

(2007) 06 MAD CK 0105

In the Madras High Court

Case No : Company Application No. 180 of 2007 in Company Petition No. 190 of 2006

BPV Classic Tea Factory P. Ltd.

APPELLANT

Vs

The Corporation Bank

RESPONDENT

Date of Decision : 18-06-2007

Acts Referred:

Companies Act, 1956 — Section 433, 439, 529
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(1), 13(2), 13(4), 13(9)
Transfer of Property Act, 1882 — Section 48

Citation : AIR 2007 Mad 323 : (2008) 142 CompCas 793

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : R. Murari, for the Appellant; A.L. Somayaji for S. Sethuraman, for the Respondent

Final Decision : Dismissed

Judgement

S. Rajeswaran, J.—This Company Application has been filed by the Applicant/Petitioner to stay the public auction to be held by the

respondent/Corporation Bank on 9.2.2007.

2. Company Application No. 188/2007 has been filed by the petitioner-company in C.P.No. 190/2006 to stay the public auction to be held by the

Corporation Bank, who was impleaded as the respondent as per order dated 8.2.2007 in C.A.No. 214/2007.

3. The brief facts are as under:

The applicant-company filed C.P.No. 190/2006 seeking the voluntary winding up under Sections 433(a) and 439 of the Companies Act, 1956.

The respondent-bank who is the secured creditor of the applicant-company

initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, hereinafter called the "SARPAESI Act", and the respondent took possession of the immovable properties of the Company which consists of the land and factory including the plant and machinery vide possession notice dated 31.1.2006. The respondent-bank is now ready to sell the above mentioned property by public auction on 9.2.2007 at 12.30 p.m., by fixing the reserve price at Rs. 20 lakhs. The respondent bank on an earlier occasion tried to sell the property by public auction, but it could not do so as the bank tried to sell the property in bits and pieces. Notwithstanding such an aborted attempt earlier the respondent-bank has now issued another notice for public auction on 9.2.2007 on the same terms as that of the previous auction.

4. According to the applicant's company they appointed an independent registered valuer, who valued the entire property at Rs. 1,08,14,982/-.

Therefore the reserve price now fixed by the bank is too low and if the entire asset of the Company is sold as a single unit the auction is likely to fetch a sum which is far greater than what may be obtained by selling the property in bits and pieces. Hence they filed the above Application to stay the public auction to be held by the bank on 9.2.2007.

5. A counter affidavit was filed by the respondent-bank wherein a preliminary objection as to jurisdiction was raised by them. According to the respondent-bank, the proviso to Section 13(9) of SARFEASI Act deals with the situation arising out of winding up and any action taken under the SARFEASI Act cannot be questioned before the Company court as SARFEASI Act is a special enactment. Further it was stated in the counter that the auction was already conducted, the successful bidder has also deposited 25% of the bid amount.

6. Heard the learned Counsel for the Applicant and Mr. A.L. Somayaji, the learned Senior counsel for the respondent-bank. I have also perused the documents and the judgments referred to by them in support of their submissions.

7. The learned Counsel for the Applicant submitted that the applicant-company can very well maintain this Application before this company-court and the jurisdiction of the company-court under the Companies Act which is also

a special enactment is not ousted. He further submitted that in view of the valuation arrived at by the independent valuer at Rs. 1 crore and above, the auction sale by fixing a reserve price of Rs. 20 lakhs does not reflect the real market value of the property. He further pointed out that selling the property in bits and pieces is also unwarranted and the property would fetch a greater sum if it is sold as a single unit.

8. Per contra, the learned Senior Counsel submitted that in view of Sections 34 and 35 of the SARFEASI Act the above Application is not

maintainable, and Section 13 of the SARFEASI Act, is a self-contained Code with regard to enforcement of security interest, which takes care of

the cases of Company in liquidation also and anyone aggrieved by any of the measures referred u/s 13(4) of the SARPEASI Act can file an

Appeal before the Debts Recovery Tribunal (DRT) u/s 17(1) of the SARFEASI Act and a further Appeal is also provided under the Debts

Recovery Appellate Tribunal,(DRAT) u/s 18(1) of the BARFEASI Act. Therefore the learned Senior counsel argued that the Application is not

maintainable as the same has been filed before a wrong forum. The learned Senior counsel relied on the following decisions in support of his

submissions:

1) ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others,

2) 2007 CLC 3 (Raghunath Rai Bareja v. Punjab National Bank)

3) Transcore Vs. Union of India (UOI) and Another, .

9. I have considered the rival submissions carefully with regard to facts and citations.

10. First let me consider the maintainability of the Application before this Court as objected to by the learned Senior counsel for the respondent-bank.

11. It is not in dispute and in fact is admitted by the petitioner-company that the respondent-bank is a secured creditor and by possession notice

dated 31.1.2006, the immovable property of the Company has been taken possession of by the bank.

12. SARFEASI Act has been enacted to regulate securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest and

for matters connected therewith or incidental thereto. Therefore it is no doubt

that it is a special enactment.

13. Section 13 of Chapter III of the SARFAESI Act deals with the enforcement of security interest by any secured creditor. u/s 13(4) in case the

borrower fails to discharge the liability in full within the period specified in Sub-section (2), the secured creditor may 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. The proviso given

below Section 13(9) covers the cases of Company in liquidation and therefore the entire Section 13 with its Sub-sections 1 to 13 itself a complete

code for enforcement of security interest. Any person aggrieved by any of the measures referred to Sub-section (4) of Section 13 may prefer an

appeal to DRT within 45 days. A further appeal is also provided to Appellate Tribunal u/s 18(1) of the Act. Section 34 of the Act bars the

jurisdiction of civil court to entertain any suit or proceeding in respect of any matter which a DRT or the appellate tribunal is empowered by this

Act to determine and no injunction shall be granted by any court in respect of any action taken or to be taken pursuant to the power conferred by

this SARFEASI Act or under the DRT Act. u/s 35 of the SARFEASI Act, the provisions of SARFEASI Act shall have the effect notwithstanding

anything inconsistent therewith contained in any other law for the time being in force.

14. In ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others, , the Hon''ble Supreme court held that while enacting the Companies Act the

Parliament cannot be held to have intended to deprive the first charge holder of such a valuable right obtained in common law as also under the

provisions of Transfer of Property Act. Such a valuable right therefore must be held to have been kept preserved. The Supreme Court further held

that merely because Section 529 of the Companies Act does not specifically provide for the rights of the priorities over the mortgaged assets, it

would not mean that the provisions of Section 48 of the Transfer of Property Act in relation to a Company, which has undergone liquidation shall

stand obliterated.

15. In the above judgment, the Supreme Court referred to the previous decision of the Supreme Court reported in AIR 2000 S.C. 1535

(Allahabad Bank v. Canara Bank and Anr.) wherein the Supreme Court held that

DRT Act was a special statute enacted by the Parliament much after the Companies Act came into force and therefore DRT had exclusive jurisdiction with respect to matters concerning recovery of dues by banks and financial institutions.

16. In 2007 CLC 3 (cited supra), the Hon''ble Supreme court held that provisions of DRT Act (Act 51 of 1993) would prevail over the

Companies Act against a Company in liquidation as 1993 Act is a special law while 1956 Act is a general law. The Hon''ble Judges of the Bench

further observed that when there is a conflict between law and equity, it is a law which has to prevail in accordance with the Latin maxim, "Dura lex

sed lex"- which mean, ""the law is hard but it is the law"".

17. In Transcore Vs. Union of India (UOI) and Another, , the Hon''ble Supreme court held that Section 35 of the SARFEASI Act gives an

overriding effect to that Act with all other laws and of such other laws are inconsistent with the SARFEASI Act. The Supreme court further

observed that the very object of Section 13 of SARFEASI Act is recovery by non-adjudicatory process and it is for this reason that Section 13(1)

and 13(2) of the Act proceeds on the basis that security interest needs to be enforced expeditiously without the intervention of the court/tribunal.

The SARPEASI Act states that enforcement would take place by non-adjudicatory process and the Act removes all fetters on the rights of the

secured creditors.

18. A reading of the provisions of the SARFEASI Act and the above referred judgments of the Supreme Court would make it very clear that

SARFEASI Act is a special Act while Companies Act is a general law. In such circumstances, with regard to enforcement of a security asset u/s

34 of the SARFEASI Act, the provisions as contained in that Act alone would apply with regard to a sale of an immovable property by the

secured creditor and the same cannot be challenged before the Company Court under the provisions of the Companies Act. If aggrieved by any of

the measures taken by the secured creditor u/s 13(4) OF THE SARFEASI Act, the aggrieved person has to workout his remedy as provided

under that Act only.

19. Hence I find force in the preliminary objections raised by the learned Senior Counsel appearing for the respondent-bank as to the

maintainability of the above Application before the Company Court.

20. In the light of the above discussion, I am of the considered view that the above Application filed under the Companies Act is not maintainable

and the same is dismissed. No costs.