THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

<u>WRIT PETITION NO.8502 OF 2018</u>

<u>O R D E R</u>
(Per Sri Justice Sanjay Kumar)

M/s. H.D.B.Financial Services Limited extended loan facilities to M/s. Sree Sree Srinivas Constructions, Hyderabad, the third respondent firm, in the year 2011. The petitioner, a partner in the said firm, offered her residential property at H.No.8-2-686/B/D, Plot No.5, Sy.No.129/31, Road No.12, Banjara Hills, Hyderabad, as security for these loan facilities. Failure on the part of the firm to repay the loan led to initiation of arbitration proceedings by the financial institution culminating in the Award dated 15.02.2012, holding that a sum of Rs.1,01,71,494.56 Ps was payable by the firm. The application filed before the Bombay High Court to set aside the said Award was disposed of on 20.01.2014 and the appeal filed against the said order was also disposed of, directing the firm to pay Rs.10,00,000/- per month in thirteen installments, but the firm admittedly failed to do so. Execution proceedings in relation to this Award were thereafter transferred to Hyderabad in E.P.No.12 of 2014 on the file of the learned II Additional Chief Judge, City Civil Court, Hyderabad. This Court is now informed that the said E.P. was again transferred to the learned XXIV Additional Chief Judge, City Civil Court, Hyderabad, and is pending as on date.

While so, the financial institution invoked the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the SARFAESI Act') and issued demand notice dated 10.11.2016 under Section 13(2) thereof, quantifying the amount payable by the firm as Rs.2,43,55,483/-. The financial institution then issued possession notice dated 01.03.2017 under Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 (for brevity, 'the Rules of 2002') read with Section 13(4) of the SARFAESI Act. However, for some reason, the financial institution again issued another demand notice under Section 13(2) of the SARFAESI Act on 11.12.2017, quantifying the amount due and payable by the firm as Rs.2,08,40,697/-. Having received the same, the petitioner got issued a reply notice through her Advocate on 08.02.2018. The reply notice was sent on 10.02.2018 to the office address reflected in the Section 13(2) demand notice dated 11.12.2017. However, as the financial institution was not available at the said address, the reply notice was re-directed to it and was received only on 22.02.2018. While so, the financial institution issued possession notice dated 16.02.2018 under Section 13(4) of the SARFAESI Act read with Rule 8(1) of the Rules of 2002 in relation to the petitioner's residential property. It was only thereafter that the financial institution issued reply dated 23.02.2018 in response to the petitioner's reply notice dated 08.02.2018. The contention of the petitioner is that the financial institution did not comply with Section 13(3A) of the SARFAESI Act and therefore, issuance of the possession notice dated 16.02.2018 is illegal.

The financial institution filed its counter through its Authorized Signatory. Therein, while adverting to the facts set out *supra*, it stated that the petitioner and the firm did not submit objections to the demand notice within sixty days or make any payment and therefore, it proceeded to issue the possession notice on 16.02.2018. According to it, the petitioner's reply notice dated 08.02.2018 was received by it only on 22.02.2018 and it promptly responded thereto. A copy of the downloaded tracking report filed along with the counter shows that the petitioner's reply notice was booked at

Khairatabad Head Office in Hyderabad on 10.02.2018 and was delivered to the financial institution at Mumbai only on 22.02.2018.

In its additional counter-affidavit, the financial institution stated that its office was located at the II Floor, Kamala Mills Compound, Senapati Bapat Marg, Lower Parel, Mumbai, the address shown in the demand notice dated 11.12.2017, but on 29.12.2017 there was a fire in Kamala Mills building and the financial institution had to shift to Zenith House, Ground Floor, Keshav Rao, Khade Marg, Opp. Mahalakshmi Race Course, Mumbai, on 02.01.2018. It further stated that its sister concern had an office near Kamala Mills compound and the postal authorities were asked to deliver all communications either to the new office at Zenith House or to the office of the sister concern. The postal authorities accordingly delivered some correspondence at the new office and some at the office of the sister concern near Kamala Mills compound. In so far as the petitioner's reply notice dated 08.02.2018 is concerned, the financial institution stated that the same was delivered at its new office only on 22.02.2018. It further stated that despite receiving the demand notice on 16.12.2017, the petitioner waited till February, 2018 and dispatched her reply at the fag end of the sixty day period. It pointed out that the sixty day period expired on 14.02.2018 and claimed that its action in issuing the possession notice on 16.02.2018 could not be said to be illegal.

Heard Sri V.V.Ramana, learned counsel for the petitioner, and Sri G.Kalyan Chakravarthy, learned counsel for the financial institution.

Section 13(3A) of the SARFAESI Act stipulates that if the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if it is found not acceptable or tenable, the secured creditor shall communicate within fifteen days of the receipt of such representation or objection the reasons for such non-acceptance to the borrower. Rule 3A of the Rules of 2002 affirms this legal position. Rule 3A(a) reiterates that the Authorized Officer shall consider any representation or objection made by the borrower after issue of the demand notice under Section 13(2) and examine whether the same is acceptable or tenable. Rule 3A(b) provides that if on examining such representation or objection, the Authorized Officer is satisfied that there is a need to make any changes or modifications in the demand notice, he shall do so and shall serve a revised notice or pass such other suitable orders as deemed necessary, within fifteen days from the date receipt of the representation or objection. Rule 3A(c) states that if on examination of the representation or objection, the Authorized Officer finds that it is not acceptable or tenable, he shall communicate the reasons for non-acceptance thereof within fifteen days of receipt of such representation or objection to the borrower. Well settled is the legal position that compliance with the requirements of Section 13(3A) is mandatory. (See ITC LIMITED V/s. BLUE COAST HOTELS LIMITED[1]).

Further, it is only if the borrower fails to discharge his liability in full within the period specified in the demand notice as per Section 13(2) of the SARFAESI Act, that the secured creditor is entitled to take recourse to one or more of the measures under Section 13(4) of the SARFAESI Act to recover its secured debt. Though neither the SARFAESI Act nor the Rules of 2002 specifically stipulate any period for the borrower to make his representation or objection after issuance of the demand notice, a Division Bench of this Court, comprising one of us, SK,J, and another learned Judge, held in M/s. SASANKA INFRA PROJECTS LIMITED, HYDERABAD, V/s. THE

[1] (2018) SCC OnLine SC 237

ICICI BANK LIMITED, VADODARA[2], that the scheme of the SARFAESI Act indicates that a demand notice under Section 13(2) would require the borrower to discharge, in full, his liabilities to the secured creditor within sixty days from the date of the demand notice and by implication, the borrower necessarily has to either raise his objections or make his representation in response to the demand notice within the said period of sixty days. It was further held that if he does so, Section 13(3A) requires the secured creditor to communicate its response thereto within fifteen days of the receipt of such representation or objection. It was also observed that the scheme of the SARFAESI Act did not lend itself to the interpretation that the borrower can, at his own convenience and leisure, raise his objection or file a representation in response to the demand notice at any stage of the proceedings and the same must necessarily be filed by the borrower within the stipulated period of sixty days given to him to discharge his liability.

In the present case, the demand notice under Section 13(2) of the SARFAESI Act was issued on 11.12.2017. The sixty day period, in terms of Section 13(2) of the SARFAESI Act, would begin from the date of the demand notice. Therefore, the objection raised by the petitioner in response thereto, *vide* her reply notice dated 08.02.2018, dispatched on 10.02.2018, was within the stipulated sixty day period. It is an admitted fact that the financial institution, having sent the demand notice from a particular address, did not remain at the said address owing to a fire accident. Therefore, the delay in the financial institution receiving the said reply notice is not attributable to the petitioner. Once she responded to the demand notice within the stipulated sixty day period, the petitioner completed her part and the financial institution necessarily had to follow the mandate of

[2] (2017) 6 ALT 584 (DB)

Section 13(3A). Be it noted that the financial institution could not have proceeded to initiate measures under Section 13(4) of the SARFAESI Act without complying with the mandate of Section 13(3A). it may be noticed that Rule 3A(b) of the Rules of 2002 postulates that if upon examination of the representation or objection of the borrower, the Authorized Officer is satisfied, he can also make changes or modifications to the demand notice and issue a revised demand notice. Therefore, without completing this step, a secured creditor cannot proceed to issuance of a possession notice under Section 13(4) of the SARFAESI Act read with Rule 8(1) of the Rules of 2002.

Though the financial institution would make much of the fact that the petitioner waited till the fag end of the sixty day period, the right available to the borrower to make a representation or raise an objection would be available till the very last day and merely because the petitioner sent her reply notice towards the end of the sixty day period would not disentitle her from claiming compliance with Section 13(3A) of the SARFAESI Act.

On the other hand, as already stated *supra*, it is the financial institution which is to blame for the delayed receipt of the petitioner's reply notice as it failed to make proper arrangements for service of communications. Admittedly, it asked the postal authorities to either direct such communications to its new office or to the office of its sister concern. Having given such an alternative to the postal authorities, the financial institution cannot seek to blame either the postal authorities or the petitioner for the delayed service of the petitioner's reply notice at its new office only on 22.02.2018. Once the petitioner dispatched the said reply notice on 10.02.2018 before the expiry of the sixty day period, she sufficiently complied with the requirement laid down by this Court in M/s. SASANKA INFRA PROJECTS LIMITED, HYDERABAD[2]. In consequence, issuance of the possession notice on 16.02.2018 by the financial institution before compliance with the mandate of Section 13(3A) of the SARFAESI Act cannot be sustained. However, we hasten to clarify that invalidation of the said possession notice would not adversely impact the demand notice dated 11.12.2017 issued by the financial institution or the steps taken by the financial institution under Section 14 of the SARFAESI Act after due compliance with Section 13(3A) of the SARFAESI Act (*see* STANDARD CHARTERED BANK V/s. V.NOBLE KUMAR[3]).

The writ petition is accordingly allowed to the extent of holding that the possession notice dated 16.02.2018 is invalid for non-compliance with the statutory mandate of Section 13(3A) of the SARFAESI Act before issuance thereof.

Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. In the circumstances, there shall be no order as to costs.

SANJAY KUMAR, J

T.AMARNATH GOUD,J

10th AUGUST, 2018

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[3](2013) 9 SCC 620