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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 11540/2018 and CM Nos. 44668/2018 & 44669/2018**

M/S KANNU ADITYA INDIA LTD.

..... Petitioner

Through: Mrs Anjali J. Manish and Ms Nidhi
Saini, Advocates.

versus

STATE BANK OF INDIA

..... Respondent

Through: Counsel for the respondent
(appearance not given).

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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26.10.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, praying as under:-

“(a) Issue a writ, order or direction in the nature of certiorari or any appropriate writ, order or direction to set aside the reply dated 14.10.2018 under Section 13(3A) of the SARFAESI Act, 2002 to representation dated 27.09.2018.

(b) Grant the cost of the petition.”

2. In substance, the petitioner seeks to challenge the proceedings instituted by the respondent bank (State Bank of India – hereafter ‘the SBI’) for enforcement of security interest under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereafter ‘SARFAESI Act’). The petitioner had made a

representation against the notice issued by the SBI under Section 13(2) of the SARFAESI Act. The SBI had responded to the same by a letter dated 14.10.2018. The petitioner claims that the said response was received beyond a period of fifteen days from the date of communication of its representation and, therefore, the proceedings under the SARFAESI Act are rendered invalid.

3. The only question that falls for consideration of this court is whether the delay by a lender in communicating its decision to reject a representation made by a borrower under Section 13(3A) of the SARFAESI Act vitiates the proceedings initiated in terms of Section 13 of the SARFAESI Act.

4. The aforesaid controversy arises in the following context:

4.1 The petitioner had during the course of its business availed of financial assistance from various banks, namely, State Bank of Travancore, State Bank of Bikaner and Jaipur and State Bank of Mysore. These accounts are now merged in an account with the SBI.

4.2 The SBI has since recalled the facilities. The petitioner seeks to contest the aforesaid claims on several grounds including that the default in repayment of the loan is for reasons not attributable to the petitioner but as a result of the action of the banks in question and Directorate of Revenue Intelligence (DRI).

4.3 The SBI issued a notice dated 30.07.2018 under Section 13(2) of the SARFAESI Act, *inter alia*, stating that the petitioner's account had been classified as a Non Performing Asset (NPA) as on 07.06.2017 and further calling upon the petitioner to discharge its liability amounting to ₹3,11,29,26,154/- (inclusive of interest upto 30.07.2018). The petitioner

claims that it received the said notice on 02.08.2018.

4.4 Thereafter, on 12.09.2018, the petitioner submitted a resolution plan for consideration of the SBI. The petitioner further asserted that the banks had frozen the petitioner's account without any direction from DRI and were responsible for, effectively, disabling the petitioner from servicing its loan. The petitioner also filed a writ petition (being W.P.(C) 9777/2018) agitating its grievance that the petitioner's account had been frozen by the bankers without any direction from the DRI and the same had effectively prevented the petitioner from servicing the accounts. The said petition was dismissed on 24.09.2018.

4.5 On 24.09.2018, the SBI provided the observations made by the forensic auditor in respect of the audit conducted for the period commencing from 01.04.2014 to 30.04.2018.

4.6 On 27.09.2018, the petitioner filed a representation against the SBI's notice dated 30.07.2018 issued under section 13(2) of SARFAESI Act. The SBI did not accept the objection/representation submitted by the petitioner and communicated its conclusion by a letter dated 14.10.2018 (which is impugned in the present petition). The petitioner claims that the said letter was dispatched on 19.10.2018 and was received by the petitioner on 20.10.2018.

5. Mrs Anjali J. Manish, learned counsel appearing for the petitioner earnestly contended that since the response to the petitioner's representation under Section 13(3A) of the SARFAESI Act was received beyond the period of fifteen days from receipt of the petitioner's representation, the said communication was untenable. She contended that failure on the part of the

SBI to respond to the petitioner's representation within the aforesaid period was fatal to the proceedings commenced under the SARFAESI Act and the same was liable to be quashed. She contended that the provisions of Section 13(3A), which expressly stipulates that the lender should communicate its decision to the borrower within a period of fifteen days of receipt of such representation/objection, is mandatory. She referred to the decision of the Supreme Court in *ITC Limited v. Blue Coast Hotels Ltd. & Ors.: 2018 SCC OnLine SC 237* in support of her contention.

6. She further contended that the petitioner was well within its right to approach this Court since the petitioner did not have any equally efficacious remedy, at this stage.

Reasons and Conclusion

7. At the outset, it would be necessary to refer to Section 13(3A) of the SARFAESI Act, which reads as under:-

“13. Enforcement of security interest.-

* * * * *

(3-A) 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 fifteen days] 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 17-A.”

8. In *ITC Limited v. Blue Coast Hotels Ltd.* (*supra*), the Supreme Court had held that the aforesaid provision is mandatory. The petitioner has founded its case on the said proposition. In that case the Supreme Court considered the appeals preferred against the decision of the Bombay High Court holding that Section 13(3A) of the SARFAESI Act was mandatory and failure on the part of the lender to respond to the same had vitiated the recovery proceedings. The action taken by the creditor under Section 13(4) of the Act was also held to be invalid. The Supreme Court considered the question whether the provisions of Section 13(3A) of the Act were mandatory and held in the affirmative. The relevant extract of the said decision is as under:-

“30. We find the language of sub-section (3A) 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.

31. There is nothing in the legislative scheme of Section 13 (3A) which requires the Court to consider whether or not, the word ‘shall’ is to be treated as directory in the provision. As the Section stood originally, there was no provision for the above mentioned requirement of a debtor to make a representation or raise any objection to the notice issued by the creditor under Section 13(2). As it was introduced via sub-section (3A), it could not be the intention of the Parliament for the provision to be futile and for the discretion to ignore the

objection/representation and proceed to take measures, be left with the creditor. There is a clear intendment to provide for a locus *poenitentiae* which requires an active consideration by the creditor and a reasoned order as to why the debtor's representation has not been accepted.

32. Moreover, this provision provides for communication of the reasons for not accepting the representation/objection and the requirement to furnish reasons for the same. A provision which requires reasons to be furnished must be considered as mandatory. Such a provision is an integral part of the duty to act fairly and reasonably and not fancifully. We are not prepared in such circumstances to interpret the silence of the Parliament in not providing for any consequence for non-compliance with a duty to furnish reasons. The provision must nonetheless be treated as 'mandatory'."

9. It is relevant to note that in that case the creditor had failed to respond to the representation submitted by the borrower. The Supreme Court held the provisions of Section 13(3A) to be mandatory; nonetheless, it also examined the relevant facts and concluded that the lender had, in fact, examined the borrower's representation even though it had failed to furnish a reply to the representation made by the borrower. In view of the above, the Supreme Court held that the debtor was not entitled to discretionary relief under Article 226 of the Constitution of India. The relevant extract of the decision indicating the above is set out below:-

"38. In these circumstances, we have no doubt that the failure to furnish a reply to the representation is not of much significance since we are satisfied that the creditor has undoubtedly considered the representation and the proposal for repayment made therein and has in fact granted sufficient opportunity and time to the debtor to repay the debt without any avail. Therefore, in the fact and circumstances of this case, we are of the view that the debtor is not entitled to the discretionary relief

under Article 226 of the Constitution which is indeed an equitable relief.”

10. Undoubtedly, the provisions of Section 13(3A) of the SARFAESI Act are mandatory and it is necessary for the lender to consider the representation/objection made by the borrower in response to the notice issued under Section 13(2) of the SARFAESI Act. However, the question that falls for consideration of this Court is whether the time period of fifteen days for a lender to respond to the borrower’s objection/representation as specified under Section 13(3A) of the SARFAESI Act is also mandatory.

11. It is settled law that the question whether the provision is mandatory or directory has to be determined by ascertaining the real intention of the Legislature. It is relevant to refer to the oft quoted passage from Crawford on Statutory Construction (Addition 190, Article 261 page 516) which reads as under:-

“The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other.”

12. In *State of U.P. v Babu Ram Upadhyay: 1961(2) SCR 679*, Subba Rao, J observed as under:

“For ascertaining the real intention of the Legislature the court may consider, inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in

question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered”.

13. In *ITC Limited v. Blue Coast Hotels Ltd. (supra)*, the Supreme Court had held that the SARFAESI Act and the rules made thereunder expressly provided for the borrower to raise an objection to the notice under Section 13(2) and make a representation to the creditor. The scheme of the SARFAESI Act makes it amply clear that the creditor is required to consider such representation before proceeding to resort to any measures under Section 13(4) of the SARFAESI Act. The Supreme Court had explained that such a provision was an integral part of the duty to act fairly and reasonably and not fancifully. Thus, the said provision was held to be mandatory.

14. In *Mardia Chemicals Ltd. v. Union of India: (2004) 4 SCC 311*, the Supreme Court had observed as under:-

“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 fulfilment 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 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.”

15. As observed by the Supreme Court in *ITC Limited v. Blue Coast Hotels Ltd. (supra)*, the provisions of sub section (3A) of Section 13 were introduced in the SARFAESI Act pursuant to the aforesaid observations made by the Supreme Court in *Mardia Chemicals Ltd. v. Union of India (supra)*.

16. Plainly, the intention of the Legislature in introducing sub-section (3A) is to ensure that objection/representation of a borrower against any action for enforcement of security interest are considered before a creditor proceeds to take possession of the secured assets in terms of Section 13(4) of the SARFAESI Act.

17. Bearing the aforesaid object in mind, it is at once clear that whereas it is imperative for the creditor to consider the objection and representation furnished by the borrower before resorting to any action under Section 13(4) of the SARFAESI Act – and the same is, thus, mandatory – there is no reason to hold that if the lender fails to do so within a period of fifteen days, it loses its right to enforce the security interest under provisions of Section 13 of the Act. The intention of the Parliament in enacting sub-section (3A) of the SARFAESI Act is to provide the borrower an opportunity to object to and/or make a representation against the proposed action for enforcement of the security interest. Clearly, the intention is not to preclude the lender from enforcing its security interest even after the lender has considered and rejected the objection/representation made by the borrower. Such a construction of sub-section (3A) of Section 13 of the SARFAESI Act would militate against the very object of the SARFAESI Act of providing a mechanism for the secured creditors to enforce their security interest

expeditiously.

18. The reference to a period of fifteen days in Section 13(3A) of the SARFAESI Act must, therefore, be considered as directory and introduced to indicate a time frame within which the lender is expected to consider the objections and take a decision with regard to any representation or any objection made by the borrower. If a lender considers the same within a reasonable time – reasonable time being such period as can be considered reasonable in the context of the benchmark of fifteen days as specified – before proceeding to take an action under section 13(4) of the SARFAESI Act, would be substantial compliance of the aforesaid provision.

19. Merely because the requirement of a lender to consider a representation or an objection raised by the borrower has been held to be mandatory (as held in *ITC Limited v. Blue Coast Hotels Ltd.*) does not necessarily mean that the period within which the lender must respond – fifteen days – as specified under Section 13(3A) of the SARFAESI Act is also to be construed as mandatory.

20. There are several instances where certain requirement of the statutory provisions have been held to be mandatory while the others have not. In *Commissioner of Income Tax v Punjab Financial Corporation : 254 ITR 6*, a Full Bench of Punjab and Haryana High Court considered the question whether the requirement to file an audit report along with return for claiming reduction under Section 32AB of the Income Tax Act, 1961 was mandatory or not. After noticing the principles of statutory interpretation, Justice G.S. Singhvi, as he then was, held that it was necessary for an assessee to file the audit report in order to claim deduction under Section 32AB of the Income

Tax Act, 1961. However, the requirement that it be filed along with the return was not mandatory. In that case Punjab Financial Corporation had filed its return and claimed a deduction under Section 32AB(1) of the Income Tax Act but had not filed the audit report along with the return as required under Section 32AB(5) of the Income Tax Act. Initially, the deduction was allowed but subsequently the income tax authorities sought to withdraw the said deduction on the ground that the audit report had not been filed as required under Section 32AB(5) of the Income Tax Act. The assessee (Punjab Financial Corporation) filed the audit report on receipt of the notices seeking to withdraw the benefit of the said deduction. Indisputably, the conditions for claiming deductions as specified under Section 32AB of the Income Tax Act were mandatory and it was necessary to comply with the same. This included furnishing of an audit report. However, the Court held that failure of an assessee to furnish the audit report along with the return as required under Section 32AB(5) of the Income Tax Act was not vital to its claim and the assessee could do so at a later stage.

21. In *M.Y. Ghorpade v. Shivaji Rao M. Poal* : (2002) 7SCC 289, the Supreme Court considered the provisions of Section 117 of the Representation of People Act, 1951 which required the petitioner to deposit a sum of Rs.2000/- as security for costs of the petition at the time of presenting an election petition. The Court held that the requirement of making deposit of Rs.2000/- as security was mandatory but the mode of making the deposit as well as the person who could make the deposit was directory. Thus, even if the deposit was made by a person other than a petitioner, the provisions of Section 117 of the Representation of People

Act, 1951 would be considered as fully complied with.

22. It is also relevant to refer to the decision of the Supreme Court in ***P.T. Rajan v T.P.M Sahir and Others: (2003) 8 SCC 498***. In that case the Supreme Court had observed as under:-

“48. Furthermore, even if the statute specifies a time for publication of the electoral roll, the same by itself could not have been held to be mandatory. Such a provision would be directory in nature. It is well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefore, the same would be directory and not mandatory. (See *Shiveshwar Prasad Sinha v. District Magistrate of Monghyr*, *Nomita Chowdhury v. State of W.B.* and *Garbari Union Coop. Agricultural Credit Society Ltd. V. Swapan Kumar Jana.*)”

23. In the present case the requirement that the secured creditor considered the objection/representation of the borrower as mandatory but the requirement that he communicates its conclusion within fifteen days cannot be held to be so. It is difficult to accept that the Parliament intended a secured creditor to forfeit its right to enforce its security interest on account of failure to respond to the representation or objection of a borrower within the stipulated period of fifteen days.

24. In view of the above, the petitioner's contention that the SBI is precluded from taking any action under Section 13(4) of the SARFAESI Act since it had not communicated its decision to the petitioner's representation within a period of fifteen days from receipt of such representation, is unmerited.

25. This Court is also of the view that no interference with the

proceedings under the SARFAESI Act are warranted at this stage. In *Authorized Officer, State Bank of Travancore and Anothers v. Mathew K. C.: (2018) 3 SCC 85*, the Supreme Court considered the contention that borrower had no option but to prefer a writ petition against an order passed under Section 13(3A) of the SARFAESI Act, in absence of a right to appeal under Section 17 of the said Act. In this context, the Supreme Court held as under:-

“.....The legislative scheme, in order to expedite the recovery proceedings, does not envisage grievance redressal procedure at this stage, by virtue of the explanation added to Section 17 of the Act, by Amendment Act 30 of 2004, as follows :-

“*Explanation.-* For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.”

26. In *United Bank of India v. Satyawati Tondon and Others: (2010) 8 SCC 110*, the Supreme Court had observed as under:-

“43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this Rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for

recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

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55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.”

27. Given the legislative intent of providing for expeditious recovery proceedings, any interference by this Court at the stage of rejection of the representation or objection under Section 13(3A) of the SARFAESI Act is not warranted.

28. The petition is unmerited and is, accordingly, dismissed. The pending applications are also disposed of.

VIBHU BAKHRU, J

OCTOBER 26, 2018
MK