

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN
W.P.No.32841 of 2013
and M.P.No.1 of 2013

K.Saravanan

..

Petitioner

Vs.

1. Vijaya Bank,
rep. by its Authorised Officer,
Kancheepuram Branch,
No.227, Gandhi Road,
Kancheepuram - 631 501.
2. The Registrar,
Debt Recovery Appellate Tribunal,
No.55, Ethiraj Salai, Egmore,
Chennai - 600 008.
3. The Debt Recovery Tribunal - III,
Dewa Towers, V Floor,
No.770-A, Anna Salai,
Chennai - 600 002.

... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India seeking a Writ of Certiorari, calling for the records relating to the order passed by the 2nd respondent Debts Recovery Appellate Tribunal, Chennai, passed in RA(SA) No.92 of 2012, dated 23.09.2013 and quash the same.

For Petitioner : Mr.S.Ganesh

For Respondent 1 : Mr.S.Mohan

O R D E R

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

Challenging the order dated 23.09.2013, passed by the 2nd respondent Debts Recovery Appellate Tribunal, Chennai, (in short 'the Appellate Tribunal') passed in RA(SA) No.92 of 2012, the

petitioner has come forward with the instant writ petition.

2. Short facts leading to filing of the instant writ petition is as follows:

(i) The writ petitioner is carrying on Mineral Water business under the name and style of M/s.Aquerdhanaa Packaged Drinking Water Industries and availed PMEGP Loan (Prime Minister's Employment Generation Programme Scheme) and OD loan for running the business.

(ii) The petitioner, approached the first respondent bank by way of executing a loan agreement, in the name of the petitioner for PMEGP loan for a sum of Rs.19,85,000/- and OD loan of Rs.4,90,000/- being the principal amount at the rate of 11.25% of contractual rate of interest, as levied by the first respondent bank, on 16.11.2009.

(iii) The petitioner, wanted to reduce the loan liability, hence he repaid substantial dues of Rs.3,25,000/- and in the month of February 2010, requested the first respondent bank, to adjust the amount deposited towards subsidy under PMEGP scheme and further requested to give the correct calculation of the remaining loan dues.

(iv) The respondent bank, vide letter dated 20.06.2011, informed the petitioner, that if there are more than three installments in arrears, the account moves to NPA status and the bank will be constrained to initiate proceedings, under the SARFAESI Act, without further notice and advised the petitioner, to pay the arrears, within three days .

(v) The petitioner, in order to settle all the liabilities with the respondent bank, initiated negotiation for amicable settlement of the loan dues with the respondent bank.

(vi) But the respondent bank had chosen to initiate proceedings under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short 'SARFAESI Act') and issued notice dated 22.09.2011, demanding remittance of a sum of Rs.24,06,164/-, as on 22.09.2011, within 60 days from the date of the notice and threatened that the security interest in the immovable property, owned by the petitioner, would be enforced by the first respondent bank.

(vii) The petitioner after receipt of the demand notice dated 22.09.2011, approached the first respondent bank, under Section 5 r/w Section 7(1) of the Right to Information Act, 2005 seeking, inter alia, copy of agreement, entered into between the petitioner and the first respondent bank, with regard to the

loan account, so as to calculate the actual dues.

(viii) The Central Public Information Officer, of the respondent bank, vide letter dated 14.11.2011, responded to the queries of the petitioner.

(ix) According to the petitioner, in spite of receiving the letter dated 22.09.2017, sent by the petitioner, the first respondent bank did not respond and thereby, violated the provision contained in Section 13(3-A) of the SARFAESI Act.

(x) The respondent bank, invoking the powers contained under Section 13(4) of the SARFAESI Act, issued a possession notice dated 26.11.2011, and informed the petitioner about the same, vide its letter dated 01.12.2011.

(xi) Challenging the issuance of possession notice dated 26.11.2011, under Section 13(4) of the SARFAESI Act, the petitioner filed S.A.No.368 of 2011, before the Debts Recovery Tribunal-III at Chennai (in short "the Tribunal") on the following grounds:

(a) Section 13(3A) of the SARFAESI Act reply was given mechanically by the respondent without applying its mind.

(b) The impugned notice was issued not in accordance with the mandatory provisions of the SARFAESI Act and Rules.

(c) Penal interest was compounded and capitalised and the interest claimed is exorbitant and unilaterally lifted up.

(d) Demand Notice was not signed by the Authorised Officer.

(e) Possession Notice was not properly affixed and published.

(xii) The respondent bank, filed counter, inter alia, stating as follows:

(a) The possession notice was issued in accordance with the mandatory provisions of the SARFAESI Act and Rules and it was properly affixed and published in the dailies in accordance with sub-rule (1) and (2) of Rule-8 of the Security Interest (Enforcement) Rules, 2002.

(b) It has further stated that since the petitioner made defaults in the repayment, the account was classified as NPA and Section 13(2) notice dated 22.09.2011, was issued to the petitioner and in the absence of any response from the side of the petitioner, the bank issued possession notice, in accordance with law.

(xiii) The Tribunal, vide order dated 06.07.2012, allowed the application filed by the petitioner and set aside the possession notice dated 26.11.2011. In paragraph 9, of the said order, the Tribunal held as follows:

"9. In the result, the SARFAESI application is allowed and the impugned notice is hereby set aside and possession is restored. The bank is restrained from realising the costs, charges and expenses of the notices, including the Possession Notice issued by them and thereafter, from the borrower. No order as to costs."

(xiv) Aggrieved over the order of the Tribunal dated 06.07.2012, the respondent bank filed appeal in R.A.(S.A.) No.92 of 2012, before the Debts Recovery Appellate Tribunal, Chennai seeking to set aside the order passed by the Tribunal.

(xv) The Appellate Tribunal, vide impugned order dated 23.09.2013, allowed the appeal filed by the bank and set aside the order of the Tribunal dated 06.07.2012, passed in S.A.No.368 of 2011. The Appellate Tribunal held as follows:

"It is seen that a perusal of letter dated 02.11.2011, reveals that it has been addressed only to the Public Information Officer and not to the Authorized Officer and therefore it cannot be taken as a reply to Sec.13(2) notice issued by the bank. It is also seen that when the borrower or his representative was not present at the premises when the possession of the same had been taken of, the Authorized Officer can resort to Rule 3 of the Security Interest (Enforcement) Rules, 2002 and send a notice under the said rule. Therefore, it can be seen that there has been no reply to Sec.13(2) Notice and the Authorized Officer has also properly served the Possession Notice as required under law. It can also be seen that there are no contraventions on the part of the Authorized Officer and the Authorized Officer has done his duty as required under the provisions of the SARFAESI Act and the rules made thereunder and such being the case this tribunal is driven to conclude that the order of the Ld. Presiding Officer is liable to be set aside. Accordingly, the order of the Ld. Presiding Officer, DRT-III, Chennai dated 6.7.2012 made in SA No.368/2011 is hereby set aside.

In the result, this RA(SA) is allowed."

3. Aggrieved over the order passed by the Appellate Tribunal, the petitioner, has filed the instant writ petition seeking to quash the order dated 23.09.2013, made in RA(SA) No.92 of 2012.

4. Mr.S.Ganesh, learned counsel for petitioner, briefly submitted the facts of the case, referred to the relevant provisions of the Act, and assailed the order of the Appellate Tribunal, inter alia, as follows:

(i) That the Appellate Tribunal has failed to consider that it is obligatory on the part of the first respondent bank that the possession notice should be served on the petitioner on the date of actual taking delivery of possession as per Rule 8(1) of the Security Interest (Enforcement) Rules, 2002, rightly held by the 3rd respondent Tribunal.

(ii) That the Appellate Tribunal ought not to have taken a hyper technical approach by rejecting the contention of the petitioner that the reply given to the show cause notice was one that was given under the RTI Act.

(iii) That the copy of the possession notice dated 26.11.2011 was served only on 07.12.2011, by the first respondent bank and the mandatory requirement of serving at the time of possession was not complied with, which vitiates the entire proceedings.

(iv) The Appellate Tribunal failed to consider that the possession notice should be served in form provided in Appendix IV which categorically states that the possession notice should be served on the same date of taking possession.

(v) The Appellate Tribunal has failed to note that there was no reply given under Section 13(3A) for the objection sent by the petitioner to the first respondent bank.

(vi) That the Appellate Tribunal has failed to note that the first respondent bank did not produce any documentary evidence in respect of affixture of possession notice.

(vii) That even according to the first respondent bank, the possession notice was published in newspapers on 01.12.2011 and the first respondent bank ought to have served the possession notice to the petitioner prior to the same in accordance with the provisions of the Act.

(viii) According to the learned counsel for the petitioner, the Appellate Tribunal has misunderstood and misinterpreted the

issue and for the above reasons prayed for quashing the impugned order passed by the Appellate Tribunal.

5. Mr.S.Mohan, learned counsel appearing for the first respondent bank, made submissions to sustain the order of the Appellate Tribunal, inter alia, as follows:

(i) That the reply given by the petitioner dated 02.11.2011, would clearly indicate that it was addressed to the Central Public Information Officer and not to the Authorized Officer and as such, the said communication cannot be treated as a reply to Section 13(2) Notice issued by the first respondent bank.

(ii) That the petitioner was not present at the time when possession was taken and hence the Authorized Officer has resorted to Rule 8 (1) & (2) of Security Interest (Enforcement) Rules, 2002 and that there was no contravention on the part of the Authorized Officer.

6. Heard the learned counsel appearing for the parties and perused the materials available on record.

7. Relevant provisions from the SARFAESI Act, 2002 and Security Interest (Enforcement) Rules, 2002 requires for the purpose of instant writ petition are as follows:

"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.

(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 subsection (4).

(3) The notice referred to in subsection (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.

(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."

Security Interest (Enforcement) Rules, 2002

"3. Demand notice.-

(1) The service of demand notice as referred to in sub-section (2) of section 13 of the Act shall be made by delivering or transmitting at the place where the borrower or his agent, empowered to accept the notice or documents on behalf of the borrower, actually and voluntarily resides or carries on business or personally works for gain, by registered post with acknowledgment due, addressed to the borrower or his agent empowered to accept the service or by Speed Post or by courier or by any other means of transmission of documents like fax message or electronic mail service: Provided that where authorised officer has reason to believe that the borrower or his agent is avoiding the service of the notice or that for any other reason, the service cannot be made as aforesaid, the service shall be effected by affixing a copy of the demand notice on the outer door or some other conspicuous part of the house or building in which the borrower or his agent ordinarily resides or carries on business or personally works for gain and also by publishing the contents of the demand notice in two leading newspapers, one in vernacular language, having sufficient circulation in that

locality.

(2) Where the borrower is a body corporate, the demand notice shall be served on the registered office or any of the branches of such body corporate as specified under sub-rule (1).

(3) Any other notice in writing to be served on the borrower or his agent by authorised officer, shall be served in the same manner as provided in this rule.

(4) Where there are more than one borrower, the demand notice shall be served on each borrower.

(3A) Reply to representation of the borrower.—

(a) After issue of demand notice under sub-section (2) of section 13, if the borrower makes any representation or raises any objection to the notice, the Authorised Officer shall consider such representation or objection and examine whether the same is acceptable or tenable.

(b) If on examining the representation made or objection raised by the borrower, the secured creditor is satisfied that there is a need to make any changes or modifications in the demand notice, he shall modify the notice accordingly and serve a revised notice or pass such other suitable orders as deemed necessary, within seven days from the date of receipt of the representation or objection.

(c) If on examining the representation made or objection raised, the Authorised Officer 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.]”

“8. Sale of immovable secured assets.—

(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in sub-rule (1) shall also be published in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.” (emphasis is ours)

8. From the materials culled out, it can be seen that Demand Notice, under Section 13(2), of the SARFAESI Act, was sent by the first respondent bank, on 22.09.2011, to the petitioner, wherein, it has been clearly stated that since the petitioner was irregular in payment of installments, his debt has been classified as a Non Performing Asset (NPA) on 14.08.2011 by the first respondent bank and an aggregate amount of Rs.24,06,164.03 as on 22.09.2011 was due and payable along with interest from

22.09.2011. The first respondent bank further called upon the petitioner to pay a sum of Rs.24,06,164.03 to the bank, within a period of 60 days from the date of demand notice and in case the petitioner fails to make the payment, the first respondent bank would take recourse in terms of the provisions of Section 13(4) of the SARFAESI Act.

9. For the Demand Notice dated 22.09.2011, sent by the first respondent bank, under Section 13(2) of the SARFAESI Act, the petitioner instead of sending a representation or objection as contemplated under Section 13(3-A) of the SARFAESI Act, has simply sent an application dated 02.11.2011, under the Right to Information Act, 2005 seeking certain information.

10. The reply dated 14.11.2011, sent by the Central Public Information Officer of Vijaya Bank to the petitioner is as follows:

"ROC:LEGAL:F:RTI ACT:2011 Date:14.11.2011

K.Saravanan
S/o M.Kuppusamy
Aqurathna Mineral Water Industries,
37, Arap Perunchelvi Street,
Kancheepuram 631 502.

RPAD

Dear Sir,

Sub: Application received under The Right To Information Act, 2005,

This has reference to your application dated 2.11.2011, addressed to the Information Officer.

I have examined the above application and our reply in this regard is furnished as under:

Sl. No.	Information sought	Reply
1	1. Can the arrears of present SL be paid and can I run the factory ? 2. Should I remit the entire demanded sum of Rs.24.00 lakhs in terms of SARFAESI notice ?	The information sought is not coming within the purview of definition of 'information' specified under RTI Act. Hence, rejected.

Sl. No.	Information sought	Reply
2.	In case I offer to remit the full amount in terms of SARFAESI notice, will the Bank adjust the subsidy amount of Rs.7.00 laksh held by it and adjust it to my liability ?	The information sought is not coming within the purview of definition of 'information' specified under RTI Act. Hence, rejected.
3.	If I am not able to remit the whole amount, whether I will be permitted to pay the arrears and continue to remit the Instalments thereafter ?	The information sought is not coming within the purview of definition of 'information' specified under RTI Act. Hence, rejected.
4.	Will you help to extend the time limit given in SARFAESI notice for few weeks and allow me to remit the entire loan amount ?	The information sought is not coming within the purview of definition of 'information' specified under RTI Act. Hence, rejected.
5.	The loan repayment period is 84 months. The arrears are for few months only. Is there any exemption in a situation when you demand the whole amount when the arrears for few instalments?	The information sought is not coming within the purview of definition of 'information' specified under RTI Act. Hence, rejected.
6.	Is there any way to extend the instalment period ?	The information sought is not coming within the purview of definition of 'information' specified under RTI Act. Hence, rejected.

Sl. No.	Information sought	Reply
7.	I request you to send SARFAESI Act in CD/Xerox copies and I shall pay the cost of the same, if informed ?	Please send demand draft for Rs.100/- favouring the Accounts Officer, Vijaya Bank to enable us to provide the Xerox copy of the contents of the Act.

However, If you are not satisfied with the above decision, you can prefer an appeal against this order to the Appellate Authority within 30 days of the receipt of this letter, whose details are given below:

- 1) Name of the Appellate Authority:
Mr.K.Satish Shetty, Regional Manager
 - 2) Address of the Appellate Authority:
Vijaya Bank, Regional Office,
123, Marshalls Road, Egmore, Chennai-8.
- Thanking you,

Yours faithfully

(S.Ashok Kumar Shetty)
Central Public Information Officer."

11. A perusal of the above reply would make it clear that for Section 13(2) demand notice, the petitioner has sent his representation / objections, by way of an application under the Right to Information Act, 2005, to the Public Information Officer, under the RTI Act and not to the Authorized Officer who had sent the demand notice. Thus, representation / objection as contemplated under Section 13(3A) of the SARFAESI Act, has not at all been made by the petitioner to Section 13(2) notice.

12. As the petitioner, failed to discharge his liabilities, in full, within the period specified in the demand notice, issued under Section 13(2) of the Act, the first respondent bank by invoking Section 13(4) of the SARFAESI Act, issued Possession Notice dated 26.11.2011 and took symbolic possession of the secured asset on 26.11.2011. The first respondent bank has also served possession notice to the petitioner via registered post on 01.12.2011. As the petitioner's unit was closed, the first respondent bank affixed a copy of the possession notice at the entrance of the premises on 01.12.2011. The first respondent bank has also published the possession notice in two leading dailies viz (i) New Indian Express (English Daily) and (ii) Dinamani (Tamil Daily) on 01.12.2011.

It is also acknowledged by the petitioner that possession notice was served on him on 07.12.2011, through registered post.

13. From the above material facts, it is clear that the first respondent bank has duly complied with the provision of the SARFAESI Act and the Security Interest (Enforcement) Rules, 2002 while issuing the Demand Notice under Section 13(2) of the SARFAESI Act and Possession Notice under Section 13(4) of the SARFAESI Act r/w Rule 8 (1) & (2) of the Security Interest (Enforcement) Rules, 2002. Therefore, we are of the considered view that the first respondent bank has not committed any irregularity in invoking the provisions of the SARFAESI Act and its Rules.

14. For the reasons, stated supra, we do not find that there is any material irregularity or illegality, in the order of the Appellate Tribunal, impugned in this writ petition, and the same is liable to be dismissed and accordingly dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS VII)

//True copy//

Sub Assistant Registrar

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To

1. The Registrar,
Debt Recovery Appellate Tribunal,
No.55, Ethiraj Salai, Egmore,
Chennai - 600 008.

2. The Debt Recovery Tribunal - III,
Dewa Towers, V Floor,
No.770-A, Anna Salai,
Chennai - 600 002.

+1cc to Mr.S.Ganesh, Advocate SR.No.18907
+1cc to Mr.S.Mohan, Advocate SR.No.17656

W.P.No.32841 of 2013
and M.P.No.1 of 2013

NRK(CO)
GN(10/04/2018)