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HIGH COURT OF CHHATTISGARH, BILASPUR

WPC No. 687 of 2016

1. M/s Mohan Rice Mill Aamaseoni, Vidhan Sabha Road, Raipur, A Partnership Firm Acting In The Premises Through Its Partner Shri Dwarika Das Rathi, S/o Late Narayan Das Rathi, Aged About 58 Years, R/o Hanuman Mandir Road, Gudhiyari, Raipur, (Chhattisgarh)

2. Shri Dwarika Das Rathi, S/o Late Narayan Das Rathi, Aged About 58 Years R/o Hanuman Mandir Road, Gudhiyari, Raipur, Civil & Revenue District Raipur, (Chhattisgarh)

---- Petitioners

Versus

Bank Of Baroda A Banking Company Duly Incorporated Under The Relevant Provisions Of The Law And A Bank Within Its Meaning Under The Banking Regulation Act, Carrying On The Business Of Banking All Over The India, Having Its Office At Laxmi Plaza, Near Bijli Office, Gandhi Chowk, Raipur, (Chhattisgarh)

---- Respondent

For Petitioners	:	Mr. B.P. Sharma, Advocate.
For Respondent	:	Mr. Ankit Singhal, Advocate.

Hon'ble Shri Justice Manindra Mohan Shrivastava

Order

31/03/2016

Heard.

1. As a short issue arises for consideration, with the consent of the parties, the matter is heard finally.

2. This petition as originally filed, involved challenge to respondent's action in proceeding further after issuance of notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 (for short “the Act of 2002”) on the ground that without taking any decision

on petitioners' reply as required under sub-Section (3A) of Section 13 of the Act of 2002 read with Rule (3A) of the Security Interest (Enforcement) Rules, 2002 (for short “the Rules of 2002”), no further proceeding could be taken. However, soon after filing of the petition, the petitioners received communication/reply dated 08.03.2016 (Anneuxre P/4). Thereafter, the petitioners were permitted to amend the petition.

3. The petitioners availed Bank's credit facility of Rs. 66,00,000/- from the respondent Bank. As a security towards repayment of loan, the petitioners deposited with the Bank, the title document of residential house of the partners of the petitioner firm.

A dispute arose between the petitioners and the Bank when the Bank sought to recover Rs. 50,04,000/- as outstanding amount which was objected to by the petitioners stating that as the petitioners had already deposited Rs.20,00,000/-, the recovery of the demanded amount is illegal. It has also been the case of the petitioners that the rate of interest is much higher than the agreed rate of 11% per annum.

4. The Bank proceeded to recover the outstanding amount and a notice under Section 13(2) of the Act of 2002 was issued to the petitioners on 05.01.2016 (Annexure-P/1) requiring the petitioners to discharge his loan liability within a period of 60 days from the date of notice failing which the secured creditor would be entitled to exercise all or any of the rights under Section 13 sub-Section (4) of the Act of 2002.

5. The petitioners sent their representation/ objection through counsel to the respondent Bank. In response to petitioners' objection, he was communicated with a reply dated 08.03.2016 of the respondent Bank that was sent through their counsel rejecting his objection.

6. Sole submission of learned counsel for the petitioners is that the provision contained in Sub-Section (3A) of Section 13 read with Rule 2(a) of the Rules of 2002 mandatorily required the secured creditor to consider representation/objection and draw its own conclusion with regard to acceptability or tenability of such objection or representation

and this statutory function could not be delegated by respondent Bank to its counsel. Therefore, it is argued that no further proceeding can be taken against the petitioners in the matter under the provision of the Act of 2002 as period of 15 days from the date of receipt of representation has already elapsed.

7. On the other hand, learned counsel for the Respondent Bank submits that the decision on petitioner's representation has actually been taken by the Bank but it has been communicated through the counsel. Therefore, it cannot be said that there is no decision of the Bank or that the Bank has abdicated its statutory function under sub-Section (3A) of Section 13 of the Act of 2002.

8. The question which arises for consideration is whether, on facts, the reply dated 08.03.2016 (Annexure P/4) sent by the counsel of the Bank can be treated as statutory compliance of provision contained in Section 13 sub-section (3A) of the Act of 2002 read with Rule 2(a) of the Rules of 2002. For this purpose, the aforesaid two relevant provisions are set out herein below:

> “**S.13. Enforcement of security interest.-** (1) Notwithstanding 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 court or tribunal, by such creditor in accordance with the provisions of this Act.
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> (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).
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> (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.
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> **(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 under section 17 or the Court of District Judge under section 17A.

(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 realising 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 realising 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 for 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 creditor 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 realised 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 realise 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 cannot 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,--

(a) "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;

(b) "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 may be, 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, the 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 authorised 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."

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The relevant provision contained in Rule 2(a) of the Rules of 2002 further defines authorized officer as below :-

"Rule 2(a) "authorised officer" means an officer not less than a chief manager of a public sector bank or equivalent, as specified by the Board of Directors or Board of Trustees of the secured creditor or any other person or authority exercising powers of superintendence, direction and control of the business or affairs of the secured creditor, as the case may be, to exercise the rights of a secured creditor under the Act;"

A reading of the statutory provisions as aforesaid reveals statutory scheme that upon notice under Section 13(2) of the Act of

2002, given by the secured creditor to the borrower, the borrower is entitled to make representation or raise any objection. If any such objection is raised, it is the statutory function of the secured creditor to consider the representation or objection and arrive at its own conclusion as to whether such representation or objection is or is not acceptable or tenable. If the secured creditor concludes that such representation or objection is not acceptable or tenable, he is required to communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower. This statutory duty is enjoined upon the secured creditor and none else. Therefore, the decision on representation or objection has to be taken by the secured creditor.

9. Learned counsel for the respondent could not bring to the notice of this Court any provision or notification or authorization under the provision of the Act or Rules made thereunder, authorizing the legal advisor/ counsel of the Bank to himself deal with the objection and reject the same and thereafter communicate it to the borrower.

In fact, notice under Section 13(2) of the Act of 2002, Annexure P/1 shows that one Sunil Bagdi is the authorized officer of the respondent Bank, who in that capacity, issued notice to the petitioners. It is thus clear for the purposes of exercise that power on behalf of the secured creditor, only authorized officer is empowered to consider the representation or objection, to apply its mind and take a decision on the same as per statutory requirement of Sub-Section (3A) of Section 13 of the Act of 2002.

10. The submission of learned counsel for the respondent that the very fact that the reply to objection was sent by the counsel of the Bank under instructions of the Bank to the counsel of the petitioners is indicative of decision taken by the Bank in terms of provision contained in Sub-Section (3A) of Section 13 of the Act of 2002, deserves to be rejected at the threshold.

The statutory duty cast upon the secured creditor under Sub-Section (3A) of Section 13 of the Act of 2002 is not an empty formality. It is not a case where any decision of the authorized officer of the Bank in terms of provision contained in Sub-Section (3A) of Section 13 of the Act of 2002 has been sent along with reply Annexure P/4 so as to say that the Bank's counsel has only communicated the decision. It is a case where the counsel of the Bank himself, sent reply to the notice. By mere statement in the reply that it is being sent under instructions of his client, can by no stretch of imagination be said to be in compliance of statutory requirement of consideration of representation or objection by the secured creditor. In other words, there has been no consideration of the representation / objection of the borrower in accordance with the spirit of sub-section (3A) of Section 13 of the Act of 2002.

The judgment relied upon by learned counsel for the respondent was rendered in entirely different factual context where the question for determination was whether sending of notice under Section 13 (2) of the Act of 2002 by the counsel under instructions of the secured creditor would be substantial compliance of requirement of issuance of notice under Section 13(2) of the Act of 2002. Present is not a case where it involves a mere exercise of issuance of notice. In a case like the present one, the legal requirement is of consideration of objection / representation by the secured creditor (through its authorized officer) by due application of mind. It is not merely confined to communication aspect. Once the secured creditor has not taken any conscious decision on the representation/ objection, there is failure to comply with the mandatory requirement of consideration envisaged under Sub-Section (3A) of Section 13 of the Act of 2002.

11. In the result, it has to be held that respondent Bank has acted illegally in not taking any decision on petitioners' representation / objection, as per statutory requirement of Section 13 (3A) of the Act of 2002. This view find support from the decision of this Court in the case of **Anil Kumar Agarwal Vs. I.C.I.C.I. Bank and another, AIR 2011 Chhattisgarh 1.**

In the absence of there being any such decision, no further action could be taken by the secured creditor towards realization of the loan by taking recourse to the provision contained in Section 13 or other provisions of the Act of 2002. However, notice (Annexure P/1) under Section 13(2) of the Act of 2002 is not required to be quashed as it is the line with the provision of the Act. The Bank, however, is restrained from proceeding further in the matter unless it decides the representation/ objection of the petitioners in accordance with the statutory requirement of Section 13 (3A) of the Act of 2002.

12. The petition is accordingly allowed in the manner and to the extent indicated above. No order as to costs.

Sd/-

(**Manindra Mohan Shrivastava)**
J U D G E

Rekha