Constitutional Writ

Present:

The Hon'ble Mr. Justice Jayanta Kumar Biswas

Judgment on 02.09.2010

W.P.No.17769 (W) of 2010

M/s. Hotel Payel & Anr.

v.

Central Bank of India & Anr.

Points:

Second Notice- Whether bank can proceed under s. 13 (4) without specifically disposing of the objection -Whether second notice under S.13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is valid- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002- S. 13(2) (4)

Facts:

Bank issued a notice under the provisions of S.13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 for non payment of loan after classifying the account as a non performing Thereafter bank initiated proceeding under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. During the proceeding bank again issued another notice under S.13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Petitioner gave his objection to the said notice. Bank thereafter issued notice under section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Challenging those notices writ petition is filed.

Held:

There is no statutory prohibition against issuing more than one notice under subs.(2) of s.13. The borrower's failure to comply with the secured creditor's demand does not create any obligation of the secured creditor to exercise all or any of the rights under sub-s.(4) of s.13; it only entitles the secured creditor to exercise all or any of the rights under sub-s.(4) of s.13. The secured creditor's decision not to exercise any right under sub-s.(4) of s.13 cannot prejudice the borrower. There is nothing wrong if the secured creditor decides to waive its right to proceed on the basis of a s.13(2) notice and decides to issue a fresh s.13(2) notice. A fresh notice can never be for the same liability of the borrower; it is bound to change with each passing day. Para 10 and 11

It has been specifically stated in the letter dated July 1, 2010 that the petitioners were free to give specific proposal for repayment of the outstanding debts in terms of the s.13(2) notice, and that the notice would be treated as redundant only if the petitioners submitted an acceptable proposal putting down 25% on the outstanding debt in terms of the Reserve Bank of India Rules. Simply because the authorized officer did not write his reply paraphrasing subs.(3A) of s.13, it is not be held that he did not come to the conclusion that the petitioners' objections were not acceptable or tenable. It is wrong to say that the objections are pending. Having dealt with the objections in terms of s.13(3A), in my opinion, the authorized officer of the bank was empowered to take the measure under s.13(4). Para 15 and 16

Cases cited:

M/s. Dauji Farms Limited & Ors. v. Dena Bank & Anr, AIR 2009 Chh. 22

Mr. S. Sengupta, advocate, for the petitioners. Mr. V. Raja Rao and Ms. A. Rao, advocates,
for the bank.

The Court: The petitioners in this art. 226 petition dated August 19,2010 are seeking the following principal relief:

"(a) A writ in the nature of Mandamus commanding the respondentsi) to act in accordance with law;

ii) to cancel, rescind and/or set a side the impugned notices under Section 13(2) and 13(4)(a) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 issued by the respondent bank on 29.4.2010 and 30.7.2010 respectively in respect of the properties described in the schedule of the purported notice dated 30.7.2010;"

2. The petitioners obtained credit facilities upto the limit of Rs.40 lacs from the Malda branch of the Central Bank of India in 2003. They were in default on the loan. Under the circumstances, the bank classified the account as non-performing asset on April 1, 2006; and its authorised officer issued a notice dated January 2, 2007 under s.13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and a notice dated August 4, 2007under s.13(4) of the Act.

3. Questioning the actions the petitioners moved W.P. No.20394 (W) of 2007 under art. 226. By an order dated March 4, 2008 the petition was disposed of setting aside the s. 13(4) notice on the ground that the petitioners' objection under s.13(3A) had not been considered and disposed of according to law. The bank was given liberty to proceed with the s.13(2) notice according to law.

4. Instead of proceeding with the s.13(2) notice dated January 2, 2007 the bank initiated recovery proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. During pendency of the proceedings the authorised officer of the bank issued a fresh s.13(2) notice dated April 29, 2010. The petitioners submitted an objection dated June 28, 2010. The authorised officer wrote a reply dated July 1, 2010 and then issued the s.13(4) notice dated July 30, 2010.

5. Mr. Sengupta, counsel for the petitioners, has argued as follows. The bank having waived its right to proceed on the basis of the first s.13(2) notice, its authorised officer could not issue the second s.13(2) notice initiating fresh proceedings, when it is not the case that after the account was regularized, the bank once again classified it as nonperforming asset. In any case, the authorised officer having not recorded a finding in his reply dated July 1, 2010 that the petitioners' objections were not acceptable or tenable, it cannot be said that the petitioners' objections have been disposed of in terms of s.13(3A).

6. Mr. Rao, counsel for the bank, relying on M/s. Dauji Farms Limited & Ors. v. Dena Bank & Anr, AIR 2009 Chh. 22, has argued as follows. A second s.13(2) notice could be issued by the authorised officer of the bank. It is wrong to say that the bank's decision not to proceed with the first s.13(2) notice amounted to waiver of its right to initiate proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The petitioner's objections to the s.13(2) notice were duly considered.

7. The provisions of s.13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 are quoted below:

"13.(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 nonperforming 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)."

8. A notice issued by a secured creditor under sub-s.(2) of s.13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is in effect a demand notice. The notice can be issued only when the borrower, who is under a liability to the secured creditor under a security agreement, is in default on the secured debt or any installment thereof, and his account respecting such debt has been classified by the secured creditor as non-performing asset.

9. The purpose of a notice under sub-s.(2) of s.13 is to give the borrower a chance to discharge in full his liabilities to the secured creditor within sixty days from the date of the notice ad thus to avoid steps against him under sub-s.(4) of s.13. The borrower's failure entitles the secured creditor to exercise all or any of the rights under sub-s.(4) of s.13.

10. There is no statutory prohibition against issuing more than one notice under subs.(2) of s.13. The borrower's failure to comply with the secured creditor's demand does not create any obligation of the secured creditor to exercise all or any of the rights under sub-s.(4) of s.13; it only entitles the secured creditor to exercise all or any of the rights under sub-s.(4) of s.13.

11. The secured creditor's decision not to exercise any right under sub-s.(4) of s.13 cannot prejudice the borrower. There is nothing wrong if the secured

creditor decides to waive its right to proceed on the basis of a s.13(2) notice and decides to issue a fresh s.13(2) notice. A fresh notice can never be for the same liability of the borrower; it is bound to change with each passing day.

12. In this case, the measure taken by the authorized officer of the bank by issuing the s. 13(4) notice dated August 4, 2007 was set aside by this Court by order dated March 4, 2008 in the petitioners' W.P.No.20394(W) of 2007. Hence at the date the impugned s.13(2) notice was issued, the position was as if the authorized officer of the bank had never taken any measure under s.13(4).

13. Though under the first s.13(2) notice the bank was entitled to exercise rights under s.13(4) even in the face of the changed circumstances, it decide to issue a fresh s.13(2) notice, evidently noticing the changed circumstances. I do not find any reason to say that the authorized officer of the bank acted without jurisdiction. The decision relied on supports the proposition that a second s.13(2) notice under the Act is permissible in law.

14. I do not find any merit in the argument that since in his reply dated July 1, 2010 the authorised officer of the bank did not record his conclusion that the petitioners' objections to the s.13(2) notice were not acceptable or tenable, in law it cannot be said that the objections have been disposed of. This argument has been made for advancing the contention that keeping the petitioners' objection to the s.13(2) notice pending, the authorized officer of the bank could not take the impugned measure under s.13(4).

15. It has been specifically stated in the letter dated July 1, 2010 that the petitioners were free to give specific proposal for repayment of the outstanding debts in terms of the s.13(2) notice, and that the notice would be treated as redundant only if the petitioners submitted an acceptable proposal

putting down 25% on the outstanding debt in terms of the Reserve Bank of India Rules.

16. Simply because the authorized officer did not write his reply paraphrasing subs.(3A) of s.13, it is not be held that he did not come to the conclusion that the petitioners' objections were not acceptable or tenable. It is wrong to say that the objections are pending. Having dealt with the objections in terms of s.13(3A), in my opinion, the authorized officer of the bank was empowered to take the measure under s.13(4).

17. For these reasons, the petition is dismissed. No costs. Certified xerox.

(Jayanta Kumar Biswas, J.)