

(2014) 12 DEL CK 0202

In the Delhi High Court

Case No : LPA 784/2014

Sigma Generators Pvt. Ltd.

APPELLANT

Vs

Oriental Bank of Commerce

RESPONDENT

Date of Decision : 09-12-2014

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(3A), 13(4), 14

Citation : (2015) 1 AD 375 : (2015) 217 DLT 622

Hon'ble Judges : G. Rohini, C.J.;Rajiv Sahai Endlaw, J

Bench : Division Bench

Advocate : Lalit Kumar, Advocate for the Appellant; H.D. Talwani for M.S. Saluja, Advocate for the Respondent

Judgement

Rajiv Sahai Endlaw, J.

CM No. 20184/2014 (for exemption)

1. Allowed, subject to all just exceptions.

2. The application is disposed of.

LPA No. 784/2014 & CM No. 20183/2014 (for stay)

3. This intra court appeal impugns the order dated 2nd December, 2014 of the learned Single Judge, of dismissal of W.P.(C) No. 5716/2014 preferred by the appellants.

4. The appellants had preferred the said writ petition impugning the notice dated 26th May, 2014 issued by the respondents Oriental Bank of Commerce (OBC) / its officers to the appellant under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and seeking a mandamus to the respondents OBC to regularize the cash credit account of the appellants / petitioners.

5. The learned Single Judge has dismissed the writ petition observing that the Supreme Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc.*, has held that the notice under Section 13(2) is a pre-condition under Section 13(4) of the SARFAESI Act and the remedy available to a borrower can be availed only after the measures under Section 13(4) of the said Act have been taken.

6. Before dealing with the contentions raised by the appellants / petitioners before us, we may notice that the appellants / petitioners had failed to appear before the learned Single Judge on 2nd December, 2014 and the impugned order though dismissing the writ petition on merits is in the absence of the appellants / writ petitioners.

7. Ordinarily, in the absence of the petitioner, it is not open to the Court to dismiss the petition on merits and the dismissal should only be for the reason of default. Though in the said light of the matter, the remedy of the appellants / writ petitioners, instead of preferring this appeal, would have been to prefer an application for setting aside of the impugned order dated 2nd December, 2014 and / or to urge that the dismissal on merits is erroneous but the counsel for the appellants / writ petitioners has not raised the said issue and has argued on merits. In that light of the matter, we also deem it appropriate to consider the merits of the appeal.

8. The counsel for the appellants / writ petitioners has pegged his case on the judgment of the Division Bench of the Andhra Pradesh High Court in *Sravan Dall Mill P. Limited Vs. Central Bank of India and Another*, . The High Court of Andhra Pradesh in the said judgment held that the remedy of judicial review under Article 226 of Constitution of India is available with respect to a decision of a creditor declaring the debtor's account as an NPA by issuing a notice under Section 13(2) of the SARFAESI Act. However the said remedy was held to be available, because in that case the creditor, after issuing notice under Section 13(2) on 14th June, 2006 and in spite of the debtor representing / objecting under Section 13(3A) there against, neither passed any order on the said representation / objection, nor took any measures under Section 13(4) of the SARFAESI Act. In view thereof, it was held that declaring the account as NPA by itself leads to serious consequences and when measures under Section 13(4) are not taken by the creditor, debtor is also deprived of seeking redressal under Section 17 of the said Act.

9. The respondent OBC, in the present case, issued notice dated 26th May, 2014 under Section 13(2) of the SARFAESI Act. The appellants/ writ petitioners claim to have submitted representations dated 18th June, 2014, 16th July, 2014, 22nd July, 2014 and thereafter in or about August, 2014 filed the writ petition from which this appeal arises, as aforesaid, impugning the notice dated 26th May, 2014 under Section 13(2) and seeking a mandamus to the respondent OBC to regularize the account. However, according to the appellants / writ petitioners themselves, the respondent OBC during the pendency of the writ petition

obtained orders from the Court of the Chief Metropolitan Magistrate under Section 14 of the Act for taking possession of the secured assets.

10. It is therefore evident that the facts of the present case are materially different from that before the Andhra Pradesh High Court in the judgment *supra*. In that case, a notice dated 14th June, 2006 under Section 13(2) of the Act was issued and till the judgment in 2009, no action under Section 13(4) had been taken. It was in that context that it was held that a challenge to the notice under Section 13(2) was maintainable, as the creditor Bank having not taken action under Section 13(4), the remedy under Section 17 was not available. However here, the respondent OBC has admittedly taken action under Section 13(4) of the Act, though after filing of the writ petition and thus the remedy under Section 17 is available to the appellants / writ petitioners. The appellants / writ petitioners by rushing to this Court, immediately after the notice under Section 13(2) and challenging the same, cannot interfere with the scheme of the SARFAESI Act, whereunder the respondent OBC after considering the representation against the notice under Section 13(2) and after rejecting the same, is entitled to take action under Section 13(4) of the Act. It may be mentioned that no time for taking action under Section 13(4), after issuance of the notice under Section 13(2) has been specified and the action under Section 13(4) in the present case has been taken within reasonable time.

11. The Supreme Court recently in *Devi Ispat Limited and Another Vs. State Bank of India and Others*, was also concerned with a case where immediately after receipt of notice under Section 13(2), a writ petition impugning the same was filed before the Calcutta High Court. A Single Judge of that Court dismissed the same observing that the statutory remedy under Section 13(3A) was available against the notice under Section 13(2). The debtor in that case availed of the remedy under Section 13(3A) as well as of preferring an appeal to the Division Bench of that Court. During the pendency of the appeal, the creditor rejected the representation of the debtor under Section 13(3A). The Division Bench dismissed the appeal, relying on *Mardia Chemicals Limited supra*. The Supreme Court held that the remedy of a writ petition under Article 226 is not available against a notice under Section 13(2) owing to the alternative remedy of making a representation under Section 13(3A) being available. It was further held that upon the debtor availing of the remedy under Section 13(3A), nothing survived in the dispute raised in the writ petition and the appeal to the Division Bench was misconceived. It was yet further held that since in the interregnum the creditor had also taken steps under Section 13(4), there was no need to interfere with the judgment of the Division Bench.

12. It would thus be seen that the facts of the present case are identical to that before the Supreme Court in the judgment *supra*.

13. Mention may also be made of *Punjab National Bank and Another Vs. Imperial Gift House and Others* where the High Court had quashed the notice issued by the Bank under Section 13(2) of the SARFAESI Act. Finding that the debtor had

filed a representation under Section 13(3A) and which was rejected and that the writ petition was filed immediately thereafter, the Supreme Court held that the High Court was not justified in entertaining the writ petition against the notice under Section 13(2) of the Act and in quashing the proceedings initiated by the Bank.

14. Faced therewith, the counsel for the appellants / writ petitioners contends that the respondent OBC has not complied with its obligation under Section 13(3A) of the Act and has not communicated to the appellants / writ petitioners the reasons for rejecting the representation of the appellants / writ petitioners.

15. The counsel for the respondent OBC appearing on advance notice states that in fact no representation / objection was made by the appellants / writ petitioners.

16. We are of the opinion that the respondent OBC having taken steps under Section 13(4) and the remedy under Section 17 having thus become available to the appellants / writ petitioners, the said grievance can also be made by the appellants / writ petitioners in the proceeding under Section 17 of the Act.

17. We may record that a Division Bench of the High Court of Madras in M/s. N.A.K.G. Cotfibres Private Ltd. Vs. The Zonal Manager and UCO Bank 328, Thambu Chetty Street Chennai - 600001 and The Authorised Officer UCO Bank 806-A, Thenkasi Road Rajapalayam also has taken the view that if the Bank has not followed the procedures contemplated under Section 13(2) or under Section 13(3A) or Section 14, the proper course open to the petitioner is to approach the DRT under Section 17 and not to rush to the Court with a writ petition. The view of the Madras High Court thus appears to be that even if the creditor Bank, after issuing notice under Section 13(2) does not take further steps, the remedy available to the aggrieved debtor is under Section 17 only. However the view of the High Court of Orissa in Krushna Chandra Sahoo Vs. Bank of India and Others, and of the High Court of Jharkhand in Jayant Agencies Vs. Canara Bank and Others, (after noticing United Bank of India Vs. Satyawati Tondon and Others, , is otherwise. While in the former, finding that the notice under Section 13(4) was issued without deciding the representation / objections under Section 13(3A), writ petition was entertained and the notice under Section 13(4) quashed, in the latter, though the Bank denied receipt of representation / objection under Section 13(3A) but upon being satisfied that such representation / objections was preferred, the writ petition was entertained and the proceedings under Section 13(4) quashed. The same learned Single Judge of the Jharkhand High Court earlier, in Stan Commodities Pvt. Ltd. Vs. Punjab and Sind Bank and Others, also, held that since the "RBI's Prudential Norms of Income Asset Classification & Provisioning - Pertaining to Advances" issued by Circular dated 30th August, 2001 required that before classifying the account as NPA, there should be a settlement of the controversy / doubt regarding classification of the asset and intimation to the borrower, the borrower is entitled to be informed and be given an opportunity against the intended classification of the account as NPA;

accordingly, it was held that a borrower is entitled to be informed and given an opportunity of settlement before declaration of its account as NPA; also finding that the decision if any on the representation / objection under Section 13(3A) had not been communicated to the borrower, the notice issued under Section 13(4) was quashed. However another Single Judge of the Jharkhand High Court in *Paritran Trust Vs. Punjab National Bank*, though noticing *Stan Commodities Pvt. Ltd.* (supra) but without noticing *Jayant Agencies* (supra), dismissed the challenge, to the notice under Section 13(2) on the ground that no opportunity of hearing had been afforded to the borrower before declaring the account as NPA, and held that in the scheme of the SARFAESI Act, no opportunity of hearing is to be afforded to the borrower before declaring the account as NPA and further held that there is no prohibition in Section 13 against issuing a composite order declaring the account of the borrower as NPA and simultaneously requiring the borrower to discharge its liability.

18. The petitioners in the present case have also pleaded that the respondent OBC, before the notice dated 26th May, 2014 also had issued notices under Section 13(2). Mention in this context may be made of a judgment of the Division Bench of the High Court of Madras in *Precision Fastenings Vs. State Bank of Mysore*, holding that there is no statutory prohibition in law from issuing a second notice under Section 13(2) of the Act. S.L.P.(C) No. 5391/2010 preferred there against is found to have been withdrawn on 8th March, 2010 with liberty to urge all grounds in proceeding under Section 17.

19. We however do not deem it necessary in the present case to comment on the views taken by the other High Courts in the judgments aforesaid inasmuch as in the facts of the present case the need therefor does not arise as the respondent OBC has already taken steps under Section 13(4) of the Act. We may however state that even in a situation where the creditor bank, after declaring an account as NPA, does not take steps under Section 13(4), the same will not be a ground for quashing the notice under Section 13(2) of the Act but would only invite a direction for taking further steps within a reasonable time.

20. We may add, that where the statute lays down a procedure comprising of successive steps for action thereunder and has also provided a remedy against such action, after the final step is taken, the rule of availability of such remedy being a bar to the exercise of jurisdiction under Article 226 cannot ordinarily be defeated by invoking the remedy under Article 226 against the intermediary step and by contending that there against no alternative remedy is provided. The Supreme Court in *Avtar Singh Hit Vs. Delhi Sikh Gurdwara Management Committee and Others*, , in the context of the procedure prescribed in the Delhi Municipal Corporation Act, 1957 reiterated:-

"The law of elections in India does not contemplate that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the Courts having been expressly

excluded), and another after they have been completed by means of an election petition. Any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court....

Where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.

It will be a fair inference from the provisions of the Representation of the People Act to draw that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage."

A Single Judge of this Court also in *Cadre Estate Pvt. Ltd. Vs. Salochna Goyal and Others*, echoed the same thought in the context of Section 16 of the Arbitration and Conciliation Act, 1996. It was held that the legislative scheme having provided for the remedy against the dismissal of an application under Section 16 only at the stage of challenge if any required to the arbitral award, the mere fact that this may cause inconvenience of having to await the conclusion of arbitral proceedings is no ground to entertain a writ petition at an intermediate stage violating and defeating the legislative scheme.

21. In the light of the aforesaid, there is no merit in the appeal. Dismissed. No costs.