(2026) 08 BOM CK 3492

In the Bombay High Court

Case No : CRIMINAL WRIT PETITION NO. 2776 OF 2023

Avarsekar & Sons Pvt. Ltd. & Ors. — APPELLANT

Vs

Assets Care and Reconstruction Enterprises Ltd. & Anr. — RESPONDENT

Date of Decision : 03-08-2026

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 5, 3, 5(4), 5(2), 5(2A), 5(3), 5(5)
Negotiable Instruments Act, 1881 — Section 138, 141, 142, 9, Chapter XVII, 142(1)(a), 7
Code of Criminal Procedure, 1973
Companies Act, 1956 — Section 446(1)
Insolvency and Bankruptcy Code, 2016 — Section 14(1)(a)
Indian Stamp Act, 1899 — Section 8F
Sick Industrial Companies (Special Provisions) Act, 1985-sub — Section (1) of section 15
Recovery of Debts Due to Banks and Financial Institutions Act, 1993-sub — Section (23) of section 19

Citation : (2026) 08 BOM CK 3492

Hon'ble Judges : N.R. Borkar, J

Bench : Single Bench

Advocate : Mr. Girish Kulkarni, Sr. Advocate a/w. Mr. Prathamesh Parkar, Adv. Atithi Abhay and Ms Shashikala Sharma i/b. Ms Poonam Ankleshwaria for the Petitioners, Adv. Manaswi Agrawal a/w. Mr. Shantanu Ray a/w. Karan Parmar i/b. Meraki Chambers for the Respondent No.1, Mr. P.H. Gaikwad / Mr. B.V. Holambe Patil, APP for the Respondent/State

Final Decision : Dismissed

Judgement

1. The short question raised in the present petition is whether an Asset Reconstruction Company (ARC), which acquires a bank's financial assets, including cheques taken as security under a Deed of Assignment executed pursuant to Section 5 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), can be substituted as the complainant in a pending prosecution under Section 138 read

with Sections 141 and 142 of the Negotiable Instruments Act, 1881 (NI Act), in place of the bank that originally instituted the complaint as payee of the dishonoured cheque.

2. Petitioner No. 1 availed an overdraft facility of ☐ 75,00,00,000/- (Rupees Seventy Five Crore only) from Axis Bank Limited under a Facility Agreement dated 30.12.2013. As security, Petitioner No. 1 furnished three post-dated cheques bearing Nos. 566439, 566440, and 566441 for a sum of ☐ 25,00,00,000/-(Rupees Twenty Five Crore only) each. Petitioner Nos. 2 to 4 are the Directors of Petitioner No. 1.

3. Upon presentation, the cheques were dishonoured with the endorsement "Funds Insufficient". A statutory notice dated 21.11.2016 under Section 138 of the NI Act was issued by Axis Bank Limited. Thereafter, upon the failure of payment by the Petitioners, Axis Bank Limited instituted a complaint under Section 138 read with Sections 141 and 142 of the NI Act before the learned Metropolitan Magistrate Court at Esplanade, Mumbai on 11.01.2017.

4. During the pendency of the complaint, Axis Bank Limited executed a Deed of Assignment dated 27.03.2017 in favour of Respondent No. 1, Assets Care and Reconstruction Enterprise Limited, an Asset Reconstruction Company registered under Section 3 of the SARFAESI Act. By the said Assignment Agreement, and in consideration of a purchase price paid by Respondent No. 1, Axis Bank Limited assigned the loan facilities extended to the Petitioners together with the underlying security interest and 'Financing Documents' to Respondent No. 1. The Schedule of the said Assignment Agreement expressly included the three post-dated cheques, the cheque return memos, and the demand notice under Section 138, along with the right to institute, continue, and enforce legal proceedings, including the pending complaints, in Respondent No. 1's own name.

5. In terms of the said Assignemnt Agreement, Respondent No. 1 moved an application before the learned Trial Court seeking substitution as complainant in place of Axis Bank. The learned Trial Court, vide order dated 05.09.2018, allowed the said application. Against the order of the Trial Court, the Petitioners filed a revision before the Sessions Court. By the judgment and order dated 11.02.2021, the Sessions Court has dismissed the said revision.

6. The Petitioners being aggrieved by both the orders passed by the Trial Court and the Revisional Court filed the present petition.

7. I have heard the learned Senior Counsel for the Petitioners and the learned Counsel for contesting Respondent No. 1.

8. The learned Senior Counsel for the Petitioners submits that the Respondent No. 1 has no *locus standi* to seek substitution in place of the original complainant. It is submitted that the application is not maintainable either under the Negotiable Instruments Act, 1881 or under the Code of Criminal Procedure, 1973. It is submitted that Section 142 of the NI Act bars a Court from taking

cognizance of an offence under Section 138 except upon a complaint made by the **payee or the holder in due course**. It is submitted that Section 9 of the NI Act requires three conditions to be cumulatively satisfied before a person can be treated as a "**holder in due course**": - (i) that possession of the cheque was acquired for consideration; (ii) that it was so acquired before the amount became payable; and (iii) that the acquirer had no notice of any defect in the title of the person from whom the cheque was derived. It is submitted that Respondent No. 1 does not satisfy these conditions. It is submitted that since Respondent No. 1 is admittedly neither a payee nor a holder in due course, and therefore cannot be permitted to prosecute the complaint in place of original complainant Axis Bank Limited.

9. The learned Senior Counsel further submits that Section 5 of the SARFAESI Act contemplates substitution of an ARC in civil proceedings and not in criminal proceedings. It is submitted that the expression "*other proceeding of whatever nature*" occurring in Section 5(4) of the SARFAESI Act, by applying the principle of *ejusdem generis*, must take colour from the preceding word "*suit*" and be confined to civil proceedings. It is submitted that a complaint under Section 138 of the NI Act, being penal in character, cannot be brought within its ambit.

10. The learned Senior Counsel, in support of his submissions, places reliance on the judgments of this Court in ***Indorama Synthetics (India) Ltd. v. State of Maharashtra1*** and ***Tayal Cotton Pvt. Ltd. v. State of Maharashtra2***. It is submitted that in *Indo Rama Synthetics*, a Division Bench of this Court, construing the expression "*suits or proceedings*" in Section 446(1) of the Companies Act, 1956—a provision requiring leave of the Company Court before institution or continuation of any suit or legal proceeding against a company in winding up—held that a criminal complaint under Section 138 of the NI Act does not answer that description and is accordingly unaffected by the bar in that provision. It is submitted that this reasoning was further extended by this Court in *Tayal Cotton (supra)*, wherein an identical construction was placed on the expression "*suits or proceedings*" in Section 14(1)(a) of the Insolvency and Bankruptcy Code, 2016, the moratorium provision barring institution or continuation of suits or proceedings against a corporate debtor; this Court thereby held that the moratorium did not extend to a pending Section 138 complaint or to a criminal revision arising therefrom. It is submitted that the orders impguned, therefore, cannot be allowed to stand.

11. On the other hand, learned Counsel for Respondent No. 1, by referring to the Assignment Agreement, submits that Axis Bank Limited unconditionally and irrevocably had assigned the loans to Respondent No. 1, thereby constituting it to be the sole entity legally entitled to the loans and to recover all amounts due, including the right to sue and institute recovery proceedings in its own name. It is submitted that the Schedule to the Assignment Agreement expressly includes the three cheques, the cheque return memos, and the demand notice under Section 138 and the pending complaint itself, thereby demonstrating that

possession of the cheques and the right to prosecute the complaint arising from their dishonour, passed to Respondent No. 1 for valid consideration prior to any payment being made by the Petitioner. Learned Counsel places reliance upon ***D.H. Bhatter v. State Bank of Bikaner and Jaipur3***, wherein this Court has held that a purchaser of a cheque for consideration is a holder in due course even without a formal endorsement.

12. It is submitted that Section 5(2) of the SARFAESI Act operates as a statutory deeming fiction, by which Respondent No. 1, upon acquisition of the financial asset, is deemed to be the lender, with all the rights of Axis Bank Limited vesting in it. It is submitted that Section 5(4) of the Act, in using the expression "*suit, appeal or other proceeding of whatever nature*", employs language of deliberate width that admits of no implied restriction to civil proceedings. It is submitted that accepting the Petitioners' request to read down this language would require the Court to insert words into the statute that the Legislature did not use. It is submitted that such an interpretation would also defeat the object of the SARFAESI Act, which is to allow Asset Reconstruction Companies to fully step into the shoes of the assigning bank for all purposes connected with the realization of the acquired financial asset. In support of this submissions, learned Counsel places reliance on the decision of this Court in ***Harikrishnan Selvakumar v. L&T Infrastructure Finance Co. Ltd.4***, wherein this Court, on facts materially similar to the present case, expressly rejected the *ejusdem generis* argument and held that an assignee-ARC, having acquired the cheque for consideration by virtue of the Section 5 deeming fiction, becomes its possessor and is thus a holder in due course entitled to be substituted as complainant.

13. It is further submitted that in ***Man Singh Tusaria v. JM Financial Asset Reconstruction Company Private Limited and Anr.5***, the Hon'ble Delhi High Court has held that once an entire loan account is taken over by an Asset Reconstruction Company, there is no reason why the liabilities and proceedings arising from the loan should not travel with it, and that Section 5(4) of the SARFAESI Act is wide enough to cover complaints under Section 138 of the NI Act. Similarly, it is submitted that in ***Paam Pharmaceuticals (I) (P) Limited v. India SME Asset Reconstruction Company Limited6,*** the Hon'ble Delhi High Court has held an Asset Reconstruction Company, though not the payee, but would be a holder in due course under Section 9 of the NI Act read with Section 5 of the SARFAESI Act. It is submitted that thus the orders impugned need no interference.

14. Section 5 of the SARFAESI Act relevant for the purpose of deciding the convroversy reads thus:

> **"5: Acquisition of rights or interest in financial assets.-** *(1) Notwithstanding anything contained in any agreement or any other law for the time being in force, any [asset reconstruction company] may acquire financial assets of any bank or financial institution—*
>
> (a) *by issuing a debenture or bond or any other security in the nature of debenture, for*

consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or

(b) *by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.*

[(1A) Any document executed by any bank or financial institution under sub-section (1) in favour of the asset reconstruction company acquiring financial assets for the purposes of asset reconstruction or securitisation shall be exempted from stamp duty in accordance with the provisions of section 8F of the Indian Stamp Act, 1899 (2 of 1899):

Provided that the provisions of this sub-section shall not apply where the acquisition of the financial assets by the asset reconstruction company is for the purposes other than asset reconstruction or securitisation.]

(2) *If the bank or financial institution is a lender in relation to any financial assets acquired under sub-section (1) by the [asset reconstruction company], such [asset reconstruction company] shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets.*

[(2A) If the bank or financial institution is holding any right, title or interest upon any tangible asset or intangible asset to secure payment of any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire the tangible asset or assignment or licence of intangible asset, such right, title or interest shall vest in the asset reconstruction company on acquisition of such assets under sub-section (1).]

(3) *Unless otherwise expressly provided by this Act, all contracts, deeds, bonds, agreements, powers-of-attorney, grants of legal representation, permissions, approvals, consents or no-objections under any law or otherwise* ***and other instruments of whatever nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset*** *under sub-section (1) and to which the concerned bank or financial institution is a party or which are in favour of such bank or financial institution shall, after the acquisition of the financial assets, be of as full force and effect against or in favour of the [asset reconstruction company], as the case may be, and* ***may be enforced or acted upon as fully and effectually as if, in the place of the said bank or financial institution, [asset reconstruction company], as the case may be, had been a party thereto or as if they had been issued in favour of [asset reconstruction company],*** *as the case may be.*

(4) *If, on the date of acquisition of financial asset under sub-section (1), any suit, appeal or* ***other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution,*** *save as provided in the third proviso to sub-section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the [asset reconstruction company], as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the [asset reconstruction company], as the case may be.*

(5) *On acquisition of financial assets under sub-section (1), the [asset reconstruction company], may with the consent of the originator, file an application before the Debts Recovery Tribunal or the Appellate Tribunal or any court* ***or other Authority for the***

purpose of substitution of its name in any pending suit, appeal or other proceedings *and on receipt of such application, such Debts Recovery Tribunal or the Appellate Tribunal* ***or court or Authority shall pass orders for the substitution of the [asset reconstruction company] in such pending suit, appeal or other proceedings****.*

[5A. Transfer of pending applications to any one of Debts

Recovery Tribunals in certain cases.—(1) If any financial asset, of a borrower acquired by a [asset reconstruction company], comprise of secured debts of more than one bank or financial institution for recovery of which such banks or financial institutions has filed applications before two or more Debts Recovery Tribunals the [asset reconstruction company] may file an application to the Appellate Tribunal having jurisdiction over any of such Tribunals in which such applications are pending for transfer of all pending applications to any one of the Debts Recovery Tribunals as it deems fit.

(2) *On receipt of such application for transfer of all pending applications under sub-section (1), the Appellate Tribunal may, after giving the parties to the application an opportunity of being heard, pass an order for transfer of the pending applications to any one of the Debts Recovery Tribunals.*

(3) *Notwithstanding anything contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993), any order passed by the Appellate Tribunal under sub-section (2) shall be binding on all the Debts Recovery Tribunals referred to in sub-section (1) as if such order had been passed by the Appellate Tribunal having jurisdiction on each such Debts Recovery Tribunal.*

(4) *Any recovery certificate, issued by the Debts Recovery Tribunal to which all the pending applications are transferred under sub-section (2), shall be executed in accordance with the provisions contained in sub-section (23) of section 19 and other provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) shall, accordingly, apply to such execution.]"*

15. Perusal of Sections 5(4) and 5(5) of the SARFAESI Act would show that they are not restrictive; instead, they are facilitative, enacted to ensure that a proceeding "*relating to the said financial asset*" does not abate and may be "*continued, prosecuted and enforced by or against*" the ARC, precisely because the bank or financial institution that instituted or defended it has, by the acquisition, divested itself of the financial asset and the right of action upon them. This Court finds Section 5(5) of the SARFAESI Act expressly permits the ARC to seek substitution before "*any court or other authority*" in any pending *"suit, appeal or other proceeding*". This wide language is sufficient to include a criminal court exercising jurisdiction under Chapter XVII of the NI Act.

16. In this regard, the distinction was rightly recognized by this Court in *Hari Krishnan Selvakumar (supra)* and similarly by the Hon'ble Delhi High Court in *Man Singh Tusharia (supra)*, thereby holding Section 5(4) of the SARFAESI Act to be wide in its ambit and sufficient to cover Section 138 proceedings, further observing that once the entirety of a borrower's loan account is taken over by an ARC, there is no reason the proceedings arising from that loan should not travel with it.

17. The decisions in *Indorama Synthetics (supra) and Tayal Cotton (supra),* arise

in a materially different situation and do not govern the construction of Section 5 of the SARFAESI Act.

18. It is true that Section 142(1)(a) of the NI Act bars a Court from taking cognizance of an offence under Section 138 except upon a complaint in writing made by the "*payee*" or, as the case may be, the '*holder in due course of the cheque*'. "***Payee***" is defined in Section 7 of the NI Act as *"the person named in the instrument to whom, or to whose order, the money is directed to be paid*." ***"Holder in due course***" is defined in Section 9 as **"*any person who, for consideration, became the possessor of the cheque, if payable to bearer, or the payee or endorsee thereof, if payable to order, before the amount became payable, and without sufficient cause to believe that any defect existed in the title of the person from whom he derived title***."

19. In the present case, the subject cheques were drawn in favour of Axis Bank Limited as the payee. That character is fixed at the point the instrument is drawn and is not, and could not be, altered by a subsequent assignment of the underlying debt. Respondent No. 1 does not claim to be, and cannot be treated to be, the "*payee*" of the cheques. However, as far as the "*holder in due course*" is concerned, this Court in *D.H. Bhatter (supra)* has rightly held that a purchaser of a cheque for consideration is a holder in due course even in the absence of a formal endorsement, rejecting the contention that an endorsement is indispensable to that status. Further, in *Hari Krishnan Selvakumar (supra)*, this Court, on facts materially identical to the present case, has observed that an ARC substituted as complainant upon assignment of a bank's debt together with post-dated cheques taken as security, having for consideration acquired the cheques under the Section 5 deeming fiction, becomes its possessor and is thus a holder in due course, even though not the payee. Similarly, the Delhi High Court has taken the same view in *Man Singh Tusaria (supra)* and in *Paam Pharmaceuticals (supra)*, that an ARC, though admittedly not the payee, answers the description of holder in due course under Section 9 of the NI Act read with Section 5 of the SARFAESI Act, once the assignment is for consideration and the cheque forms part of the assigned security. Thus by virtue of Section 9 of the NI Act read with Section 5(2) and (3) of the SARFAESI Act, respondent No.1 can be treated as a '*holder in due course'* of the cheques for the purpose of maintaining and prosecuting the complaint under Section 138 read with Section 142 of the NI Act. The impugned orders dated 05.09.2018 and 11.02.2021, allowing the substitution of Respondent No.1 as the complainant in place of Axis Bank Limited thus calls for no interference by this Court. Accordingly, the present Petition is dismissed.

FOOTNOTES

1. 2016 (4) Mh.L.J. 249
2. MANU/MH/2352/2018
3. 2002 SCC OnLine Bom 76
4. Criminal Application No. 329 of 2015 decided on 07.03.2016

5. 2014 SCC OnLine Del.3469
6. 2012(132) DRJ 82

