(2009) 03 P&H CK 0079

In the Punjab And Haryana At Chandigarh

Case No : C.W.P. No. 18999 of 2008

Cybersys Infotech Ltd. APPELLANT

Vs

District Magistrate and Others RESPONDENT

Date of Decision : 27-03-2009

Acts Referred:

Companies Act, 1956 — Section 446, 456(1A), 456(2), 529, 529A
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(13), 13(2), 13(4), 13(9), 14
Transfer of Property Act, 1882 — Section 65A

Citation : (2011) 163 CompCas 442

Hon'ble Judges : Surya Kant, J

Bench : Single Bench

Judgement

Surya Kant, J.—This writ petition wherein the Petitioner seeks quashing of the order dated October 16, 2008 (annexure P5), gives rise to more than one interesting questions of law but not so easily answerable.

2. The facts may be noticed briefly:

(a) Property bearing Nos. 242-243, Udyog Vihar, Phase IV, Gurgaon is owned by Respondent No. 3-Unicorp Industries Ltd., a company incorporated under the Companies Act, 1956. Respondent No. 3 took loan from the IDBI Bank and mortgaged its aforestated property on September 30, 1998, in favour of the said bank. On December 22, 1999, a petition for winding up of Respondent No. 3 company was filed before the hon''ble Delhi High Court. During the pendency thereof, Respondent No. 3 leased out its mortgaged property to the Petitioner by way of the lease deed dated June 15, 2000, followed by a supplementary lease deed dated December 7, 2000 (annexures P1 and P2) for a period of five years commencing from May 1, 2001, with a "renewal clause" for further three years. The Petitioner is said to have been paying rent to the lessor company-(Respondent No. 3) regularly against rent receipts until it was directed by the income tax Department to deposit the rent towards the statutory charges. The

Petitioner claims to have deposited a sum of Rs. 10.5 lakhs with the income tax Department between March 18, 2002 to August 14, 2002.

(b) The hon''ble Delhi High Court vide its order dated September 16, 2002, ordered winding up of Respondent No. 3 and appointed a provisional liquidator to take over its assets. Thereafter, the final winding up order was passed on April 30, 2003 and an official liquidator has also been appointed. The fact that the Petitioner-company was a lessee of the company in liquidation (Respondent No. 3) was brought on record of the hon''ble Delhi High Court by the official liquidator vide his report dated March 11, 2004 (annexure P3) whereby he sought permission of the company court to receive 60 per cent, of the rent (amounting to Rs. 1,85,956 per month) from the Petitioner-company and allow it to continue as tenant till the disposal of the property, though with an express order against subletting of the premises.

(c) Meanwhile, the IDBI assigned its rights as a "secured creditor" to Respondent No. 2, who in turn, decided to have recourse under Sub-section (4) of Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act") and approached the District Magistrate, Gurgaon u/s 14 to facilitate the taking of possession of assets of the borrower company including the premises under the Petitioner''s tenancy. The request of the securitisation company-Respondent No. 2 has been accepted by the District Magistrate, Gurgaon, who vide her impugned order dated October 16, 2008, directed to provide police assistance to Respondent No. 2 for taking possession of the subject property.

(d) Pursuant to the District Magistrate''s order, the premises were sealed though they have been unsealed now under the orders dated November 6, 2008, of this Court, permitting the Petitioner to occupy and run its business activities.

3. Assailing the District Magistrate''s order dated October 16, 2008, it is contended on behalf of the Petitioner-company that when a winding up order has been made or the provisional/official liquidator appointed, no legal proceedings including under the SARFAESI Act can commence except by leave of the company court. Relying upon Section 456(2) of the Companies Act, 1956, it is urged that all the properties, effects and actionable claims of the company under winding up are deemed to be in the custody of the company court or its extended hand, namely, the provisional/official liquidator. Sections 529, 529A and 530 of the Companies Act have been referred to assert that the official liquidator alone can sell the assets of the company and disburse the sale proceeds as per the prescribed priorities. Section 537 of the Companies Act is also relied upon to lay emphasis that save as permitted by the court, no attachment, distress or execution against the assets or effects of the company under winding up is permissible and no such permission has been sought or granted to Respondent No. 2 by the winding up court.

4. It is then argued that the provisions of the SARFAESI Act have no supervening

effect and do not apply to any hire-purchase or lease or a contract in which no security interest has been created (Ref.: Sections 13(13) and 31(e) of the SARFAESI Act). Reliance is also placed upon Section 37 of the SARFAESI Act which provides that the provisions of the Act are in addition to and not in derogation of the Companies Act, 1956. It is suggested that the non obstante clause contained in Section 35, giving overriding effect to the provisions of the SARFAESI Act, needs to be read together with Section 37 of the said Act. Learned Counsel for the Petitioner has relied upon (i) Krishan Singh Rana v. Harayana State Industrial Development [2001] 1 PLR 149; (ii) Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, ; (iii) Kerala State Financial Enterprises Ltd. Vs. Official Liquidator, High Court of Kerala, ; (iv) LOIL Continental Foods Ltd. v. Punjab Wireless Systems Ltd. (in liquidation) [2008] 143 Comp Cas 619 (P&H); and (v) M.V. Janardhan Reddy Vs. Vijaya Bank and Others, , to buttress his contentions.

5. Per contra, it is maintained on behalf of Respondent No. 2 that in view of Section 14(3) of the SARFAESI Act, no court including a writ court, is competent to test the validity of the order passed by the District Magistrate. It is pointed out that an order u/s 14(1) is an assistance to the secured creditor to take one of the measures referred to in Section 13(4) and, therefore, being appealable before the Debts Recovery Tribunal u/s 17 of the SARFAESI Act, the Petitioner has got an alternative efficacious remedy. The first and second proviso to Sub-section (9) of section 3 of the SARFAESI Act have been relied upon to urge that the "secured assets" of a company in liquidation can also be sold u/s 13(4) of the SARFAESI Act, though the sale proceeds of such secured assets need to be distributed in accordance with Section 529A of the Companies Act.

6. Section 35 has been strongly pressed into aid to contend that the SARFAESI Act enjoys legislative supremacy over all other laws and in the event of any conflict, the provisions of the SARFAESI Act, which is later in time and a special statute, shall have over-riding effect over the provisions of the Companies Act. It is urged that since the alleged lease agreement between the Petitioner and Respondent No. 3 was executed much after the subject property had been mortgaged in favour of the IDBI, it does not affect the rights of the mortgagee. Section 65A of the Transfer of Property Act, 1882, is relied upon to submit that a mortgagor in possession can lease out the mortgaged property for a duration not exceeding three years and that too with no covenant for renewal of the lease. It is claimed that the lease deed relied upon by the Petitioner is totally in contravention of the aforesaid provision.

7. Learned Counsel for Respondent No. 2 has also placed reliance upon various decisions including:

(i) Mangru Mahto and Others Vs. Shri Thakur Taraknathji Tarakeshwar Math and Others, ;

(ii) Bhoruka Steel Ltd. Vs. Fairgrowth Financial Services Ltd., ;

(iii) Allahabad Bank Vs. Canara Bank and Another, ;

(iv) Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. [2001] 104 Comp Cas 569 : [2001] 3 SCC 71;

(v) Trade Well, a Proprietorship firm and Mr. Suniel K. Mehta, Proprietor of Trade Well Vs. Indian Bank and The State of Maharashtra, ;

(vi) Sree Lakshmi Products Vs. State Bank of India, ; and

(vii) Delhi Punjab Goods Carrier P. Ltd. v. Bank of Baroda [2008] 2 RCR (Civil) 459.

8. Having heard learned Counsel for the parties at some length and after going through the records, it appears that the question as to whether or not the provisions of Section 13(2) and (4) or Section 14 of the SARFAESI Act can be invoked to sell the "secured assets" of a company in liquidation without the leave of the company court, has not been directly and effectively addressed in any of the decisions cited at the Bar though these judgments throw light on various related issues. It is well-settled in a catena of judgments that where charge on a property was created before the commencement of the tenancy, the tenant can not claim any protection as the property has already been encumbrated by the charge created over it by its owner. The said principle, however, falls short to answer the next question, namely, as to whether or not the proceedings u/s 13(2) and (4) of the SARFAESI Act would also constitute amongst others "other legal proceedings" which, in terms of Section 446 of the Companies Act, cannot commence except by leave of the company court ? The enabling powers of a provisional/official liquidator u/s 456(1A) of the Companies Act are somewhat pari materia with those of a "secured creditor" u/s 14 of the SARFAESI Act, though worded differently but leading to the same object of securing possession of the assets with the assistance of the Chief Presidency Magistrate/District Magistrate under the Companies Act or Chief Metropolitan Magistrate/District Magistrate under the SARFAESI Act. If the provisional/official liquidator and a "secured creditor", simultaneously invoke their respective powers u/s 456(1A) of the Companies Act and Section 14 of the SARFAESI Act qua the same set of assets owned by a borrower company in liquidation, the question of their inter se precedence for the purposes of taking possession or disposal of such assets, the sale proceeds of which shall have to be distributed in accordance with the provisions of Section 529A of the Companies Act only (please see first proviso to Section 13(9) of the SARFAESI Act), would also arise for consideration.

9. There is yet another curious question, namely, can the scope of Section 35 of the SARFAESI Act vis-a-vis the Companies Act, be restricted by Section 37 of the Act, even when Section 35 operates with a non obstante clause ?

10. Can the golden rule of construction that the court''s endeavour shall always be to harmonise the provisions to avoid the seeming conflict between two sets of enactments, be relied upon to resolve that a "secured creditor" can invoke the

provisions of the SARFESAI Act and dispose of the "secured assets" but only with the leave of the company court and by associating the official liquidator `-is also a debatable issue.

11. Having regard to their importance and the fact that the same are likely to arise in several cases, I am of the considered view that these questions may be determined by a larger Bench.

12. Let the papers be accordingly put up before the hon''ble Chief Justice for appropriate orders.

13. Meanwhile, the interim order dated November 6, 2008, is made absolute.