
(2016) 10 DEL CK 0115

In the Delhi High Court

Case No : W.P.(C) No. 8726 of 2016 and C. Ms No.35776-77 of 2016

M/s Mekaster Engineering Ltd.

APPELLANT

Vs

IDBI Bank Limited

RESPONDENT

Date of Decision : 03-10-2016

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(4), Section 35, Section 37
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1), Section 16, Section 17

Citation : (2017) 2 ADDelhi 453 : (2017) 200 CompCas 316

Hon'ble Judges : Ms. Hima Kohli, J.

Bench : Single Bench

Advocate : Mr. Muneesh Malhotra with Mr. Rituraj Shahi, Advocates, for the Petitioner; Mr. Sanjay Bhatt, Advocate, for the Respondent No. 1; Mr. Arun Aggarwal, Advocate, for the Respondent No. 2/Bank of Baroda; Mr. Karan Khanna and Ms. Asmita Kumar, Advocates, for the Respondent No. 3/IDBI Bank.

Final Decision : Dismissed

Judgement

Ms. Hima Kohli, J. - The present petition has been filed by the petitioner/company praying inter alia for quashing the e-auction Sale Notice dated 28.9.2016, published by the respondents for auctioning its properties attached pursuant to an order passed under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Act").

2. Though notice has not been issued on the present petition, appearance is entered on behalf of the respondents No.1/IDBI Bank, respondent No.2/Bank of Baroda and respondent No.3/Indian Overseas Bank.

3. At the outset, learned counsels for the respondents state that they do not wish to file replies in opposition to the present petition and are ready to address arguments straight away.

4. Both sides have been heard at some length. It is considered expedient to recapitulate the relevant dates and sequence of events before adverting to arguments advanced by learned counsels for the parties.

5. The petitioner/company had approached the respondents/Banks for financial support and the respondents had agreed to create a Consortium for the said purpose and had provided several credit facilities to it. It is the case of the petitioner/company that due to paucity of funds, the working of the company became difficult and as a result, its assets got eroded and the accumulated losses exceeded the net worth of the company.

6. On 31.3.2014, the respondent No.2, which is the lead Bank of the Consortium, declared the petitioner's account as an NPA, followed by similar notices issued by the respondents No.1 and 3/Banks. On 8.7.2014, a notice was issued to the petitioner by the respondent No.2 under Section 13(2) of the Act calling upon it to discharge its liabilities within 60 days from the date of receipt of the said notice. Instead of taking appropriate action within the prescribed period of 60 days reckoned from the date of issuance of the notice by the respondent No.2, which would have expired on 06.9.2014, the petitioner chose to give a reply only on 4.2.2015. Since the petitioner failed to respond to the notice dated 08.7.2014 issued by the respondent No.2 within the prescribed timeline, the said respondent proceeded to initiate steps against it under Section 13(4) of the Act on 25.9.2014. The respondent No.2 had also rejoined to the petitioner vide letter dated 24.2.2015.

7. It is the contention of the counsels for the respondents that instead of invoking the provisions of Section 17 of the Act, which provides a right of appeal to a person aggrieved by any of the measures referred to under Section 13(4) of the Act, as have been taken by the respondents, by submitting an application before the DRT, the petitioner had approached the Board for Industrial and Financial Reconstruction (BIFR) under Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (in short "SICA"). The said reference was registered on 6.1.2016. Thereafter, on 23.3.2016, the petitioner had approached the respondent No.2 offering a One Time Settlement of Rs.21.50 Crores. The said offer was accepted by the respondents on 28.3.2016 with a clear understanding that the petitioner would pay the sum of Rs.21.50 Crores by 30.6.2016.

8. It is an undisputed position that the petitioner had handed over a cheque for the aforesaid amount to the respondents, which on presentation was dishonoured on 9.8.2016. In the meantime, the respondents had taken steps to take over the possession of the secured assets of the petitioner as per the procedure prescribed under the Act. On 28.4.2016, the respondents invoked the provisions of Section 14 of the Act by approaching the District Magistrate for assistance.

9. Mr. Malhotra, learned counsel appearing for the petitioner/company refers to

the order dated 14.7.2016 passed by the BIFR to contend that in the course of the hearing held before the BIFR, the respondent No.2 was directed to file an application for abatement of the reference of the company and the case was adjourned to 14.9.2016. On 14.9.2016, the matter could not be taken up as there is a vacancy in the post of Chairman and Member of the BIFR and no fresh Bench has been constituted so far.

10. Learned counsel for the petitioner/company argues that once the respondent No.2 had filed an application before the BIFR for abatement of the reference, it is barred from taking any steps for conducting the auction till the said application is decided one way or the other. He also relies on the proviso to Section 15 of the SICA to urge that a decision has to be taken by the appropriate forum, namely BIFR, as to whether a reference stands abated on the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the petitioner and till such an adjudication is done, the respondents cannot proceed to auction the secured assets of the petitioner. He also asserts that the respondents collectively do not cross the threshold of three-fourth of the value of the secured creditors for them to invoke the proviso to Section 15 of SICA.

11. The aforesaid submission is however vehemently disputed by the counsels for the respondents who draw the attention of the Court to Annexure P-7 enclosed with the petition, which is a copy of "Form-A" submitted by the petitioner before BIFR, that names only the three respondents herein in column 17(A) that requires an applicant to furnish the names and addresses of the concerned Banks who have extended credit facilities. The outstanding amounts payable by the petitioner to the respondents No.1 and 3 have been furnished in column 18 of the said Form as Rs.32.40 lacs and Rs.11.20 lacs (approx.). However, the amount payable by the petitioner to the respondent No.2 does not find mention in the said column. To urge that it is an undisputed position that there are no other secured creditors of the petitioner company except for respondents No.1,2 and 3, counsels for the respondents also refer to the order dated 14.7.2016 passed by BIFR, particularly para 2.0 thereof which specifically mentions that there are only three secured creditors of the petitioner company.

12. Learned counsel for the petitioner has not been able to rebut the submissions made by the other side to the effect that apart from the respondents, there are other secured creditors of the petitioner/company. Reference made by learned counsel to column 21 of Form-A (Annexure P-7) to contend that there are other contingent liabilities including guarantees, cannot detract from the submission made by the other side and noted here in above as admittedly, only an amount of Rs.59.00 lacs (approx.) has been mentioned in the said column towards contingent liabilities owed to various parties named therein, as against the claim of the respondent No.1 for Rs.9,48,77,404/-, respondent No.2 to the tune of Rs.13,61,32,99.01, respondent No.3 for a sum of Rs.12,72,62,040.35.

13. Reliance placed by learned counsel for the petitioner on the decision of the

Division Bench of this Court in the case of Global Infrastructure Technology Ltd. v. Kotak Mahindra Bank Ltd. & Ors. reported at 209 (2014) DLT 468 to urge that it is not for the respondents on their own to conclude as to whether they represent three-fourth in value of the financial assistance in respect of the financial assets, without taking recourse to any tribunal or court, would also not be of any assistance as nowhere in the writ petition has it been averred by the petitioner that apart from the three respondents impleaded herein, there are other secured creditors. Nor has the petitioner stated anywhere that the respondents collectively do not represent three-fourth in value of the financial assistance in respect of the financial assets of the petitioner.

14. Learned counsels for the respondents point out that the decision in the case M/s Global Infrastructure Technology Ltd. (supra) referred to by counsel for the petitioner does not hold good as it was challenged before the Supreme Court in Civil Appeal No.3076/2016 and vide order dated 18.3.2016, the same was set aside.

15. Moreover, learned counsels for the respondents have fruitfully referred to a recent decision of the Supreme Court on the aforesaid aspect in the case of Madras Petrochem Limited & Anr. v. Board for Industrial and Financial Reconstruction & Ors., reported as (2016) 4 SCC 1 where, after discussing a gamut of case law and judicial pronouncements on the interplay between the SICA and the Securitization Act, the Supreme Court had summed up its observations in the following words :-

"57. The resultant position may be stated thus :

1. Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 will continue to apply in the case of unsecured creditors seeking to recover their debts from a sick industrial company. This is for the reason that the Sick Industrial Companies (Special Provisions) Act, 1985 overrides the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

2. Where a secured creditor of a sick industrial company seeks to recover its debt in the manner provided by Section 13 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, such secured creditor may realise such secured debt under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, such secured creditor may realise such secured debt under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, notwithstanding the provisions of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985.

3. In a situation where there are more than one secured creditor of a sick industrial company or it has been jointly financed by secured creditors, and at least 60% of such secured creditors in value of the amount outstanding as on a record date do not agree upon exercise of the right to realise their security under the Securitisation and Reconstruction of Financial Assets and Enforcement of

Security Interest Act, 2002 Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 will continue to have full play.

4. Where, under Section 13(9) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, in the case of a sick industrial company having more than one secured creditor or being jointly financed by secured creditors representing 60% or more in value of the amount outstanding as on a record date wish to exercise their rights to enforce their security under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 Section 22 of the Sick Industrial Companies (Special Provisions), Act, 1985, being inconsistent with the exercise of such rights, will have no play."

16. The above decision has made it clear that notwithstanding the provisions of Section 22 of the SICA, the secured creditor is entitled to recover its debts in the manner contemplated in Section 13(2) of the Securitization Act. The submission of the learned counsel for the petitioner that the grievance of the petitioner is not with regard to the manner of seeking recovery of the debt, but the forum that the respondents ought to have approached for a decision as to whether they collectively constitute not less than three-fourth in value of the financial assistance in respect of the financial assets of the petitioner, cannot be a ground to assail the impugned Sale Notice issued by the respondents for auctioning the properties of the petitioner attached under the Securitization Act.

17. In view of the fact the petitioner has nowhere asserted in the present petition that the respondents collectively do not cross the three-fourth threshold in the value of the amount outstanding against the financial assistance disbursed to it and nor has it been able to demonstrate the said position by referring to any documents in this regard, this court declines to quash the impugned Sale Notice dated 28.9.2016.

18. Accordingly, the present petition is dismissed in limine as being devoid of merits along with the pending applications.