

(2019) 02 PAT CK 0012

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 11495 Of 2013

Swarn Lata

APPELLANT

Vs

The Punjab National Bank And Ors

RESPONDENT

Date of Decision : 18-02-2019

Acts Referred:

Securitization And Reconstruction Of Financial Assets And Investment Of Security Interest Act, 2002 — Section 13(2), 13(4), 13(3A), 13(4)(a), 17, 17(1)
Constitution Of India, 1950 — Article 226

Citation : (2020) 1 BC 88 (Pat.) : (2019) 2 PLJR 1033

Hon'ble Judges : Rajeev Ranjan Prasad, J

Bench : Single Bench

Advocate : Onkar Nath, Prabhat Kishore, Niraj Kumar Sinha, Dhaneshwar Pd. Gupta

Final Decision : Dismissed

Judgement

1. This writ application has been preferred for the following reliefs:

"(i) Setting aside the entire process/actions performed by the respondent authorities in furtherance of provisions of Section 13(2) of SARFAESI Act 2002 in contrary to the mandatory provisions of Section 13-3A of the SARFAESI Act 2012 read with rule 3-A of the Security Interest (Enforcement) Rules 2002.

(ii) Further commanding the respondent authorities particularly respondent no. 3 and 4 to comply the mandatory provisions of the SARFAESI Act 2002 and rules framed therewith as per the principle of

(iii) Grant of any other incidental or consequential relief or reliefs for which the petitioner can be found entitled for."

Case of the Petitioner

2. It is the case of the petitioner that she got established a private registered firm in the name and style of 'NEERCO' in the year 2006 and subsequently

secured cash-credit loan from the respondent Bank by mortgaging her Flat No. 115, Raddhani Palace, C.P. Thakur Lane, Patna-23 Circle No. 249-D holding No. 35/3/189, Plot No. 765, Thana No. 3, Ward No. 13, Area 487 Sq. feet. As her business failed and cash-credit account was declared a Non-Performing Asset (in short 'NPA') in the year 2009, the respondent Bank served a demand notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Investment of Security Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act, 2002"). The petitioner challenged the notice before this court in CWJC No. 5536/2009, but the learned Writ Court took a view that the petitioner may, if so advised, approach the Banking Ombudsman.

3. At this stage, the petitioner seems to have managed to make certain payments in the account, therefore no subsequent action under Section 13(4) of the 'SARFAESI Act, 2002' was taken. As the petitioner again failed to pay the amount due to the Bank, a fresh notice under Section 13(2) dated 08.06.2011 as contained in Annexure-2 to the Writ Application was issued calling upon the petitioner to pay a sum of Rs. 13,17,068.75. The petitioner submitted an objection to demand notice. A copy of objection is Annexure-3 to the Writ Application. The petitioner took a number of plea including that the statement of account duly maintained by the Bank has not been furnished to the petitioner along with the demand notice. A request was made to the Bank to supply a copy of statement of account immediately for submission of a meaningful proposal for compromise settlement in accordance with the guidelines of the Reserve Bank of India.

4. The petitioner did not receive any response to her objection (Annexure-3). The Bank proceeded with action under Section 13(4) of the 'SARFAESI Act, 2002' by taking symbolic possession of the mortgaged property on 08.12.2011. Thereafter Bank proceeded to sale the mortgage assets by publishing notice in Newspaper on 04.09.2012. The petitioner challenged the sale notice dated 04.09.2012 by filing a Securitization Application under Section 17 of the 'SARFAESI Act, 2002' It is stated that while the matter was pending in the Debts Recovery Tribunal (hereinafter referred to as the 'DRT') at Patna, the Bank avoided filing of any reply, the case was adjourned on several dates after appearance of the Bank on 09.10.2012. On 29.10.2012, the Bank put the property to public auction which was confirmed on the same day, i.e., 29.10.2012 and a sale deed dated 22.11.2012 was drawn up in favour of the purchaser (respondent no.5). These facts were not brought to the notice of the 'DRT'. On 18.02.2013, the 'DRT' took note of the main contention of the petitioner saying that the objection of the petitioner under Section 13(2) had not been disposed of by the Bank under Section 13(3-A) and without disposing of the representation the Bank had proceeded with the action under Section 13(4). Since the 'DRT' was given to understand that the representation of the petitioner has already been disposed, in the order dated 18.02.2013 'DRT' while issuing direction to the Bank directed that if the representation has not been disposed of, be disposed of within 15 days in accordance with law and a copy of the reply be

communicated to the petitioner. It was also observed that if the representation of the applicant has already been disposed of, then, there shall be no interim order and the Bank shall be free to proceed in accordance with law but till compliance of the order status quo be maintained.

5. Learned counsel for the petitioner has assailed the entire SARFAESI Action mainly on the ground that instead of furnishing the account to the petitioner as requested in her objection (Annexure-3) and without deciding the objection raised therein the Bank could not have proceeded to take possession of the mortgaged assets and/or to auction sale the assets.

6. It is submitted that the Bank misled the 'DRT' and has even attempted to mislead this court by making a specific statement in the counter affidavit that prior to going for action under Section 13(4), the Bank had disposed of the objection of the petitioner under Section 13(3-A) of the 'SARFAESI Act, 2002'.

7. Learned counsel submits that the account ledger inquiry dated 21.12.2012 which was made available to the 'DRT' on 18.02.2013 is of one page without details therein and mentioned that Rs. 11 Lakhs had been received through auction, meaning thereby the auction was conducted behind back of the petitioner and without any information to the 'DRT'.

8. Learned counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of Mardia Chemicals Ltd. Vs. Union of India reported in AIR 2004 SC 2371 wherein the Hon'ble Apex Court has held in paragraph-46 of the judgment 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. In her written notes of argument reliance has also been placed on the judgment of Hon'ble Andhra Pradesh High Court in the case of M/s Venshiv Pharma Chemical (P) Ltd. Vs. State Bank of India and on the judgment of Hon'ble Madras High Court in the case of Padmavathy Vs. The Authorized Officer and others.

9. By filing a supplementary affidavit petitioner has also brought on record the developments which took place after filing of the present writ application. It appears that during pendency of the Writ Application the Bank took action to take over physical possession of the mortgaged property. On 24.06.2014 itself when the writ application was taken up for consideration, this court was informed that the flat in question has already been given to the auction purchaser in presence of the Magistrate deputed for that purpose. This court thereafter took note of the fact and passed an interim order directing that in the meantime the respondent no. 5 shall keep the premises under his lock and key but shall not put any of his furnitures and other belongings in the said flat and keep the flat in vacant position.

Stand of the Bank

10. A counter affidavit has been filed on behalf of respondent nos. 3 & 4 which has been sworn by one Ramendra Narayan Om, the Chief Manager (Branch) of

the Bank. In paragraph-6 of the counter affidavit, it is specifically stated that 'after compliance of Section 13(3A) of the SARFAESI Act, 2002 within the stipulated period, the respondent bank took possession of the mortgaged property'.(underline is mine)

11. In paragraph-8 again it is stated that 'in compliance of order dated 18.02.2013 passed in S.A. No. 174 of 2012 by the Hon'ble Presiding Officer, D.R.T., Patna, the petitioner submitted her objection on 20.02.2013 and the respondent bank again replied on 25.02.2013 point wise as raised in her objection petition within the stipulated period'. (underline is mine)

12. It is submitted that from Annexure-R/1 dated 25.02.2013 it would appear that the respondents took a stand that Section 13(2) notice was correct as per accounting procedure maintained in the Bank and as per the agreement executed between the parties. It is submitted that there is no provision to attach the statement of account with the said notice. In concluding paragraph-13 of Annexure-R/1 the Bank expressed it's desire to release the property if the petitioner pays the total dues along with up to date interest and cost.

13. It is thus submission of learned counsel representing the Bank that despite such opportunity given to the petitioner she did not pay the amount, and, therefore, at this stage, the action of the Bank in selling the property in favour of respondent no. 5 need not be interfered with.

14. In course of hearing, learned counsel for the bank was directed to produce the records showing consideration of objection of the petitioner dated 01.08.2011 (Annexure-3), however no such consideration could be brought to the notice of this court.

15. Learned counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of ITC Limited Vs. Blue Coast Hotel Pvt. Ltd. reported in AIR 2018 SC 3063 to submit that the Hon'ble Supreme Court has held that provision of Section 13(3-A) is only directory in nature. Submission is that petitioner having failed to pay the amount due to the Bank despite the opportunity granted to her vide letter dated 25.02.2013 in the attending circumstances of this case, the petitioner may not be allowed to take a plea that the action of the bank in proceeding with taking over possession and sale of the mortgaged assets without disposing of her objection (Annexure-3) be declared illegal.

Stand of the Respondent No. 5

16. Respondent no. 5 who is the auction purchaser in the present case has also filed a counter affidavit. Submission of the auction purchaser is that he has made full payment of the auction amount to the Bank and got the sale deed registered and is in possession of the property. It is submitted that despite letter dated 25.02.2013 of the Bank communicating the petitioner to get released the property by paying the entire amount up to date, if the petitioner has not come forward to pay the same and the sale deed was executed and registered on 13th

May 2013 when no Writ Application was pending before this court, the same need not be interfered with at this stage.

Consideration

17. Having heard learned counsel for the parties and on perusal of the records, this court finds that the petitioner admits to have committed default in payment of outstanding dues under her cash-credit account which she had obtained by providing the mortgaged property as a secured asset to the Bank. Under these circumstances if the Bank issued a demand notice under Section 13(2) of the 'SARFAESI Act, 2002', it was wholly in accordance with law.

18. It is true that petitioner submitted her objection within 60 days from the date of receipt of the notice but she did not get any response. To this extent, the petitioner is correct that the Bank proceeded with action under Section 13(4) by taking symbolic possession of the property without complying with the provision of Section 13(3-A) of the 'SARFAESI Act, 2002'. This court finds no statement in the Writ Application saying that the action of the Bank in taking symbolic possession of the mortgaged property as back as on 08.12.2011 and the notice of possession published in newspaper on 13.12.2011 was ever challenged by the petitioner. It is only when a sale notice was issued inviting tender which was published on 04.09.2012, the petitioner moved 'DRT' by filing an application under Section 17 of the 'SARFAESI Act, 2002' on 24.09.2012.

19. From the scheme of the Act of 2002 and Rules framed thereunder it is quite clear that there is no dichotomy between symbolic and actual possession. A borrower can avail remedy under Section 17(1) by filing an application to the Debts Recovery Tribunal within forty five days from the date constructive possession is taken. Every measure under Section 13(4) gives rise to a separate cause of action.

20. Recently in the case of M/s Hindon Forge Pvt. Ltd. & Anr. Vs. State of Uttar Pradesh reported in AIR 2018 SC 5382, Hon'ble Supreme Court has examined the scheme of the 'SARFAESI Act, 2002' and held that a borrower can prefer an application under Section 17 of the 'SARFAESI Act, 2002' even before physical or actual possession of secured assets is taken over. In the present case, the first measure was taken under Section 13(4)(a) when symbolic possession of the mortgaged property was taken. Thus, on 08.12.2011/13.12.2011 a cause of action arose to the petitioner but she did not challenge this action of the Bank.

21. It is only the subsequent action by which notice was published inviting purchasers came to be challenged before the 'DRT', Patna, therefore, it cannot be said that the 'DRT' was not aware of the ongoing sale process. No doubt, the Bank was taking adjournments in the 'DRT' but at the same time, the petitioner being aware of the ongoing sale process did not get any interim order staying the sale. The sale was conducted during pendency of the SARFAESI Application, but then on 18.02.2013, when the 'DRT' directed the Bank to consider objection of the petitioner if it has not been done earlier, within a period of 15 days, the Bank

considered the objection of the petitioner received on 20.02.2013 and wrote a letter dated 25.02.2013 to the petitioner calling upon her to pay the entire outstanding amount. The Bank offered her to release the property if she pays the entire amount. Receipt of the letter dated 25.02.2013 from the Bank is not in dispute.

22. It appears that in the aforesaid circumstance when the petitioner did not pay the outstanding amount, almost for three months, the Bank proceeded to execute a registered deed on 20th of May, 2013 in favour of respondent no. 5. Nothing has been brought to the notice of this court to take a view that the sale in question is a mala fide sale particularly when it is apparent from the records that even on 25.02.2013 the Bank agreed to release the property if the petitioner pays the entire outstanding amount.

23. This Writ application was presented before this court on 17.06.2013, i.e., when the sale deed was already registered in favour of respondent no. 5.

24. Under these circumstances, it appears to this court that the petitioner was only interested in wasting time and somehow was looking for a delay in culmination of the sale process. The petitioner was continuing in possession for about one year after presenting the Writ Application. The records of this court shows that from 20.06.2013 to 23.06.2014 no order has been passed and it is not the case of the petitioner that she had moved this court for hearing in the stay matter on her I.A. No. 4049/2013. Since the Writ Application was pending without there being any interim order of stay, the Bank proceeded to take physical possession of the property and handed it over to respondent no. 5.

25. In course of argument, looking to the pleadings of the parties this court found that in the counter affidavit filed on behalf of respondent nos. 3 & 4, there are false statements made with total irresponsibility in paragraph- 6 & 8 of the counter affidavit wherein it is stated that the Bank had considered the objection of the petitioner and only thereafter had proceeded to take action under Section 13(4) of the 'SARFAESI Act, 2002'.

26. In course of hearing, when the Bank was called upon to produce the records, it became crystal clear that the statements made in paragraph-6 & 8 are not correct. Apparently the Bank had proceeded to take action under Section 13(4) of the 'SARFAESI Act, 2002' without disposing of the objection of the petitioner, but for this reason alone the court is not willing to interfere with the whole SARFAESI action. The attending circumstances are to be looked into.

27. In the discussed facts and circumstances hereinabove, the court finds that the petitioner had not challenged the action under Section 13(4)(a) of the 'SARFAESI Act, 2002' by which the symbolic possession of the mortgaged property was taken over by the Bank. An action under Section 13(4) is required to be challenged before the 'DRT' within a period of 45 days. In this case, the possession notice was published in the newspaper on 08.12.2011. The petitioner did not take any step to challenge the possession notice on the ground that her

objection was not disposed of. The right of the petitioner to challenge the action taking symbolic possession of the mortgaged property being a statutory right, it will be deemed that the petitioner waived her right to challenge the taking over possession action on the ground of non-disposal of her objection. There is one more reason not to grant the prayer on the plea of non-disposal of objection as this court finds that pursuant to the order dated 18.02.2013 passed by 'DRT' in S.A. No. 177/2012, the Bank had considered the objection of the petitioner, replied her denying her objection and then in concluding part of the letter the Bank offered the petitioner to get released the mortgaged property by paying the outstanding dues with interest.

28. Thus, at this stage the Bank had given an opportunity to the petitioner to redeem the mortgaged property which was not availed by the petitioner. There is nothing on the record to show that after receipt of letter dated 25.02.2013 the petitioner ever approached the respondent Bank with an intention to pay the outstanding dues of the Bank. In her Writ Application she has chosen not to mention this fact.

29. In the aforementioned circumstances, this court is of the considered opinion that the views expressed by the Hon'ble Apex Court in *Mardia Chemicals Ltd.* (supra) in paragraph-46 of the judgment may not help the petitioner because the facts situation in the present case are quite different and distinct.

30. In the facts and circumstances, as stated above, vide letter dated 25.02.2013 the petitioner was given an opportunity to pay the dues of the Bank, therefore, it cannot be said that because of inaction on the part of the Bank in not disposing of her application dated 01.08.2011 (Annexure-3) and then proceeding with the action under Section 13(4), the Bank had closed the door of the petitioner to know the reasons for proceeding with the action and also to get redeemed her mortgaged property.

31. In the case of *ITC Ltd.* (supra) it was admitted fact that the Bank had not disposed of the objection of the petitioner under Section 13(3A). The Hon'ble Apex Court took note of this in Paragraph-32 of the judgment. The Apex Court agreed with the views expressed in the case of *Mardia Chemicals Vs. Union of India* (2004) 4 SCC 311 : AIR 2004 SC 2371, *Transcore vs. Union of India* (2008) 1 SCC 125 : AIR 2007 SC 712 and *Keshav Lal Khemchand and Sons Pvt. Ltd. Vs. Union of India* (2015) 4 SCC 770 = AIR 2015 SC 1168; Section 13(3A) has been construed as 'mandatory' in nature. According to Hon'ble Supreme Court the conduct of the debtor should not affect the construction of a statutory provision. It was held that where remedy applied is a discretionary remedy. The court may deny relief if the circumstances so warrant.

32. This court finds that in the case of *ITC Limited* (supra) noticing the facts and attending circumstances of the said case wherein the Hon'ble Supreme Court found that several opportunities were granted to the borrower to pay the outstanding dues, thus the contention of the borrower/guarantor that because of

non-consideration of his objection in terms of Section 13(3-A) of the 'SARFAESI Act, 2002', the whole action would become bad in law, was rejected by the Hon'ble Supreme Court. In paragraph-25 of the judgment, Hon'ble Apex Court formulated the question for consideration in the following words: -

"25. The question that arises for consideration before us is whether the Parliament intended for a total invalidity to result from the failure to reply and give reasons for the non-acceptance of the borrower's representation. In other words, whether sub-section (3A) of Section 13 is mandatory or directory in nature."

33. Thereafter the Hon'ble Court went into the facts and attending circumstances of the case and finally in paragraph-34 recorded as under:-

"34. In these circumstances, we have no doubt that the failure to furnish a reply to the representation is not of much significance since we are satisfied that the creditor has undoubtedly considered the representation and the proposal for repayment made therein and has in fact granted sufficient opportunity and time to the debtor to repay the debt without any avail. Therefore, in the fact and circumstances of this case, we are of the view that the debtor is not entitled to the discretionary relief under Article 226 of the Constitution which is indeed an equitable relief."

34. This court having examined the attending circumstances noted above comes to a conclusion that the petitioner cannot claim, in the present facts of the case that the action of the Bank in proceeding under Section 13(4) of the 'SARFAESI Act, 2002' and subsequent registration of sale deed are liable to be quashed. The court is conscious that the matter relates to recovery of public money and the Banks are custodian of public money and relief under Article 226 of the Constitution of India is a discretionary relief.

35. Although this court is not extending any relief to the petitioner for the reasons stated above, the matter cannot be left at this stage as it has been noticed that the statements made in paragraph-6 & 8 of the counter affidavit filed on behalf of respondent Bank are in fact false and baseless statements. Those statements have been made without looking into the records and have been made irresponsibly, This court would thus impose a cost of Rs. 15,000/- (Rupees Fifteen Thousand) against the deponent of the counter affidavit filed on behalf of respondent nos. 3 & 4 for making those statements without there being any basis thereof. The cost amount will be deposited by deponent with the Member Secretary, Bihar State Legal Services Authority, Patna within a period of eight (8) weeks from today and a receipt thereof shall be filed in the Registry.

36. The Writ Application is dismissed subject to the cost above.