

2010 PLRonline 0102 (Mad.)

Madras High Court

Bench: D.Murugesan, Vinod K.Sharma

S . Suhaina Banu v. Indian Bank

W.P.No.27230 of 2009

1 December, 2010

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 S. 13(2) - Whether the notice under sub-section (2) of Section 13 should be issued to the legal heirs of the deceased borrower/guarantor afresh in the event such borrower/guarantor dies after the service of notice under sub-section (2) of Section 13 of the SARFAESI Act - Proceedings initiated against a person while he was alive would automatically stand abated immediately after his/her demise - The only course open to the respondent-Bank is to initiate proceedings by issuance of fresh notice to the legal heirs of the borrower/guarantor, as the legal heirs of the borrower/guarantor will have an opportunity to discharge the liabilities in sixty days - Only in the event of failure to discharge the liabilities in full by the legal heirs, the respondent-Bank could proceed further by issuance of notice under sub-section (4) of Section 13 and duly served or affixed in terms of that provision read with Rule 8 of the Security Interest (Enforcement) Rules. [Para 6]

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 S. 13(4) - Whether the notice under sub-section (4) of Section 13 affixed in the property by the respondent-Bank showing only the name of the deceased guarantor as the owner of the property could be

considered to be a sufficient compliance of the provisions of Section 13(4) read with Rule 8 of the Security Interest (Enforcement) Rules ? - Sub-rule (1) of Rule 8 speaks of delivering a possession notice to the borrower or guarantor, as the case may be, and as well affixing the said notice on the outer door or at such conspicuous place of the property - Here again, after the demise of the borrower/guarantor, the possession notice should be delivered to the legal heirs of the borrower/guarantor and also by affixing the said notice on the outer door or at such conspicuous place of the property of the borrower/guarantor - The affixure is in addition to delivery of the possession notice to the borrower/guarantor. In the given case, the first respondent-Bank had admittedly affixed the possession notice only in the property and there is no material to show that the notice was delivered to the legal heirs of the borrower/guarantor and it is not the stand of the respondent-Bank as well - In the event the possession notice is not delivered on the borrower/guarantor or the legal heirs of the borrower/guarantor, as the case may be, the provisions of Rule 8 of the Security Interest (Enforcement) Rules are not complied with. [Para 7]

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 13(4) - Affixure of notice alone - Showing the name of the deceased/guarantor as the owner of the property - Cannot be sustained - Said notice was neither delivered on the legal heirs nor was affixed showing the names of the legal heirs on the outer door or at such conspicuous place of the property - Bank has not complied with the provisions of Section 13(4) and cannot proceed further

under the SARFAESI Act against the petitioners. [Para 7]

ORDER

D.MURUGESAN, J. - This writ petition questions the proceedings initiated by the respondent-Indian Bank under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the SARFAESI Act") against the legal heirs of the deceased-guarantor by name Mrs.A.Zoharalal. It is the case of the petitioners that the respondents 3 to 5 had availed credit facility to the tune of Rs.75 lakhs from the respondent-Bank by offering the subject property of the deceased-guarantor as security. As the borrowers defaulted in repayment, the respondent-Bank initiated proceedings under the SARFAESI Act and issued the notice dated 20.9.2008 under Section 13(2) to both the guarantors and the same were served. Subsequently, the mother of the petitioners Mrs.A.Zoharalal died on 23.11.2008. As the demand was not complied with by her in a period of sixty days, the respondent-Bank proceeded further by affixing the notice dated 5.2.2009 issued under Section 13(4) in the property. That notice was issued showing the name of the deceased as the owner of the property and not in the name of the petitioners herein. Thereafter, the respondent-Bank also approached the Chief Metropolitan Magistrate, Egmore, Chennai by filing CrI.M.P.No.1911 of 2009 under Section 14(1) of the SARFAESI Act and the same was ordered on 26.8.2009 by appointing an Advocate Commissioner to take possession of the property.

2. The above proceedings are questioned in this writ petition by the legal heirs of Mrs.A.Zoharalal. Mr.K.Subramaniam, learned senior counsel for the petitioners has submitted that though a notice under

Section 13(2) was issued to the guarantor, before the notice under Section 13(4) was affixed in the property, the said guarantor-Mrs.A.Zoharalal died on 23.11.2008 and therefore, no further proceedings could be pursued without there being (i) a fresh notice to the petitioners under Section 13(2) giving sixty days time for compliance. (ii) The notice under Section 13(4) has not been issued in their name and rather it was affixed only showing the name of Mrs.Zoharalal as the owner of the subject property. Hence, the learned senior counsel submitted that the SARFAESI proceedings initiated against the petitioners in respect of the subject property are unsustainable.

3. On the above arguments, we have heard Mr.V.Lakshminarayanan, learned counsel for the first respondent-Bank and Mr.T.Karthikeyan, learned counsel for the seventh respondent, the purchaser of the property pursuant to the sale conducted by the respondent-Bank.

4. Mr.V.Lakshminarayanan, learned counsel for the first respondent-Bank would submit that the notice under Section 13(2) was issued in the name of the guarantor. Therefore, the said notice cannot be faulted. Thereafter, the first respondent-Bank was not made aware of either the death of Mrs.Zoharalal, the guarantor or the names of her legal heirs. Hence, the respondent-Bank proceeded further by issuing the possession notice under Section 13(4). There is nothing wrong in proceeding further under the provisions of the SARFAESI Act. In fact, he would submit that the fourth petitioner filed an application before the Debt Recovery Tribunal stating that he represented the other petitioners as well and as he had the knowledge of the proceedings, he cannot, therefore, now question the proceedings on the ground that the possession notice was not served on the guarantor or the legal heirs. He

would further submit that as the respondent-Bank could not take possession pursuant to the notice under Section 13(4), the Bank had rightly moved the learned Chief Metropolitan Magistrate by invoking the provisions of Section 14(1) of the SARFAESI Act. In view of the above, the petitioners cannot now question the possession notice. In any event, he would submit that as against the action of the respondent-Bank in issuing the possession notice, the petitioners ought to have approached the Debt Recovery Tribunal by questioning the said notice and the writ petition in this regard is not maintainable.

5. In view of the several contentions, we should examine as to whether the proceedings under the SARFAESI Act initiated against the petitioners in respect of the subject property could be sustained or not. For the disposal of this writ petition, the provisions of Section 13(2) and (4) could be extracted and the same reads as under:

"13(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 sub-section (4).

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(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 secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

(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."

The notice prescribed under sub-section (2) of Section 13 shall be in writing and shall be issued as contemplated under Rule 3 of the Security Interest (Enforcement) Rules, 2002 and the said rule reads as under:

"3. Demand notice.--(1) The service of demand notice as referred to in sub-section (2) of Section 13 of the Ordinance 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."

6. Point No.(i): Whether the notice under sub-section (2) of Section 13 should be issued to the legal heirs of the deceased borrower/guarantor afresh in the event such borrower/guarantor dies after the service of notice under sub-section (2) of Section 13 of the SARFAESI Act. The object of the provisions of sub-section (2) of Section 13 is mainly requiring the borrower/guarantor 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 sub-section (4) of Section 13 of the SARFAESI Act. In that sense, the proceedings initiated against a person while he was alive would automatically stand abated immediately after his/her demise. The only course open to the respondent-Bank is to initiate proceedings by issuance of fresh notice to the legal heirs of the borrower/guarantor, as the case may be, as

the legal heirs of the borrower/guarantor will have an opportunity to discharge the liabilities in sixty days. Only in the event of failure to discharge the liabilities in full by the legal heirs, the respondent-Bank could proceed further by issuance of notice under sub-section (4) of Section 13 and duly served or affixed in terms of that provision read with Rule 8 of the Security Interest (Enforcement) Rules. The first point is answered accordingly.

7. Point No.(ii): Whether the notice under sub-section (4) of Section 13 affixed in the property by the respondent-Bank showing only the name of the deceased guarantor as the owner of the property could be considered to be a sufficient compliance of the provisions of Section 13(4) read with Rule 8 of the Security Interest (Enforcement) Rules. Sub-rule (1) of Rule 8 provides that where the secured asset is an immovable property, the authorised officer shall take possession or cause to be taken possession by delivering a possession notice prepared as nearly as possible in Appendix-IV to the rules to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property. This rule speaks of delivering a possession notice to the borrower or guarantor, as the case may be, and as well affixing the said notice on the outer door or at such conspicuous place of the property. Here again, after the demise of the borrower/guarantor, the possession notice should be delivered to the legal heirs of the borrower/guarantor and also by affixing the said notice on the outer door or at such conspicuous place of the property of the borrower/guarantor. The affixure is in addition to delivery of the possession notice to the borrower/guarantor. In the given case, the first respondent-Bank had admittedly affixed the possession notice only in the property and there is no material to show that the notice was

delivered to the legal heirs of the borrower/guarantor and it is not the stand of the respondent-Bank as well. In the event the possession notice is not delivered on the borrower/guarantor or the legal heirs of the borrower/guarantor, as the case may be, the provisions of Rule 8 of the Security Interest (Enforcement) Rules are not complied with and in that sense, the respondent-Bank cannot claim to have complied with those provisions. That apart, the affixure of notice by showing the name of the deceased/guarantor as the owner of the property cannot be sustained on the facts of this case, as the said notice was neither delivered on the legal heirs nor was affixed showing the names of the legal heirs on the outer door or at such conspicuous place of the property. In that view of the matter, the respondent-Bank has not complied with the provisions of Section 13(4) and cannot proceed further under the SARFAESI Act against the petitioners. The point no.(ii) is answered accordingly.

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8. In view of the above, we are not inclined to go into the other contentions raised by the learned counsel for the respondent-Bank in this writ petition. In that view of the matter, in our considered view, the entire proceedings against Mrs.A.Zoharalal-guarantor, who died on 23.11.2008, should be considered to be initiated against a dead person and cannot be sustained in the eye of law. Accordingly, the writ petition is allowed and the entire proceedings initiated by the respondent-Bank against the dead person Mrs.A.Zoharalal are declared invalid. Consequently, M.P.No.1 of 2009 is closed. No costs.

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