

(2016) 11 MAD CK 0063
In the Madras High Court
Case No : W.P. MD. No.18291 of 2015

M/s. Veesons Energy Systems Pvt., Ltd. APPELLANT
Vs
Assistant General Manager, State Bank of India RESPONDENT

Date of Decision : 17-11-2016

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1), Section 22

Citation : (2017) 2 BC 556 : (2017) 1 LW 207 : (2017) 1 NIJ 766

Hon'ble Judges : Nooty Ramamohana Rao and S.S. Sundar, JJ.

Bench : Division Bench

Advocate : Mr. AR.L. Sundaresan, Senior Counsel for M/s. S. Anuradha Balaji, Advocate, for the Petitioner; Mr. E. Omprakash for Mr. V. Meenakshisundaram, Advocates, for the Respondents

Final Decision : Disposed Off

Judgement

Nooty.Ramamohana Rao, J.—The Writ Petitioner is an industrial machinery manufacturing company. It seeks to challenge the validity of the notice issued by the respondents under Sub-Section 2 of Section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (for short, referred to as SARFAESI Act henceforth).

2. According to the petitioner, it had been manufacturing engineering machinery, particularly, process boilers and industrial power boilers. It has earned name for itself for the precision and skill employed by it in making boilers as well as for the quality of the products manufactured. It has, in fact, started earning foreign exchange to the country by exporting the machinery manufactured by it to Thailand. It has reached a peak turnover of Rs.210 crores by 2010-2011. During the year 2010-2011, it has entered into an export order for supplying process boilers to a sugar industry in Thailand. It has erroneously considered that EURO is more stable than US\$ and hence negotiated for payment in Euros.

Unfortunately, the economic conditions in Europe have started taking a downward slide resulting in the Euro losing much of its value. As a consequence of fluctuation of value of foreign currency, the petitioner company, it is, averred, has sustained losses. The turnover has just fallen to Rs.98 crores. But, still, it has a 140 crore worth export order in its hands. But, unfortunately, because of the accumulation of losses for the past over three years, the company has become a sick company.

3. In this backdrop, the Writ Petitioner has challenged the notice served under Sub-section 2 of Section 13 of the SARFAESI Act. According to the writ petitioner, the petitioner-company has filed for a reconstruction arrangement before Board for Industrial and Financial Reconstruction (BIFR). It was registered. In that view of the matter, the action initiated by the respondent bank has to be withheld.

4. Heard Sri AR.L. Sunderesan, learned Senior Counsel appearing for the petitioner, and Sri E.Omprakash, learned counsel appearing for the respondent bank.

5. It is urged by Sri Sunderesan that apart from State Bank of India, the writ petitioner had availed benefit of financial arrangements with IDBI. Put together, the liability of the writ petitioner company to both these banks is to the tune of little more than 100 Crores, out of which nearly 64% to 68% is due and payable to State Bank of India, while the remaining is due and payable to IDBI. Thus, to the State Bank of India alone, the total dues payable are less than 75% of the outstanding liabilities. On the strength and basis of the financial arrangement made by the petitioner with SBI, the State Bank of India alone could not have initiated the recovery proceedings without the express consent of IDBI, is the contention that is canvassed before this Court.

6. It is contended that the petitioner company has filed a reference before BIFR seeking for rehabilitation of the Sick Industrial Unit and since the reference was taken on file as Case No.129 of 2015, Section 22 of SICA would come to the rescue of the Writ Petitioner company and hence the proceedings initiated under SARFAESI Act had to be withheld.

7. In the counter affidavit filed on behalf of State Bank of India by its Assistant General Manager/Authorised Officer (Stressed Assets Management Branch), Coimbatore, the financial assistance extended to the writ petitioner company and the resultant default committed by it in properly recycling the debt has been brought out in detail in the following manner :

"6. I further submit that, as far as the factual background of this case, the writ petitioner company (Vecons Energy Systems Pvt.Ltd.) was established in the year 1981 and the company was a private limited company which was originally manufacturing package type boilers and now manufacturing all types of boilers. The boilers manufactured by the writ petitioner company are used in Thermal Power Plants, Paper Mills, etc. In the year 2010, the writ petitioner company incurring loss due to various reasons which includes the delay in execution of

orders. The writ petitioner company faced severe liquidity problems. As a part of rehabilitation, our Bank helped the writ petitioner and the existing term loan was re-phased and the irregular portion in the cash credit account was carved out into working capital loan limit of Rs.8.00 crores was sanctioned by our Bank on 23-12-2013, that apart our Bank also sanctioned (WCDL) of Rs.3.00 crores to make the working capital requirements. These are all the measures taken by our Bank to rehabilitate the writ petitioner company and as such the allegations as against our Bank made in the writ affidavit are all false and false to the knowledge of the Managing Director and other Directors of the writ petitioner company.

7. I further submit that, the writ petitioner company was unable to cope up with the crisis and again faced many liquidity problems and they sold a non core asset and paid sum of Rs.2.5 crore to reduce the irregularity, but the accounts are very irregular since April 2015 and becoming NPA on 26-07-2015. The cash credit account was irregular on a continuous basis and as per RBI Norms, the account was classified as NPA. It is purely as per RBI Master Circular as on 01-07-2015.

"A working capital borrowal account will become NPA if such irregular drawings are permitted in the account for a continuous period of 90 days even though the unit may be working or the borrower's financial position is satisfactory.

(Para 4.2.4 (1) of RBI Master Circular as on 01.07.2015)

If one account is stamped as NPA, all the other accounts are also to be considered as NPA".

Hence, the Demand Notice under Section 13 (2) of SARFAESI Act is in accordance with law.

8. I further submit that, the contention of the writ petitioner company that there is only temporary deficiency due to cash collection is not correct; the account was irregular for more than 250 days in a financial year. The liquidity problem due to invocation of Bank Guarantee by two of their customers could have been contained if the company infused equity of Rs. 20.00 crores before 31.03.2015 as stipulated in our sanction, dated 27.01.2015. It is not correct on the part of the writ petitioner to allege the Bank for the losses. The company have failed in the collection of receivables and not infused the promoters equity as stipulated by the bank. The company has not formulated any strategic approach to ensure receivable collections and hence LC was issued by the bank after taking approval from the sanctioning authority. Our Bank also helped the petitioner company by restructuring the loan by sanctioning Rs.3.00 crores as WCDL and also the clean portion in the working capital was also carved out as WCTL. Our Bank also allowed gestation period for 24 months for WCTL and 12 months for WCDL and thus there are no repayment obligations for the above said period. In these circumstances, the claim of the writ petitioner company is incorrect and declaration of NPA by our Bank is in accordance with law.

9. I further submit that, as on March,2015, the entire network of the petitioner company is almost eroded and the company is "D" rated company (Default category) and the petitioner company has agreed that the commitment under LC will be honoured on due date, but LC dues to an extent of Rs.4.94 cores was not met and the same was irregular which resulted in NPS status. Our Bank have restructured the credit facilities as per request by the writ petitioner and given long gestation period of 24 months now it is not correct to allege the Bank after accepting the terms of the restructure proposal."

8. The Supreme Court, in *Madras Petrochemical Limited and Another v. BIFR and Others*, had an occasion to consider the following two questions :

(1) Whether the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 prevails over the Sick Industrial Companies (Special Provisions) Act, 1985 ? ; and

(2) Whether the expression "where a reference is pending" in Section 15 (1) proviso 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 would include all proceedings before the BIFR or only proceedings at the initial reference stage ? After analysing the provisions of SICA, 1985, DRT Act, 1993, and SARFAESI Act, 2002, the Supreme Court concluded the first issue in paragraph 34 as under :

"34. We have now to undertake an analysis of the Acts in question. The first thing to be noticed is the difference between Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and Section 34 of the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993. Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 does not include the Sick Industrial Companies (Special Provisions) Act, 1985 unlike Section 34(2) of the Recovery of Debts Due To Banks and Financial Institutions Act, 1993. Section 37 of the Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 states that the said Act shall be in addition to and not in derogation of four Acts, namely, the Companies Act, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992 and the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993. It is clear that the first three Acts deal with securities generally and the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 deals with recovery of debts due to banks and financial institutions. Interestingly, Section 41 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 makes amendments in three Acts - the Companies Act, the Securities Contracts (Regulation) Act, 1956, and the Sick Industrial Companies (Special Provisions) Act, 1985. It is of great significance that only the first two Acts are included in Section 37 and not the third i.e. the Sick Industrial Companies (Special Provisions) Act, 1985. This is for the obvious reason that the framers of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 intended that

the Sick Industrial Companies (Special Provisions) Act, 1985 be covered by the non obstante clause contained in Section 35, and not by the exception thereto carved out by Section 37. Further, whereas the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is expressly mentioned in Section 37, the Sick Industrial Companies (Special Provisions) Act, 1985 is not, making the above position further clear. And this is in stark contrast, as has been stated above, to Section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, which expressly included the Sick Industrial Companies (Special Provisions) Act, 1985. The new legislative scheme qua recovery of debts contained in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has therefore to be given precedence over the Sick Industrial Companies (Special Provisions) Act, 1985, unlike the old scheme for recovery of debts contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993".

The second question has been answered in paragraphs 41 and 50 as under :

"41. It will thus be seen that notwithstanding the non obstante clauses in Section 22(1) and (4), read with Section 32, Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 will have to give way to the measures taken under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 more particularly referred to in Section 13 of the said Act, and that this being the case, the sale notices issued both in 2003 and 2013 could continue without in any manner being thwarted by Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985.

50..... A fourth instance of abatement is provided by the third proviso to Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. And that is that a reference which is pending in the sense understood herein above shall abate if the secured creditors of not less than 75% in value of the amount outstanding against the financial assistance disbursed to the borrower, have taken measures to recover secured debts under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. It is clear that the third proviso to Section 15(1) seeks to strike a balance between getting a sick industrial company out of the woods and secured creditors being able to recover the debt owed to them by such company. The legislature has thought it fit to annul all proceedings before the BIFR only when at least 75% of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors have taken the measures listed in Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The balance is therefore struck by the figure of "not less than 75%". The legislature has inserted this provision so that, if 75% or more of the secured creditors get together to take measures under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, they will not be thwarted by the provisions of Section 22 of Sick Industrial Companies (Special

Provisions) Act, 1985, and it will not be necessary for them to obtain BIFR permission before taking any such measures. This construction of the third proviso to Section 15(1) is in keeping with the march of events post 2002, when the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 came to be enacted pursuant to various committee reports, and for the reasons outlined herein above."

Ultimately, in Paragraph No.54 of the said Judgment, the following three conclusions, which have a very important bearing upon the present case, are arrived at :

(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, 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 per cent 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 percent 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."

9. What is now challenged in this Writ Petition is, the notice issued under Sub-section (2) of Section 13 of the SARFAESI Act by the respondent/State Bank of India, on 04.08.2015. Section 13 of the SARFAESI Act is a very salutary provision, bringing about an altogether new approach in the matter of enforcement of security interest by the secured creditors. Sub-section (1) virtually created a right in the hands of the secured creditor to enforce its security interest without the necessity to solicit the intervention of a Court or a Tribunal. This special feature enables every secured creditor to follow the special procedure prescribed under Section 13 instead of falling back upon the time consuming process of recovery of money by adopting the normal course of

approaching the Civil Court or Debts Recovery Tribunal. Sub-section (2) of Section 13 is virtually the threshold for the special procedure to be initiated. By virtue of Subsection (2) of Section 13, where any borrower commits any default in repayment of the secured debt and his account in respect of such debt is classified by the secured creditor as a non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice. Thus, a notice in writing is liable to be drawn and served on the defaulter-borrower for his default of repayment of the secured debt. In case the debtor makes payment as demanded within sixty days" period, the special follow-up procedure contemplated by Section 13 cannot be followed thereafter. Similarly, if a borrower enters into a fresh arrangement with the secured creditor, then also, the follow-up action of taking measures contemplated by Section 13 would not arise. Only in the event that no payment is made or no fresh or further arrangement is made with the secured creditor within the sixty days" period provided in the notice, the follow-up action pursuant to the notice served under Sub-section (2) of Section 13 of the SARFAESI Act can be taken. Therefore, at this threshold stage, mounting challenge to the notice drawn under Sub-section (2) of Section 13 of the SARFAESI Act is clearly unsustainable. Without first issuing the notice under Sub-section (2) of Section 13, the measures provided for in Sub-section, which are in effect and substance, securitisation measures cannot be initiated.

10. However, Sri AR.L.Sundaresan, learned Senior Counsel for the petitioner, has contended that as per the third proviso to Sub-section (1) of Section 15 of SICA, the reference made by the writ petitioner company before BIFR shall not abate, as the debt due to State Bank of India alone is lesser than three-fourth in value of the outstanding liability towards the secured creditors of the writ petitioner company.

11. In the counter affidavit, an assertion has been made that the writ petitioner has lodged its claim with BIFR, which is registered as case No. 129 of 2015, only on 30.09.2015, whereas the notice of demand is drawn and served on the writ petitioner on 04.08.2015. This apart, Sub-section (4) of Section 13 comes into operation only when the borrower fails to discharge his liability in full within the period specified in the notice drawn under Sub-section (2) of Section 13, which shall not be less than sixty days. At that stage only, the secured creditor can take recourse to one or more of the measures provided therein, such as taking possession of the secured asset of the borrower, including the right to transfer by way of lease, assignment or sale for realising the secured asset or taking over the management of the business of the borrower, including the right to transfer by way of lease, assignment or sale or appointing any person to manage the secured assets. Therefore, it is at the stage of adopting such measures under Sub-section (4), a concerted action of all the secured creditors may be required. In fact, Sub-section (9) of Section 13 brings this out clearly by setting forth that no secured creditor shall be entitled to exercise any or all of the rights conferred

on him under or pursuant to Sub-section (4), unless exercise of such right is agreed upon by the secured creditors representing not less than 60% in value of the amount outstanding as on the record date, and then alone, such action shall be binding on all the secured creditors. Such a provision is contemplated to avoid any overreaching by one of the secured creditors, leaving out the others behind. It is, therefore, more than clear that the stage for State Bank of India to enter into consultations with the other secured creditor(s) of the writ petitioner company, namely, IDBI, has not yet arisen. Such a measure is required to be initiated by SBI at the stage of exercising its right under Sub-section (4) of Section 13, but not at the stage of Sub-section (2) of Section 13.

(emphasis supplied)

12. As we have already noticed, since the notice of demand drawn under Sub-section (2) is only the initial step-in-aid, it may or may not necessarily lead to the further steps spelt out under Sub-section (4). It all depends upon the facts and circumstances of each case and the response of the borrower. As and when steps are taken under Sub-section (4) of Section 13, the provision contained under Sub-section (9) of Section 13 of the SARFAESI Act, and also the third proviso incorporated under Sub-section (1) of Section 15 of SICA are required to be complied with. Therefore, the contention canvassed by Sri Sundaresan, the learned Senior Counsel, is not tenable at this stage.

13. For the aforementioned reasons, this Writ Petition is devoid of any merit and it is, accordingly, dismissed with costs, quantified at Rs. 10,000/-, to be payable by the petitioner to the respondent, within a period of four weeks. The interim orders granted during the pendency of the Writ Petition stand dissolved. Consequently, the connected M.P.(MD) No.1 of 2015 and W.M.P.(MD) No. 299 of 2016 are closed.