IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.107 of 2015

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M/s Harihar Cold Storage a partnership firm having its site at Rajrappa Road, P.O. Gola, District Ramgarh through one of it's partners Shri Girish Chandra Agarwal, s/o Late Shatrughan Prasad, r/o Gola Cold Storage Pvt. Ltd RAjrappa Road, P.O. Gola, District Ramgarh, Jharkhand.

.... Petitioner/s

Versus

1.The Asst. General Manager State Bank of India, Stressed Assets Management Branch, 5th Floor, SBI Patna, Zonal Office Building, J.C. Road, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Arbind Kumar Jha, Adv

For the S.B.I : Mr. Sanjiv Kumar, Adv

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CORAM: HONOURABLE MR. JUSTICE MIHIR KUMAR JHA

ORAL JUDGMENT

2 19-01-2015 Heard learned counsel for the parties as with regard to the following relief, prayed in this writ application:-

> *"That the writ petition is being filed for declaring the second notice under section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter called Act) dt. 26.9.2014 void as it was issued without any authority of law under the Act. That for further declaration that in view of express provision of the Act the liability of the borrower under the Act includes his liability in full within the period specified in 13(2) notice not the interest pendentelite and further interest in view of law settled by Apex Court in case of Punjab & Sind Bank vs Allied Beverage Company Private Limited & Ors. Since reported in (2010) 10 SCC 640 where in it was held that provisions of Section 34 of CPC and O. 34 R11 of CPC are applicable to DRT Act/SARFAESI Act."*

2. Mr. Arvind Kumar Jha, learned counsel appearing on behalf of the petitioner in support of the

aforementioned prayer has submitted that the law does not include the provisions under SARFAESI Act (hereinafter referred to as the Act) and does not envisage second notice under Section-13(2) of the SARFAESI Act. He explains that the petitioner was already subjected to an earlier notice under Section-13(2) of the SARFAESI Act dated 13.09.2010, for a sum of Rs. 58.4 Lacs but consequently action taken on the basis of such notice under Section-13(2) of the SARFAESI Act by way of bank taking possession under Section-13(4) of the Act was found to be bad by the Debt Recovery Tribunal and therefore, the Bank now cannot give second notice under Section-13(2) of the Act of higher amount of Rs. 90, 94, 346.00.

3. For this purpose he has firstly sought to take help of the provision of Section-13(2) of the Act by pointing out that such notice has to be given for the amount and the amount thereafter cannot be varried and/or modified. He secondly points out that the amount as now sought to be included in the impugned notice

dated 26.09.2014 for a sum of Rs. 90, 94, 346.00, by way of future interest or interest pendente lite is wholly impermissible both on fact in law. he in this regard has placed reliance on Section-3 of the Act which according to him, in view of the provision under Section-37 of the SARFAESI Act, will be applicable. Reliance has also been placed by him on the judgment of the Apex Court n the case of ***AISHWARYA STONES & STEELS INDIA PVT LTD VS. STATE BANK OF INDIA*** *reported in* ***(2008) 1 SCC 125.***

4. On the other hand, learned counsel for the Bank having filed the counter affidavit has explained that when in the first round the notice under Section-13(2) dated 13.09.2010, did not yield to the bank in getting the money from the petitioner because of the order of the Debt Recovery Tribunal setting aside its order under Section Section-13(4) of the Act, the Bank had withdrawn the first notice under Section-13(2) dated 13.09.2010 by an order dated 26.07.2014, and thereafter it had issued a fresh notice under Section-13(2) of the

Act. He in fact has also questioned the maintainability of the writ application against the notice given under Section-13(2) of the Act by placing reliance on two judgments one being unreported judgment of Kolkata High Court dated 02.09.2010 in the case of **M/s Hotel Payal & Anr vs Central Bank of India & Anr** and the other in the case of **M/s Dauji Farms Limited vs Dena Bank** reported in **AIR 2009 Chhatisgarh 22**.

5. In the considered opinion of this Court, the only question for the time being would be as to whether the bank could have issued impugned notice under Section-13(2) of the Act ? There is no difficulty in coming to the conclusion that once the earlier notice under Section-13(2) of the Act dated 13.09.2010, was withdrawn by the Bank, that notice did not survive. Let it be noted that after the Bank had issued notice under Section-13(2) of the Act on 13.09.2010, it had proceeded to take possession of the property under Section-13(4) of the Act which became subject matter of appeal before the Debt Recovery Tribunal, Ranchi in

S.A. No. 14 of 2011, which was disposed of by an order dated 25.03.2014, wherein, the Tribunal had held as follows:-

> *"In view of the foregoing, the DRT has not alternative but to set asides the Possession notice. The Bank to publish fresh Possession notice, make fresh valuation and fresh sale notice. The quantum of demand shall also undergo a change as per recovery certificate granted in O.A. No. 44 of 2011. However fresh demand notice is not required to be given. If the account is still NPA, the quantum of demand as per recovery certificate shall be indicated in the fresh Possessin notice. The appropriate authority in the Bank shall make further endeavour to educate the officers in charge of NPA cells, SARCs and SARBs or SAMBs (or which so ever name they are called) who must justify accepting emoluments every month for rendering service."*
>
> (underlining for emphasis)

6. Let it be noted that this order dated 25.03.2014, passed by the D.R.T. Ranchi being the inter parte order has become final since the petitioner has not assailed this order. The Bank thereafter had gone to communicate the petitioner by its letter dated 27.06.2014, relevant portion whereof reads as follows:-

> ***"WITHDRAWAL OF DEMAND NOTICE ISSUED U/S 13(2) OF SARFAESI ACT BY SME ADITYAPUR BRANCH.***
>
> *The Demand Notice issued to you under Sec. 13(2) of SARFAESI Act on 13.09.2010 by SBI, RASECC-SARC, Bokaro for Rs. 58,41,198.00 (Rs. Fifty eight lac forty one thousand one hundred ninety eight only) plus future interest is being withdrawn for some technical reasons.*
>
> *2. Please note that this withdrawal will in no way affect our right for recovery of Bank's dues. The Bank is free to initiate various legal measures for*

> *recovery of its dues including the remedy available under SARFAESI Act afresh.*
>
> *Yours faithfully*
>
> *Sd/-*
>
> *Authorised Officer"*

7. From a bare reading of the aforementioned letter of the Bank, it would become clear that the Bank had withdrawn its earlier notice dated 13.09.2010, and therefore, there was no existing notice under Section-13(2) of the Act before the impugned notice dated 26.09.2014 was issued to the petitioner. The aspect as to whether such a second notice can be issued or not has to be firstly decided in the light of the statute under Section-13(2) of the Act reading as follows:-

> *"(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 <u>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 exercised all or any of the rights under sub-section(4)</u>."*
>
> (underlining for emphasis)

8. In view of the aforementioned provision of Section-13(2) of the Act there does not seem to be any

restriction on power of issuance of a fresh notice. The requirement under Section-13(2) of the Act is to the effect that there should be a subsisting loan and the loan has not been paid by the borrower despite its being declared as Non Performing Assets (N.P.A.). In fact it is this aspect of the matter which has been considered by the Kolkata High Court in its judgment in the case of M/s Hotel Payal (supra), wherein, it was held as follows:-

> *"There is no statutory prohibition against issuing more than one notice under Sub-s.(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.*
>
> *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).*
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> *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."

9. The same view has also been taken by the Chhatisgarh High Court in the case of M/s Dauji Farms (supra), wherein, it was held as follows:-

> *"The respondent Bank had not taken the first notice to its logical conclusion as the respondents Bank failed to reply to the notice within one week as prescribed under sub-section (3A) of Section 13 of the SARFAESI Act. There is no bar or prohibition in the provisions of the SARFAESI Act for not issuing the second show cause notice. Since the first notice under Section 13(2) of the SARFAESI Act was withdrawn, the second notice may be treated as first notice under section 13(2) of the SARFAESI Act. The petitioners have not suffered any loss or prejudice on account of the fact that the first notice dated 24-2-2005 under Section 13(2) of the SARFAESI Act was not taken to its logical conclusion as the petitioners have been in a position to retain the money for more period till the second notice dated 28-7-2006 under Section 13(2) of the SARFAESI Act was issued."*

10. The petitioner infact has not paid a single farthing after the first notice was given on 13.09.2010, and had infact gone to assail the same when a notice was issued by the Bank under Section-13(4) of the Act. The D.R.T. had thereafter found such action on the part of the Bank to be bad and had set aside the notice taking possession under Section 13(4) of the Act while giving liberty to the Bank to issue fresh notice for taking possession. The D.R.T. had also made it clear that the

quantum of demand could undergo a change as per recovery certificate granted in O.A. no. 44 of 2011. The O.A. No. 44 of 2011 was disposed of by D.R.T. on 21.03.2014 wherein it was held as follows:-

> "16. In the result, the Original Application succeeds on contest against all the Defendants with costs.
>
> It is therefore ordered:-
>
> (i) That the Original Application No. 44 of 2011 initiated by the Applicant Bank for issuance of Recovery Certificate to the tune of Rs. 61,98,071.19 (Rupees Sixty One Lacs Ninety Eight Thousand Seventy One and Paise Nineteen Only) together with interest and costs hereby succeeds and is allowed on contest against the Defendants No. 1 to 5 jointly and severally with costs. The Defendants are directed to pay the dues within a period of two months from the date of judgment, failing which the Applicant Bank will be entitled to sale the mortgaged properties detailed in the application and para 4 herein above and in the application. In case the sale proceeds do not satisfy the certificate dues in full, the balance be recovered from

other personal assets/properties of Defendants No. 1 to 5 including the properties for which the Bank had advanced funds. The Applicant Bank is further entitled to pendentelite and future interest on the amount due @ 10.00% with monthly rests from 16.02.2011 till full recovery is made from the Defendants.

(ii) Let a Recovery Certificate be issued immediately under Section 19(22) of Recovery of Debts Due to Banks and Financial Institution Act, 1993 together with the details of the properties (as detailed in its Original Application) by fixing 21.05.2014 before R.O., DRT, Ranchi.

(iii) The Defendants No. 1 to 8 are hereby restrained by means of injunctions from depleting, transferring, encumbering, alienating or in any way dealing with their properties/estates without first paying the claim of the Applicant Bank."

(underlining for emphasis)

11. Let it be noted that the earlier notice under Section 13(2) of the Act dated 13.09.2010 was only for a sum of Rs. 58.40 lacs whereas the DRT had passed an order on 21.03.2014 for recovery of Rs. 61,98,071.19

paise along with interest and costs. This amount of Rs. 61,98,071.19 was the amount as on 18.2.2011 the date of filing O.A. No. 44 of 2011 by the Bank. The Bank therefore had proceeded by computing the interest in between 19.02.2011 to 26.09.2014 as also the amount of cost. In that view of the matter the fresh impugned notice under Section 13(2) of the Act for recovery of a sum of Rs. 90,94,346.00 was infact only an aftermath of the order of DRT itself.

12. The objection of the petitioner as to whether there was a crystallized amount in the order of DRT dated 21.03.2014 or whether the interest could have been charged by the Bank for the interregnum period of 13.09.2010 to 26.09.2014, is a pure question of fact. It was/is for the petitioner to explain by way of its reply under section-13(3-A) of the Act that the Bank could not have included interest pendente lite. That however will not make impugned notice to be bad.

13. This Court infact finds hardly any relevance of the judgment of the Apex Court in the case of

Aishwarya Stones (supra). What is to be found from the ratio of the aforesaid case is that the proceeding under SARFAESI Act has to be only in respect of crystallized amount and the proceeding initiated has to be taken to its logical conclusion. Here, in this case when the authorities in view of the interparte order of DRT dated 21.03.2014 in O.A. No. 44 of 2011 had made it clear to the petitioner on 27.06.2014 held that the earlier notice under Section 13(2) of the Act was being withdrawn for technical reason, it had to necessarily keep in mind that they were referring only to the order of the Debt Recover Tribunal, Ranchi.

14. It is true that the Tribunal had given liberty to the Bank to initiate fresh proceeding from the stage of taking possession but the petitioner having not paid a single paisa on receipt of notice dated 13.09.2010, for a period of four years had in fact by itself given an occasion to the Bank to recover its dues as per the terms and conditions of the agreement and in the light of the judgment of DRT, Ranchi dated 21.03.2014. In any

event there being no bar in law and also no prejudice caused to the petitioner the case in hand is squarely covered by the ratio laid down in the case of M/s Hotel Payal (supra) and M/s Dauji Farm (supra).

15. The issue as to whether such amount is crystallized amount or not or whether the interest in between 18.02.2011 to 26.09.2014 could not be charged was/is still capable of being answered by the petitioner in its objection to the impugned demand notice under Section-13(2) of the Act. The submission of Mr. Jha, learned Counsel for the petitioner that there is an execution proceeding pending against the petitioner for the same amount in view of order dated 21.03.2014 in O.A. No. 44 of 2011 in no view of the matter could have come in the way of the Bank to take action under Section-13(2) of the Act against the petitioner.

16. That being so, this application is wholly misconceived and is, accordingly, dismissed.

(Mihir Kumar Jha, J)

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