

(2012) 08 JH CK 0087

Jharkhand High Court

Case No: Writ Petition (C) No. 1779 of 2011

M/s. Bharat Minerals Grinding
Industries

APPELLANT

Vs

The State of Jharkhand and
Others

RESPONDENT

Date of Decision: Aug. 8, 2012

Acts Referred:

- Companies Act, 1956 - Section 529, 529A
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) - Section 13, 13(2), 13(3A), 13(4), 17
- Transfer of Property Act, 1882 - Section 69, 69A

Citation: (2013) 111 BC 576

Hon'ble Judges: Narendra Nath Tiwari, J

Bench: Single Bench

Advocate: S.P. Gupta and Anil Kumar Jha, for the Appellant; Rajesh Kumar, Advocate for the Bank, for the Respondent

Final Decision: Allowed

Judgement

Narendra Nath Tiwari

1. The petitioner has sought direction on the Respondent Bank to dispose of the representation/objection dated 4th February, 2011 filed on behalf of the petitioner in response to the Notice u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter to be referred as the "Act"). The petitioner has further sought direction on the Respondent-Bank Not to take any step u/s 13(4) of the Act before giving any reply to the Notice sent to the petitioner u/s 13(2) of the Act. According to the petitioner, it had applied for loan from State Bank of India, Madhupur Branch. After completion of all the required formalities, Cash Credit Loan of Rs. 3.50 lacs was given to the

petitioner. Against the said Cash Credit Loan, a piece of land owned by the wife of the petitioner's proprietor was mortgaged to the Bank as security. The bank account was opened, being Account No. 11159162595. The said bank account was declared as N.P.A. without giving Notice to the petitioner and outstanding dues with interest was calculated at Rs. 3,74,173.03. The petitioner protested against the said calculation, contending that there was gross mistake in calculation of the dues. Without paying any heed to the said objection of the petitioner and without correcting the said calculation, the Respondent-Bank all of a sudden issued Notice u/s 13(2) of the Act, calling upon the petitioner to discharge full liability calculated at Rs. 4,33,502/- as on 17th December, 2010.

2. The petitioner filed its objection/representation dated 4th February, 2011 under the provisions of Section 13(3-A) of the Act, stating, inter alia, that there was mistake in calculation and the amount should be properly calculated, but till date the Respondent-Bank has Not sent any reply. Learned counsel submitted that the petitioner has apprehension that the Respondent-Bank may proceed under the provisions of Section 13(4) of the Act and may take possession of the mortgaged property without considering and disposing of the objection/ representation of the petitioner filed u/s 13(3-A) of the Act.

3. The writ petition has been contested by the Respondent-Bank, stating, inter alia, that almost same issue has been raised before the Permanent Lok Adalat at Deoghar and the case is still pending. Before the Lok Adalat, the petitioner had taken same plea, which was replied by the Respondent-Bank. Separate reply to the objection of the petitioner u/s 13(3-A) of the Act is Not required in view of the reply filed before the Permanent Lok Adalat dated 21st February, 2011. There is no merit in this writ petition and the same is liable to be dismissed.

4. Heard learned counsel for the parties.

5. In the counter affidavit as also in course of hearing, it is Not disputed by the Respondent-Bank that Notice u/s 13(2) of the Act has been issued, asking the petitioner to discharge full liability failing which the creditor-bank shall be entitled to exercise all or any of the rights detailed under sub-section (4) of Section 13.

6. Section 13 of the Act gives provisions for enforcement of security interest, which reads as follows:-

13. Enforcement of security interest.-(1) Not with standing anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any

instalment thereof, and his account in respect of such debt is classified by the secured creditor as Non-performing asset, then, the secured creditor may require the borrower by Notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of Notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section(4).

(3) The Notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(3A) If, on receipt of the Notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is Not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for Non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall Not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal u/s 17 or the Court of District Judge u/s 17Aj

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset: Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt: Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;]

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by Notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause(d) of sub-section(4) to the secured creditor shall give such person a valid discharge as if he has made payment

to the borrower.

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditors shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall Not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing Not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realized from the sale of secured assets shall be distributed in accordance with the provisions of Section 529A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realize his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of Section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of Section 529A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of Section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues can Not be ascertained, the liquidator shall intimate the estimated amount of

workmen's dues under that Section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation.- For the purposes of this sub-section,- "record date" means the date agreed upon by the secured creditors representing Not less than three-fourth in value of the amount outstanding on such date;

"amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are Not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case maybe, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this Section, secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in Clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorized in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of Notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the Notice, without prior written consent of the secured creditor.

7. It is clear from the above provisions that if on receipt of the Notice under sub-section (2), the borrower makes any representation or files any objection, the secured creditor has to consider such representation/objection and if the objection is Not accepted, the secured creditor has to communicate within one week of receipt of such representation/objection, the reasons for non-acceptance of the representation/objection to the borrower.

8. Hon"ble Supreme Court, in the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., has clearly laid down that the purpose of serving a Notice

upon the borrower u/s 13(2) of the Act is that a reply may be submitted by him explaining the reasons as to why measures may or may Not be taken u/s 13(4) in case of non-compliance of the Notice within 60 days. The creditor must apply its mind to the objections raised in the reply to such Notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the Notice.

9. A clear provision was, thereafter, carved out by introducing Section 13(3-A) in the said Act, which provides for consideration of representation/objection filed by the borrower and the communication of reason for non-acceptance of the representation by the secured creditor to the borrower.

10. The said provision is in consonance with the principle of natural justice and is intended to provide an opportunity to the borrower to represent against the Notice u/s 13(2) of the Act.

11. The provision is mandatory in nature and it has to be complied with. The said provision can Not be bypassed, saying that the reply of the secured creditor was already Known to the borrower. The compliance of the said provision must be obvious on record. The reason for Not accepting the representation/ objection has to be communicated to the borrower within one week of receipt of representation/objection by the secured creditor.

12. In view of the above discussions, I find much substance in the contentions of the petitioner that there was no compliance of the provision of Section 13(3-A) and further proceeding is vitiated. Accordingly, this writ petition is allowed. The respondents are directed to consider and dispose of the petitioner's representation/objection dated 4th February, 2011 filed u/s 13(3-A) of the Act before proceeding to take recourse to any measure for recovery of the debt u/s 13(4) of the Act.

There is no order as to costs.