

CWP No.26545 of 2014 (O&M)

[1]

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No.26545 of 2014 (O&M)
Date of decision:19.04.2017

M/s Cosmas Research Lab Ltd.

...Petitioner

Versus

State Bank of India and others

...Respondents

CORAM: Hon'ble Mr. Justice Rakesh Kumar Jain

Present: Mr. Anand Chhibbar, Senior Advocate, with
Mr. Nitin Thatai, Advocate, and
Mr. Ajay Chawla, Advocate, for the petitioner.

Mr. Rakesh Gupta, Advocate,
for respondents no.1 and 2.

Mr. N.C. Sahni, Advocate,
for respondent no.2.

Rakesh Kumar Jain, J. (Oral)

This petition is filed by a limited company, engaged in manufacturing and marketing of pharmaceutical and health care products, aggrieved against the possession notice dated 21.11.2014 issued by respondent no.1-State Bank of India (hereinafter referred to as the “SBI”) in exercise of powers conferred under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the “Act”).

In brief, account of the petitioner maintained with the SBI was declared Non Performing Asset (NPA) on 31.03.2013. Pursuant thereto, a notice under Section 13(2) of the Act dated 20.03.2014 was served upon the

petitioner, followed by the impugned notice dated 21.11.2014 issued under Section 13(4) of the Act. Being aggrieved against both the notices, the present petition has been filed by the petitioner alleging that the petitioner had obtained loan from two banks, namely SBI and respondent no.3-Punjab National Bank (hereinafter referred to as the "PNB") with the credit exposure of ₹22.95 crores (31.81%) and ₹49.19 crores (68.19%), total amounting to ₹72.14 crores.

Counsel for the petitioner has vehemently contended that there is a violation of Section 13(9) of the Act as the SBI has to take consent of the another secured creditor (PNB) as Section 13(9) of the Act provides that 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 Section 13(4) of the Act unless exercise of such right is agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding as on a record date.

According to the petitioner, in the consortium financing of the SBI and PNB, the share of SBI was only 31.81% and there was no consent of the PNB in this regard, though it had *pari passu* charge on the secured assets mortgaged with both the banks. It is further submitted that the assets which are sought to be taken over by the SBI pursuant to the notice issued under Section 13(4) of the Act are not the part of Schedule 'C', being plant and machinery. It is further submitted that insofar as the PNB is concerned, a statement was made by its counsel on 09.04.2015 that the PNB would exercise its right of silence in respect of the issues raised in the present writ petition. He has also referred to another order passed by this Court on 21.04.2015 in which counsel appearing

on behalf of the PNB stated that account of the petitioner was not declared as NPA as on that date. However, on the said date, counsel appearing on behalf of the SBI stated that the plant and machinery of Oncology unit of the petitioner is exclusively hypothecated in favour of the SBI and that such plant and machinery alone is sought to be sold by the SBI in the first instance.

At the time when the notice was issued in this case on 23.12.2014, this Court had directed to maintain *status quo* in respect of the assets which are the subject matter of the notice under Section 13(2) of the Act issued by the SBI.

Counsel appearing on behalf of the PNB has submitted that because of the said order, the PNB is maintaining the *status quo*.

Today, counsel for the petitioner has given an application to the Court with advance copies to the counsel for the opposite parties and with their consent, the said application is taken on record. Registry is directed to number the said application.

According to the petitioner, the PNB had categorized account of the petitioner as 'NPA' on 18.02.2016 but during pendency of the present petition, a compromise had arrived at between the parties as per which a tagging agreement has been entered into. The petitioner has also produced two ceding agreements executed by the PNB on 10.05.2011 and by the SBI on 18.05.2011.

On the other hand, counsel for the SBI has submitted that firstly the present petition is not maintainable as the petitioner has the statutory alternative remedy under Section 17 of the Act and secondly it is submitted that it is not a case of consortium finance rather it is a case of multiple finance,

therefore, Section 13(9) of the Act is not applicable in this case. He has also submitted that even otherwise, Section 13(9) of the Act is not available to a borrower but to a secured creditor. It is further submitted that the ceding agreements pertain only to the fixed assets for which both the banks have given consent for *pari passu* charge and insofar as the movable properties are concerned, he has referred to the hypothecation agreement dated 18.03.2011 to contend that all the machineries of the borrower hypothecated and charged to the bank shall be treated as movable property and it would not apply to the immovable property. It is further submitted that the petitioner had applied for loan separately to the PNB for Beta Lectum unit and to the SBI for Oncology unit, therefore, it is not a case of consortium finance but a case of multiple finance, which is not covered under Section 13(9) of the Act. He has also supported his argument that the remedy under Section 13(9) of the Act is not available to the borrower but it is available to the secured creditor by referring to a Division Bench judgment of the Delhi High Court in the case of **Chemstar Organics India Limited vs. Bank of Baroda & Ors.**, W.P.(C) 1487/2011, decided on 17.09.2012 and a Division Bench judgment of this Court in the case of **M/s MSD Industrial Enterprises Ltd. vs. Debts Recovery Appellate Tribunal and others**, CWP No.19666 of 2014, decided on 26.09.2014. He has also referred to a Single Bench decision of this Court in the case of **M/s. Sangrur Milk Products Pvt. Ltd. vs. District Magistrate, Sangrur & Ors.**, 2012(7) R.C.R. (Civil) 2763 to contend that if the secured assets in question were exclusively mortgaged to bank and not to other secured creditor, then provisions of Section 13(9) of the Act would not be applicable.

I have heard learned counsel for the parties and examined the

available record with their able assistance.

Insofar as the applicability of Section 13(9) of the Act is concerned, it is now settled by this Court by following decision of the Delhi High Court rendered in **Chemstar Organics India Limited's case (supra)** that Section 13(9) of the Act is a beneficial legislation only for the secured creditor and not for the borrower.

Now the question would arise that if Section 13(9) is not applicable to the case of the petitioner, whether the present petition is maintainable or not because the entire base of the case of the petitioner is on account of violation of Section 13(9) of the Act as it has been mentioned by the petitioner in the entire writ petition that the SBI did not take consent of the PNB before initiating proceedings against it under Sections 13(2) and 13(4) of the Act.

To my mind, the argument raised by counsel for the petitioner has no legs to stand because once it has been held that the remedy of Section 13(9) of the Act is not available to the borrower but to the secured creditor, then the present petition for seeking benefit of Section 13(9) of the Act cannot be allowed and has to be dismissed on this ground alone.

Insofar as the question as to whether the loan advanced to the petitioner was a consortium finance or multiple finance is concerned, it has been mentioned by the SBI that two loans have been obtained by the petitioner for plant and machinery, one from the SBI for Oncology unit and another from the PNB for Beta Lectum unit, and hypothecation agreements were also executed separately, which I have already mentioned in the earlier part of this order. The hypothecation agreement is specifically meant for the movable

properties and not for the fixed assets and insofar as the ceding agreements are concerned, those were executed in respect of *pari passu* charge only with regard to the fixed assets and not the movable properties. The SBI is taking action in respect of the movable properties, i.e. plant and machinery of the Oncology unit, which was specifically hypothecated by the petitioner with the SBI.

Thus, I hold that it is not a case of consortium finance but it is a case of multiple finance, therefore, the petitioner cannot take the help of Section 13(9) of the Act.

Even otherwise, the objection of the SBI about maintainability of the present writ petition is also sustainable because the remedy lies with the petitioner under Section 17 of the Act to approach the Debts Recovery Tribunal but since counsel for the petitioner has submitted that he would press the present petition as much water has flown now as the present petition was filed in the year 2014, therefore, I have decided this case on merits without touching the question of maintainability in view of Section 17 of the Act.

In view of the aforesaid observations, I do not find any merit in the present writ petition and hence, the same is hereby dismissed.

April 19, 2017
vinod*

(Rakesh Kumar Jain)
Judge

Whether speaking / reasoned: Yes/No

Whether Reportable: Yes/No