any pleading of the second petitioner suffering

damage/loss/injury to his reputation and goodwill is conspicuous by its absence, appears to be correct.

36. This Bench, therefore, holds that this is not a fit and proper case for any compensation to be awarded by the court of writ to the petitioners. While declining compensation, liberty to approach the appropriate forum for recovery thereof in accordance with law is reserved.

37. However, having regard to the findings recorded above that the second respondent grossly exceeded his authority in publishing the demand notice in the newspapers with, inter alia, the photograph of the second petitioner, this writ petition stands disposed of with the direction that the respondents shall publish an apology in the said newspapers (Ananda Bazar Patrika and The Times of India) expressing regret for having published the photograph of the second petitioner, within 30 days from date. The petitioners shall also be entitled to costs of proceedings assessed at Rs.50,000/-, to be paid within the same period as aforesaid. Liberty of the PNB to recover the publication charges as well as costs of proceedings from the second respondent, in accordance with law, is also reserved.

38. Urgent photostat certified copy of this judgment and order, if applied, may be furnished to the applicant at an early date.