

(2010) 02 AP CK 0016

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 6831 and 6832 of 2005

Kumar Metallurgical Corporation Limited

APPELLANT

Vs

Asset Reconstruction Company (India) Limited, Manaksia
Limited and Sri. Anil Kumar Agarwal

RESPONDENT

Date of Decision : 19-02-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13, 13(12), 13(2), 13(4), 13(9)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Rules, 2004 — Rule 8(1)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 15(1), 22

Citation : (2010) 3 ALD 41 : (2010) 3 ALT 412 : (2010) 4 BC 15

Hon'ble Judges : Noushad Ali, J;A. Gopal Reddy, J

Bench : Division Bench

Advocate : S. Ravi, in W.P. No. 6831 of 2005 and L. Venkateswara Rao, in W.P.
No. 6832 of 2005, for the Appellant; S. Niranjan Reddy and K.V. Simhadri, for
the Respondent

Final Decision : Allowed

Judgement

A. Gopal Reddy, J.—Since the issue involved in both the writ petitions is one and the same, they are being disposed of by this common order.

2. In these petitions, the petitioner has obtained a rule from this Court calling upon the respondents to show cause as to why a writ in the nature of certiorari (wrongly prayed as mandamus) should not be issued under Article 226 of the Constitution of India for calling up and quashing common order dated 28-02-2005 passed by the Debts Recovery Appellate Tribunal, Chennai (for short, "the appellate Tribunal") in R.A Nos. 10 and 11 of 2005, whereunder the appeals filed by respondent Nos. 1 and 2 against the orders of the Debts Recovery Tribunal, Hyderabad (for short, "the Tribunal") in S.A. No. 15 of 2005 were allowed by setting aside the order passed by the Tribunal, dated 07-02-2005.

3. The facts which are not in dispute, briefly stated, are as under:

The petitioner - Company availed credit facilities from ICICI Ltd., (subsequently merged with ICICI Bank Ltd.,) (ICICI), Industrial Development Bank of India (IDBI) and Industrial Finance Corporation of India (IFCI). The petitioner - Company availed loan facility from ICICI for an amount of Rs. 18.97 Crores towards various loans which amounts to 22.5% of the total loans sanctioned, apart from various loans from IDBI which constitutes 46.7% of the loan amount and the remaining from IFCI by offering immovable properties as securities including the plant and machinery, machinery spares, tool and accessories and other movables of plant and machinery situated at its factory. As the petitioner committed default in repayment of the loans, ICICI, IDBI and IFCI filed O.A No. 945 of 2001 in the Tribunal for due recovery of the amounts due and for enforcement of the securities.

4. As the petitioner became sick in terms of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short, "the SICA Act"), the matter was referred to the Board for Industrial and Financial Reconstruction (BIFR) for rehabilitation. The BIFR received reference and registered the same as Case No. 68 of 2004 and intimated the same to the petitioner through its letter dated 23-01-2004.

5. While the matter is pending before the BIFR, the Asset Reconstruction Company (India) Limited (ARCIL), the 1st respondent herein which acquired the rights of ICICI by way of assignment on 31-03-2004 issued a notice to the petitioner u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the SARFAESI Act") on 01-11-2004 for taking action for recovery of the monies due for which the petitioner - Company raised certain objections through its letter dated 29-12-2004 and the same was replied by the 1st respondent on 05-01-2005 overruling the objections stating that it secured the consent of more than 75% of the secured creditors including Stressed Assets Stabilization Fund (SASF) which acquired the rights of IDBI by way of assignment of debt and IFCI vide their letters dated 10-01-2005 and 17-01-2005 for initiating action u/s 13(4) of the SARFAESI Act and thereafter, they approached the District Magistrate and Collector, Nalgonda u/s 14 of the SARFAESI Act for taking over possession of the plant belonging to the petitioner - Company. The District Magistrate and Collector passed orders on 20-01-2005 directing for taking over possession by the Mandal Executive Magistrate and Revenue Officer, Chityal and for handing over the same to the Authorised Officer of the 1st respondent. The Mandal Revenue Officer accordingly conducted panchanama and handed over the possession to the 1st respondent - ARCIL. The Authorized Officer of the 1st respondent tendered possession notice as per Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 (for short, "the Enforcement Rules") to the representative of the petitioner - Company. The petitioner thereafter filed Securitisation Appeal No. 15 of 2005 against the respondents questioning the notice dated 01-11-2004 as null and

void which was allowed by the Tribunal on 07-02-2005 holding that while the reference before the BIFR and O.A No. 945 of 2001 filed by the secured creditors are pending, the 1st respondent stepped into the shoes of ICICI, the 3rd applicant in the OA and that the proceedings before the BIFR shall not get abated unless the secured creditors not less than 3/4th in value of the amount outstanding against the financial assets disbursed to the borrower of such secured creditors, have taken steps to recover their secured debt u/s 13(4) of the SARFAESI Act. One of the secured creditors cannot take proceedings u/s 13(4) since the notice u/s 13(2) does not disclose that the securitisation proceedings are also being taken up on behalf of the other two secured creditors. In the absence of their consent, the reference pending before the BIFR will not abate and the petitioner - Company is entitled to the statutory protection afforded to it u/s 22 of the SICA Act. It was further held that the Mandal Executive Magistrate has not followed the provisions of the SARFAESI Act and the Enforcement Rules in conducting the proceedings on 22-01-2005 and 23-01-2005. Accordingly, the proceedings taken by the 1st respondent under the SARFAESI Act have been set aside. Aggrieved by the same, respondent Nos. 1 and 2 filed R.A Nos. 10 and 11 of 2005 which were allowed by the appellate Tribunal holding that when action is taken by all the lenders representing not less than 3/4th in value of the amount outstanding and when there is a communication that the lenders having more than 3/4th of the value of the total outstanding have consented to one of the lenders to take action u/s 13(4) of the SARFAESI Act, then the proceedings before the BIFR stands abated as per second proviso to the Schedule to Section 41 of the SARFAESI Act. Accordingly, the order passed by the Tribunal was set aside. Hence, the present writ petitions.

6. Sri L. Venkateshwar Rao, learned Counsel for the petitioner in Writ Petition No. 6831 of 2005 contends that detailed objections are filed by the petitioner on 29-12-2004 to the notice u/s 13(2) of the SARFAESI Act, that since creditors representing not less than 3/4th in the value of the amount outstanding have not taken any measures to recover their secured debt under Sub-section (4) of Section 13, the consent obtained by the 1st respondent u/s 13(9) of the SARFAESI Act is not a measure taken for recovery of the amounts due. Therefore, the finding recorded by the appellate Tribunal that the proceedings before the BIFR gets abated on the consent having been obtained by the 1st respondent u/s 13(9) is erroneous and liable to be set aside. The consent, if any, obtained by the 1st respondent u/s 13(9) from the other secured creditors is not sufficient when only one of the secured creditors initiated action under the SARFAESI Act since one of the secured creditors cannot take any action unless the proceedings are abated. The consent obtained from the other secured creditors will not enure to the benefit of the 1st respondent. Once Section 22 of the SICA Act prohibits initiation of the proceedings without the consent of the BIFR, issuance of notice u/s 13(2) of the SARFAESI Act and the consequential proceedings are liable to be set aside.

7. Sri S. Ravi, learned Senior Counsel appearing for the petitioner in Writ Petition

No. 6832 of 2005 however submitted that since SASF which acquired the rights of the IDBI agreed for the offer made by Global Profiles Limited which in turn agreed to purchase the secured assets of the petitioner and since it received the amounts from Global Profiles Limited subsequently during the pendency of the writ petition, the matter can be remitted to the Tribunal to pass appropriate orders in view of the subsequent developments by reviewing its order.

8. Sri S. Niranjan Reddy, learned Counsel for the respondents contended that once the 1st respondent - ARCIL obtained permission from the other two secured creditors to proceed against the petitioner to exercise any rights conferred on it or pursuant to Sub-section (4) of Section 13, it is the proceedings before the BIFR which gets abated. Therefore, the bar u/s 22 of the SICA Act will not come in the way of the 1st respondent for taking possession of the properties. He further contended that the consent of secured creditors not less than 3/4th in the value of the amount outstanding u/s 13(9) of the SARFAESI Act amounts to taking measures to recover the amount. As SASF which obtained the assignments from the IDBI gave its consent u/s 13(9) for exercise of the powers u/s 13(4) of the SARFAESI Act on 10-01-2005 and a similar consent was also obtained from IFCI for exercising the rights under or pursuant to Sub-section (4) of Section 13 of the SARFAESI Act on 17-01-2005, by operation of third proviso to Section 15(1), the proceedings before the BIFR gets abated.

9. IDBI gave its consent to SASF for the following:

1. Take any of the measures under the Act.
2. Appoint an officer(s) of Arcil as an Authorised Officer u/s 13(12) of the Act for taking all action contemplated under Chapter III of the Act. However, Arcil would seek SASF's concurrence on any action relating to sale of assets, giving plant on lease and change of management.
3. The Authorised Officer may also be empowered to:
 - a) Appoint a Manager to manage the secured assets;
 - b) Appoint security personnel for protection of the secured assets;
 - c) Take adequate insurance cover over the secured assets.

10. The facts which are admitted disclose that ICICI made an assignment in favour of the 1st respondent on 31-03-2004 u/s 5 of the SARFAESI Act. On such acquisition, the proceedings viz., suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the Bank or financial institution, shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial assets by the securitisation company or reconstruction company, as the case may be, but the suit, appeal or other proceeding may be prosecuted and enforced by or against the securitisation company or reconstruction company, as the case may be (save as provided in the third proviso to Sub-section (1) of Section 15 of the SICA Act).

SICA Act specified in the schedule has been amended by adding second and third provisos to Section 15(1) of the SICA Act. The second proviso added to Section 15(1) of the SICA Act prohibits making of a reference to the BIFR after commencement of the SARFAESI Act on acquisition of financial assets by the securitisation company or reconstruction company. The third proviso reads as under:

Provided also that on or after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Reconstruction, such reference shall abate if the secured creditors, representing not less than three-fourth in the value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under Sub-section (4) of Section 13 of that Act.

11. It is not disputed that on the date of acquisition of the financial assets by the 1st respondent, the reference before the BIFR was pending. The 1st respondent which initiated the proceedings issued notice u/s 13(2) of the SARFAESI Act after obtaining the consent of the SASF which stepped into the shoes of IDBI, wherein it gave consent u/s 13(9) to take measures under the SARFAESI Act and permitted the 1st respondent to file a copy of the consent given by them with the BIFR, if required so that the reference before the BIFR may abate. Any recovery from the secured assets be distributed among the charge holders as per their rights. Similar consent was also obtained from IFCI, wherein it agreed for the 1st respondent exercising rights under Sub-section (4) of Section 13 of the SARFAESI Act.

12. To get the proceedings before the BIFR abated, under third proviso to Section 15 of the SICA Act, secured creditors not less than 3/4th in value of the amount outstanding against the financial assets disbursed to the borrower, have to take measures as contemplated in the said provision to recover the secured debt under Sub-section (4) of Section 13 of the Act. Admittedly, as on the date when notice u/s 13(2) was issued by the 1st respondent, the other two creditors have not taken any measures to recover their secured debt under Sub-section (4) of Section 13 of the SARFAESI Act. Consent to be obtained u/s 13(9) will be under a different circumstance viz., when secured creditors not less than 3/4th in value of the amount outstanding have taken measures and one of the secured creditors seeks to exercise any or all of the rights conferred on him under or pursuant to Sub-section (4) of Section 13. Such is not the case on hand.

13. The third proviso to Section 15 of the SICA Act as amended by Schedule - I of the SARFAESI Act and Sub-section (9) of Section 13 have to be harmoniously construed to give a meaningful interpretation to the provisions of the SARFAESI Act. Section 22 of the SICA Act prohibits initiation of proceedings for recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of loans or advances granted to the industrial company

except with the consent of the BIFR or as the case may be, appellate authority. Take an example, if in a given case, the secured creditor - Bank obtains consent of the BIFR to proceed against the industrial company and obtains a recovery certificate from the Debts Recovery Tribunal for the amounts due from the borrower and wants to enforce the provisions of Section 13 of the SARFAESI Act, it has to necessarily take the consent of secured creditors not less than 3/4th in value of the amount outstanding to take measures under Clauses (a) to (d) of Sub-section (4) of Section 13. The consent, if any, obtained by the secured creditor u/s 13(9) of the SARFAESI Act is only for the purpose of taking measures u/s 13(4) either when the proceedings before the BIFR gets abated or when the secured creditor - Bank took consent of the BIFR to proceed under the SARFAESI Act. Therefore, if both the provisions are interpreted harmoniously, it is manifest that unless secured creditors not less than 3/4th in value of the amount outstanding have taken measures either jointly or independently to recover the secured debt, the proceedings will not get abated. If the proceedings have not abated, the consent obtained u/s 13(9) will not enure to the benefit of the 1st respondent to claim that on obtaining such consent, the proceedings get abated.

14. It is also not disputed before us that the other secured creditors have not taken any measures to secure the debt from the petitioner - industrial company. Further, even if we assume that SASF has given consent to take measures on 10-01-2005, its finance is only 46.7% of the loan lent. The loan lent by the 1st respondent comes to 22.5%. If put together the finance given by both of them comes to 69.2% which is less than 3/4th of the amount borrowed by the petitioner. Similar consent has not been given by the IFCI Limited except for exercising the rights u/s 13(4) of the SARFAESI Act, which the 1st respondent can only exercise on getting the proceedings before the BIFR abated.

15. In view of the same, the impugned orders passed by the appellate Tribunal in R.A Nos. 10 and 11 of 2005 are liable to be set aside and we accordingly do so.

16. Since it is now brought to our notice that during the pendency of the writ petitions, SASF acting on behalf of IDBI agreed to sell the assets of the petitioner to Global Profiles Limited and certain amounts have been deposited which have to be distributed between the secured creditors or adjusted as per the books of accounts between the 1st respondent, SASF and IFCI, the matter requires to be remitted to the Tribunal to pass appropriate orders in the securitisation appeals after taking note of the same.

17. The writ petitions are accordingly allowed and the matter is remitted to the Tribunal to pass appropriate orders in the securitisation appeals after taking into consideration the subsequent events that took place during the pendency of the writ petitions. No costs.