(2010) 07 BOM CK 0190

In the Bombay High Court

Case No : Company Petation No. 189 of 2008

Assets Reconstruction Co. India Ltd. APPELLANT

Vs

Horizon Flora India Ltd. RESPONDENT

Date of Decision : 16-07-2010

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 2, 3

Citation : (2010) 160 CompCas 366

Hon'ble Judges : S.J. Vazifdar, J

Bench : Single Bench

Advocate : D.D. Madon, Ashish Kamat and Vinod Kothari and Shahid Saiyed, instructed by Apex Law Partners, for the Appellant; Mehta and Bhavin Gada, instructed by Harakhchand and Co., for the Respondent

Judgement

S.J. Vazifdar, J.—This is a petition for winding up of the Respondent-company, inter alia, on the ground that it is unable to pay the debts.

2. The Petitioner is an assignee from Dena Bank in respect of the amounts due and payable by the Respondent-company to Dena Bank. On the merits of the case, there is little to be said on behalf of the Respondent-company. The fact that Dena Bank had advanced the usual banking facilities to the Respondent-company, is not denied. The fact that the amounts have not been repaid in full is not only established but admitted. This is clear from the letter of acknowledgment dated April 25, 2001, wherein the Respondent admitted an amount of over Rs. 14 crores to be due and payable to Dena Bank. In the balance-sheet for the year ended March 31, 2006, the Respondent-company admitted its liability to Dena Bank in the sum of about Rs. 9 crores towards the principal amount. The auditor''s report annexed to the said balance-sheet clarifies that the amount due together with interest was over Rs. 16 crores. Thus, today the said amount would be in excess of Rs. 20 crores.

3. It was however, contended that the Petitioner has no cause of action and it

has also no locus standi in the present petition. Reliance in this regard is placed on the deed of assignment, dated February 17, 2007, entered into between the Dena Bank, therein referred to as the "seller" and the Respondent, therein referred to as the "purchaser". Reliance is placed on the manner in which the Petitioner is described in this document which is as under:

Asset Reconstruction Company (India) Limited, a company incorporated under the Companies Act, 1956 and registered as a securitisation and asset reconstruction company pursuant to Section 3 of the SARFAESI (as hereinafter defined), having its registered office on 17th Floor, Express Towers, Nariman Point, Mumbai-400 021 acting in its capacity as trustee of the ARCIL-CPS-012--I Trust for the benefit of the holders of security receipts issued by the trustee thereunder (hereinafter referred to as the ''purchaser'', which expression shall, unless repugnant to the context or meaning thereof, be deemed to mean and include its successors and assigns) of the other part.

4. The submission is not well founded. Section 2(za) read with Section 2(zd) of the Securitisation and Reconstruction Financial Assets and Enforcement of Security Interest Act, 2002, is a complete answer to this submission. Section 2(za), 2(zb) and 2(zd) of the said Act reads as under:

2. (za) ''securitisation company'' means acquisition of financial assets by any company formed and registered under the Companies Act, 1956 (1 of 1956) for the purpose of securitisation ;

(zb) ''security agreement'' means an agreement, instrument or any other document or arrangement under which security interest is created in favour of the secured creditor including the creation of mortgage by deposit of title deeds with the secured creditor ;

(zd) ''security creditor'' means any bank or financial institution or any consortium or group of banks or financial institutions and includes--

(i) debenture trustee appointed by any bank or financial institution ; or

(ii) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be ;

5. The Petitioner is a company, registered under the Companies Act, 1956. It is also a secured creditor and is entitled to maintain this petition as it acts as a trustee in respect of a trust which it has set up.

6. It was then submitted that the Respondent has a counter-claim of over Rs. 120 crores.

7. I will ignore for the present purpose the Petitioner''s contention that it has not taken over the liability of the Dena Bank and that the Respondent is not entitled to set up the liability, if any, of the assignor, i.e., Dena Bank to the Respondent as a defence. In the present matter, it is not necessary to express any view on

this contention of the Petitioner. This is for the reason that learned Counsel appearing on behalf of the Respondent has not been able to establish any cogent or plausible basis for the claim for Rs. 120 crores. The counter-claim filed in the Debts Recovery Tribunal is on the basis of damages for mental torture, harassment, wrongful loss, injury, loss of reputation, etc. There is nothing on record to which my attention has been invited which inspires any confidence about the maintainability of the claims. In these circumstances, the mere raising of the counter-claim, would not entitle the Respondent to take the same into consideration.

8. It was then submitted that the rate of interest charged by the Petitioner was excessive. It was submitted that though interest at 2.5 per cent, per annum ought to have been charged, the Dena Bank charged interest at 17.5 per cent, per annum. However, even if interest is calculated at 2.5 per cent, it would make no difference. The Respondent''s dues even then would be over Rs. 10 crores. Moreover, in spite of being requested to do so, learned Counsel for the Respondent did not invite my attention to any provision of law, which entitled the Respondent to pay interest only at 2.5 per cent, per annum. Further, it appears that this contention was raised only after recovery proceedings were instituted.

9. Lastly, it was submitted that there are over 100 workers in the Respondent-company and that the Respondent-company has extensive properties including land, valued at over Rs. 25 crores.

10. It is important to note that there was not even an offer to or a suggestion of depositing any amount, much less making payment, even in moderate installments. The affidavit-in reply shows that the net worth of the company cannot be made positive. It is also important to note that a reference was made to the BIFR. The same was rejected. The AAIFR rejected the appeal on March 26, 2009. The order of the BIFR has not been made available. A second reference was also made to the BIFR and the same was also rejected by an order dated August 10, 2009. Even assuming that the references were rejected only on the ground of maintainability or for non-compliance of the office objections, the same would indicate that it is the Respondent''s own case that its financial position was very poor.

11. There is not even a suggestion or a proposal or project pending with a view to improving the financial health of the Respondent.

12. In these circumstances, in fact the interest of the workers would also be gravely prejudiced and jeopardised, if the Respondent is permitted to continue incurring huge liabilities. It is always open for the appropriate parties to make applications to revive the Respondent-company. This would be in the greater interest of the workmen and other employees.

13. In the circumstances, the company petition is made absolute in terms of prayer Clauses (a) and (b).

14. The operative part of this order is stayed up to October 31, 2010. However, till the official liquidator takes possession of the property, the Respondent-company shall not dispose of, alienate, encumber, part with possession of or create any third party right, title or interest in respect of the assets of the company, except payment of wages of the employees and workers of the company and statutory dues.