

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WPC No. 2175 of 2018**

1. Vishal Chopra, S/o Late Shri S. N. Chopra, Aged About 50 Years R/o Chopra Chasma Ghar, Ravi Bhawan, Opposite GPO (Head Post Office) Jaistambh Chowk Raipur Chhattisgarh.
2. Smt. Dipali Chopra W/o Shri Vishal Chopra Aged About 46 Years R/o House No.8, Taigor Nagar, SBI Colony, Tikrapara Raipur Chhattisgarh.
3. Chopra Trading Company, Through Its Authorised Officer, Shri Vishal Chopra, Office At Chopra Chasma Ghar, Ravi Bhawan Opposite GPO (Head Post Office) Jaistambh Chowk Raipur Chhattisgarh.

---- Petitioner**Versus**

1. Aditya Birla Finance Ltd. Through Its Authorized Officer, Having Its Registered Office At Indian Rayon Compound, Verawal Gujrat.

Branch Office At 2nd Floor, UCO Bank Building, 5 Parliament Street, New Delhi 110001

And 4th Floor , Lal Ganga Shopping Mall , G E Road Raipur Chhattisgarh.

---- Respondent

For Petitioners
For Respondent

Shri Amrito Das, Advocate
Shri Ashish Shrivastava, Advocate

Order On Board**By****Prashant Kumar Mishra, J.****18/09/2018**

1. Challenge in this petition is to the order passed by Debts Recovery Appellate Tribunal, Allahabad (henceforth 'the DRAT') allowing the appeal preferred by the respondent Finance Company to set aside the order passed by the Debts Recovery

Tribunal, Jabalpur (henceforth 'the DRT') on 19-5-2018 by which it had sustained the petitioners' objection that the proceedings initiated by issuance of notice dated 9-9-2016 under Section 13 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (henceforth 'the Act, 2002') cannot proceed further without deciding the petitioners representation dated 22-9-2016 by a reasoned order.

2. Since the issue lies in a narrow compass I would not refer to the details of loan transaction. Suffice it would be to mention that as on 9-9-2016 i.e. the date of issuance of notice under Section 13 (2) of the Act, 2002 the petitioner has outstanding dues to the sum of Rs.4.61 crores in his loan account, as he had failed to repay the amount under the schedule for repayment and the account had become NPA (Non Performing Asset). The petitioner submitted a representation on 22-9-2016 (Annexure – P/3), however, he did not refer to the Bank's notice under Section 13 (2). When the Bank proceeded further in the matter and eventually order under Section 14 of the Act, 2002 was passed by the District Magistrate, Raipur, on 20-3-2017, the petitioner preferred WPC No.1423 of 2017. The said writ petition was dismissed by this Court on the ground of availability of alternative remedy.
3. Petitioners' appeal before the DRT was allowed by order dated 19-5-2018 (Annexure – P/7) holding that the Bank having not

decided the representation preferred by the petitioner it has violated the mandatory provisions of Section 13 (3-A) of the Act, 2002, therefore, the action of the Bank in proceeding further is illegal. Accordingly, all the proceedings subsequent to the notice was quashed and the Bank was directed to return physical possession of the property which has been taken over pursuant to the order dated 20-3-2017 passed by the District Magistrate, Raipur.

4. The order passed by the DRT has been challenged by the respondent herein in an appeal before the DRAT, which has allowed the appeal holding that the petitioners letter dated 22-9-2016 was not a representation or objection under Section 13 (3-A), therefore, non-compliance of the provisions of Section 13 (3-A) may be excused in view of para 27 of the judgment rendered by the Supreme Court in **ITC Limited v Blue Coast Hotels Ltd. & Ors.**¹
5. In view of specific finding given by the DRAT, I am only required to consider whether or not in the given facts situation of the case the non-compliance of the provisions of Section 13 (3-A) can be excused validating the action of the respondent to proceed further to obtain possession of stressed assets.
6. In **ITC Limited** (supra) the Supreme Court has considered the true construction of Section 13 (3-A) of the Act, 2002 in paras 19 to 33.

¹ 2018 SCC OnLine SC 237 = AIR 2018 SC 3063

7. Referring to the observations made in the earlier judgment in **Mardia Chemicals Ltd. and Others v Union of India and Others**², in **ITC Limited** (supra) the Supreme Court held thus in para 24 :

24. Sub-section (3-A) of Section 13 was introduced in the Act by the Parliament in pursuance of the following observations of this Court in Mardia Chemicals:

45.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 with 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

2 (2004) 4 SCC 311

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 for not accepting the objections taken by the secured borrower may not be taken to give 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 Debts 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.”

(emphasis supplied)

8. In para 26 the Supreme Court considered the issue as to whether sub-section (3-A) of Section 13 is mandatory or directory in nature and eventually held thus in para 30 :

30. We find the language of sub-section (3-A) to be clearly impulsive. It states that the secured creditor “shall consider such representation or objection and further, if such representation or objection is not acceptable or tenable, he shall communicate the reasons for non-acceptance” thereof. We see no reason to marginalize or dilute the impact of the use of the imperative ‘shall’ by reading it as ‘may’. The word ‘shall’ invariably raises a

presumption that the particular provision is imperative

9. In para 27 the Supreme Court observed that there is no doubt that if a reply with reasons is an integral and indispensable part of the statutory scheme, the Courts would not excuse a departure from it. But, on the other hand, if the reply is merely a direction and not of substance to the scheme, the non-compliance may be excused.
10. Thus, the provisions contained in sub-section (3-A) of Section 13 has been held to be mandatory and similarly compliance thereof has also been held to be necessary, as according to the Supreme Court there is no reason to marginalize or dilute the impact of the use of the imperative 'shall' by reading it as 'may'. The word 'shall' invariably raises a presumption that the particular provision is imperative.
11. Much emphasis has been laid on the fact that the reply does not refer to the notice under Section 13 (2), therefore, it cannot be treated as a representation contemplated in law under sub-section (3-A) of Section 13. In view of creditor's above submission, I will refer to the contents of reply to cull out as to whether the same was independent communication without having any bearing on the notice under Section 13 (2) or it was in the context in which the parties were positioned on that date.

12. The reply refers to the creditors insistence to repay the loan mentioning in specific terms in page 4 that the “local authorities of the creditor are threatening me that they will auction my both property for their outstanding amount and will recover the loan.” This fact of auction of property is not the figment of imagination on the part of borrower, but the same crept in his mind only after receiving the notice under Section 13 (2) of the Act, 2002.
13. Merely because there is no reference to the notice under Section 13 (2) it cannot be said that the letter was not worth the contents mentioned in it. The borrower desired, in no uncertain terms that he is trying to sell entire building and negotiations are going on with the intending purchasers involving whopping amount, therefore, it may take about six months time and as soon as that happens the loan will be repaid. He has also mentioned that he has one property in the GE Road valued at Rs.10 crores for which the questioned loan has been taken, therefore, the building can be sold and loan amount can be recovered. Thus, there was an offer in the representation for settlement of the loan account and the manner in which that can be done has also been mentioned, therefore, it carries substance and it was not mere formality.
14. In view of the above, I am of the considered opinion that the representation dated 22-9-2016 (Annexure – P/3) was a representation under sub-section (3-A) of Section 13 of the Act, 2002 and the respondent creditor was obliged in law, in

mandatory terms, by virtue of the decision of the Supreme Court in **ITC Limited** (supra) to decide the same in objective manner by a reasoned order before proceeding further in the matter.

15. As an upshot, the writ petition is allowed for violation of the mandatory provisions of sub-section (3-A) of Section 13 of the Act, 2002. All further proceedings subsequent to the stage of notice under Section 13 (2) of the Act, 2002 stands quashed. The order passed by the DRT is restored. The respondents shall handover possession of the building to the petitioner, however, liberty is reserved in favour of the respondent to proceed further from the stage of decision on representation under Section 13 (3-A) of the Act, 2002.
16. There shall be no order as to cost(s).

Sd/-

Judge
Prashant Kumar Mishra

Gowri