IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.10.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.P.No.27059 of 2017
W.M.P.No.28872 of 2017

M/s.Paterson Cancer Center Pvt. Ltd.,
Rep. by its Managing Director,
Dr.S.Vijayaraghavan ... Petitioner

versus

1. The Chief Regional Manager - Region II,
Indian Overseas Bank,
Anna Salai, Chennai 600 002.

2. The Chief Manager,
Indian Overseas Bank,
Kodambakkam Branch,
No.292, Arcot Road,
Kodambakkam, Chennai-24.

3. The Authorised Officer,
Indian Overseas Bank,
Kodambakkam Branch,
No.292, Arcot Road,
Kodambakkam, Chennai-24. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus, to call for the records of the respondents in classifying the account of the petitioner as "Non Performing Asset (NPA)", contrary to the guidelines of the Reserve Bank of India and even before the entire credit facilities stood disbursed and acting in an arbitrary manner in invoking provisions of Securitisation and Reconstruction Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter in short referred to as "SARFAESI Act"), quash the Amended Demand Notice dated 04.08.2017 and consequently, direct the respondents to permit the petitioner to operate the accounts with the third respondent to enable the petitioner to repay the dues to exit the Bank honorably in a reasonable manner.

For Petitioner : Mr.Om Prakash, SC for M/s.Ramalingam and Associates

ORDER

(Order of the Court was made by S.MANIKUMAR, J.)

Writ petition is filed, challenging the action of the respondents in classifying the account of the petitioner as "Non Performing Asset (NPA)", which is contrary to the guidelines of the Reserve Bank of India and even before the entire credit facilities stood disbursed and acting in an arbitrary manner in invoking provisions of Securitisation and Reconstruction Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter in short referred to as "SARFAESI Act") and also the amended Demand Notice, dated 04.08.2017. Consequently, a direction is sought for, directing the respondents to permit the petitioner to operate the accounts with the third respondent, so as to enable the petitioner to repay the dues to exit the Bank honorably in a reasonable manner.

2. The petitioner company was established in the year 2003 and given treatment for cancer patients. From the date of inception, the company had been banking with Indian Overseas Bank, for all their banking needs. All the machineries have been purchased from the finance, funded by the Indian Overseas Bank and the same have been hypothecated to them. The initial term loans availed from the bank were repaid within 4 to 5 years, far ahead of the tenure of such loans and hence the Bank came forward to offer more loans for the development of the institute. With the support of the bank, the petitioner company uccessfully entered the second phase of its development with the project to establish a super specialty hospital with 100 bed capacity. It was proposed to acquire land for such establishment and Indian Overseas Bank, Kodambakkam Branch, who had come forward to transfer an asset and fund the establishment of the super specialty hospital.

3. The petitioner has further submitted that Indian Overseas Bank, Kodambakkam Branch, considering their request, came forward to sanction Term loan of Rs.1275.70 Lakhs, for Equipment purchases and Rs.1655.50 lakhs for purchase of land and construction of building, thus totaling a sum of Rs.2931.20 Lakhs. A sanction letter dated 05.12.2011 was issued by the Bank sanctioning the said facilities. The said sanction was amended, by a letter, dated 16.03.2012 revising the terms of repayment,

with a holiday period of 2 years only. The facilities were availed by executing necessary loan and security documents, including providing the house property as the collateral security. The Managing Director of the petitioner-Company had personally stood as a guarantor for the facilities. None of the other Directors of the company are part of the loan. Till date the filing of the writ petitioner, the petitioner had obtained only a sum of Rs.1081.28 Lakhs, as disbursement out of the said sanctioned facilities.

4. The petitioner has further submitted that the land for establishment of the hospital was agreed to be transferred by the 3rd respondent, being a property in their hands of a defaulting borrower. Accordingly, the Indian Overseas Bank, Kodambakkam Branch disbursed a part of the Term Loan, towards cost of the purchase of the land. The auction sale notice was given by the 3rd respondent for sale of 10 grounds and 808 sq. feet on 15.06.2011 and 22.01.2012 and the petitioner became the purchaser of the property in terms of the auction sale, dated 22.01.2012. Registration of the property was done on 28.03.2012. Tamil Nadu Housing Board and Highways Department had acquired a portion of the property and the petitioner was left with only the remaining extent. Further, the petitioner had to use their own resources to take physical possession of the property, after facing intimidation from the earlier owners of the property.

5. After sorting out all the issues and obtaining the registered documents and revenue documents, the petitioner applied for the approval to be obtained from CMDA. But the authorities had delayed the approval and it was obtained only on 13.03.2017. However, CMDA is seeking the petitioner to gift a portion of the property for OSR at their cost, when they are already borrowing money to put up the hospital.

6. In the meanwhile, the petitioner had planned to purchase of few machineries to improve income generation, by taking part disbursements from the 3rd respondent. But the 3rd respondent has refused to disburse a further loan to the petitioner, which made them to pay the interest accruals in the account. Claiming that the holiday period was over, the respondents insisted that payment of instalments shall commence. Though the project is yet to commence and even disbursement of the loan has not taken place fully the respondents were insisting for commencing the repayment of the loan. Upon persuasion, the Bank took letters from the petitioner, seeking for rescheduling the loans and sanction of Funded Interest Term Loans, which were utilized only to regularize the loans by payment of interest and installments.

7. It is the further case of the petitioner that most of

the terms of CMDA sanction are almost complied now and the petitioner can now start the construction upto lintel level and after the excess land for road widening is gifted to the Government, they can proceed with further construction. Due to paucity of funds, the petitioner is not able to execute the gift deed to the Government and complete the only pending compliance. In the meanwhile, the respondents have been insisting to commence repayment, as per the terms of restructuring. According to the petitioner, it is not possible under the present financial conditions, unless the project becomes operational or alternate funding is available to close the loan.

8. The petitioner has further submitted that they are obligated to establish a viable, life-saving, scientific venture, that is also critically relevant for the Health Security for the cancer patients. Their facility is sought to be enabled, earn income, repay dues and fulfill the avowed objective of making efficacious cancer treatment and multi specialty treatment, accessible and affordable to all needy cancer patients. However, the respondents have arbitrarily proceeded to classify the credit facilities of the petitioner as Non Performing Assets (NPA), unmindful of the fact that the entire disbursement had not happened and the project is delayed, only because of the delay in providing approvals by the statutory authorities and in the absence of the project being completed and income generated. The respondents ought to have stipulated repayment only on the completion of the construction and commencement of the commercial operations.

9. According to the petitioner, contrary to the norms promulgated by Reserve Bank of India, the respondents have proceeded to classify the account as NPA and started pressurizing them to close down the accounts by repaying the dues. Along with the Auditor, they had met the officials of the respondents on many occasions and during the meeting, the officials of the respondents promised that they do not intend to take any coercive action and would enable them to arrange for funds by way of equity or external funding and pay the bank dues. Contrary to such assurances, the respondents had proceeded under SARFAESI Act, to enforce the mortgage and recover the dues.

10. However, the respondents have issued a Demand Notice, dated 01.08.2017, under Section 13(2) of the SARFAESI Act. Upon perusal of the notice, the petitioner has found that the dues payable is wrongly quoted and the same was immediately informed to the officials of the respondents. Thereafter, on 04.08.2017, the 3rd respondent has issued an amended Demand Notice, rectifying the outstanding dues and published the same, in the newspapers on 17.08.2017, with the names of the independent Directors, who have no obligation, in respect of repayment of

loan amount.

11. The petitioner has further submitted that the prudential norms of the Reserve Bank of India clearly stipulates that repayment terms shall be in commensurate with the date of commencement of the commercial operations. The RBI, in their circular, dated 30.05.2013, had received their instructions to the Banks, wherein, it is clearly stated that assets classification shall be based on the date of commencement of commercial operation (DCCO). In view of the same, the respondents ought not to have classified the account of the petitioner as NPA and should have maintained the same as standard and restructured the repayment schedules in tune with DCCO.

12. In this regard, the petitioner has submitted a detailed reply, dated 27.09.2017, to the Demand Notice, issued under Section 13(2), by exercising the right, under Section 13(3A) of the Act. In the absence of any reply, the petitioner has filed this writ petition, for the reliefs, stated supra. However, pending writ petition, the 3rd respondent has filed a rejoinder, dated 10.10.2017 and the same was served on the petitioner on 14.10.2017.

13. According to the petitioner, the Demand Notice and the amended Demand Notice issued, are without any jurisdiction. The arbitrariness and high handedness of the proposed action under SARFAESI Act, is glaring on the face of record, as the respondents had chosen to mark the copies of the notices sent to the petitioner to the Board of Directors in their individual names, when none of them are the guarantors to the facilities in their personal capacity. The said action was done only to bring disrepute to the organization.

14. The petitioner has further submitted that the the Bank has failed to act, in terms of the lending, by suggesting corrective measures, for the temporary setbacks, being faced by them, for the various reasons set forth. In terms of the guidelines of Reserve Bank of India, which is statutory in nature, the Bank is required to assess the situation and suggest measures for corrective action by playing a prominent role and the Bank has failed to carry out the lender's obligation. The Bank primarily did not consider the track record of the petitioner unit and also the implementation of the project and the success, it is to achieve.

15. As per clause 4.2.4 of Reserve Bank of India Circular No.RBI/2013-14/62 DBOD.No.BP.Be.1/21.04.048/2013-14, dated July 1, 2013, mere existence of irregularity in the account cannot be a reason for treating an account as NPA and for initiating enforcement action under SARFAESI Act. As per the guidelines of

Reserve Bank of India, in respect of prudential norms, in terms of Circular, dated 30.05.2013, where the term loan is sanctioned for a project and project completion gets delayed, due to factors beyond the control of the borrower, such as, delay in Government approval, the bank has the liberty to retain the classification as performing asset.

16. According to the petitioner, in terms of the above guidelines, classification of our account as NPA is itself irregular and violates the RBI guidelines. Therefore, the notices are neither warranted nor justifiable. Banks have acquired substantial powers under SARFAESI Act, including, absolute power of possession, transfer, sale and other rights over the alleged securities, without going to court, but such absolute & massive power is not without accountability for their actions. The Bank has a responsibility and cannot shed away from the lender's obligation in addressing the concerns in the account, which are temporary in nature.

17. Placing reliance on a decision of this Court in Sheeba Philominal Merlin & Esther Evelyn v. Repatriate bank [W.P.No.15272 of 2009, dated 10.08.2010], the petitioner has stated principle of public accountability is applicable to such officers/officials, with all its vigor. Greater the power to decide higher is the responsibility to be just and fair. The dimensions of the administrative law permit judicial intervention in decisions, though of administrative in nature, but are ex facie discriminatory. The adverse impact of lack of probity in discharge of public duties, can result in varied defects, not only in the decision making process, but in the decision as well.

18. The petitioner has further submitted that the action of the respondents resulting in the issuance of the Amended Demand Notice, dated 04.08.2017 is arbitrary, vindictive, in breach of guidelines of RBI, which are statutory in nature, violative of fundamental rights of the petitioner and the cancer patients, who are beneficiaries of the scientific endevour of the petitioner. The classification of the Petitioner's account as NPA and the Demand Notice issued under SARFAESI Act, is liable to be set aside, on the following grounds,

> "(i) The classification of the petitioner's accounts as Non Performing Asset (NPA) and the action following the same, being an Amended Demand Notice dated 04.08.2017 under SARFAESI Act are arbitrary, unjust, illegal and violative of sacred rights of the petitioner guaranteed under Articles 14, 19(1)(g) of the Constitution of India.
>
> (ii) The Petitioner Institute has been a customer of the respondent Bank all along for more than 15 years and has been maintaining the banking accounts correctly. The present state of affairs is only due to

delay in granting of permission to commence construction of hospital over which the Petitioner had no control at all and had to be dependent on the action of the statutory authority.

(iii) The Petitioner had utilized the funds disbursed by the Bank only for the purpose of the lending and it is not a case of any diversion of siphoning of the Bank funds. The utilization of the funds has only enhanced the value of the security and the project is duly approved and set to be implemented as committed to the bank. The Bank is not entitled to invoke the provisions of SARFASI ACT as a recovery in the subject case.

(iv) The loan was provided by the Bank to construct hospital and the recovery repayment to take place out of the income generation from the hospital operational activities. With the Govt. sanction got delayed and has now only come, it is but natural that the Bank should allow the Petitioner to complete the construction, generate income and to repay the loan amount to the Bank. On the contrary the Bank is now blocking the operation of the hospital and refuse to allow the loan to be availed, which will only put the spoke on the project completion and in turn will hinder the interest of the bank.

(v) The respondents are not only calling upon the Petitioner to bear the cross of interest burden caused by such delay that is multiple times over their exposure itself but are also seeking to deprive the Petitioner of right a have an operating account and honorably exit if in case the Petitioner is not able to operate the accounts to the satisfaction of the bank.

(vi) The Respondents' classification of the account as their prerogative and discretionary domain is not only incorrect but also untenable in view of the RBI guidelines. Even assuming such a right is in the realm of their discretion, as in the case of every administrative discretion, it ought to be exercised with reasonableness and fairness. Discretion does not mean absence of accountability. In the instant case, the respondents have unjustly acted that has primarily been affected by the Respondents own actions and omissions and further by external factors affecting the whole nation.

(vii) The Respondents are instrumentalities of the State and cannot act against the interests of the nation and its citizens. The respondents cannot turn a blind eye to the hostage situation being the delay occurred in obtaining the approvals and cannot strive to close one more valuable unit that is seeking to survive with resilience. Right to health and medical aid are Integral components right to life. The respondents have no right or justification to deny such sacred right to scores of our terminally ill cancer patients to whom survival of petitioner would mean affordable access to cure and care.

(viii) The respondents failed and omitted to consider that the petitioner, as a cancer care centre, would fall under priority segment in as much as its survival and revival is critical for our Nation's Health Security Safety that are matters of serious concern.

(x) Instrumentalities of State have obligation to act fairly and reasonably. The respondents continuously failing to consider the pleas of the Petitioner and the fact that the entire loan sanctioned is not disbursed and the petitioner who brought debt free assets was never considered a stakeholder by the Banks and are sought to be proceeded with in an arbitrary manner. Such conduct is arbitrary, violative of Articles 14, 19 (1) (g) & 21 of the Constitution of India.

(ix) The respondents have acted unjustly in crippling a unique project. The Respondents, as instrumentalities of State are bound to implement the fair practices in the wake of serious crisis being faced by our nation to US health security. The Banks cannot compromise public interest by resorting to distress enforcement in an account where there is scope for much larger recovery through revival.

(xi) The Petitioner reserves the right to seek for considering additional grounds as and when required."

19. Though Mr.Om Prakash, learned Senior Counsel appearing for the petitioner has made submissions on the above grounds, this Court is not inclined to accept the same, on the ground that for the demand notice, under Section 13(2) of the SARFAESI Act, 2002, the petitioner has already submitted objections, in terms of Section 13(3A) and thereafter, the respondents have sent a reply to the said objections, to the petitioner. The next stage after demand notice, is issuance of possession notice, under Section 13(4) of the SARFAESI Act.

20. The Hon'ble Supreme Court in Mardia Chemicals v. Union of India reported in AIR 2004 SC 2371 : 2004(4) SCC 311 held that notice under Section 13(2) would not give rise to a cause to challenge. At Paragraphs 45 and 46, the Hon'ble Supreme Court held as follows:

"45. In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance.

The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non- compliance of notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfillment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly we must make it clear unequivocally that communication of the reasons not accepting the objections taken by the secured borrower may not be taken to give an occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debt Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub- section (4) of Section 13 of the Act.

46. We are holding that it is necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to notice under Section 13(2) of the Act more particularly for the reason that normally in the event of non-compliance with notice, the party giving notice approaches the court to seek redressal but in the present case, in view of Section 13(1) of the Act the creditor is empowered to enforce the security himself without intervention of the Court. Therefore, it goes with logic and reason that he may be checked to communicate the reason for not accepting the objections, if raised and before he takes the measures like taking over possession of the secured assets etc."

21. However, as per Section 13(3A) of the SARFAESI Act, 2002, 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. Proviso to the said Section states 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.

22. Similarly, the prayer, challenging the action of the respondents, in classifying the account, as NPA, is also not permissible, because after the said classification, demand notice, under Section 13(2) has been issued and that the petitioner has already submitted his objections, under Section 13(3A). Thereafter, a reply was also given by the 3rd respondent-Bank.

23. Challenge to the classification of the account as NPA, can be raised, if recourse to any of the measures, taken by the Bank, under Section 13(4) of the SARFAESI Act, 2002, is taken or

any application is filed for recourse, as the case may be. As of now, the Bank has not resorted to either of the above.

24. In the light of the above decision and statutory provision, writ of certiorari, cannot be entertained. Hence, the writ petition is dismissed. No costs. Consequently, the connected Writ Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

skm

TO

1. The Chief Regional Manager - Region II,
   Indian Overseas Bank,
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+2cc to M/s.Ramalingam and Associates, Advocate SR.No.759622

W.P.No.27059 of 2017

MG(CO)
GN(16/11/2017)