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WPO/1627/2023
IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

OPT SOLUTIONZ MARKETING (OPC) PVT. LTD. AND ANR.
VS
YES BANK AND ORS.

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date: 8th January, 2024.

Appearance:
Mr. Uday Banerjee, Adv.
Mr. Ataur Rahman, Adv.
Mr. Javed Majid, Adv.
...for the petitioner.

Mr. Pratip Mukherjee, Adv.
Mr. Sayak Ranjan Ganguly, Adv.
Ms. Srijani Ghosh, Adv.
...for the respondents

The Court: Learned counsel for the petitioner contends that the respondent bank acted without jurisdiction in issuing the impugned notice under Section 13(2) of the SARFAESI Act and consequentially the notice under Section 13(4) of the said Act, since the petitioner's account could not have been declared to be NPA (non-performing asset). It is argued that the allegation that the account of the petitioner was classified as NPA is belied by the fact that subsequent EMIs were being deducted from the petitioner's account. Learned counsel also submits that there are contradictions between the amount due shown in the notices under Section 13(2) on the one hand and Section 13(4) on the other as well as the show cause notice for declaration of wilful defaulter.

Learned counsel seeks to argue that neither the notice under Section 13(2) nor the one under Section 13(4) discloses the exact specific boundaries of the secured asset. For such purpose, learned counsel places reliance on Appendix-IV of the Security Interest (Enforcement) Rules, 2002, to indicate that the format given in the said Appendix clearly shows that the description of the immovable property has to be specific as regards the boundaries of the said immovable asset on four sides.

Learned counsel for the bank, at the outset., takes an objection as to maintainability of the writ petition on several counts. First, the respondent bank is a private bank and does not come within the purview of Article 12 of the Constitution of India. Secondly, it is argued that the provisions of Section 17 of the SARFAESI Act clearly debar the writ court from interfering with a proceeding taken under Section 13(4) of the SARFAESI Act.

Thirdly, it is argued that the show cause notice for declaration of the petitioner as wilful defaulter is at a premature stage and the remedy of the petitioner lies in giving a reply to the same. Having not done so, the writ petition is not maintainable at the behest of the petitioner.

On merits, it is argued that the notice under Section 13(2) clearly discloses the date when the petitioner's account became NPA to be December 14, 2022.

It is also contended that there is no legal bar in deduction of EMI amounts from the account of the petitioner even after classification of the account as NPA.

Heard learned counsel.

Insofar as the arguments of the petitioner are concerned, the argument as to the notice being bad for non-disclosure of the specific boundaries of the secured asset cannot be accepted, being not tenable in the eye of law. Appendix IV of the 2002 Rules is merely an illustration of how the property is to be described. Since the secured asset in question in the present case is comprised of flats, which have been categorically numbered and described in all the communications of the bank including the impugned notices, no further details of boundary were required to be given.

It is found in the notice under Section 13(2) of the said Act that the said notice, by clear delineation of the description of the property, describes in detail in the first schedule the land over which the mortgaged flats are situated. The said schedule, that is, the first schedule clearly discloses the boundaries of the property on all four directions.

The bank went so far as to give a second schedule where the description of the mortgaged flats in question, situated on the said land, have been given. Thus, there were no flaws on the part of the bank in describing the property in the impugned notice. The notice under Section 13(4) being a corollary to the notice under Section 13(2), a pedantic approach has to be taken. It is well-settled that a fault-finding approach is not to be taken with regard to notices. Thus, there is no scope of faulting the notices on the ground of lack of description of the property.

Insofar as the classification of the account as NPA is concerned, the date of the same has clearly been disclosed in the notices of the bank. As rightly argued by the bank, there is no bar as such in deduction of EMI amounts even after declaration of an account as NPA.

Again, Section 17 of the SARFAESI Act clearly provides the Tribunal as the appropriate forum for deciding all issues regarding measures taken by the banks and financial institutions under Section 13 of the SARFAESI Act. Hence, the remedy of the petitioner lies before the appropriate Tribunal and not before the writ court. Although alternative remedy is not an absolute bar, it has been held time and again that this Court under Article 226 of the Constitution normally opts for a self-imposed restriction where the party coming before this Court does not exhaust the equally efficacious alternative remedies available to it.

Thus, there is no scope to interfere here in the writ jurisdiction as the high ground of interference by issuing prerogative writ has not been made out by the petitioner.

Insofar as the show cause notice for declaration of the petitioner as wilful defaulter is concerned, the same prima facie discloses sufficient grounds to come within the purview of the concerned Master Circular of the RBI relating to declaration of Wilful Defaulter. The bank has disclosed in the said notice the clear grounds on which it proposes to declare the petitioner as a wilful defaulter. The remedy of the petitioner, if any, lies in giving a comprehensive reply to the said show cause notice before the Wilful Defaulter Identification Committee and not before the writ court.

In fact, even with regard to the notice under Section 13(2), the petitioner never took advantage of the provisions of sub-Section 3(A) of Section 13 by giving a comprehensive reply and, as such, cannot be permitted to invoke the writ jurisdiction of this Court at this juncture after measures have been taken by the bank under Section 13(4).

In such view of the matter, the Writ Petition cannot be entertained. Accordingly, WPO/1627/2023 is dismissed on contest without any order as to costs.

However, nothing in this order shall preclude the petitioner from taking out an appropriate challenge before the concerned Tribunal against the measures taken by the respondent bank under Section 13(4) of the SARFAESI Act.

Insofar as the question of limitation is concerned, the petitioner has cited an unreported judgment of this Court in *Mackeil & Company Pvt. Ltd. Vs. State Bank of India & Ors.* However, in the said case, on the factual premise of the case, the Court had observed that the petitioner therein had the leave to ventilate its grievances before the Tribunal which would then decide the same on merits without going into the question of time bar. However, the notions of applicability of Section 14 of the Limitation Act differ from Court to Court depending on the factual scenario in each particular case. I do not find in the said judgment that any straight jacket ratio of law was laid down that in every such case, the principle of Section 14 is to be applied and the time bar is to be condoned.

In any event, I do not intend to adjudicate the issue of time bar either way in the present proceeding, since the same would be *de hors* the findings rendered above and would pre-judge the issue of limitation. It will be open to the Tribunal, if so approached by the petitioner, to consider on its own merits whether the belated application under Section 17 of the SARFAESI Act would be entertained by the Tribunal on the facts of the case or not. Nothing in this order shall influence the Tribunal in such regard or on the merits of the case.

No order as to costs.

Urgent certified website copy of this order, if applied for, be made available to the parties subject to compliance with the requisite formalities.

(SABYASACHI BHATTACHARYYA, J.)

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