
(2015) 08 P&H CK 0046

In the Punjab And Haryana At Chandigarh

Case No : CWP No. 15890 of 2015 (O&M)

Majestic Hotels Limited

APPELLANT

Vs

IFCI Ltd. and Others

RESPONDENT

Date of Decision : 04-08-2015

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 17, 2(m)
Transfer of Property Act, 1882 — Section 130

Citation : (2015) 128 CLA 453 : (2015) 132 SCL 86

Hon'ble Judges : Hemant Gupta, J; Lisa Gill, J

Bench : Division Bench

Advocate : V.K. Sachdeva, for the Appellant; Sunil Kalra, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Hemant Gupta, J—Challenge in the present writ petition is to a public notice dated 14.07.2015 (Annexure P-1), whereby respondent No. 1 - IFCI Ltd., a financial institution, as defined under Section 2(m) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Act"), invited bids for sale/assignment of debts/secured assets of the petitioner-company at a reserve price of Rs. 37.69 crores as against the reserve price of Rs. 110 crores fixed in e-auction notice dated 25.06.2015 (Annexure P-37) for sale of the mortgaged property.

2. Challenge to the aforesaid notice arises out of the fact that with a view to finance its Hotel Project, the petitioner-company approached the Financial Institutions including respondent No. 1- IFCI Ltd. and a term loan worth Rs. 815 lacs was sanctioned in the year 1991. The hotel became operational and came into business on 27.12.1999. The hotel, having 117 well furnished rooms and various restaurants and other luxurious amenities, is being run as a Five Star Hotel in the name and style of "Hotel Majestic Plaza" in the heart of Ludhiana

City.

3. It is pleaded that the implementation of the Hotel Project was delayed, therefore, vide letter dated 12.04.1999, respondent No. 1 rescheduled the loans and also granted various concessions by waiving of compound interest and by extending the repayment period. The loan was again restructured on 03.01.2003 while reducing the rate of interest and rescheduling the repayment. The loan was again restructured vide letter dated 31.03.2005. In the year 2007, the petitioner-company decided to renovate the hotel and to meet the cost of renovation, a term loan of Rs. 5.22 crores was obtained from respondent No. 3 - Punjab National Bank. In April, 2008 and May, 2010, credit facilities of Rs. 4.50 crores and Rs. 5 crores were obtained from IDBI Bank Limited and Reliance Capital Ltd. respectively. Still further, another credit facility of Rs. 2.25 crores was obtained from Axis Bank Ltd. on 26.04.2011. It was vide letter dated 01.07.2011, Punjab & Sind Bank taken over loan from M/s. Reliance Capital Limited after sanctioning the loan of Rs. 12 crores.

4. As per the petitioner, the total amount due and payable to respondent No. 1 as on 29.02.2012 was Rs. 6,10,76,124/- i.e. Rs. 5,83,99,497/- as principal amount and Rs. 26,76,627/- as interest. However, on 04.06.2012, respondent No. 1 recalled the loan and claimed an amount of Rs. 99,95,92,260/- as due on 31.03.2012. Thereafter, pursuant to a notice dated 17.08.2012 issued under Section 13(2) of the Act, the petitioner-company submitted its reply on 15.10.2012. However, the request of the petitioner for restructuring of the loan and for additional funds was rejected on 23.10.2012. It was on 02.11.2012, the symbolic possession of the secured assets of the petitioner-company was taken over by respondent No. 1 after a notice under Section 13(4) of the Act was issued. The petitioner-company is said to have paid an amount of Rs. 302 lacs on 29.11.2012 and 30.11.2012, thus, making a total payment of Rs. 377.50 lacs out of Rs. 610.17 lacs due as on 29.02.2012. The petitioner-company is said to have made another payment of Rs. 25 lacs on 31.01.2013 and some other payments amounting to Rs. 47 lacs during the period from April, 2013 to 26.02.2014. However, a sale notice claiming an amount of Rs. 105.65 crores due as on 13.08.2012 was issued by respondent No. 1 on 28.02.2014 for sale of immovable and movable properties of the petitioner-company though the total outstanding as per the petitioner is Rs. 267.76 lacs. Respondent No. 1 issued another sale notice dated 27.06.2014 (Annexure P-19).

5. However, respondent No. 3 - Punjab National Bank challenged the said sale notice before the Debt Recovery Tribunal by filing a Securitization Application bearing No. 363 of 2014 on 25.07.2014. In the said application, as per the petitioner, the respondent No. 1 has not filed a detailed reply explaining highly and illegal exaggerated amount. Even though the matter was pending before the Debt Recovery Tribunal, but respondent No. 1 again issued sale notice dated 12.12.2014 and also included the amount of respondent No. 3 - Punjab National Bank to the tune of Rs. 4.23 crores. The petitioner challenged such action by way

of a writ petition i.e. CWP No. 222 of 2015, which was dismissed on 08.01.2015 leaving the petitioner- company to avail the alternative remedy i.e. proceedings before the Debt Recovery Tribunal at the instance of Punjab National Bank. Thereafter, the petitioner-company filed an application i.e. SA No. 118 of 2015 under Section 17 of the Act before the Debt Recovery Tribunal. When the matter was pending and no interim relief was granted, respondent No. 1 issued another sale notice dated 10.04.2015. The said application was withdrawn after a fresh sale notice dated 25.06.2015 was published. Thereafter, SA No. 372 of 2015 has been filed by the petitioner-company challenging the sale notice dated 25.06.2015, but the same was adjourned to 30.07.2015. It is also pointed out that in order to seek relief, the petitioner-company filed CWP No. 14547 of 2015, which was disposed of vide order dated 22.07.2015, whereby the Tribunal has been directed to decide the application filed by the petitioner under Section 17 of the Act expeditiously and that the secured creditors shall not confirm the auction till such time the application is decided by the Tribunal.

6. Learned counsel for the petitioner contends that such proceedings before the Debt Recovery Tribunal are pending, but after exercising the right to sale the property through e-auction vide sale notice dated 25.06.2015, the secured creditor has issued a second auction notice dated 14.07.2015 inviting bids on 10.08.2015 for assignment of debt, which is not permissible. The argument is that law permits availing of alternative remedies, but does not permit simultaneous availment of the remedies. It is contended that under Section 13(4) of the Act, the Bank has proceeded to take possession of the secured assets and for the sale of the assets, therefore, the second alternative of assignment of debt in terms of Section 5 of the Act is not permissible. It is alleged that the impugned sale notice dated 14.07.2015 is a novel and dubious mechanism evolved to help and facilitate a general bidder to enter into an unholy nexus with the Assets Reconstruction Company or secured creditors etc. to purchase the valuable assets of the petitioner- company at throwaway price by piggyback mechanism.

7. The argument on behalf of the petitioner-company is that the secured creditor may take recourse to one or more measures as delineated under Section 13(4) of the Act, which includes to take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset, but the assignment of a debt is a separate right, which is governed by Section 5 of the Act. Therefore, the action of respondent No. 1 to assign debt is mala fide, mischievous and to defeat the pending action initiated by the petitioner against the Bank before the Debt Recovery Tribunal.

8. Vide notice dated 14.07.2015 (Annexure P-1), respondent No. 1 - secured creditor has invited proposals from eligible Asset Reconstruction Companies/Banks/Financial Institutions/Non-Banking Financial Companies/Secured Creditors for purchase/assignment of 22 NPA accounts, on individual basis with an aggregate book balance of Rs. 2295.77 crores as on 31.03.2015 alongwith

underlying securities. The relevant extract from the notice dated 14.07.2015 reads as under:

"5. Parties who are interested in purchasing/assignment one or both the accounts identified for sale have to submit their bid for individual accounts in writing to "Shri Sudhir Garg, Executive Director, IFCI Ltd. IFCI Tower, 61, Nehru Place, New Delhi 110019 so as to reach him on or before 10.08.2015 by 11.00 a.m. or alternatively may be dropped in the Tender Box, kept at the Reception of IFCI Tower. Bids received after the bid deadline will not be accepted. The bid proposal will be opened on 10.08.2015 by 11.30 a.m. by the "NPA Sale Committee of IFCI", at IFCI Ltd. IFCI Tower, 61, Nehru Place, New Delhi 110019.

6. In each of the NPA accounts, once the bid is opened, IFCI may in its discretion hold either bilateral negotiations with the highest bidder OR decide to proceed with inter se bidding mode. This discretion exercised by IFCI would be final.

7. IFCI has the sole right to shortlist the participants to the top three bidders, for the purpose of Inter se bidding, if so decided in any account individually, which would be decided by the competent authority of IFCI after opening of the bid. The participant who quotes the highest price in the inter se bidding, if adopted will be the successful bidder subject to:

? Bid price being above reserve price.

? Approval by the Competent Authority of IFCI.

? The bid being rejected for other indices viz., management fee/cash + SR ratio/ upside sharing etc. not being viable acceptable.

? Conditional and contingent offers shall be liable to be disqualified by IFCI.

? In the event of there being no improvement in price quoted in inter se bidding or no participation by parties, the eligible bidder, who quoted the highest price in the tender/bid opening process may be declared the highest bidder and / or the bid itself could be rejected at the discretion of IFCI.

? Any other reason where IFCI has reasonable grounds to believe that there is a likely impairment or would be prejudicial to the recovery steps/redemption of SRs.

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11. The sale will be on the following terms and conditions:

a. The 2 NPA accounts offered for sale/assignment on individual basis, details of which are given in the Annexure II, are available for due diligence / verification to the ARCs/ Banks/FIs/NBFs at the IFCI's Offices, the addresses being enumerated in the Annexure-III between 10.00 AM to 6.00 PM only as per the schedule for Due Diligence.

b. Any ARCs/Banks can participate and submit bid/s for one or both the accounts

identified for sale/assignment. However, it is clarified that bids are to be submitted individually for each account in a sealed cover. The name of the account(s)/or the specific NPA account shall be duly mentioned on top of the sealed cover. Bids once submitted shall not be allowed to be cancelled or withdrawn.

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9. Having heard learned counsel for the petitioner at length, we do not find any merit in the arguments raised. Section 13 of the Act empowers the secured creditor to take recourse to one or more measures as delineated under sub-section (4) to recover the secured debt. Clause (a) itself contemplates the right to take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset. The relevant Section 13(4) of the Act reads as under:

"13. Enforcement of security interest - xx xx

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely: -

(a) 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;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt;

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

10. The secured creditor has taken action under clause (a) of Section 13(4) of the Act, when it published notice for sale of the secured assets on 25.06.2015, the legality and validity of which is being examined by the Debt Recovery Tribunal. Clause (a) also permits assignment of secured asset. Such assignment of the secured asset is a transaction independent of sale of the secured asset of

the borrower. It is a transaction between a person, who is holding a debt to any asset reconstruction company or a financial institution. Section 5 of the Act permits any securitization company or reconstruction company to acquire financial assets of any bank or financial institution. In fact, Section 5 is recognizing the right given to a creditor to transfer debt, as has been recognized by this Court in C.P. No. 129 of 2004 "Kotak Mahindra Bank Ltd. Vs. Coventry Coil-O-Matic (Haryana) Ltd. & another" decided on 12.11.2010. The Court observed to the following effect:

"55. The argument that the secured creditors i.e. IFCI and IDBI have assigned their debts to the Alchemist in the sum of Rs. 7.1 crores but the amount claimed from the Company exceeds Rs. 143 crores i.e. Rs. 133 crores from IFCI and Rs. 10.77 Crores from IDBI, is again not tenable. The transaction between the secured creditors of the Company and that of the assignee is an independent transaction. It is not in the nature of One Time Settlement arrived at by a secured creditor with a debtor. The assignee has stepped into the shoes of the secured creditors on the basis of the assignment deed and thus all the rights and obligations arising in terms of the loan agreement executed by the borrower with the secured creditors can be enforced by the assignee against the borrower. Therefore, the amount of assignment cannot be claimed to be an amount on the basis of which the Company can claim to settle the account of the secured creditors."

11. In another judgment dated 08.04.2013 in CWP No. 7187 of 2013 titled "M/s. Sachdeva & Sons Rice Mills Ltd. Vs. Kotam Mahindra Bank Ltd. & others" by a Division Bench of this Court, the assignment of debt was found to be permissible in terms of Section 130 of the Transfer of Property Act, 1882. The Bench observed as under:

"The assignment of debt is permissible in terms of Section 130 of the Transfer of Property Act, 1882. Learned counsel for the petitioner could not point out any prohibition in the documents of loan prohibiting assignment of debt in favour of another Banking company. It is not disputed that respondent No. 1 is a Banking Company registered under the Banking Regulation Act, 1949 with the Reserve Bank of India. We are not able to agree with the observations of Madhya Pradesh High Court in the aforesaid judgment as the Court has proceeded on the assumption that assignment of debt could only be under the provisions of the Act. The Court has not examined the provisions of the Transfer of Property Act. In fact, the Gujarat High Court has not noticed the judgment of Supreme Court ICICI Bank Limited Vs. Official Liquidator of APS Star Industries Ltd. and Others, AIR 2011 SC 1521 : (2011) 1 BC 178 : (2010) 159 CompCas 443 : (2010) 4 CompLJ 241 : (2010) 10 JT 599 : (2010) 10 SCALE 378 : (2010) 10 SCC 1 : (2010) 9 UJ 4531 : (2010) AIRSCW 6214 : (2011) AIRSCW 1427 : (2010) 5 Supreme 369 . The view as reproduced above, was set aside by the Supreme Court. We find that reliance on the judgment of Gujarat High Court in view of the Supreme Court order is rather unfortunate. The Supreme Court was examining

the question as to "Whether the Gujarat High Court was right in holding that assignment of debts by the banks inter se is not an activity permissible under the BR Act, 1949 and consequently all executed contracts of assignment of debts were illegal?".....

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The Gujarat High Court has not only failed to notice the above judgment but also the provisions of the Transfer of Property Act. In view of the above judgment of the Supreme Court, the assignment of debt by a Bank to another Bank is not impermissible under the Banking Regulation Act, 1949. Therefore, the challenge to the assignment of debt is wholly devoid of merit."

12. We find that the intended assignment of debt by a secured creditor is an independent transaction, which does not affect either the liability or the rights of the borrower. Any transfer of debt by a secured creditor will not either diminish or enlarge liability of the borrower. The transferee in terms of Section 5(3) of the Act is bound by the rights and liabilities of the transferor. The reserved price fixed by the secured creditor is the valuation for transfer of debt. It has no correlation with the market value or the saleable value of the asset. The notice for sale of the property is already subject matter of challenge before the Debt Recovery Tribunal, whereas the challenge in the present writ petition is to the transfer of a debt by the secured creditor. Both actions are independent of each other, therefore, merely for the reason that an application under Section 17 of the Act against the sale notice is pending before the Debt Recovery Tribunal, is not a ground for interference in exercise of the writ jurisdiction of this Court against the transfer of debt by the secured creditor. It is a commercial decision of the secured creditor in which the borrower cannot have any say.

13. Consequently, we do not find any merit in the present writ petition. The same is dismissed.