

Dear All,

On 19th March, 2018, Supreme Court of India, in the matter *ITC LIMITED vs BLUE COAST HOTELS LTD. & ORS.* held that where a loan was taken by Blue Coast Hotel (debtor) which was not paid, the debtor did not respond to a notice of demand and made a representation which was not replied to in writing by IFCI (creditor) but creditor, considered proposals for repayment of loan as contained in representation in course of negotiations which continued for a considerable amount of time. The court further said that failure to furnish a reply to representation is not of much significance since creditor has undoubtedly considered representation and proposal for repayment made therein and has in fact, granted sufficient opportunity and time to debtor to repay debt without any avail. Therefore, debtor is not entitled to discretionary relief under article 226 of Constitution which is indeed an equitable relief. Thus, non-compliance of sub-section (3A) of section 13 cannot be availed by debtor whose conduct has been merely to seek time and not repay loan as promised on several occasions. The Court set aside the Bombay High Court impugned judgement and the debtor, was directed to handover possession of the mortgaged properties to ITC(auction purchaser) within a period of six months.

Issue I

Whether the Parliament intended for a total invalidity to result from the failure to reply and give reasons for the non-acceptance of the borrower's representation. In other words, whether sub-section (3A) of Section 13 is mandatory or directory in nature.

The Court pointed out that the provision was phrased in mandatory terms. The court further observed that the language of sub-section (3A) is clearly impulsive. It states that the secured creditor shall consider the representation or objection of debtor and if such representation or objection is not acceptable, the creditor shall communicate the reasons for non-acceptance.

The court saw no reason to marginalize the impact of the use of the imperative 'shall' by reading it as 'may'. The word 'shall' invariably raises a presumption that a particular provision is imperative. The Court, however, opined that IFCI had considered the representation as it had granted sufficient opportunity and time to the debtor to repay the debt. This was thus sufficient compliance with the provision. The court observed that the debtor's actual intention was to seek extension of time to pay, with the usual unfulfilled promise of repayment. The debt was not repaid and the objection raised was merely on the ground that the taking of assets is illegal because the creditor failed to reply to the representation. The Court thus held that the debtor is not entitled to the discretionary relief under Article 226 of the Constitution which is indeed an equitable relief.

The Court further held that the bar on creating interest over agricultural land under Section 31 (i) of the Act would not apply in the present case, even though the land adjoining the Hotel premises was categorized as "agricultural land" in revenue entries, it would be considered as such due to the "character of the land" and the purpose for which it was set apart.

"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." (Para 28)

“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.”(Para 29)

“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.”(Para 34)

Issue II

Whether the creditor could maintain an application of possession under Section 14 of the Act; even though it had taken over only symbolic possession before the sale of the property to the auction purchaser.

The court held that *“The transfer of the secured asset by the creditor therefore cannot be construed to be a complete transfer as contemplated by Section 8 of the Transfer of Property Act. The creditor nevertheless had a right to take actual possession of the secured assets and must therefore be held to be a secured creditor even after the limited transfer to the auction purchaser under the agreement. Thus, the entire interest in the property not having been passed on to the creditor in the first place, the creditor in turn could not pass on the entire interest to the auction purchaser and thus remained a secured creditor in the Act”.*(Para 50)

The court concluded the non- compliance of section 13 of sub section 3A cannot be applied to the debtor whose conduct has been merely to seek time and not to repay the loan as promised by the debtor. This showed that the debtor was having a mala fide intention. Therefore, the debtor was not entitled to the discretionary equitable relief under Articles 226 and Article 136 of the Constitution of India. Therefore, court instructed the debtor to deliver the possession of the mortgaged property. Thus, compliance with provision of Section 13 sub-section 3-A is a mandatory requirement and is not discretionary. However, the creditor need not send a reply or rejection to such representation expressly and that this condition can also be constructively satisfied. Thus, where sufficient time and opportunity has been granted to debtor by the credit to repay the loan, it would deemed to be a sufficient compliance with sub section 3A of Section 13 under the SARFAESI Act.

Regards,

KM Team