

(2007) 08 MP CK 0103
In the Madhya Pradesh High Court

Asset Reconstruction Company	Vs	APPELLANT
Paharpur Cooling Towers Ltd. and Another		RESPONDENT

Date of Decision : 06-08-2007

Acts Referred:

COMPANIES ACT, 1956 — Section 433, 434, 529, 529A
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 17, 2, 3, 35

Citation : (2008) 1 CompLJ 306 : (2007) 4 MPLJ 560

Hon'ble Judges : W.A. Shah, J;S.K. Kulshrestha, J

Bench : Division Bench

Judgement

S.K. Kulshrestha, J.

This company appeal is directed against the order dated 7.5.2007 passed by the learned Company Judge in Company Petition No. 7/2005 whereby, in modification of the earlier directions issued by the Company Court vide order dated 16.4.2007, on intervention by the appellant, the following directions have been issued:

(1) The applicant/intervener will give more publicity by advertising the publication for sale of the property belonging to the company in question, namely, Maikal Fibres Ltd. in English daily national newspapers having circulation all over the country. These papers shall include Times of India, Hindu, Hindustan Times, Indian Express, Financial Express. It shall also be displayed on the Website of ARC (India) with prominence and with all details so to enable more and more persons to participate in bidding process;

(2) In addition to above, the advertisement of sale of property of the company, as aforesaid, shall also be published in one daily regional language news paper having circulation in the State of Maharashtra, Tamil Nadu and Gujrat;

(3) The intending tenderers, who have already collected the tender forms pursuant to the advertisement already issued vide Annexure A/4 will be allowed

to submit the tenders on or before the date to be published in the Advertisement as per Clause 1 and 2 above of this court order;

(4) The ARC (India) Ltd., i.e., intervener/applicant of IA No. 4446/07 will also get one more valuation done of all properties of the company in question which is subject-matter of sale from any well-known and reputed Government valuer by maintaining absolute secrecy of all the matters in the larger interest of all creditors, so as to have one more opinion of independent Government valuer;

(5) Needless to say, the applicant/intervener shall ensure full safety and preservation of all assets of the company in question and shall further ensure that no theft, pilferage or any loss/damage is caused to any assets (whether movable or immovable) of company's properties till it is sold;

(6) In order to enable the intervener to fetch best maximum marketable price, they are also at liberty to enter into negotiations with all tenderers for raising their original bids. It is, however, made absolutely clear that negotiations would be held only after opening of the tenders and in presence of all the valid tenders at one place so that every one gets equal opportunity to participate in negotiations process.

The respondent No. 1 claiming to be an unsecured creditor, initiated the proceedings of winding up under the provisions of Section 433 and 434 of the Companies Act, 1956, in which, on coming to know that the present appellant is initiating enforcement of the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the SARFAESI ACT), an application was made before the learned Company Judge to seek a restraint order against the respondent No. 2 (company) of which winding up is pending and on being represented that the purpose of winding up would stand defeated if the assets of the company are sold by the secured creditor, the learned Company Judge issued the following directions by order dated 16.4.2007:

(1) The respondent through their directors, authorised signatories, employees or any person acting for and on behalf of the respondent company are restrained jointly or/and severally from transferring, alienating, negotiating, selling encumbering or parting away of any of the assets whether movable or immovable property standing in the name of the respondent company by name Maikaal Fibres-Limited for consideration or otherwise;

(2) The respondent company through their directors are restrained from parting away or/and handing over the possession of any of their assets movable or immovable belonging to respondent company to any third party;

(3) In case if possession of any of the assets whether movable or immovable of the respondent company is taken over by any of the secured creditors of the respondent company under the provisions of the Securitisation Act or otherwise, then in that event no sale either by way of auction, tender, negotiations or

otherwise shall be held by either respondent company or any secured creditors, who has taken over the possession of the assets of the respondent company till further orders;

On learning about the said direction, the present appellant filed an Interlocutory Application IA No. 4446/2007 to seek intervention and on the representation of the present appellant (intervenor) the abovesaid directions have been issued in modification of the restraint contained in the order dated 16.4.2007.

Learned Counsel for the appellant submits that appellant company is a duly registered securitisation company under the provisions of Section 3 in respect whereof our attention has been invited to the certificate issued by the Reserve Bank of India in favour of the company to the effect that the company can carry on the business of securitisation or assets reconstruction u/s 3 of the SARFAESI Act. Attention has also been invited to the provisions of Section 2(ii)(a) defining the securitisation company to mean any company formed and registered under the Companies Act, 1956 for the purpose of securitisation. Reference has also been made to Section 2(zd) which defines secured creditors to mean any bank or financial institution or any consortium or group of banks or financial institution, including securitisation company or reconstruction company. It was in view of the provisions of the Securitisation Act that the learned Company Judge was apprised by the appellant that the company was entitled to take resort to the provisions of Section 13, without any fetters, for enforcement of security interest and to issue notice in accordance with Sub-section (2) of Section 13 and take further action there under including action under Sub-section (4). It is further submitted that not only the borrower has power to make representation, an appeal has been provided u/s 17 of the SARFAESI Act to the DRT which safe-guards the interest of the borrower and others affected and, therefore, notwithstanding that the Company Court was in the seizin of the matter of winding up, it was not entitled to issue the said direction. In short, the contention of the learned Counsel is that the Company Court could not have acted de hors the provisions of the SARFAESI Act which has been given an overriding effect u/s 35. Section 35 provides that the provisions of the SARFAESI Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. The further contention of the learned Counsel for the appellant is that the applicability of the Companies Act has been restricted only to the extent the provision is made in Section 529A of the Companies Act which has been incorporated by reference under the provisions of Sub-section (9) of Section 13 of the SARFAESI Act. In the above premises, the learned Counsel contends that the most that the learned Company Judge could have directed was to safeguard the dues of the other secured creditors and the workmen who share *pari passu*.

Section 13 of the SARFAESI Act provides for enforcement of security interest which has been created in favour of any secured creditor, without the intervention of court or Tribunal, in accordance with the provisions of the said

Act. Sub-section (2) thereof provides that where a borrower, who is under a liability to secure creditor under the security agreement, makes any default in repayment of secured debt or any installment thereof, and his action 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 full liabilities to the secured creditors within 60 days from the date of notice failing which the secured creditor shall be entitled to exercise power or any of the rights under Sub-section (4). Sub-section (4) enumerates the rights created in favour of the secured creditor on failure of the borrower to discharge his liability as required under Sub-section (2) of Section 13. Since the main thrust of the learned Counsel is on the construction of Sub-section (4) of Section 13 in particular and Sub-section (9) of Section 13 in general, Sub-section (4) of Section 13 is reproduced hereunder:

(4) In case the borrower fails to discharge his liability in full within the period specified in Sub-section (2), the secured creditors 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 releasing the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt;

(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.

Learned Counsel submits that by issuing the directions de hors the provisions of Section 13 of SARFAESI Act, the learned Company Judge has over-stepped his jurisdiction and the most that the Company Judge could have done was to secure amount for the other secured creditors and the workmen who share *pari passu* u/s 529A of the said Act.

We have bestowed our full consideration to the above contentions and we find that since the SARFAESI Act has been given an overriding effect, the other provisions of law should yield to the provision of the Act. Insofar as the Companies Act is concerned, since there is incorporation of Section 529A in Sub-section (9) of Section 13, to that extent and subject to the other provisions contained in Sub-section (9), provision can be made for payment of dues in

accordance with law. Sub-section (9) of Section 13 along with its provisos reads as under:

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all the rights conferred on him under or pursuant to Sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Ordinance, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to Sub-section (1) of Section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of Section 529A of that Act:

Provided also that liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of Section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator.

Learned Counsel for the appellant submits that firstly Section 529A becomes operative when the company is in liquidation and not merely upon initiation of the proceedings and even assuming that entitlement of the securitisation company is subject to the restrictions contained in Section 529A, insofar as the power of the company to realise the amount under Sub-section (4) of Section 13 is concerned, the same could not have been defeated, curtailed or impeded. At the most, the liquidator, if appointed, could have informed the appellant about the workmen's dues estimated by the liquidator to call upon the secured creditor to deposit the said amount in accordance with the provisions of Section 529A of the Companies Act. Learned Counsel has invited attention to the decision of the Bombay High Court (Nagpur Bench) in *The Akola Oil Industries Vs. State Bank of*

India, . Reference has also been made to the decision in Allahabad Bank v Canara Bank (2000) 2 Comp LJ 170 (SC): AIR 2000 SC 1535, particularly to paragraph 35.

Insofar as the contention of the learned Counsel with regard to the overriding effect given to SARFAESI Act is concerned, there cannot be two opinions. At the same time, it cannot be overlooked that once an amount is realised from the sale of the assets of a borrower indebted to his securitisation company, the provisions of Section 13 subject to the limitations contained therein become operative. The question that falls for consideration is whether in view of the provisions of Section 529A of the Companies Act, the learned Company Judge can provide for certain safeguards to ensure that other secured creditors and the workmen do not suffer on account of any negligence or other carelessness on the part of the secured creditor or to defeat their claim willfully while appropriating the amount towards its dues. One cannot be oblivious of the fact that, in its overzealousness, the securitisation company may alienate the assets for price lower than the price it would otherwise fetch, once the amount offered satisfied its dues. It is for this reason that the learned Company Judge issued the above directions but we find that the directions have been issued at an premature stage as it is only when the company is in liquidation that Section 529A incorporated in the proviso to Sub-section (9) of Section 13 would become operative.

In these premises, we are of the considered view that the power of the appellant company could not have been curtailed by the learned Company Judge to such an extent that the provisions of Section 13, specially Sub-section (2) and Sub-section (4) thereof, were rendered otiose. However, since SARFAESI Act contemplates making payment to other secured creditors to the extent provided in Sub-section (9) of Section 13 thereof as also Section 529A, we are, therefore, of the considered view that the directions issued by the learned Company Judge, being not in consonance with the provisions of SARFAESI Act, deserve to be set-aside. At the same time, however, to safeguard the interest of persons covered by Section 529A of the Company Act, we are of the view that directions be issued to the appellant in the following terms:

- (1) The appellant shall endeavour to obtain/realise maximum price from the assets which can be alienated under the provisions of Sub-section (4) of Section 13 like a prudent man in respect of his own property.
- (2) The appellant shall, on realising the amount, apply to the Company Court to inform the appellant as to the dues of the workmen of the industry concerned;
- (3) The appellant shall also place before the learned Company Judge a list of the other secured creditors and the amount due to them.
- (4) The appellant company shall file an undertaking before the company court to the effect that the appellant shall abide by the provisions of Section 529A of the Companies Act as incorporated in Section 13(a) of the SARFAESI Act, 2002.

With the above modification in the direction of the learned Company Judge, this appeal is disposed of with no order as to costs.