

(2016) 08 BOM CK 0133

In the Bombay High Court

Case No : OLR No. 629 of 2015/LIQN.V in Company Petition No. 103 of 2011 with Company Petition No. 104 of 2011 with Company Petition No. 375 of 2010

M/s Kotak Mahindra Prime Ltd.

APPELLANT

Vs

M/s Lifeline Industries Ltd. (In Liqn.)

RESPONDENT

Date of Decision : 11-08-2016

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 5
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1)

Citation : (2016) 6 BCR 813 : (2016) 198 CompCas 291 : (2017) 1 DRTC 212 : (2016) 137 SCL 366

Hon'ble Judges : B.P. Colabawalla, J.

Bench : Single Bench

Advocate : Mr. Sanjaya Verma, Asstt Official Liquidator present, for the Appearing Parties; Ms. Jane Cox, Advocate, for the Worker; Mr. Satish S. Shetye i/b Barsha Parulekar, Advocates, for the Ex-directors; Ms. Kirti Kanakia, Ex-Director present and Ms. Nupur Awast

Final Decision : Disposed Off

Judgement

B.P. Colabawalla, J. (Oral)—By this Official Liquidator's Report ("OLR"), the following directions are sought:-

- (i) to direct the Ex-Director of the Company (in liqn.) (Mr Nikunj Kanakia) to deposit the advertisement charges of Rs. 25,749/- with the Official Liquidator and permit the Official Liquidator to pay the same to the advertising agency; and
- (ii) to direct Indian Overseas Bank ("IOB") to take physical possession of the factory premises situated at B-10, MIDC Industrial Area, Akkalkot Road, Solapur ("factory premises"), and to appoint Security Guards in relation thereto. In the alternative, it is prayed that the Official Liquidator be allowed to take physical possession of the factory premises.

2. Mr. Shetye, learned counsel appearing on behalf of the Ex-Directors, at the outset submitted that no reliefs in this OLR can be granted in view of the fact that the Company (in Liqn.) [M/s Lifeline Industries Ltd.] has filed a reference before the BIFR and which is pending. He submitted that there is a complete bar by virtue of section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA, 1985") from proceeding with the present OLR or for that matter, any further proceedings in winding up.

3. On the other hand, Ms. Nupur Awasthi, appearing on behalf of ARCIL stated that the debts owed by the Company (in Liqn.) to IOB have been assigned in favour of ARCIL pursuant to a Deed of Assignment dated 12 November, 2014 and which was subsequently registered on 23 January, 2015. A reference, on behalf of the Company (in Liqn.), was filed before the BIFR only thereafter on 21 November, 2015. Looking to these facts, Ms. Awasthi on behalf of ARCIL as well as Ms. Jane Cox appearing on behalf of the workers, submitted that by virtue of the 2nd proviso to section 15(1) of SICA 1985, there was a complete bar on the Company (in Liqn.) from approaching the BIFR. They, therefore, submitted that the proceedings before the BIFR are non-est in the eyes of law, and therefore, no protection can be claimed under section 22 of SICA, 1985. To support this argument, both counsel placed reliance on a decision of a Division Bench of this Court in the case of Paper Prints (India) Pvt. Ltd. v. Phoenix ARC Pvt. Ltd. (2012) 6 Mah L.J 427 : (2013) 2 Bom CR 371 as well as my decision in the case of ICICI Bank Ltd. v. S. Kumars Nationwide Ltd. Company Petition No. 511 of 2014 and other connected Petitions decided on 1 July, 2016. Relying upon the aforesaid two decisions, and the 2nd proviso to section 15(1) of SICA, 1985, the learned Counsel contended that there was no bar under section 22 of SICA, 1985 to proceed with the present OLR.

4. I have heard the learned Counsel for the parties at length and perused the papers and proceedings in this OLR. As far as the objection raised by Mr. Shetye that this OLR cannot proceed by virtue of the fact that the Company (in Liqn) is before the BIFR, I find the same to be without any substance. The facts of the present case clearly disclose that the debt owed by the Company (in Liqn) to IOB was assigned in favour of ARCIL on 12 November, 2014 and which Deed of Assignment was even registered on 23 January, 2015. The reference of the Company (in Liqn) was filed before the BIFR only thereafter on 21 November, 2015. The 2nd proviso to section 15(1) of SICA 1985, clearly stipulates that no reference shall be made to the BIFR after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act"), where financial assets have been acquired by any securitisation company or reconstruction company under sub-section 1 of section 5 of the SARFAESI Act. The 2nd proviso to section 15(1) of SICA, 1985 reads thus:

"Provided further that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where financial assets have been acquired by any securitisation company or reconstruction company under sub-section (1) of Section 5 of that Act:"

5. Incidentally, this proviso along with the 3rd proviso were inserted into section 15 of SICA, 1985 by section 41 of the SARFAESI Act. As can be seen from the said provision, once the debt has been assigned to a securitisation or reconstruction company, there is a complete bar from filing a reference before the BIFR. In the facts of the present case, two things are undisputed:-

(i) Firstly, the debt owed by the Company (in Liqn.) to IOB has been assigned in favour of ARCIL, which is admittedly a securitisation or reconstruction company as contemplated under the provisions of the SARFAESI Act; and

(ii) This assignment in favour of ARCIL was much prior in point of time to the reference filed on behalf of the Company (in Liqn) before the BIFR.

6. This being the factual scenario, the bar under the 2nd proviso to section 15(1) of SICA 1985, would clearly come into play and no reference could be filed before the BIFR on behalf of the Company (in Liqn.). Consequently, any reference so filed, would be in the teeth of this statutory provision [namely the 2nd proviso to section 15(1) of the SICA, 1985], and would therefore be non-est in the eyes of law. The protection as contemplated under section 22 of SICA 1985, would get attracted only if a valid reference has been made before the BIFR. If no reference in law could have been filed before the BIFR, the question of claiming protection under section 22 of SICA, 1985 cannot and does not arise.

7. This issue is no longer res-integra and has been considered by a Division Bench of this Court in the case of Paper Prints (India) Pvt. Ltd. (2012) 6 Mah L J 427 : (2013) 2 Bom CR 371. The facts of this case would disclose that DBS Bank Ltd. had granted an overdraft facility in the sum of Rs. 2.50 Crores to Paper Prints (India) Pvt. Ltd., in terms of which, financial facilities were extended by the Bank. Since there were defaults in making payment, the Bank issued a demand notice calling upon Paper Prints (India) Pvt. Ltd. to pay its dues. Since, Paper Prints (India) Pvt. Ltd. failed to comply, the Bank moved the Debt Recovery Tribunal ("DRT") for recovery of an amount of Rs. 2.46 Crores together with interest. Thereafter, by a Deed of Assignment dated 9 December, 2009, DBS Bank Ltd. assigned its debt in favour of Phoenix ARC Pvt. Ltd. (which is an ARC), whereas the reference to the BIFR was made by Paper Prints (India) Pvt. Ltd. only on 26 November, 2010. In these circumstances, the Division Bench held that in view of the specific and unambiguous language of the 2nd proviso to section 15(1) of the SICA 1985, the reference filed by Paper Prints (India) Pvt. Ltd. was not maintainable. The relevant portion of the said decision reads thus:

"6. The submission of the Appellant is that the Respondent is an unsecured creditor and that consequently the reference under the SICA, 1985 will not abate unless secured creditors representing three-fourths in value of the amount outstanding have taken measures to recover their secured debt under section

13(4).

7. There is no merit in the submission. The first proviso to section 15(1) of the SICA, 1985 as introduced by the provisions of the Securitisation Act applies specifically to a situation where financial assets have been acquired by any securitisation company or by a reconstruction company under sub-section (1) of section 5 of the Securitisation Act. The second proviso applies to a situation where a reference is pending before the BIFR after the commencement of the Securitisation Act. The second proviso provides the eventuality in which the reference would abate. That eventuality is where the secured creditors representing not less than three-fourth in value of the amount outstanding against the financial assistance disbursed to the borrowers have taken measures under section 13(4).

8. The first and second proviso to sub-section (1) of section 15 of the SICA, 1985 operate in different fields. The first proviso is a specific provision made in relation to a securitisation company or reconstruction company, which has acquired financial assets after the commencement of the Securitisation Act, 2002 under section 5(1). The expression "financial asset" is defined in section 2(1) as follows:

"(1) "financial asset" means debt or receivables and includes--

- (i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or
- (ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or
- (iii) a mortgage, charge, hypothecation or pledge of movable property; or
- (iv) any right or interest in the security, whether full or part underlying such debt or receivables; or
- (v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or
- (vi) any financial assistance."

Sub-clause (i) of clause (1) includes a claim to any debt or receivables whether secured or unsecured. Therefore, the intent of Parliament when it introduced the two amendments to section 15(1) is clear. A special provision has been made in case of securitisation and reconstruction companies, where a financial asset within the meaning of section 2(1) has been acquired after the enactment of the Securitisation Act of 2002. In such a case, no reference can lie before the BIFR. The second proviso in contradistinction applies to a situation where a reference has been made validly. Such a reference can abate where measures under section 13(4) have been taken by the secured creditors representing not less than three-fourths in value of the amount outstanding against financial assistance disbursed to the borrower. The first proviso does not contain any

reference to a secured creditor at all. It refers to the acquisition of a financial asset by a securitisation or reconstruction company which as noted earlier includes among other things a debt or receivables whether secured or unsecured. As a matter of fact, it may be noted that an express provision has been made in sub-section (4) of section 5 of the Securitisation Act in respect of suits, appeals or other proceedings which are pending on the date of the acquisition of the financial asset. Section 5(4) reads as follows:

"(4) If, on the date of acquisition of financial asset under sub-section (1), any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to sub-section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the securitisation company or reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the securitisation company or reconstruction company, as the case may be."

9. In the present case, the order of the learned Single Judge admitting the Company Petition for winding up was passed on 21 October, 2010. Prior thereto on 9 December, 2009 the Respondent had acquired the financial assets in question being the debts and receivables of DBS Bank Ltd. under section 5(1) of the Securitisation Act. The reference to the BIFR was made on 26 November, 2010. Clearly in view of the specific language of the first proviso to section 15(1) of the SICA, 1985, the reference was not maintainable.

10. For these reasons we do not find any merit in the contention of the Appellant based on the provisions of section 22 of the SICA, 1985."

(emphasis supplied)

8. I must mention here that reference to the 1st proviso to section 15(1) of SICA, 1985 in the aforesaid decision is factually incorrect and should be read as the 2nd proviso. The 1st proviso to section 15(1) inter alia stipulates that if the Board of Directors had sufficient reasons, even before the finalisation of the duly audited accounts of the company, to form the opinion that the company had become a sick industrial company, the Board of Directors had to, within sixty days after it has formed such opinion, make a reference to the BIFR for determination of the measures which ought to be adopted with respect to such company. I must also mention here that the decision of this Court in Paper Prints (India) Pvt. Ltd. (2012) 6 Mah L J 427 : (2013) 2 Bom CR 371 was challenged before the Supreme Court by filing a Special Leave Petition, which was dismissed on 9 January, 2013.

9. Following the decision of the Division Bench of this Court in Paper Prints (India) Pvt. Ltd. (2012) 6 Mah L.J 427 : (2013) 2 Bom CR 371 as well as considering the judgment of the Delhi High Court in the case of Asset

Reconstruction Company India Pvt. Ltd. v. Shamken Spinners Ltd. & Ors. AIR 2011 Delhi 17 and another decision of the Andhra Pradesh High Court in the case of M/s SVPCL Ltd. v. State Bank of India and Anr. 2015 SCC OnLine Hyd 111 : (2015) 191 Comp Cases 214 (AP). I have, in my decision in the case of ICICI Bank Ltd. v. S. Kumars Nationwide Ltd. Company Petition No. 511 of 2014 and other connected Petitions decided on 1 July, 2016 considered the law on this subject and thereafter held that a reference cannot be filed by a company before the BIFR after its debts or part thereof, have been assigned in favour of a securitisation or reconstruction company under section 5(1) of the SARFAESI Act.

10. In view of the law laid down by this court, I find considerable force in the contentions canvassed by Ms. Cox as well as Ms. Awasthi. In the facts of the present case also, the debts owed by the Company (in Liqn.) to IOB have been assigned to ARCIL [which admittedly is an ARC] long before the reference [on behalf of the Company (in Liqn.)] was filed before the BIFR. This being the factual scenario, as per the 2nd proviso to section 15(1) of SICA, 1985, the reference itself was not maintainable and non-est in the eyes of law. Consequently, there is no question of the Company (in Liqn.) and/or its Ex-Directors contending that the Company (in Liqn.) gets protection under section 22 of SICA, 1985. In view of this clear enunciation of the law, I have no hesitation in rejecting the argument of Mr. Shetye that this OLR cannot proceed because the Company (in Liqn.) is before the BIFR.

11. As far as the prayers in the OLR are concerned, Mr. Shetye points out that as far as the advertisement charges of Rs. 25,749/- are concerned [prayer clause (a)], the said directions have already been complied with. The representative of the Official Liquidator who is present in Court today, has also confirmed this fact. In this view of the matter, no directions in this regard are necessary save and except that the Official Liquidator is directed to pay the charges of the advertising agency out of the sum of Rs. 25,749/- already deposited with the Official Liquidator.

12. In addition to the above directions, the Official Liquidator has also sought a direction against IOB to take the physical possession of the factory premises and appoint security guards for the same [prayer clause (b)]. Ms Awasthi, appearing on behalf of ARCIL states that symbolic possession of the factory premises was taken by IOB and thereafter IOB also made an application under section 14 of the SARFAESI Act for the purposes of taking physical possession. This application under section 14 of the SARFAESI Act was allowed by the Magistrate vide his order dated 29 November, 2011 and appointed the authorised officer of IOB to take the physical possession of the factory premises. Thereafter, Mr. Nikumbh Kanakiya and others filed a Securitisation Application No. 111 of 2011 before the DRT-III challenging the actions initiated by IOB. Though, initially the DRT has passed an interim injunction restraining IOB from proceeding under the SARFAESI Act, on 8 December, 2012, the said SA was dismissed for default. Thereafter, IOB has assigned the debts owed by the Company (in Liqn.), in

favour of ARCIL. ARCIL is in the process of amending/modifying the order passed by the Magistrate on 29 November, 2011 for taking physical possession of the factory premises in the name of ARCIL instead of IOB. This Application is still pending.

13. Considering that IOB had already taken steps under the SARFAESI Act for taking possession of the factory premises, and even ARCIL has now taken the steps in that regard, the directions sought in prayer clause (b) of the OLR are rendered infructuous.

14. It is made clear that considering the fact that the Company has already been ordered to be wound up and the Official Liquidator has already been appointed, there is no question of the Company and/or its Ex-Directors carrying on its business after the date of the winding up order.

15. The OLR is disposed of in the aforesaid terms.