(2014) 10 JH CK 0019

Jharkhand High Court

Case No: Writ Petition (Civil) No. 3710 of 2012

Paritran Trust	APPELLANT
Vs	
Punjab National Bank	RESPONDENT

Date of Decision: Oct. 14, 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), 17

Citation: AIR 2015 Jhar 34 : (2015) 1 AJR 398 : (2015) 2 BC 82

Hon'ble Judges: S. Chandrashekhar, J

Bench: Single Bench

Advocate: A.K. Sinha, Sr. Advocate and Prashant Pallav, Advocate for the Appellant; Rajesh Kumar, P.A.S. Pati and Ravi Kumar Singh, Advocate for the Respondent

Judgement

S. Chandrashekhar, J.
Seeking quashing of notice dated 09.12.2011 issued under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and for issuance of a writ of mandamus directing the respondent-Banks to immediately reschedule the term-loan sanctioned in favour of the petitioner-Trust and for disbursement of loan of Rs. 21.44 crores, the petitioner has approached this Court by filing the present writ petition.

2. The facts narrated in the writ petition are briefly summarized thus;

The petitioner-Trust was established to provide health education and health care services to all class of society. The petitioner was granted Essentiality Certificate for establishing a medical college in the name of Paritran Medical College and Hospital with intake capacity of 150 students in the college and 750 beds in the hospital. The petitioner submitted a detailed project report for taking loan from the respondent-Banks. Originally the project

cost was assessed at Rs. 165.92 crores. A consortium of banks, the Punjab National Bank being the lead bank decided to provide finance, the details of which are as under:

"(a) Punjab National Bank (Lead Bank) - Rs. 46.5 crores

(b) Union Bank of India (Member) - Rs. 23.25 crores

(c) Oriental Bank of Commerce (Member)- Rs. 23.25 crores"

When the Trust was at the verge of completion of the project the Medical Council of India, vide notification dated 13.11.2009 notified the revised guidelines relating to establishment of medical college which drastically effected the project initially conceived by the petitioner-Trust for establishing the Paritran Medical College and Hospital. As a consequence, the project cost escalated and not only a huge part of construction was to be demolished, the project itself got delayed. The repayment of the term-loan was to start from August, 2010 and as per the original plan/project report the Medical College was expected to start from academic session 2010-11 however, due to the change in the MCI guidelines the project could not be completed in time and therefore, the affiliation from MCI could not be obtained for commencing academic session 2010-11. In the changed circumstance the petitioner-Trust approached the consortium of banks for reschedulement of the loan account. Meetings between the consortium of banks and the representative of the petitioner-Trust were held on 29.06.2010 and 28.08.2010 and finally the lead bank-Punjab National Bank agreed for reschedulement of the loan and accorded its sanction for the same which was communicated to the petitioner-Trust vide letter dated 14.12.2010. The Punjab National Bank had infact sanctioned an additional loan on 26.03.2010 which was subsequently cancelled because the other members of the consortium did not sanction their share, that is, 50% of the additional loan. In the meantime, the petitioner-Trust applied for approval of MCI for academic session 2012-13 and the MCI vide letter dated 16.03.2012 sought proof of loan sanctioned for the project. The project now is complete and only some corrective measures are to be taken. A site inspection has also been conducted by the team of the State Government however, in the meantime the account of the petitioner was declared NPA and notice dated 09.12.2011 was issued under Section 13(2) of the SARFAESI Act, 2002. The petitioner submitted its representation dated 21.01.2012 under Section 13(3-A) which was rejected by the respondent-Banks by non-speaking orders. The petitioner-Trust made several representations to the respondent-Banks however, in a most arbitrary manner the respondent-Banks initiated proceeding under the SARFAESI Act, 2002 and therefore, the petitioner-Trust was constrained to approach this Court by filing the present writ petition.

3. A counter-affidavit has been filed on behalf of the respondent Nos. 1 and 2, the lead bank, taking an objection to the maintainability of the writ petition stating that in view of the judgments of the Hon''ble Supreme Court, the writ petition is not maintainable as the petitioner has an alternative efficacious remedy under Section 17 of the SARFAESI Act, 2002. The petitioner-Trust was demanded a sum of Rs. 98,65,47,296.75/- With future and

pendente-lite interest however, the Trust neither paid any interest nor installment as per the repayment schedule. Due to non-payment of interest and installments the account became overdue for more than 90 days and as such the account was categorised as NPA on 31.03.2011 by the Punjab National Bank, by the Oriental Bank of Commerce on 31.12.2010 and by the Union Bank of India on 30.09.2010. The petitioner was thereafter allowed about 9 months'' time to repay the overdue amount however, the petitioner did not respond and therefore, the respondent-bank was compelled to issue notice under Section 13(2) of the SARFAESI Act, 2002. The representation of the petitioner-Trust was considered by the respondent-bank, being the leader of the consortium bank and reschedulement of loan account was refused on account of various reasons, one of the reasons was that the allied concern of the petitioner-Trust namely, Maa Lalita Hospital and Research Centre had already come under NPA category and therefore, request for sanctioning additional term loan could not have been considered. The respondent-bank has already initiated action under Section 13(4) of the SARFAESI Act, 2002 and issued possession notice dated 07.08.2012 which was duly affixed at the site and published in leading newspapers on 12.08.2012 and 13.08.2012 however, the petitioner suppressed the material facts from the Court and obtained an interim protection vide order dated 25.09.2012.

4. Heard the learned counsel appearing for the parties.

5. Mr. A.K. Sinha, the learned Senior Counsel appearing for the petitioner contended that issuance of letter dated 09.12.2011 under Section 13 of the SARFAESI Act, 2002 is bad in law for two reasons namely, the loan account of the petitioner-Trust was declared NPA without affording an opportunity of hearing to the petitioner and by the same notice dated 09.12.2011, provision under Section 13 of the SARFAESI Act has been invoked which is not permissible in law. It is submitted that the scheme of Section 13 of the SARFAESI Act, 2002 envisages that only after the account is declared NPA, the notice under Section 13 can be issued and since, in the present case, vide notice dated 09.12.2011 itself, the loan account was declared NPA and a notice under Section 13 has also been issued, the impugned notice dated 09.12.2011 is liable to be quashed. It is further submitted that on account of change in the MCI guidelines and due to the reasons beyond the control, of the petitioner-Trust, the project could not be completed within time and although the lead bank had agreed to sanction additional term loan, the same was not accepted by the other banks which was contrary to the binding RBI guidelines and therefore, a direction be issued to the respondent-Banks for disbursal of additional term loan of Rs. 21.44 crores. The learned counsel has relied on decision of the Hon''ble Supreme Court in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., and Sudhir Shantilal Mehta Vs. C.B.I., . It is submitted that since the action taken under Section 13 of the SARFAESI Act, 2002 itself is bad in law, the subsequent action taken under Section 13 must go. It is further submitted that though the writ petition was filed on 05.07.2012, notice under Section 13 is alleged to have been issued on 07.08.2012 and thus, it would be hit by the principle of lis-pendens.

6. Per contra, Mr. Rajesh Kumar, the learned counsel appearing for the Respondent Nos. 1 and 2 has raised a preliminary objection to the maintainability of the writ petition and submitted that under the SARFAESI Act, 2002, a cause of action accrues only after the Bank/Financial Institution takes recourse to one of the measures under Section 13 and not before that and therefore, the challenge to notice dated 09.12.2011 under Section 13 is pre-mature. Moreover, the petitioner-Trust has not disclosed any reason for approaching the Writ Court by-passing the remedy provided under the SARFAESI Act, 2002. Reiterating the stand taken in the counter-affidavit, the learned counsel has submitted that the credibility of the petitioner-Trust is already under cloud and inspite of sufficient time granted by the Bank and stay operating in its favour for more than two years, the petitioner-Trust has failed to pay the amount due to the respondent-Banks.

7. Mr. P.A.S. Pati, the learned counsel appearing for the Respondent Nos. 3 and 4 has submitted that an application being O.A. No. 154 of 2013 has already been filed before the Debts Recovery Tribunal (DRT) and in that view of the matter also, the present writ petition is not maintainable.

8. Mr. Ravi Kumar Singh, the learned counsel appearing for the Respondent Nos. 5 and 6 has reiterated the stand taken by the other respondent-Banks and submitted that the RBI guidelines on which reliance has been placed by the learned counsel for the petitioner is not applicable in the case of the petitioner. The petitioner is a defaulter and he has not shown his bona fide in making any payment for more than three years and therefore, the petitioner-Trust is not entitled for any relief in the present proceeding.

9. I have carefully considered the submissions of the learned counsel appearing for the parties and perused the documents on record.

10. The learned Senior Counsel for the petitioner has submitted that before the account of the petitioner was declared NPA, no opportunity of hearing was given to the petitioner and therefore, the declaration of the petitioner''s account as NPA is bad in law. He has relied on a decision of this Court in Stan Commodities Pvt. Ltd. Vs. Punjab and Sind Bank and Others, .

11. From an analysis of provisions under Section 13 of the SARFAESI Act, 2002 it is apparent that the secured creditor is empowered to issue notice in writing requiring the borrower to discharge its liability, if the borrower has defaulted in repayment of secured debt or its account has been classified as NPA. The learned Senior Counsel for the petitioner has submitted that the letter dated 09.12.2011 is a composite letter declaring the account of the petitioner NPA as well as a notice under Section 13(2) of the SARFAESI Act and therefore, the action taken by the respondent-Bank is liable to be quashed. This contention is liable to be rejected. I find that in Section 13 of the SARFAESI Act, 2002 there is no bar for resorting to Section 13, after the account of the borrower has been declared NPA. The word "then" in Section 13 only indicates that there should be a determination of the liability prior to resorting to Section 13. It is not in dispute

that the borrower has defaulted in repayment of loan and before its account became NPA it was cautioned and directed to regularise the loan account. There is no prohibition in Section 13 of the Act against issuing a composite order both declaring the account of the borrower NPA and requiring the borrower to discharge its liability simultaneously. In the present case though the respondent-Punjab National Bank has filed counter-affidavit stating that the account of the borrower became NPA on 31.03.2011. The notice dated 09.12.2011 under Section 13 clearly demonstrates that the account was declared NPA prior to notice dated 09.12.2011.

12. In the scheme of the SARFAESI Act, 2002, I do not find any provision which requires an opportunity of hearing to be afforded to the borrower. In "M/s. Stan Commodities Pvt." the question before the Court was, "whether the declaration of the account as NPA without giving prior information/opportunity to settle the controversy regarding classification of account as NPA is justified?" In the present case, the respondent-Bank has written letter requiring the petitioner to make payment and regularise the account. The petitioner''s account was declared NPA on 31.03.2011 by the respondent-Punjab National Bank and thereafter, a notice under Section 13 was issued to the petitioner. The petitioner made his representation under Section 13. Representation dated 21.01.2012 was rejected by the Punjab National Bank vide letter dated 27.01.2012 and by the Union Bank of India vide letter dated 25.01.2012 and the Oriental Bank of Commerce has also rejected the representation ''of the petitioner-Trust under Section 13 and copies of the rejection letters have been produced in the present writ proceeding. It is pertinent to note that the representation by the petitioner-Trust under Section 13 of the SARFAESI Act, 2002 was for reschedulement of the loan account. In the said representation, the petitioner-Trust has detailed the difficulties faced by it due to revised guidelines issued by the MCI and nowhere in the representation dated 21.01.2012, the ''petitioner-Trust has disputed the calculation nor has it claimed its account being declared NPA as arbitrary, illegal or defective. Mere submission of a representation cannot create a bar against taking action in accordance with law by the secured creditor. As noticed above, the petitioner''s account was declared NPA on different dates, much prior to issuance of letter dated 09.12.2011 and the petitioner was requested to make payment and regularise the account.

13. The learned Senior Counsel for the petitioner has submitted that since the declaration of the petitioner''s account as NPA follows adverse civil consequences, the petitioner should have been afforded an opportunity of hearing. This contention merits no acceptance. Under the loan repayment schedule, the petitioner was under a duty to make repayment of the loan as per the schedule. It is not in dispute that the petitioner has defaulted in making payment of the installments. The principles of natural justice cannot be confined in a straight jacket formula. It is a matter of record that the petitioner has made representations to the respondent-Banks and such representations have been rejected by the respondents. I do not find any violation of the principles of natural justice in declaring the petitioner''s account as NPA.

14. The learned Senior Counsel for the petitioner has contended that the rejection letter dated 27.01.2012 of the Punjab National Bank and letter dated 25.01.2012 of the Union Bank of India as well as the rejection letter of the Oriental Bank of Commerce rejecting the representation under Section 13 of the petitioner does not contain any reason and therefore, on that score alone, the notice under Section 13 is liable to be quashed. It is submitted that since the provision contained under Section 13 is not a mere formality rather, it forms the basis of challenge to action taken by the Bank/Financial Institution under Section 13 therefore, the respondent-Banks were under a duty to give detailed reasons. Per contra, Mr. Rajesh Kumar, the learned counsel appearing for the Respondent Nos. 1 and 2 has submitted that in the representation dated 21.01.2012 filed under Section 13 by the petitioner, the only request made by the petitioner was for reschedulement of the loan repayment plan which has been rejected by the respondents-Banks and therefore, no detailed reason was required to be given by the respondent-Banks. I find substance in the contention of the learned counsel for the Respondent Nos. 1 and 2. In view of the facts disclosed in the present proceeding which would indicate that the respondent-Banks provided about 9 months'' time to the petitioner for making payment and for about 2 years the petitioner enjoyed the stay granted by this Court however, he failed to take any step for making payment of the loan amount. The Banks/Financial Institutions are trustees of public money and they are under a duty to protect and secure the public money. In view of the difficulties faced by the Banks/financial Institutions in recovering the loan amount, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and SARFAESI Act, 2002 were enacted.

15. In Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., , while upholding the constitutional validity of the Securitisation and Reconstruction - of Financial Assets and Enforcement of Security Interest Act, 2002, the Hon''ble Supreme Court has observed as under;

81. "..... The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of the economy of the country and welfare of the people in general which would subserve the public interest."

16. In United Bank of India Vs. Satyawati Tondon and Others, , after tracing the historical background for enacting The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002, the Hon''ble Supreme Court has observed that, "it is evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective". The Hon''ble Supreme. Court has observed thus:

43. "Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective

remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code onto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

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55. 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 the 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."

17. The learned Senior counsel for the petitioner has submitted that when the lead bank agreed to finance an additional term loan, in view of the RBI guidelines, it was not open to the other partner of the consortium bank to disagree with the proposal of the lead bank and therefore, a direction may be issued to the respondent-Banks for grant of the additional term loan of Rs. 21.44 crores. I find that the RBI guidelines on which the petitioner has placed reliance cannot be construed in a manner prejudicial to the financial interest of the Banks. Only a proposal from the Punjab National Bank vide letter dated 14.12.2010 (Annexure-5) was given to the petitioner and it is not the case of the petitioner that in the joint meeting of the consortium banks, the lead bank took a decision to grant additional term-loan of Rs. 21.44 crores to the petitioner. On the contrary, I find that the proposal contained in letter dated 14.12.2010 (Annexure-5) was made subject to the approval of the other partners of the consortium banks. The minutes of the consortium meeting dated 28.08.2010 records that the borrower sought permission to bring a new member to the consortium if the Oriental Bank of Commerce (OBC) and the Union Bank of India are not keen to take further exposer in the project and the borrower was permitted to bring another member to the consortium. The borrower sought permission for raising unsecured, loan to complete the project and the consortium members permitted the borrower for raising unsecured loan, subject to condition that the rate of interest payable to the financier shall be at par with or lower than the rate of interest being charged by the member banks. The letter dated 14.12.2010, on which the petitioner has placed reliance, contains several conditions including the repayment schedule. It has not

been brought on record that those conditions were fulfilled by the petitioner-Trust. Relying on the circular dated 20.05.1994 of the Reserve Bank of India (RBI), the learned counsel for the petitioner has submitted that the cancellation of the term-loan of Rs. 18.55 crores which was initially sanctioned by the Punjab National Bank (PNB) because other member banks did not sanction their share in the additional term-loan of Rs. 18.55 crores, was not justified. From the circular dated 20.05.1994, it appears that the lead bank has been made final authority in cases of difference of opinion amongst members of the consortium and the views of the lead bank should prevail in all cases of disputes among the members relating to terms and conditions. From the materials brought on record including the minutes of meeting dated 30.08.2010 and letter dated 14.12.2010, it does not appear that there was difference of opinion amongst the member banks of the consortium. The proposal of the borrower for raising additional unsecured loan was approved by all the respondent-Banks and it is apparent from the materials on record that the petitioner-Trust did not fulfill the condition contained in letter dated 14.12.2010. Inspite of opportunities granted to the petitioner, it failed to regularise its account and discharge its loan liability. I do not find any arbitrariness, illegality or irregularity in rejecting the representation dated 21.01.2012 of the petitioner or in letter dated 09.12.2011 whereby notice under Section 13 of the SARFAESI Act, 2002 was issued by the respondent-Banks.

18. In the result, I find no merit and accordingly, this writ petition is dismissed. Interim order dated 25.09.2012 stands vacated.