

**IN THE HIGH COURT FOR THE STATE OF TELANGANA,
HYDERABAD**

*** * * ***

W.P.No.23268 of 2020

Between:

M/s. Tandra Impex Pvt. Ltd. & another

Petitioners

VERSUS

Punjab National Bank,
B/o. 8-3-988/42, Main Road,
Srinagar Colony,
Hyderabad – 500 073 & another

Respondents

JUDGMENT PRONOUNCED ON: 03.03.2022

THE HONOURABLE SRI JUSTICE UJJAL BHUYAN
AND
THE HONOURABLE Dr. JUSTICE CHILLAKUR SUMALATHA

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? : Yes
2. Whether the copies of judgment may be
Marked to Law Reporters/Journals? : Yes
3. Whether His Lordship wishes to
see the fair copy of the Judgment? : **Yes**

UJJAL BHUYAN, J

*** THE HONOURABLE SRI JUSTICE UJJAL BHUYAN**

AND

THE HONOURABLE Dr. JUSTICE CHILLAKUR SUMALATHA

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! Counsel for Petitioners : Mr. V.Murali Manohar

^ Counsel for the respondents: Mr. Muddu Vijay

<GIST:

> HEAD NOTE:

? Cases referred

¹ AIR 2010 AP 35

² 2022 SCC Online SC 44

³ (2013) 14 SCC 622

⁴ 2018 SCC Online SC 237

⁵ (2013) 14 SCC 622

THE HONOURABLE SRI JUSTICE UJJAL BHUYAN

AND

THE HONOURABLE Dr. JUSTICE CHILLAKUR SUMALATHA

WRIT PETITION No.23268 of 2020

ORDER: *(Per Hon'ble Sri Justice Ujjal Bhuyan)*

Heard Mr. V.Murali Manohar, learned counsel for the petitioners and Mr. Muddu Vijay, learned counsel for the respondent.

2. By filing this writ petition under Article 226 of the Constitution of India, petitioners seek quashing of the decision of the respondent dated 31.03.2020 classifying the loan account of the petitioners as Non-Performing Asset (NPA) and further seek quashing of demand notice dated 31.07.2020 issued by the respondent under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (briefly referred to hereinafter as the 'SARFAESI Act').

3. It is stated that first petitioner is a company of which petitioner No.2 is a Director. Petitioner No.1 is a Micro, Small and Medium Enterprise (MSME) carrying on business of trading in stone and granite blocks. Petitioner No.1 had availed cash credit facilities from the respondent in September, 2019. Repayments were made in the form of installments and the last installment was paid on 29.02.2020. However, because of the outbreak of COVID-2019 pandemic and the resultant lock down, petitioner No.1 defaulted in repayment. Consequently, respondent classified the loan account of the petitioners as NPA on 31.03.2020 followed by issuance of the demand notice dated 31.07.2020 under Section 13(2) of the SARFAESI Act.

4. It was at that stage that the present writ petition came to be filed seeking the reliefs as indicated above. This Court by order dated 31.12.2020 had issued notice and granted stay. Relevant portion of the order dated 31.12.2020 reads as under:

“Learned counsel for the petitioners submits that though the 1st petitioner has paid the last installment for a sum of Rs.9 lakhs on 29.02.2020 to the respondent Bank,

the account of the petitioners was declared as NPA on 31.03.2020, and that the said declaration is in violation of the moratorium granted by the Reserve Bank of India with respect to payment of interest.

A perusal of notice dated 31.07.2020 issued under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, goes to show that the account of petitioners was classified as NPA on 31.03.2020, which prima facie, appears to be against the guidelines issued by the Reserve Bank of India and also the specific assertion that the 1st petitioner has paid the last installment for a sum of Rs.9 lakhs on 29.02.2020.

In view of the above, there shall be interim stay for a period of four weeks.

Issue notice to the respondent.

Learned counsel for the petitioners is permitted to take out personal notice to the respondent by registered post with acknowledgment due and file proof of service.

List on 22.01.2021.”

5. From the above, it is seen that the impugned challenge has been made on the ground that respondent had not considered guidelines of the Reserve Bank of India (RBI) dated 01.11.2012 and 17.03.2016 while classifying the loan

account of the petitioners as NPA. That apart, respondent had not considered the impact of the pandemic and the lock down on functioning of MSME sector and in this connection, would like to place reliance on guidelines of RBI dated 06.08.2020 regarding re-structuring of advances.

6. Respondent has filed counter affidavit wherein it is stated that cash credit limit of Rs.10 crores availed of by the petitioners from the respondent was last renewed on 27.03.2019. Denying that petitioners had paid the last installment on 29.02.2020, it is stated that interest charges for the period from 31.10.2019 to 29.02.2020 was for an amount of Rs.56.54 lakhs. Against the aforesaid amount, petitioners had deposited only a sum of Rs.24.55 lakhs. Account of the petitioners was continuously running overdue and irregular since September, 2019. Sanction limit of the account got lapsed on 26.03.2020. Therefore, the account of the petitioners was declared as NPA on 27.03.2020 looking into the previous irregularities as well as the overdue account. Following classification of loan account of the petitioners as NPA, demand

notice was issued on 31.07.2020 under Section 13(2) of the SARFAESI Act. It is stated that respondent had followed guidelines of the Reserve Bank of India (RBI) while classifying the loan account of the petitioners as NPA. Finally it is stated that till date petitioners have not paid any amount/installments to the respondent.

7. Learned counsel for the petitioners would like to contend that the decision of a secured credit in classifying a loan account as NPA is amenable to judicial review under Article 226 of the Constitution of India. In this connection, he has placed reliance on a decision of this Court in **Sravan Dall Mill P. Limited vs. Central Bank of India**¹. He submits that faced with a similar situation, this Court in W.P.No.760 of 2021 granted liberty to the petitioners to make application under the Banking Ombudsman Scheme, 2006, with further direction that the Ombudsman would look into the grievance of the petitioners. He has referred to various guidelines issued by Reserve Bank of India (RBI) for rehabilitation and re-structuring

¹ AIR 2010 AP 35

of MSME units. His further submission is that while extending credit facilities, banks normally make a discretion between priority sector and non-priority sector. Insofar priority sector like the petitioners is concerned, banks are expected to fully comply with the instructions and guidelines of the RBI.

8. On the other hand, learned counsel for the respondent submits that after demand notice was issued to the petitioners, 2nd petitioner wrote to the respondent on 24.11.2020 assuring the respondent that petitioner No.1 would be repaying the loan amount within March, 2021. But contrary to such assurance, no payment has been made. After advertng to the averments made in the counter affidavit, learned counsel has referred to the recent decision of the Supreme Court in **Phoenix ARC Private Limited vs. Vishwa Bharati Vidya Mandir**², more particularly to paragraph 43 thereof. He submits that as per the aforesaid decision, if a borrower approaches the High Court under Article 226 of the Constitution of India against a proposed action under Section

² 2022 SCC Online SC 44

13(4) of the SARFAESI Act instead of availing the remedy under Section 17 of the SARFAESI Act thereof, it would be an abuse of the process of the Court. In the circumstances, learned counsel for the respondent seeks dismissal of the writ petition.

9. We have duly considered the rival submissions made at the Bar.

10. As noted above, challenge made in the writ petition is two-fold, firstly decision of the respondent dated 31.03.2020 classifying the loan account of the petitioners as NPA should be set aside and secondly demand notice dated 31.07.2020 under Section 13(2) of the SARFAESI Act should be set aside.

11. Section 13 of the SARFAESI Act deals with enforcement of security interest.

11.1. As per Sub-Section (1), 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 the SARFAESI Act

notwithstanding anything contained in Section 69 or Section 69-A of the Transfer of Property Act, 1882.

11.2. Sub-Section (2) says that 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 installment 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 would be entitled to take action under Sub-Section (4).

11.3. Pausing here for a moment, what Sub-Section (2) of Section 13 contemplates is that in the event of a borrower defaulting in repayment and his account in respect of such debt is classified by the secured creditor as NPA, the secured creditor may require the borrower by notice in writing to discharge his liabilities in full to the secured creditor within sixty days of the notice. In other words, the stage at which the

loan account is classified as NPA precedes issuance of a demand notice under Sub-Section (2) of Section 13.

11.4. Proceeding further, we find that Sub-Section (3) provides that the demand notice under Sub-Section (2) should provide 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.

11.5. This brings us to Sub-Section (3-A). If the borrower makes any representation or raises any objection upon receipt of the demand notice, the secured creditor is under an obligation to consider such representation or objection. If the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within fifteen days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower.

11.6. Before we deal with the proviso to Sub-Section (3-A), we may mention that in the event of failure by the borrower

to discharge his liability in full within the period specified in Sub-Section (3-A), Sub-Section (4) will come into the picture, whereunder the secured creditor may take recourse to one or more of the measures mentioned therein to recover the secured debt. The measures include taking over of possession of the secured assets, assignment or sale thereof for releasing the secured asset.

11.7. Reverting back to the proviso to Sub-Section (3-A), we may mention that the legislative intent is quite manifest thereunder in as much as the proviso makes it very clear that the reasons so communicated under Sub-Section (3-A) 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 jurisdictional Debts Recovery Tribunal under Section 17 or to the Court of District Judge under Section 17-A. This position is made more specific by insertion of the Explanation below the proviso to Sub-Section (1) of Section 17. Sub-Section (1) of Section 17 provides a remedy to the aggrieved person including borrower to file

application against any of the measures taken by the secured creditor under Sub-Section (4) of Section 13. The Explanation however declares that the communication of reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower would not entitle the aggrieved person including borrower to make an application to the jurisdictional Debts Recovery Tribunal under Sub-Section (1) of Section 17.

12. From the above, it is quite clear that the legislative intent is to ensure that there should be no judicial or *quasi* judicial interdiction at the stage of issuance of demand notice under Section 13(2) of the SARFAESI Act. This is so because of the very object and reasons behind enactment of the SARFAESI Act.

13. This Court in W.P.Nos.23643 of 2020 and 20046 of 2021, decided on 09.02.2022, following the decision of the Supreme Court in **Punjab National Bank vs. Imperial Gift**

House³, has held that no cause of action within the meaning of the SARFAESI Act can be said to have arisen at the stage of issuance of demand notice under Section 13(2) of the SARFAESI Act or rejection of representation and/or objection by the borrower to issuance of the demand notice. It has been held as follows:

“25 From a conjoint reading of Sub-Sections (2), (3) and (3A) of Section 13 of the SARFAESI Act, it is seen that if upon receipt of a notice under Sub-Section (2) of Section 13, 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 the reasons for nonacceptance of the representation or objection to the borrower within a period of 15 days of receipt of such representation or objection. However, as per the proviso, 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 jurisdictional Debts Recovery Tribunal under Section 17 of the SARFAESI Act or to the Court of District Judge under Section 17A of the SARFAESI Act.

26 At this stage we may also mention that under Section 17 (1) of the SARFAESI Act, any person including a borrower

who is aggrieved by any of the measures referred to in Sub-Section (4) of Section 13 taken by the secured creditor or by his authorized officer may make an application before the jurisdictional Debts Recovery Tribunal within 45 days from the date on which such measure has been taken. The Explanation to Sub-Section (1) clarifies that the communication of reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person concerned including the borrower to make an application to the jurisdictional Debts Recovery Tribunal under Sub-Section (1) of Section 17 of the SARFAESI Act.

27 Reverting back to Sub-Section (3A) of Section 13 of the SARFAESI Act, this Court in **Smt. Gudupati Laxmi Devi Vs. Canara Bank**, W.P.No.28291 of 2021, decided on 10.11.2021, held as follows:

5. A careful analysis of sub-section (3-A) of Section 13 of the SARFAESI Act would go to show that upon receipt of notice issued by the secured creditor under sub-section (2), the borrower has a right to make a representation, or raise any objection, as to the notice so issued. If the borrower exercises that right, then, it is incumbent upon the secured creditor to consider such representation or objection. The use of the word 'shall' in sub⁷ section (3-A) is indicative of the legislative intent of considering such representation or objection, by the secured creditor mandatory. If the secured creditor is not satisfied with the representation or

³ (2013) 14 SCC 622

objection, and finds it to be unacceptable, or untenable, he shall communicate such decision within fifteen days along with the reasons to the borrower.

6. While the statute is silent as to what happens in case of a positive decision by the secured creditor on consideration of such representation or objection, it is axiomatic that once the decision is taken either way, the same has to be communicated to the borrower, notwithstanding the fact that it would not give rise to a cause of action for moving an application either under Section 17 or under Section 17(A). But the fact remains that it would be obligatory on the part of the secured creditor to consider the representation or objection of the borrower, and then take a conscious decision one way or the other, which should be communicated to the borrower within fifteen days of receipt of such representation or objection.

28 Supreme Court in **Mardia Chemicals (supra) and in ITC Limited Vs. Blue Coast Hotels Limited**⁴ stressed upon the need of the secured creditor to consider the representation / objection of the borrower and to communicate the decision taken thereon within the stipulated period. The secured creditor has to act in a fair and reasonable manner.

29 In the instant case, respondent No.1 issued the impugned notice under Section 13 (2) of the SARFAESI Act on 16.11.2020. Petitioner raised objection to such notice vide letter dated 24.11.2020 under Section 13 (3A) of the

⁴ 2018 SCC Online SC 237

SARFAESI Act, which was replied to by the authorized officer of the first respondent on 04.12.2020.

30 Thus, on a careful consideration of the statutory language employed in the proviso to Sub-Section (3A) of Section 13 of the SARFAESI Act read with the Explanation to Sub-Section (1) of Section 17 of the SARFAESI Act, it is crystal clear that a notice under Section 13 (2) of the SARFAESI Act or the rejection of the objection raised to it including the reasons in support thereof would not give rise to a cause of action for instituting an action in law. To that extent, we find sufficient force in the contention advanced by the respondents that the writ petition filed is premature. The statute does not contemplate any intervention at this preliminary stage. Only when the process ripens into a definitive action taken by the secured creditor under Sub-Section (4) of Section 13 of the SARFAESI Act, the aggrieved person can avail the statutory remedy under Section 17 of the SARFAESI Act by filing securitization application before the jurisdictional Debts Recovery Tribunal.

31 This aspect was highlighted by the Supreme Court in **Punjab National Bank Vs. Imperial Gift House**⁵. In that case, the High Court had interfered with the notice issued under Section 13 (2) of the SARFAESI Act and quashed the proceedings initiated by the Bank. Setting aside the order of the High Court, Supreme Court held that the High Court was not justified in entertaining the writ petition before any further action could be taken by the Bank under Section 13 (4) of the SARFAESI Act.

⁵ (2013) 14 SCC 622

32 That being the position, we are of the view that filing of this writ petition is misconceived. Consequently Writ Petition No.23643 of 2020 is dismissed. However, dismissal of the writ petition would not foreclose the remedies available to the petitioner under the law as and when the cause of action arises.”

14. We have already noticed above that classification of loan account by the secured creditor is at a stage prior to issuance of the demand notice under Section 13(2) of the SARFAESI Act. If at the stage of issuance of demand notice, interference by the Court and Tribunal is not to be made, we fail to understand as to how such intervention can be made at a stage prior to issuance of demand notice under Section 13(2) of the SARFAESI Act.

15. Insofar earlier decision of this Court in **Sravan Dall Mill P. Limited** (1 supra) is concerned, even in that case, the ultimate relief granted by the Court was to direct the respondent bank to consider afresh the objection raised by the borrower and thereafter to pass a reasoned order, which should be communicated to the borrower. It was further held that as

no measures under Section 13(4) of the SARFAESI Act were being initiated by the respondent bank, no directions were called for.

16. In the recent decision in W.P.No.760 of 2021, a co-ordinate Bench of this Court, without expressing any opinion on merit, gave liberty to the petitioners to approach the Banking Ombudsman under the Banking Ombudsman Scheme, 2006.

17. No binding precedent can be said to have been laid down in the above two decisions of this Court. Therefore, these two decisions can be of no assistance to the petitioners.

18. In **Phoenix ARC Private Limited** (2 supra), Supreme Court has severely criticized the tendency to entertain writ petitions under Article 226 of the Constitution of India against proposed action to be taken by the secured creditor under Section 13(4) of the SARFAESI Act when there is adequate and efficacious alternative remedy statutorily provided under Section 17 of the SARFAESI Act.

19. In the present case, we are yet to reach that stage. As and when the secured creditor takes any action under Section 13(4) of the SARFAESI Act, petitioners would have their remedy under Section 17 of the SARFAESI Act. But at a stage prior thereto, in our considered opinion, no interference is called for.

20. In that view of the matter, the writ petition is premature and is accordingly dismissed.

21. Interim order passed earlier stands vacated. No costs.

22. As a sequel, miscellaneous applications pending, if any, in this Writ Petition, shall stand closed.

UJJAL BHUYAN, J

Dr. CHILLAKUR SUMALATHA, J

Date: 03.03.2022

Note: L.R. copy to be marked.

(B/o.)

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