(2012) 04 DEL CK 0038

In the Delhi High Court

Case No : Co. Petition 359 of 2009

Magicon Impex Pvt. Ltd. APPELLANT

Vs

Megnostar Telecommunications Pvt. Ltd. RESPONDENT

Date of Decision : 26-04-2012

Acts Referred:

Companies Act, 1956 — Section 529, 529A, 530
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(4)

Citation : AIR 2012 Delhi 164 : (2013) 176 CompCas 238 : (2012) 189 DLT 502 : (2013) 120 SCL 85

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Sanjay Katyal, for the Respondent

Final Decision : Allowed

Judgement

Manmohan, J.—Present two applications have been filed by the auction purchaser - M/s. Mohan Tractors (P) Ltd. and by M/s. Kotak Mahindra Bank Ltd. for desealing the premises i.e. plot No. 1297 ad measuring 50233 sq. yards situated at Sector MIE, Bahadurgarh, Haryana and for handing over possession of the same to the auction purchaser - M/s. Mohan Tractors (P) Ltd. Mr. Chetan Sharma, learned Senior Counsel appearing for the auction purchaser submits that the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, "the SARFAESI Act") override the provisions of the Companies Act because the former is a special and specific legislation. He further submits that the role of the liquidator arises only when the claims of workmen are pending adjudication before the Official Liquidator. In this connection, he places reliance on Sub-section (9) of Section 13 of the SARFAESI Act. He further states that in the present case, the Secured Creditor M/s. Kotak Mahindra Bank Ltd. had not only appointed a valuer but had also published the auction notice in national dailies.

2. Mr. Shahzad Khan, learned Counsel appearing for M/s. Kotak Mahindra Bank Ltd. adopts the arguments of Mr. Chetan Sharma.

3. On the other hand, Mr. Sanjay Katyal, learned Counsel for the Official Liquidator submits that Punjab and Haryana High Court in Haryana State Industrial & Infrastructure Development Corporation v. Haryana Concast Limited, Hisar and Another, (2010) ILR 2 P&H 284 has held that a Secured Creditor is entitled to conduct an auction under the SARFAESI Act only after associating the Official Liquidator at all stages. He states that as in the present case the Provisional Liquidator had been appointed on 3rd August, 2011, the auction conducted by the Secured Creditor, namely, M/s. Kotak Mahindra Bank Ltd. on 24th August, 2011 without involving the Liquidator was bad in law. He further states that since no claims have been invited in the present case by the Official Liquidator, it cannot be said that there are no claims payable to the workmen u/s 529A of the Companies Act,

4. Mr. Chetan Sharma, learned senior Counsel submits in rejoinder that the judgment of the Punjab and Haryana High Court is per incuriam as it has relied on the observations of the Supreme Court in Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, which is actually a case under the State Financial Corporations Act, 1951 and not under the SARFAESI Act. According to him the judgment of Allahabad Bank Vs. Canara Bank and Another, is applicable in the present case.

5. In rejoinder, Mr. Shahzad Khan, learned Counsel appearing for M/s. Kotak Mahindra Bank Ltd. states that notice for conducting the auction had been published on 23rd July, 2011.

6. Having perused the aforesaid judgments and having heard learned Counsel for the parties, this Court is of the view that the issue of conflict between the SARFAESI Act and the Companies Act has been resolved by the Punjab and Haryana High Court by following the principle of harmonious construction of two overlapping Statutes. In fact, this Court is of the opinion that the Punjab and Haryana High Court has not merely followed the judgment rendered by the Hon''ble Supreme Court in the case of Rajasthan Financial Corporation (supra) but has also decided the issue of conflict between the SARFAESI Act and the Companies Act. The relevant portion of Haryana State Industrial & Infrastructure Development Corporation (supra) is reproduced below:

26. The aforesaid detailed arguments would lead us to the following two questions of law-

(A) Whether the Company Court enjoys jurisdiction to issue supervisory direction to a securitisation company/secured creditor in connection with a company in liquidation or under winding up in the face of Section 13 of the SARFAESI Act or securitisation company opting to stand outside the winding up is absolutely free to utilise the sale proceeds of assets of the company in liquidation?

XXX

32. Once the aforesaid legal position of the Company Court vis-a-vis the State Financial Corporation and Debts Recovery Tribunal is clear then by virtue of the same logic if the securitisation company seeks to sell or transfer the assets of a borrower company in liquidation opting the course u/s 13(4) of the SARFAESI Act then it follows that such a power could be exercised by a securitisation company only after obtaining permission from the Company Court and acting in terms of the directions issued by that Court. The aforesaid view has been followed and applied by Hon''ble the Supreme Court in para 40 of the judgment in the case of Bakemans Industries Pvt. Ltd. (supra) by following the reasoning given in the case of Rajasthan State Financial Corporation (supra) which has already been extracted in the preceding para.

xxx

34. Once the aforesaid legal position is clear then it has to be concluded that the Company Court enjoys the jurisdiction to issue directions to a securitisation company or a secured creditor who might have opted to stay outside the winding up and has invoked its power u/s 13(4) of the SARFAESI Act. Therefore, we find that the learned Company Judge has correctly appreciated the issue when it placed reliance on a judgment of Allahabad High Court in the case of In Re. BPL Display Devices (supra) and proceeded to observe in para 11 as under:

11. The Allahabad High Court identified the objects of the SARFAESI Act as providing for enforcement of Securities Act without any intervention of Court or Tribunal and went on to hold on a point which it had earlier observed that was not a pointed controversy that "there was no apparent conflict between SARFAESI Act and the Companies Act and therefore does not appear to be any conflict between the sale of the security interest. The SARFAESI Act has to be harmonized in that the Act itself declares that is in addition and not in derogation of the Companies Act. It said at paragraph 41 that the objects of speedy recovery of loan from non-performing assets would be defeated if the O.L. would intervene to CAPP No. 23 of 2009 36 enforce the provisions of the Companies Act and to monitor each step of the securitization and enforcement of Security interest. The Company Court therefore must allow the provisions of SARFAESI Act to be put into motion even if the proceedings of the winding up have been recommended or are pending of that Company is under liquidation. The statutory duties of the Company Court for protecting the workmen''s dues, and interest of the other stake holder including the public interest will however, oblige the Court to be informed with the process of sale.

35. We are in complete agreement with the aforesaid observation which in our humble conform to the view expressed by Their Lordships of Hon''ble the Supreme Court in various judgments, some of which have been referred above.

7. This Court is also of the view that the judgment of the Supreme Court in Rajasthan Financial Corporation (supra) has been passed after taking into

consideration the earlier judgment of the Supreme Court in Allahabad Bank (supra). The relevant portion of Rajasthan Financial Corporation (supra) is reproduced herein below:

17. Thus, on the authorities what emerges is that once a winding up proceeding has commenced and the liquidator is put in charge of the assets of the company being wound up, the distribution of the proceeds of the sale of the assets held at the instance of the financial institutions coming under the Recovery of Debts Act or of financial corporations coming under the SFC Act, can only be with the association of the Official Liquidator and under the supervision of the Company Court. The right of a financial institution or of the Recovery Tribunal or that of a financial corporation or the Court which has been approached under Action 31 of the SFC Act to sell the assets may not be taken away, but the same stands restricted by the requirement of the Official Liquidator being associated with it, giving the company Court the right to ensure that the distribution of the assets in terms of Section 529-A of the Companies Act takes place. In the case on hand, admittedly, the appellants have not set in motion, any proceeding under the SFC Act. What we have is only a liquidation proceeding pending and the secured creditors, the financial corporations approaching the company Court for permission to stand outside the winding up and to sell the properties of the company in-liquidation. The company Court has rightly directed that the sale be held in association with the Official Liquidator representing the workmen and that the proceeds will be held by the Official Liquidator until they are distributed in terms of Section 529-A of the Companies Act under its supervision. The directions thus, made, clearly are consistent with the provisions of the relevant Acts and the views expressed by this Court in the decisions referred to above. In this situation, we find no reason to interfere with the decision of the High Court. We clarify that there is no inconsistency between the decisions in Allahabad Bank v. Canara Bank and Anr. (supra) and in International Coach Builders Limited v. Karnataka State Financial Corporation (supra) in respect of the applicability of Sections 529 and 529A of the Companies Act in the matter of distribution among the creditors. The right to sell under the SFC Act or under the Recovery of Debts Act by a creditor coming within those Acts and standing outside the winding up, is different from the distribution of the proceeds of the sale of the security and the distribution in a case where the debtor is a company in the process of being wound up, can only be in terms of Section 529-A read with Section 529 of the Companies Act. After all, the liquidator represents the entire body of creditors and also holds a right on behalf of the workers to have a distribution pari passu with the secured creditors and the duty for further distribution of the proceeds on the basis of the preferences contained in Section 530 of the Companies Act under the directions of the company Court. In other words, the distribution of the sale proceeds under the direction of the company Court is his responsibility. To ensure the proper working out of the scheme of distribution, it is necessary to associate the Official Liquidator with the process of sale so that he can ensure, in the light of the directions of the company Court, that a proper price is fetched for

the assets of the company in liquidation. It was in that context that the rights of the Official Liquidator were discussed in International Coach Builders Limited (supra). The Debt Recovery Tribunal and the District Court entertaining an application u/s 31 of the SFC Act should issue notice to the liquidator and hear him before ordering a sale, as the representative of the creditors in general.

18. In the light of the discussion as above, we think it proper to sum up the legal position thus--

(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the liquidator appointed by the Company Court and after hearing him.

(ii) A District Court entertaining an application u/s 31 of the SFC Act will have the power to order sale of the assets of a borrower company-inliquidation, but only after notice to the Official Liquidator or the liquidator appointed by the Company Court and after hearing him.

(iii) If a financial corporation acting u/s 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-inliquidation, the said power could be exercised by it only after obtaining the appropriate permission from the company Court and acting in terms of the directions issued by that Court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529A and Section 529 of the Companies Act.

(iv) In a case where proceedings under the Recovery of Debts Due to Bank''s and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the concerned creditor is to approach the company Court for appropriate directions regarding the realization of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company-inliquidation.

8. Consequently, this Court is of the view that the judgment of Punjab and Haryana High Court lays down the correct law. Moreover, as the Liquidator was appointed in the present case prior to the auction being conducted, this Court is of the opinion that the Official Liquidator should be associated with the auction process. Consequently, M/s. Kotak Mahindra Bank Ltd. is directed to prepare a fresh draft sale notice in association with the Official Liquidator after taking into account the valuation report prepared by the valuer appointed by the Official Liquidator. In view of the aforesaid, both the applications stand dismissed. The amount deposited by the applicant/auction purchaser - M/s. Mohan Tractors (P) Ltd. shall be refunded by M/s. Kotak Mahindra Bank Ltd. within a period of two weeks.

CO. APPL. 657/2012

Present application has been filed by the applicant - National Agricultural Cooperative Marketing Federation of India Ltd. (NAFED) seeking its impleadment. Issue notice. Mr. Sanjay Katyal, learned Counsel accepts notice on behalf of the Official Liquidator. He states that he has no objection to the present applicant being impleaded. Keeping in view the aforesaid consent as well as the fact that NAFED has already an arbitral award in its favour, the present application is allowed and the applicant is impleaded in the present proceedings.

With the aforesaid observations, the application stands allowed.

CO. PET. 359/2009

The agreed draft sale notice between the parties shall be placed before this Court for approval on 14th August, 2012. The status report dated 19th January, 2012 filed by the Official Liquidator is taken on record. Keeping in view the said report, the deployment of security agency, namely, M/s. Kat Eye Security Services is approved.