
(2017) 07 J&K CK 0009
In the Jammu And Kashmir High Court
Case No : 310 of 2017

Mir Sons Constructions Pvt. Ltd.

APPELLANT

Vs

State of Jammu and Kashmir and others

RESPONDENT

Date of Decision : 03-07-2017

Acts Referred:

[Constitution of India](#), [Article 226](#) -
Power of High Courts to Issue certain writs

[Securitisation and Reconstruction of Financial Assets and Enforcement
of Security Interest Act, 2002](#), [h](#)

Citation : 2017 0 AIR(J&K) 122

Hon'ble Judges : Badar Durrez Ahmed, M.K. Hanjura

Bench : DIVISION BENCH

Final Decision : Dismissed

Judgement

1. This writ petition is directed against the notice dated 25.1.2017, issued by the respondents (Jammu & Kashmir Bank) under Section 13(2) of

the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (hereinafter referred to as the said Act).

The main challenge to the notice dated 25.01.2017 is that it has been issued in violation of the guidelines of the Reserve Bank of India and is,

therefore, liable to be quashed. The plea of the petitioner is that the respondent bank did not adhere to the guidelines as issued by the Reserve

Bank of India with regard to classification of assets as non-performing assets. It was also contended that since the classification of an asset as a

non-performing asset (NPA) is a pre-condition for the issuance of a notice under Section 13(2), when the said pre-condition is not satisfied in

accordance with the law, the notice itself would be bad in law and would be liable to be challenged by way of a writ petition under Article 226 of

the Constitution of India read with Section 103 of the Constitution of Jammu and Kashmir.

2. In the impugned notice dated 25.01.2017, it has been stated that the petitioner had defaulted in repayment of the secured debt in violation of the terms agreed upon and, therefore, the petitioner's account had been classified by the bank as a non-performing asset with effect from 30.06.2016, as per the guidelines/ directions of the Reserve Bank of India. It is this statement in the impugned notice which has been challenged in the present writ petition.

3. The learned counsel for the petitioner drew our attention to a document known as the Master Circular " " Prudential Norms on Income

Recognition, Asset Classification and Provisioning pertaining to advances issued by the Reserve Bank of India. Paragraph 2 of the said document

deals with definitions and paragraph 2.1 pertains to non-performing assets. A non-performing asset has been defined as a loan or an advance

where, inter alia, the account remains " out of order" as indicated in paragraph 2.2 in respect of an Overdraft/Cash Credit (OD/CC). Paragraph

2.2 of the said Reserve Bank of India guidelines is set out herein below;

"2.2" Out of Order-status

An account should be treated as " out of order-if the outstanding balance remains continuously in excess of the sanctioned limit/ drawing power for

90 days. In cases where the outstanding balance in the principal operating account is less than the sanctioned limit/ drawing power, but there are no

credits continuously for 90 days as on the date of Balance Sheet or credits are not enough to cover the interest debited during the same period,

these accounts should be treated as" out of order."

4. On going through the above extracted paragraph 2.2, it is evident that an account is to be treated as " out of order-if the outstanding balance

remains continuously in excess of the sanctioned limit/drawing power for 90 days. In the present case, we are concerned with an overdraft facility

of Rs. 09 crores. It is the case of the bank that in respect of the said overdraft facility, the outstanding balance remained continuously in excess of

the sanctioned limit/ drawing power for 90 days and that is why it was classified as a non-performing asset. It is also provided in paragraph 2.2,

which has been set out here, that in case the outstanding balance in the principal

operating account is less than the sanctioned limit/ drawing power, but there are no credits continuously for 90 days as on the date of balance sheet or credits are not enough to cover the interest debited during the same period, such accounts should also be treated as " out of order."

5. We may point out that the outstanding balance in the overdraft facility which was extended by the respondent bank to the petitioner had crossed the Rs.09 crore sanctioned limit in November, 2015, itself and continued to be outstanding for a period of over 90 days.

6. The learned counsel for the petitioner next drew our attention to paragraph 4.2 of the said Reserve Bank of India circular which prescribed the guidelines for classification of assets. The said paragraph 4.2 is reproduced herein below;

"4.2 Guidelines for classification of assets

4.2.1 Broadly speaking, classification of assets into above categories should be done taking into account the degree of well-defined credit

weaknesses and the extent of dependence on collateral security for realization of dues.

4.2.2 Banks should establish appropriate internal systems (including technology enabled processes) for proper and timely identification of NPAs,

especially in respect of high value accounts. The banks may fix a minimum cut off point to decide what would constitute a high value account

depending upon their respective business levels. The cutoff point should be valid for the entire accounting year. Responsibility and validation levels

for ensuring proper asset classification may be fixed by the banks. The system should ensure that doubts in asset classification due to any reason

are settled through specified internal channels within one month from the date on which the account would have been classified as NPA as per

extant guidelines."

7. Paragraph 4.2.2 was particularly emphasized by the learned counsel for the petitioner. He laid stress on the last sentence of paragraph 4.2.2

which provides that the system should ensure that doubts in asset classification due to any reason are settled through specified internal channels

within one month from the date of classification of the account as NPA as per extant guidelines. The learned counsel for the petitioner submitted

that inbuilt into this statement was an opportunity of the borrower to be heard

and to present its case with regard to whether an account had been properly classified as NPA or not and it is only thereafter that the account should have been classified as NPA. The contention of the petitioner was that no such opportunity was given to the petitioner prior to the classification of its overdraft facility as NPA and, therefore, the Reserve Bank of India guidelines had not been adhered to and consequently petitioner's overdraft facility could not be regarded as a non-performing asset in law. This being the position, it was submitted that the impugned notice under Section 13(2) of the said Act could not have been issued as the very foundation of that notice, which was the classification of the overdraft facility as a non-performing asset, was contrary to law.

8. The learned counsel for the petitioner also relied on the decision of the Supreme Court in the case of *Mardia Chemicals Ltd v. Union of India* (2004) 4 SCC 311 : (AIR 2004 SC 2371). Particular emphasis was placed on paragraph 44 of the said decision. Referring to the said paragraph, it was submitted that the settlement of doubts or disputes regarding classification of NPAs should be resolved by some internal mechanism.

According to the learned counsel for the petitioner, the Supreme Court had clearly noted that this in itself suggested safeguards for a borrower before a secured asset was classified as NPA. The Supreme Court, according to the petitioner, made it clear that if there was any difficulty or objection pointed out by the borrower, the same was to be resolved expeditiously by means of some internal mechanism. According to the learned counsel for the petitioner, this was absent in the present case and, therefore, the safeguard for the borrower which was inbuilt into the Reserve Bank of India guidelines was denied to the petitioner. The consequence of which would be that the classification of the petitioner's account as an NPA would be bad in law.

9. Before we examine and consider the contentions raised by the learned counsel for the petitioner, it would be necessary to set out some facts.

10. On 29.6.2016, an e-mail was sent by the Bank to the petitioner which, inter alia, indicated that since there were no transactions in the petitioner's account since long it was apprehended that the accounts would slip into NPA as on 30.06.2016. Consequently, the bank requested the petitioner to arrange sufficient funds to save the account from slipping into

NPA. On 29.06.2016, itself the Bank sent a demand notice calling upon the petitioner to pay the amount of Rs.9,82,27,146.41/- with further interest thereon with effect from 01.06.2016 and to discharge its liabilities towards the Bank in full within a period of 15 days from the date of notice, failing which the Bank would be constrained to initiate appropriate action. It is pertinent to note that the petitioner did not send any response to the e-mail dated 29.06.2016, nor did it make the payment as demanded by virtue of the notice dated 29.06.2016. Thereafter, on 28.11.2016, the petitioner sent a letter to the respondent Bank essentially seeking sanction of a rehabilitation package or equivalent package so that the petitioner company could be able to survive. However, in the said letter dated 28.11.2016, it was admitted that a notice were issued on 29.06.2016 about the information that the petitioner's accounts would become NPA on 30.06.2016 and that a recovery notices for payments were issued to the petitioner company as well as to its directors. This, according to the petitioner, demonstrated that some officers had adopted an inhuman and negative approach against the company. However, what is pertinent to note is that there was no response to the e-mail dated 29.06.2016 with regard to the likelihood of the petitioner's overdraft facility becoming a non-performing asset on 30.06.2016, nor is there any dispute raised in the letter dated 28.11.2016 with regard to the said account being classified as NPA.

11. This was followed on 02.12.2016 by a notice issued by the respondent Bank to the petitioner wherein it was clearly indicated that after availing, inter alia, the overdraft facility, the petitioner had defaulted in repaying the same as per agreed terms and conditions of the sanction letter and that the account had been classified as NPA as on 30.06.2016. By virtue of the said notice, the petitioner was called upon once again to pay the bank the amount of Rs. 10,87,68,048.72/- with further interest thereon with effect from 01.12.2016 and discharge its liability towards the Bank in full within a period of 30 days from the date of the notice.

12. The petitioner did not respond to this notice at all. It is obvious that the petitioner did not challenge the fact that its account had been classified

as NPA as on 30.06.2016, nor did it make the payment of the amount demanded.

13. As a consequence, the bank issued the impugned notice dated 25.01.2017,

under Section 13(2) of the said Act. As mentioned above, the said notice clearly indicates that the petitioner had defaulted in repayment of the secured debt in violation of the terms agreed upon and, therefore, the petitioner's account had been classified by the bank as an NPA with effect from 30.06.2016 as per the guidelines/ directions of the Reserve Bank of India. The present petition was filed on 16.03.2017, challenging the impugned notice under Section 13(2) of the said Act. It is after the filing of the present writ petition that the petitioner sent a reply to the impugned notice under Section 13(2). The said reply was sent on 23.03.2017. It is in this reply, for the first time, that the petitioner submitted that the Bank had wrongfully and without following the process of law mandated by the guidelines of the Reserve Bank of India issued in that regard and on an unfounded assumption that the account of the petitioner has been classified as NPA proceeded to issue the impugned notice without any warrant and authority in law. It was further stated in the reply dated 23.03.2017 that no " intimation-as contemplated under Clause 4.2 of the Master Circular/ Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to advances was given to the petitioner company. Accordingly, it was stated that the declaration or classification of the petitioner's account as NPA was in utter violation of Clause 4.2 of the said Circular of the Reserve Bank of India. It was further stated that doubts in asset classification due to any reason must be settled through specified internal channels within one month from the date the account is classified as NPA. The contention of the petitioner was that no such intimation/ clarification had been given to the petitioner as would have enabled the petitioner to raise a doubt which required to be settled through specified internal channels by the Bank. The e-mail dated 29.06.2016 was referred to as a surreptitious e-mail and it was indicated that in the said e-mail only an apprehension had been indicated and that the e-mail was followed by notice of demand where there was no mention of the account having classified as NPA. It was, therefore, contended in the said reply that the petitioner was under the bona fide belief that its account had not slipped into NPA category. It was submitted that it was only through the notice dated 02.12.2016 that the bank for the first time intimated the petitioner that its account had been declared as an NPA retrospectively with effect

from 30.06.2016. Consequently, it was submitted that the impugned notice under Section 13(2) of the said Act was void ab initio and non-est and was liable to be recalled/withdrawn forthwith.

14. As provided in Section 13(3A) of the said Act, if on receipt of a notice under Section 13(2) the borrower makes any representation or raises

any objection, the secured creditor is required to consider such representation or objection. If the secured creditor comes to the conclusion that

such representation or objection is not acceptable or tenable, he is required to communicate within 15 days on receipt of such

representation/objection the reasons for non-acceptance of the representation/objection to the borrower. Consequently, the respondent Bank

having considered the representation/objection of the petitioner dated 23.03.2017, rejected the same and communicated the rejection by virtue of

its letter dated 03.04.2017, with particular reference to the classification of the petitioner's account as NPA which was recorded as under :- "As

for your allegation that the account was declared NPA in violation of the " Prudential Norms on Income Recognition, Asset Classification and

Provisioning" is baseless. Your account has been declared as NPA in strict adherence to the " Prudential Norms" . The fact is that you have failed

to adhere to the financial discipline and your account has been regularly reflecting in SLAC right from September 2015 and you have been

continuously exhorted by the bank to conduct your account as per agreed terms, but you did not pay any heed. In our mail dated 29.06.2016, you

were informed that there is a huge demand against your loan accounts and that no transactions have been made in the accounts for a long time and

you were finally warned that your accounts were likely to slip into NPA on 30.06.2016 but you neglected to regularize your account and

consequently your accounts did slip into the category of NPA on 30.06.2016. You cannot be negligent in repaying the loan and at the same time

claim to be in bonafide belief that your account will not slip into NPA. More so as the downgradation of an account is automatically done by our

computer software with almost no human intervention. As such it is denied that your accounts have been declared NPA in violation of the

guidelines of RBA."

15. In this backdrop of facts, the learned counsel for the petitioner sought to

place reliance on a decision of a single Judge of the High Court of

Jharkhand in the case of Stan Commodities Pvt. Ltd. v. Punjab & Sind Bank, AIR 2009 Jharkhand 14. Obviously that decision is not binding on

us but the learned counsel for the petitioner referred to the said decision for persuasive value. In that case, inter alia, the following question had

fallen for consideration;

(i) Whether the declaration of the petitioner's account as NPA by the respondent bank without giving prior information opportunity to settle the

controversy/ doubts regarding classification of account as NPA was justified?

In that decision references were made to the very circular which has been placed before us. It was noted in the said decision that the respondents

had not brought anything on record to show that before classification of the petitioner's account as NPA, there was any settlement of the

controversy/doubt regarding classification of the asset or even any information was given to the petitioner before classifying the petitioner's account

as NPA. In the present case the position is different inasmuch as an e-mail was sent on 29.06.2016, notifying the petitioner that it is likely that its

account shall slip into NPA on 30.06.2016. Of course the petitioner did not respond to this e-mail. Then, in the said decision, it has been held that

the borrower was entitled to be informed and any doubt or dispute is to be settled through any specific internal channel within one month from the

date on which the account would have been classified as NPA. It was further held that borrower is entitled to be informed and an opportunity is to

be afforded to explain and represent against the intended classification of his account as NPA. In that case, once again no information was

provided to the borrower that the account was liable to be classified as NPA. But, in the present case, it is clear that an e-mail had been sent on

29.06.2016 that the account of the petitioner was liable to be classified as NPA on 30.06.2016. The petitioner ought to have responded to this e-

mail but it did not. Therefore, the decision in Stan Commodities (supra) on which reliance is placed for persuasive value, would be of no assistance

to the petitioner.

16. Reliance was also placed on a decision of the Andhra Pradesh High Court in the case of M/s. Sarvan Dall Mill P. Ltd. v. Central Bank of

India, AIR 2010 AP 35. This was a Division Bench decision of the Andhra Pradesh

High Court, wherein once again the very circular which has been placed before us was the subject-matter of consideration. In that decision the following two questions were framed for consideration;

- (i) Whether the remedy under Article 226 is available to the petitioner challenging the notice under Section 13(2) of the SARFAESI Act?
- (ii) Whether the respondent bank has satisfied the requirement of asset classification under the Prudential Norms as framed under Master Circular of the RBI?

In that case the writ petition was filed after the issuance of the notice under Section 13(2) of the said Act and after the representation/ objections of the petitioner had been considered and rejected. The bank had indicated that the borrower's account was classified as NPA on 31.05.2006 and

the bank had every right to take recourse to the provisions of the said Act. The court noted that there was no reference in the bank's reply as to

how and why the account was classified as NPA, particularly, when the petitioner had asserted to the contrary and had sent detailed objections to

the very classification of the said account based upon the prudential norms referred to the circular of the RBI. It is in this context that the Division

Bench of the Andhra Pradesh High Court held that judicial review before the court was, therefore, certainly available to the borrower in such

circumstances. But the facts in the present case are entirely different. First of all, the petitioner was made aware by the e-mail dated 29.06.2016

that its account was liable to slip into NPA on 30.06.2016. Secondly, the petitioner did not respond to this e-mail at all. In fact, the petitioner even

did not respond to the notice dated 02.12.2016, wherein it was indicated that the petitioner's account had become NPA on 30.06.2016 itself.

Furthermore, the petitioner had not even given any objection with regard to classification of its account as NPA in terms of the said RBI Circular.

Therefore, the decision of the Andhra Pradesh High Court is clearly distinguishable.

As regards the second question also which was considered by the Andhra Pradesh High Court, it was observed by that court that the right of

borrower to have due consideration of its objections was, therefore, an important right where the bank was bound to apply its mind and inform the

borrower as to how his account has been classified as NPA, particularly, when the

borrower raised specific objections in that regard. We must note that these observations are made in the context of response of the bank to the representation filed by the petitioner in respect of notice issued under Section 13(2) of the said Act. In the present case, the writ petition was filed even prior to the petitioner submitting its response to the notice under Section 13(2) of the said Act. The challenge in the present writ petition was that the pre-condition of classification of the petitioner's account as an NPA was itself bad in law and contrary to the RBI guidelines. Therefore, the decision of the Andhra Pradesh High Court would again be of no help to the petitioner.

17. We must note that the learned counsel for the respondent bank submitted that under the RBI circular there is no provision for any notice to be issued to the borrower prior to the borrower's account being classified as an NPA. He further submitted that there is no requirement of giving any opportunity of hearing in the said guidelines before classification of an account as NPA. In fact, the learned counsel submitted that the e-mail dated 29.06.2016, had been sent to the petitioner by way of courtesy to inform the petitioner that its account was likely to slip into NPA in case no payments were made and the account was not regularized. Yet there was no response on the part of the petitioner to the e-mail dated 29.06.2016, nor to the notice of demand dated 29.06.2016. In fact, there was no challenge to the fact that the account had been declared as NPA as noted in the notice dated 02.12.2016. The learned counsel for the respondents placed before us Division Bench decisions of the Delhi High Court in the case of Sigma Generations Pvt. Ltd. v. Oriental Bank of Commerce, 2015 (217) DLT 622 (DB) and Dr. Yashwant Singh v. Indian Bank, 2015(220) DLT 667 (DB), but we need not to enter into a discussion with regard to those decisions as that would be unnecessary in the facts of the present case.

18. The learned counsel for the respondents also drew our attention to a decision of the Supreme Court in the case of Devi Ispat Ltd. v. SBI: (2014) 5 SCC 762. In the said decision, the Supreme Court negated the plea of the learned counsel on behalf of Devi Ispat Ltd., that it had no alternative but to file a writ petition challenging the notice dated 18.01.2013 issued by the bank whereby the bank had intimated Devi Ispat that its

account has been classified as NPA on 16.01.2013, and it was requested to regularize the accounts position within seven days. The facts of that

case further reveal that instead of regularizing its accounts, Devi Ispat sent a reply on 22.01.2013, pointing out that the cash credit account had

been operated on 19.10.2012 and, therefore, its declaration as an NPA on 16.01.2013 (that is, on the 90th day instead of on completion of 90

days) was in violation of the guidelines issued by the bank. Thereafter, the bank issued notice to Devi Ispat under Section 13(2) of the said Act on

28.01.2013, demanding payment of the outstanding liabilities and interest. Devi Ispat reacted by filing a writ petition in the Calcutta High Court

challenging, inter alia, the declaration of its account being an NPA and for setting aside the previous letters of the bank. The learned single Judge

hearing the writ petition dismissed the same by an order dated 19.03.2013, on the sole ground that Devi Ispat had an alternate statutory remedy

under Section 13(3-A) of the said Act to make a representation against the letter issued under Section 13(2) thereof. Thereafter, Devi Ispat made

a representation to the bank under Section 13(3-A) of the said Act on 22.03.2013. Immediately thereafter an intra-court appeal was filed against

the order of the learned single Judge. In the meanwhile, the representation that was made to the bank was rejected on 02.04.2013. The Division

Bench was informed of this fact during the hearing of the intra-court appeal. The appeal was, however, dismissed by the Division Bench on

26.04.2013. This was challenged in the Supreme Court on the plea, as mentioned above, that Devi Ispat had no alternative but to file a writ

petition challenging the notice issued by the bank on 18.01.2013, whereby the bank intimated Devi Ispat that its account had been classified as an

NPA. As pointed out above, this plea was negated by the Supreme Court in the following manner;

"9.1 Firstly, Devi Ispat had an alternate remedy to make a representation to the Bank under the provisions of Section 13(3-A) of the Act and

there was no reason to by-pass the statutory mechanism.

9.2 Secondly, Devi Ispat did in fact make a representation to the Bank under Section 13(3-A) of the SARFAESI Act and that representation was

rejected on 2-4-2013 during the pendency of the intra-court appeal. The statutory remedy having been availed of by Devi Ispat, nothing really

survived in the dispute raised.

9.3 Thirdly, we now find from the written submissions submitted by the Bank that it has taken possession of the secured assets of Devi Ispat on

25-5-2013 and 27-5-2013 under the provisions of Section 13(4) of the SARFAESI Act and a possession notice was also published in the

newspapers on 31-5-2013.

10. On the facts on record and the statutory remedy having been availed of, we see no reason to interfere with the impugned order passed by the

Calcutta High Court. However, it is left open to Devi Ispat to take such appropriate steps as may be considered necessary for safeguarding its interests.

11. There is no merit in this petition and it is accordingly dismissed."

19. It is, therefore, clear from the foregoing discussion that the petitioner has no case. This is primarily so because prior to the classification of the

petitioner's account as NPA, the petitioner was informed by the e-mail dated 29.06.2016 that its account is likely to be classified as an NPA yet,

the petitioner did not respond to this. In other words, the petitioner raised no objection with regard to the fact that its account was likely to be

classified as an NPA. Even to the notice dated 02.12.2016, the petitioner had not raised any objection. The petitioner did not challenge the fact

which it is now seeking to do that its account had been wrongly classified as an NPA. It did not, at the relevant time, raise the issue that its account

was wrongly classified as an NPA. Furthermore, in view of the Supreme Court decision in Devi Ispat Ltd., the petitioner would certainly have an

alternative remedy once the bank proceeds under Section 13(4) of the said Act. It also had an alternate remedy of making a representation in

response to the Section 13(2) notice which it availed of. Therefore, in the light of these circumstances, we reiterate that the petitioner has no case.

The writ petition is dismissed. All interim applications also stand disposed of. There shall be no order as to costs. Petition dismissed.