

(2016) 08 AHC CK 0194
In the Allahabad High Court
Case No : Writ C No. 36097 of 2016

M/S Aroma Chemicals

APPELLANT

Vs

Punjab National Bank

RESPONDENT

Date of Decision : 16-08-2016

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 17

Citation : (2016) 8 ADJ 696 : (2017) AIR(Allahabad) 55 : (2016) 5 AllWC 4766 : (2016) 119 ALR 652 : (2017) 1 BC 102 : (2017) 1 DCR 181 : (2017) 1 DRTC 334 : (2017) 1 NIJ 329 : (2017) 134 RD 205 : (2017) 1 RJ 513

Hon'ble Judges : Tarun Agarwala and Vipin Sinha, JJ.

Bench : Division Bench

Advocate : Amit Khanna, Advocate, for the Petitioner; Sudha Pandey, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Vipin Sinha, J.—Heard learned counsel for the parties.

2. The present writ petition has been filed by the petitioners praying for quashing of the initial notice dated 30.05.2016 issued under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred as "the Act, 2002") and have also sought quashing of the order dated 31.03.2016 by means of which the petitioners' account has been classified as NPA (Non Performing Asset) and a further relief has also been sought for quashing of the order dated 25.07.2016 by means of which objections filed by the petitioners under Section 13 (3A) of the Act, 2002 has been rejected.

3. The contention of the learned counsel for the petitioners, at the very outset, is that the accounts of the petitioners have been wrongly classified as NPA and that the classification has been done in violation of the guidelines of the Reserve Bank of India.

4. Further contention is that on the relevant date on which the account of the petitioners was classified as NPA as well as even on the date the F.I.R. was lodged, there was sufficient stock available as security towards the financial aid provided by the bank and thus, their account has been wrongly classified as NPA and moreover the second notice under Section 13(2) of the Act, 2002 is not maintainable.

5. Learned counsel for the respondent on the other hand submits that the present writ petition is not maintainable in view of the fact that admittedly no action till date has been initiated under Section 13(4) of the Act, 2002 and thus, in case the petitioners have any grievance with regard to the classification of the account as NPA or with regard to the quantum of liability towards the bank, petitioners have an effective and efficacious alternative remedy of filing an appeal/objection under Section 17 of the Act, 2002 as and when any measures under Section 13(4) of the Act, 2002 are initiated against the petitioners.

6. A perusal of notice under Section 13(2) of the Act, 2002 shows that the notice itself makes it crystal clear that:

"Due to non deposit of interest of FITL for the month of March 2016, non-submission of stock reports in time and not getting stocks checked despite various reminders and personal visits, bank has decided to recall the entire outstanding."

7. It further shows that as on 31.03.2016, the petitioners had a liability of Rs. 21,66,18,571.01/- with further interest till the date of actual payment.

8. In response to the said notice dated 25.04.2016 as well as notice dated 30.05.2016, the petitioners had filed a reply/objection under Section 13(3A) of the Act, 2002 dated 12.07.2016, copy of which has been annexed as Annexure-5 to the writ petition, in which a number of objections were taken with regard to the classification of the account as NPA as well as the crystallized liability/debt.

9. Learned counsel for the bank has drawn the attention of the Court to the conclusion/reply of the said representation dated 12.07.2016, give under Section 13(3A) of the Act, 2002, which was give by the bank vide letter dated 25.07.2016 in response to the objection filed by the petitioners.

10. A perusal of the said reply shows that it is a very elaborate and speaking reply and in fact the very basis of classifying the petitioners' account as NPA has been duly disclosed in the said reply.

11. A perusal of the said reply also shows that in spite of repeated opportunities being give to the petitioners for verification of stock, keeping in view the fact that the drawing power of borrower is based on the available hypothecated stock, the petitioners did not appear before the bank officials to verify the stock. The relevant extract of the said reply is being quoted herein below:

"Further merely submission of stock statement is not sufficient, it also require to

be checked by the bank's officials but your client did not allow the bank officials to check the stock during last six months despite various request made verbally, during meeting with the partners and letters dated 02.02.2016, 03.02.2016, 04.02.2016, 11.02.2016, 25.02.2016, 02.03.2016, 04.03.2016, 08.03.2016 and 10.03.2016, which was violation of the terms & conditions of the sanction and indication that stock was not available. Which is further confirmed when the senior bank's officials were allowed the access in factory premises on 14.06.2016 and no stock was found there."

"Stock audit was also not got conducted despite three visits by stock auditor and our various telephonic request, personal request during meeting and out letters dated 25.02.2016, 02.03.2016, 04.03.2016, 08.03.2016 and 10.03.2016 which is also in contravention of the accepted terms & conditions of the sanction. Further, it is pertinent to mention that the stock reduced from Rs. 26.07 Crores in August 2015 to Rs. 20.67 crores in the stock statement for the month of Sep"2015 to Dec"2015 submitted on 14.01.2016 for which no justification was give despite of several reminders from out office."

12. The bank has further noted that:

"The housing loan accounts in the name of Smt. Manju Agarwal & Sri Udit Mohan Agarwal and Shri Suman Kumar & Sri Udit Mohan Agarwal availed from our Retail Asset Branch, Civil Lines, Moradabad were sanctioned on the same immovable properties which are already mortgaged with our branch to secure the exposure of M/s Aroma Chemicals Moradabad as collateral security. These loan accounts are also classified as NPA on 31.03.2016 due to non deposit of E.M.I."

13. The order also makes it clear that when even after prior intimation of checking, the bank officials were not allowed to verify the stock. The bank was under a grave apprehension that the stocks have been surreptitiously removed and in fact the bank has been cheated of its valuable security and thus the bank had also lodged an F.I.R. in this regard.

14. In the said order, it is also mentioned that there is no bar under the law for issuing a revised notice under Section 13(2) of the Act, 2002 with regard to the same account with certain addition of security and liabilities, which were left to be included in the previous notice.

15. It is also clear from the said order that the amount due against the petitioners, at the relevant time, is Rs. 23,33,16,216.01/-.

16. The position, which emerges apparently is that at present neither the stock nor the sale proceeds are available.

17. Thus, the apprehension of the bank that it has been cheated and that the valuable security has been removed by the petitioners with the intention of depriving the bank of its "valuable security" seems to be well founded and thus, no illegality can be attributed to the bank in its initiating steps for recovery of its dues.

18. Keeping in view the insistence of the petitioners that on the relevant date when the account was classified as NPA and an F.I.R. was lodged subsequently, there was substantial stock available, by way of abundant caution, this Court raised a query as to what exactly is the status of the stocks as on date. A supplementary affidavit has been filed by the petitioner admitting that there is no stocks available as on date.

19. Thus, keeping in view the heavy liability of Rs. 23,33,16,216.01/- and the fact that as on date there is no stock available, this Court finds that the objections, if any, taken by the petitioners are unsustainable in law as well as in equity.

20. Further, it has been contended by learned counsel for the Bank that even otherwise if the petitioners have any grievance whatsoever, the petitioners have an effective and efficacious remedy of filing appeal/objection under Section 17 of the Act, 2002 and this Court should be reluctant to interfere keeping in view of the huge liability and the fact that the stock has been removed in a surreptitious manner with the sole intention of depriving the bank of its valuable security.

21. Keeping in view the aforesaid facts and circumstances of the case, if we examine the legal position as has been laid down by the Apex Court in a plethora of cases (though only a few are referred to herein below), the position which crystallizes is herein as under.

22. In the case of Mardia Chemicals Ltd. Etc. Etc v. U.O.I. & Ors. Etc. Etc; AIR 2004 SC 2371, the Apex Court has clearly held as under:

"44. Nonetheless dues or disputes regarding classification of NPAs should be considered and resolved by some internal mechanism. In our view, the above position suggests the safeguards for a borrower, before a secured asset is classified as NPA. If there is any difficulty or any objection pointed out by the borrower by means of some appropriate internal mechanism it must be expeditiously resolved.

45. In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non-compliance of notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under subsection (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or

points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfilment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly we must make it clear unequivocally that communication of the reasons not accepting the objections taken by the secured borrower may not be taken to give an occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debt Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub-section (4) of Section 13 of the Act.

46. We are holding that it is necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to notice under Section 13(2) of the Act more particularly for the reason that normally in the event of non-compliance with notice, the party giving notice approaches the court to seek redressal but in the present case, in view of Section 13 (1) of the Act the creditor is empowered to enforce the security himself without intervention of the Court. Therefore, it goes with logic and reason that he may be checked to communicate the reason for not accepting the objections, if raised and before he takes the measures like taking over possession of the secured assets etc.

68. The remedy of appeal available under the Act as contained in Section 17 can be availed only after measures have already been taken by the secured creditor under sub-section (4) of Section 13 of the Act.

23. Thus, it is clear that at the stage of 13(3A) no remedy is available to the borrower and it is only when measures have been initiated under Section 13(4) that remedy under Section 17 of the act lies.

24. It has also been observed in the said judgement that as far as the question of declaring the account as NPA is concerned, it should be considered and resolved by the some internal mechanism and that in case the grievance of the

borrower is that his account has been wrongly classified as NPA in violation of guidelines of Reserve Bank of India, he can file objection, which the Bank can look into.

25. In the present case, the objection was filed with regard to the account being classified as NPA in pursuance of the notice under Section 13 (2) of the Act, 2002 and the said objection has been duly considered by means of an elaborate order, which has been passed while deciding the said objections.

26. The Apex Court while concluding the case of Mardia Chemicals (Supra) has categorically held as under:

"80., we find what emerges from different provisions of the Act, is as follows :-

1. 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 subsection (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. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. 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 under Section 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debt Recovery Tribunal.

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27. Another important judgement of the Apex Court was rendered in the case of United Bank of India v. Satyawati Tondon & Ors; 2010 (8) SCC. The relevant extract of the said judgement is quoted herein below:

"3. Sub-section (3-A) of Section 13 lays down that the borrower may make a representation in response to the notice issued under Section 13(2) and challenge the classification of his account as non-performing asset as also the quantum of amount specified in the notice. If the bank or financial institution comes to the conclusion that the representation/objection of the borrower is not acceptable, then reasons for non-acceptance are required to be communicated within one week.

4. Section 17 speaks of the remedies available to any person including borrower who may have grievance against the action taken by the secured creditor under subsection (4) of Section 13. Such an aggrieved person can make an application to the Tribunal within 45 days from the date on which action is taken under that sub-section. By way of abundant caution, an Explanation has been added to Section 17(1) and it has been clarified that the communication of reasons to the borrower in terms of Section 13(3-A) shall not constitute a ground for filing application under Section 17(1).

Sub-section (5) of Section 17 prescribes the time-limit of sixty days within which an application made under Section 17 is required to be disposed of. The proviso to this sub-section envisages extension of time, but the outer limit for adjudication of an application is four months."

28. In the said case, the apex Court while concluding had observed as under:

"27. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

29. Similar is the position as has been laid down by the Apex Court in the case of GM Sri Siddeshwara Co-op. Bank v. Sri Iqbal & Ors.; 2013 (10) SCC 83 and also in the case of Devi Ispat Ltd. & Anr. v. State Bank of India & Ors.; 2014 (5) SCC 762.

30. It may also be appreciated that apart from the aforesaid legal position, we find that in order to judge the bona fide of the petitioners, this Court had inquired from the counsel as to what exactly is the status of the stock as on date in response to which a supplementary affidavit dated 05.08.2016 has been filed, which has been taken on record. The affidavit is of Udit Mohan Agarwal and in paragraph no. 3 of the said supplementary affidavit, it has been specifically stated herein as under:

"That in reply to the said query of this Hon'ble Court, it is submitted that as on 05th August, 2016 there is no Stock available in the premises of factory of the petitioner No. 1/firm. It is pertinent to mention here that the Respondent Bank has classified the account of the petitioner No. 1/firm as NPA on 31.03.2016 on the basis of the stock statements (September 2015 ? December 2015) submitted by the Petitioner No. 1/firm before the Respondent bank on 14.01.2016."

31. Thus, it is apparent that the stock, which was in the nature of valuable security of the Bank has been eroded and the same has been surreptitiously removed by the petitioners. At present neither there is any stock nor sale proceeds have been deposited with the bank and thus, apprehension of the bank

that the bank has been cheated of its valuable security, which was in the form of ready stock and which has now been removed even without informing the bank is justified and thus in this view of the matter also neither in law nor in equity is the petitioners entitled to grant of any indulgence whatsoever.

32. It may also be appreciated that admittedly till date no action under Section 13(4) has been initiated by the respondent-bank and thus, the writ petition, at this stage, is totally misconceived.

33. The fact remains that as per the established law, the petitioners have a more effective and efficacious remedy available to them under Section 17 of the Act, 2002 and writ petition nowhere states as to how and in what manner, the said remedy is not effective or efficacious.

34. Thus, keeping in view the aforesaid facts and circumstances of the case and law as established by a long line of cases, the petitioners are not entitled to grant of any indulgence whatsoever by this Court in exercise of its equitable jurisdiction under Article 226 of the Constitution of India.

35. The writ petition is accordingly dismissed.

36. No order as to costs.