

Gujarat High Court

N. V Anjaria, J.

Pareshbhai Parbatbhai Kothiya v. Authorised Officer - Hdfc Bank Limited

Special Civil Application No. 18757 of 2015

18.02.2016

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 13(3A) - Reply to notice by an Advocate on behalf of the Authorised officer - It cannot be said that when advocate sent rejoinder/notice on behalf of the *authorised officer*, he acted with different capacity than the *authorised officer* enjoyed - The reverse is also not a correct logic - The *authorised officer*, by sending notice/rejoinder through an advocate engaged to act on his behalf cannot be said to have in any way abdicated his functions under the SERFAESI Act - Nor it can be said that *authorised officer* did not apply his mind or that the reply sent was not the reply of the *authorised officer* - The answer given by the advocate acting on instructions and on behalf of the *authorised officer* was on the same pedestal in eye of law as that of given by the *authorised officer* himself - When an advocate acts by virtue of his being advocate in that capacity on behalf of the party-client, it is not the party who steps into shoe of advocate but it is otherwise and the advocate acts on behalf of his client. Notice given by the advocate on behalf of the *authorised officer* is therefore as good as one given by the *authorised officer* himself - Safaesi S. 13(3A) . [Para 61., 6.2]

(Editor : order upheld in Letters Patent Appeal No. 194 of 2016)

Aditya A Gupta Advocate for the Petitioner(s) No. 1 Mr. AR Gupta, Advocate for the Petitioner(s) No. 1 Mr. Anip A Gandhi, Advocate for the Respondent(s) No. 1

Judgment

N.V Anjaria, J.:— Limits of tolerance were lax for the benefit of juniorship of learned advocate Mr. Aditya Gupta in order to spaciously accommodate his submissions, who proceeded to argue at length notwithstanding that the point was answered by this Court's judgment dated 30th January, 2015 in **Fab Tech Manufacturing P. Limited v. Authorised Officer, State Bank of India (SBI)** in Special Civil Application No. 1670 of 2015.

2. The petitioner by filing the present petition prayed for a direction to set aside reply dated 05 October, 2015 sent by advocate of the respondent *Bank* to the petitioner under Section 13(3A) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The petitioner wanted a further direction to be issued to prohibit and restrain respondent *Bank* from taking further steps under Section 13(4) of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the Act, 2002') without considering the objection/representation dated 12 September, 2015 submitted by the petitioner.

3. Notice was issued by this Court upon a contention raised by learned advocate for the petitioner that objection raised by the petitioner under Section 13(2) of the Act, 2002, was replied by advocate of the *Bank* and not by the *authorised officer* himself. The only point in the controversy raised by the petitioner was circumscribed by this Court while issuing Notice on 05 November, 2015 namely (i) whether the *authorised officer* of the respondent *Bank* ought to deal with the objections filed by the petitioner under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 himself or can he instruct an advocate to reply to the said objections and (ii) whether the *authorised officer* or his advocate communicate a copy of reply to the advocate of the borrower instead of borrower directly.

4. Learned advocate for the petitioner harped hammer-like that under the SERFAESI Act, the *authorised officer* of the *Bank* has to act himself and his reply sent through advocate by engaging advocate would vitiate the action of the *Bank* under the Act to render it illegal. He firstly relied on decision of the Apex Court in **Maradia Chemicals Limited v. Union of India** [(2004) 4 SCC 311] in particular paragraph 44 thereof to submit that the procedure for recovery of dues by the *Bank* under the Act, 2002 has an internal mechanism. Referring to the definition of "Authorised Officer" in Section 2(a) of the Act, it was submitted that such *officer* is an *officer* not less than the rank of Chief Manager of Public Sector *Bank* or equivalent, therefore, he only is the proper person to send notice and consider the reply of the borrower. Submission was that *officer* cannot act through advocate.

4.1 Another decision of the Apex Court in **J. Rajiv Subramaniyan v. Pandiyas** [(2014) 5 SCC 651] was pressed into service. From paragraph 12 of the said judgment, same proposition was canvassed. It was submitted with reference to provisions of the SERFAESI Act and the Rules that they have their own operational ambit, therefore the provisions should be strictly followed. Yet another decision of the Apex Court in **Himalayan Cooperative Group Housing Society v. Balwan Singh** [(2015) 7 SCC 373] was referred to for its paragraph 22 to press the point that relationship with advocate of any client is one of fiduciary in nature. Learned advocate submitted that in view of principle of fiduciary nature relationship, the *authorised officer* cannot act through an advocate.

4.2 There was one more decision to be relied on by learned advocate, which was in **Sahini Silk Mills (P) Limited v. Employees' State Insurance Corporation** [(1994) 5 SCC 346] for highlighting the maxim delegata potestas non potest diligari, to submit that *authorised officer* under the Act when speaks through his advocate, it amounts to delegation of his power which is impermissible in law. It was for the same proposition namely that an advocate cannot assume role of a party, still one more judgment of the Apex Court left out from being cited was cited by the learned advocate. The same was in **Central Bureau of Investigation, Hyderabad v. K. Narayan Rao** [(2012) 9 SCC 512].

4.3 Leaving no stone unturned, learned advocate relied on decision of the Calcutta High

Court in Tarit **Ahmed Molla v. Authorised Officer** being Writ Petition No. 17389 (W) of 2010, decision of Jharkhand High Court being Writ Petition (C) No. 6284 of 2011 in **M/S.**

Tetulia Coke Plant Pvt. Ltd. v. Bank Of India decided on 13 February, 2012 and buttress his proposition.

4.4 Learned advocate for respondent No. 1 Bank Mr. Anip Gandhi submitted at the threshold of the hearing that the said issue stands squarely covered by the judgment in **Fab Tech Manufacturing P. Limited** (supra). However the incessant impatient zeal of learned advocate to make submissions was bent upon to last long.

5. The very aspect of competency of *authorised officer* acting under the Act, 2002, acting through and by engaging advocate was dealt with by this Court in **Fab Tech Manufacturing P. Limited** (supra). The following was observed and ruled by this Court.

"From the appreciation of the submissions and perusal of record, the first aspect with regard to the authority or jurisdiction by the impugned communication rejecting the request of the petitioner through lawyer require consideration. The petitioner through lawyer communicated vide communication dated 12.9.2014 which is labeled as:

*"Request for withdrawal of notice under s. 13(2) dated 18.07.2014 of the Securitisation and Reconstruction of Financial Assets and Enforcement of **Security Interest Act, 2002 (Act no. 54 of 2002)** and Objections qua the same."*

Thus, the objections are sought to be raised for withdrawal of any notice under Section 13(2) on various grounds. It is this communication which is replied through lawyer by the Respondent Bank dated 25.9.2014 which is sought to be contended as without jurisdiction or authority. It is not in dispute that the notice as required under Section 13(2) of the Securitisation Act has been already issued by the authorised officer as provided in Section 2(z) (d) of the Securitization Act. The said notice under Section 13(2) is produced at Annexure-P1 dated 18.7.2014 signed by the Chief Manager and authorized officer.

Therefore, a close look at the provisions of Securitization Act particularly Section 13 require appreciation of submission made by learned Advocate Shri Shah for the petitioners. Section 13(2) of the Securitization Act refers to the notice to the borrower for the default in repayment of the secured debt failing which the secured creditor may proceed as provided under the Securitization Act including as provided under Section 13(4) of the Securitization Act. The provisions of Section 3 or 3(a) which have been much emphasized submitting that the same analogy may be applied while considering the provisions of Section 13(3A) read with the Rules 2002. The provisions of Section 13(3A) on the contrary provide that if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate. (emphasis supplied) Therefore, like any provision or notice under the Code of Civil Procedure or any other statute, when the objection is sought to be raised by the borrower through lawyer, the same is communicated by the Respondent Bank through lawyer that such objections are not tenable and not acceptable and it cannot be said to be without jurisdiction or authority. The scheme of the Securitisation Act as provided in Section 13 contemplate for notice under Section 13(2) before proceeding further with the recovery under the Act. Admittedly such notice has been

served to the petitioners and such a notice is by the authorised officer of the Bank as stated above. Thereafter if any objection or a notice is given through a lawyer by the petitioners, one fails to understand why the Respondent Bank cannot reply suitably like any legal notice through the lawyer. Therefore, such submissions referring to the statutory provisions and the Rules as stated above has no relevance and the reliance sought to be placed on the judgment of the Hon'ble Andhra Pradesh High Court is without reference to the factual background. In the judgment of the Hon'ble Andhra Pradesh High Court it was an issue with regard to the notice and there is a specific reference that the notice under Section 13(2) has to be issued in accordance with the Enforcement Rules. It is in this context the discussion has been made referring to the provisions of Section 13(2) of the Act read with the Enforcement Rules 2002 and the definition of the authorised office as provided in Rule 2(a) of the Enforcement Rules. Again, the reference to the judgment of the Kerala High Court also has no relevance as the demand notice has been admittedly issued by the authorised officer of the Bank." (Para 4)

5.1 In paragraph 10 extracted hereinbelow, the Court rightly cautioned that such contentions were in the nature of novel way of abusing process of Court for delaying the payment of dues to the *Bank* by unruly borrowers.

"At the cost of repetition it is required to be mentioned that it is a novel way of abusing the process of the court for delay in the payment and the court particularly the High Court in exercise of discretionary jurisdiction under Article 226 or 227 would not be justified at all considering the objects and reasons of the Securitisation Act for which such an Act has been made by the parliament. If any such arguments are at all considered as relevant it would frustrate the very purpose of the Securitisation Act. Therefore, there is no reason or justification for exercise of discretion under Article 226 and therefore this court has even declined to issue a notice and the present petition therefore deserves to be dismissed and accordingly stands dismissed in limine." (Para 10)

5.2 The aforesaid law laid down by this Court in **Fab Tech Manufacturing P. Limited** (supra) is correct view. This Court also finds itself in agreement with the observations in paragraph 10 quoted above.

6. Referring to the facts of this case, notice dated 13 July, 2015 under Section 13(3) came to be issued by the respondent-HDFC *Bank* to the borrower as well as to the guarantor. That notice was signed by the *authorised officer* of the *Bank* one Mahesh C. Rane. The said person was an *officer* of the *Bank* having capacity of "Authorised Officer" defined in Section 2(a) of the Act. He acted in such capacity. To the said notice issued by the said *authorised officer*, borrower submitted his reply in which the borrower acted through his advocate; notice was by the advocate on behalf of the borrower. The *Bank* sent rejoinder to the said reply dated 05 October, 2015, which was sent by the *authorised officer* but through advocate. The notice/rejoinder mentioned in the beginning that "our client, Authorised Officer, HDFC *Bank* Limited.... has received", implying clearly thereby that the advocate acted in sending the notice for and upon the instructions of the *authorised officer*.

6.1 It cannot be said that when advocate sent rejoinder/notice on behalf of the *authorised officer*, he acted with different capacity than the *authorised officer* enjoyed. The reverse is also not a correct logic. The *authorised officer*, by sending notice/rejoinder through an advocate engaged to act on his behalf cannot be said to have in any way abdicated his functions under the SERFAESI Act. Nor it can be said that *authorised officer* did not apply his mind or that the reply sent was not the reply of the *authorised officer*. The answer given by the advocate acting on instructions and on behalf of the *authorised officer* was on the same pedestal in eye of law as that of given by the *authorised officer* himself.

6.2 When an advocate acts by virtue of his being advocate in that capacity on behalf of the party-client, it is not the party who steps into shoe of advocate but it is otherwise and the advocate acts on behalf of his client. Notice given by the advocate on behalf of the *authorised officer* is therefore as good as one given by the *authorised officer* himself.

6.3 Even though the relationship of advocate and applicant is in a way in the nature of agent and principal, the principles of agency may not strictly apply in this relationship. The principles of delegation can also not to be applied *stricto sensu* as it may in ordinary cases, therefore the submission on that score by learned advocate for the petitioner to contend that *authorised officer* cannot be represented by the advocate does not hold good. Indeed an advocate appear on behalf of the *authorised officer* is an *authorised officer* acting himself in eye of law. The decisions of other High Courts relied on by the petitioner cannot be said to be taking a correct view to hold that *authorised officer* cannot act through advocate.

6.4 The decision in **Fab Tech Manufacturing P. Limited** (supra) is a correct law laid down by this Court. The same is required to be followed. In view of the same, there was no illegality in *Bank/authorised officer* acting through its advocate. The issue raised by learned advocate for the petitioner sans merit for acceptance.

7. For the foregoing reasons, this petition is dismissed. Interim relief granted earlier stands vacated. Notice is discharged.