

**(2013) 09 P&H CK 0031**

**In the Punjab And Haryana At Chandigarh**

**Case No :** Civil Writ Petition No. 13233 of 2012 (O&M)

Rita Machine (India) Ltd.

APPELLANT

Vs

Debt Recovery Appellate Tribunal and Others

RESPONDENT

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**Date of Decision :** 30-09-2013

**Acts Referred:**

**Citation :** (2014) 3 BC 81 : (2014) 173 PLR 692

**Hon'ble Judges :** Sanjay Kishan Kaul, C.J; Augustine George Masih, J

**Bench :** Division Bench

**Final Decision :** Dismissed

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## **Judgement**

Sanjay Kishan Kaul, C.J.—The petitioner before us has tried every trick of the trade and outside the trade to delay recovery proceedings on having defaulted in repayment of loan. The present proceeding is one more in this direction. The petitioner, as borrower, failed to adhere to the financial discipline resulting in recovery proceedings being initiated by the Central Bank of India, the lending bank, before the Debts Recovery Tribunal, Chandigarh as O.A. No. 680 of 2002 for recovering a sum of Rs. 4,62,68,716.97/- alongwith interest and costs. In the meantime, in view of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act; 2002 (hereinafter referred to as the "SARFESI Act") having come into force, recourse to the provisions of Section 13 of the said Act was taken by the bank. Post issuance of notice u/s 13(2) of the said Act, objections being filed and the notice being issued u/s 13(4) of the said Act, the petitioner filed S.A. No. 112 of 2010 u/s 17 of the said Act.

2. In the SA, on 18.11.2009, after hearing both the parties, it was directed that "there shall be a stay of all further proceedings of the 1st respondent under the provisions of the SARFESI Act till further orders". The reference to respondent No. 1 was to the authorized officer, Central Bank of India.

3. It appears that the Central Bank of India exasperated by the lapse of period of time in which no recovery was made against the petitioner took a conscious

business decision to assign its debts under the assignment agreement dated 29.03.2011. The SA and OA were both consolidated, as appears from the order dated 22.07.2011, from which the dispute in question starts. The petitioner alleged that the assignment deed was in violation of the order dated 18.11.2009 and filed I.A. No. 307 of 2011 in SA for action against persons and properties of persons who are guilty of disobedience of the orders of the Tribunal. Another application was filed by the International Asset Reconstruction Company Private Limited (in short "IARC Limited") in view of the assignment in its favour by the Central Bank of India seeking to step into the shoes of the bank. The petitioner also filed another application in the OA seeking dismissal of the same (where even a counter-claim had been filed) in view of the assignment of the debt without leave of the Tribunal. The Debts Recovery Tribunal dismissed the application of the IARC Limited in view of no assignment deed having been placed on record.

On the issue of whether there was any disobedience of the interim directions in the SA, it was held that the assignment deed would amount to transferring, alienating or otherwise dealing with or disposing of secured property and assets without permission of the Tribunal and, thus, there has been breach of the order. On the application filed by the petitioner in the OA, it was opined that since IARC Limited had not been substituted in the OA in place of the Central Bank of India, which had assigned the debt, the OA itself should be dismissed, while the same fate should not be for the counter-claim.

4. We are informed that in so far as the dismissal of the OA is concerned, appeal was preferred before the Debts Recovery Appellate Tribunal in which arguments stand concluded and the judgment has been reserved.

5. The IARC Limited and the Central Bank of India both preferred Miscellaneous Appeal No. 360 of 2011 arising from the order passed, in the SA holding that there had been disobedience of the orders dated 18.11.2009. This appeal was decided by the Debts Recovery Appellate Tribunal vide order dated 21.03.2012 opining that the interim order dated 18.11.2009 was in the context of the scope of Section 17(1) of the SARFESI Act under which provision the SA had been filed and, thus, was limited only to the actions contemplated u/s 13(4) of the SARFESI Act. It could not be construed to include any other proceedings other than envisaged u/s 13(4) of the said Act and the assignment of debt u/s 5 of the said Act, thus, would not fall within the purview of the interim order. It is this order which is now sought to be assailed before us by the petitioner under Article 226 of the Constitution of India.

6. We have heard learned senior counsel for the petitioner for better part of an hour and a half. Learned senior counsel endeavoured to take us through the scope of different provisions of the SARFESI Act even though we repeatedly emphasized that the scope of scrutiny of this Court would only be qua the lis before us i.e. whether there was any violation of the order dated 18.11.2009 by the Central Bank of India in its act of assignment of the debt to IARC Limited as

per the assignment deed dated 29.03.2011.

7. The substratum of the submission of learned senior counsel for the petitioner is that the IARC Limited could have acquired the debt u/s 5 of the SARFESI Act, but the bank in turn would be assigning the debt to the asset reconstruction company only in pursuance to Section 13(4) of the said Act. It is, thus, submitted that the act of assignment fell within the purview of the interim order and, thus, there had been violation of the order. Apart from this, learned senior counsel also sought to canvass before us that there have been inconsistent pleas of the Central Bank of India qua what had been done under the assignment deed. Learned senior counsel took us through the provisions of the assignment deed also, specifically, clause C of the recital, clause 1.1(K) and clause 2.2.5 to contend that there had been in fact transfer of the assets by the bank in favour of the IARC Limited. These clauses read as under:-

(C) Borrower means a person to whom a financial assistance has been extended by the assignor under any of the financing documents as listed in Schedule 1 and includes any person who has created any security interest and/or pledge to secure, including but not limited to and/or by mortgage of immovable properties as collateral securities and/or a guarantee in respect of the repayment of any financial assistance granted by the assignor to a borrower.

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1.1(K) Purchase consideration means an amount of Rs. 3,56,00,000/- (rupees three crores fifty six lakhs only) being the aggregate purchase consideration for the loans.

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2.2.5 The assignor hereby undertakes that it shall, if so required by the assignee, notify any or all the borrowers, guarantors, advocates, other lenders, statutory authorities, DRT/DRAT/High Court/BIFR/AAIFR, official liquidator, High Court/DRT receiver, insurance company, security agency and any other entity related to the borrower of the assignment of the loans, the underlying security interests, ledges and/or guarantees and all its right, title and interest in the financing documents to the assignee.

8. The second limb of submission advanced by learned senior counsel for the petitioner is that the counter-claim of the petitioner would be left unaddressed on account of clause 8 of the assignment deed which reads as under:-

8. Exclusion of Liability of assignee.-

To the extent permitted by applicable-law, the assignee does not by virtue of entering into or carrying out the terms of this agreement or purchasing the loans assume any of the financial or pecuniary obligations of the assignor under any of the financing documents. Any such obligations, duties, warranties, indemnities and liabilities of the assignor under the financing documents shall be the sole

responsibility of the assignor.

9. Learned senior counsel sought to draw strength from the judgment of the Division Bench of the Allahabad High Court in *Arunachalam Muthu Vs. State Bank of India*, to contend that even where proceedings are pending without interim orders and an assignment deed took place, the same was found non-operative, as it was felt that prior permission was necessary. We may, however, note that there is considerable factual matrix on how the borrower endeavored to settle the matter by offering certain amounts and the assignment took place for a lesser amount. Of course, learned senior counsel for the petitioner seeks to suggest that the petitioner in the present case also made such similar endeavours, though there is nothing on record to suggest that the offer of the value of the assignment deed was ever made, though there were apparently earlier offers of lesser amounts.

10. On the other hand, learned counsel for the respondent No. 2 contends that the petitioner wants to pay on its own terms and has been using pressurizing tactics by initiating one proceeding or the other including criminal proceedings towards the said objective. He further submits that the law which would govern the matter in issue was laid down by the Hon'ble Supreme Court in *ICICI Bank Limited Vs. Official Liquidator of APS Star Industries Ltd. and Others*, .

11. In respect of the aforesaid, learned counsel for the respondent No. 2 submits that the petitioner has no role to play qua the assignment of debt. He further submits that Section 5 of the SARFESI Act permits agreement inter se the bank and the Asset Reconstruction Company (ARC) in terms of Clause (b) of sub section 1 of Section 5 of the said Act. Section 13(4) of the SARFESI Act refers to only measures to be taken to recover the secured debt and, thus, is in the context of the proceedings by the bank or the ARC against the borrower.

12. Some of the relevant paragraphs of the Hon'ble Supreme Court's judgment which have been referred to before us are paras 18 to 22 which read as under:-

18. As stated above, an outstanding in the account of a borrower(s) (customer) is a debt due and payable by the borrowers) to the bank. Secondly, the bank is the owner of such debt. Such debt is an asset in the hands of the bank as a secured creditor or mortgagee or hypothecates.

The bank can always transfer its asset. Such transfer in no manner affects any right or interest of the borrower(s) (customer). Further, there is no prohibition in the BR Act, 1949 in the bank transferring its assets inter se. Even in the matter of assigning debts, it cannot be said that the banks are trading in debts, as held by the High Court(s). The assignor bank has never purchased the debt(s). It has advanced loans, against security as part of its banking business. The account of a client in the books of the bank becomes Non Performing Asset when the client fails to repay. In assigning the debts with underlying security, the bank is only transferring its asset and is not acquiring any rights of its client(s). The bank transfers its asset for a particular agreed price and is no longer entitled to

recover anything from the borrower(s). The moment ICICI Bank Ltd. transfers the debt with underlying security, the borrower(s) ceases to be the borrower(s) of the ICICI Bank Ltd. and becomes the borrower(s) of Kotak Mahindra Bank Ltd. (assignee). At this stage, we wish to once again emphasize that debts are assets of the assignor bank. The High Court(s) has erred in not appreciating that the assignor bank is only transferring its rights under a contract and its own asset, namely, the debt as also the mortgagee's rights in the mortgaged properties without in any manner affecting the rights of the borrower(s)/mortgagor(s) in the contract or in the assets. None of the clauses of the impugned Deed of Assignment transfers any obligations of the assignor towards the assignee. In the case of *Khardah Company Ltd. Vs. Raymon and Co. (India) Private Ltd.*, the Supreme Court has held that the law on the subject of assignment of a contract is well settled. An assignment of a contract might result by transfer either of the rights or by transfer of obligations thereunder. There is a well recognized distinction between the two classes of assignments. As a rule, obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. That, rights under a contract are always assignable unless the contract is personal in its nature or unless the rights are incapable of assignment, either under the law or under an agreement between the parties. A benefit under the contract can always be assigned. That, there is, in law, a clear distinction between assignment of rights under a contract by a party who has performed his obligation thereunder and an assignment of a claim for compensation which one party has against the other for breach of contract.

19. In the case of *Comdex International Ltd. v. Bank of Zambia*, (1998) Q.B. 22 (CA) the following observation which is relevant to the present case needs to be quoted:

The assignment of a debt will not be contrary to public policy solely on the grounds that the assignee has purchased the debt for a considerably discounted price or because that price is only payable after a period of credit.

Nor will the assignment be contrary to public policy simply because the assignee may make a profit on the transaction at the end of the day. If there was no prospect of a profit, Hobhouse, L.J. observed, commercial entities would never purchase debts.

20. Similarly, the following proposition in *Chitty on Contracts*, 27th edn. (1994) at para 19.027 is relevant to be noted.

It is also well established that a claim to a simple debt is assignable even if the debtor has refused to pay. The practice of assigning or "selling" debts to debt collecting agencies and credit factors could hardly be carried on if the law were otherwise.

21. In view of the above exposition of law, we find that under the impugned Deed of Assignment only the Account Receivables in the books of ICICI Bank Ltd.

has been transferred to Kotak Mahindra Bank Ltd. The obligations of ICICI Bank Ltd. towards its borrower(s) (customer) under the loan agreement secured by deed of hypothecation/mortgage have not been assigned by ICICI Bank Ltd. to the assignee bank, namely, Kotak Mahindra Bank Ltd. Hence, it cannot be said that the impugned Deed of Assignment is unsustainable in law. The obligations referred to in the impugned Deed of Assignment are the obligations, if any, of ICICI Bank Ltd. towards Kotak Mahindra Bank Ltd. (assignee) in the matter of transfer of NPAs. For example, when an Account Receivable is treated as NPA and assigned to the assignee bank, the parties have to follow certain Guidelines issued by RBI. If there is a breach of the Guidelines or statutory directions issued by RBI by Assignor in regard to transfer of NPA then the assignee bank can enforce such obligations vis-à-vis the assignor bank. It is these obligations which are referred to in the impugned Deed of Assignment.

That an Account Receivable becomes an NPA only because of the default committed by the borrower(s) who fails to repay. Lastly, it may be mentioned that the said SARFAESI Act, 2002 was enacted enabling specified SPV to buy the NPAs from banks. However, from that it does not follow that banks inter se cannot transfer their own assets. Hence the said SARFAESI Act, 2002 has no relevance in this case.

22. Before concluding, we may state that NPAs are created on account of the breaches committed by the borrower. He violates his obligation to repay the debts.

One fails to appreciate the opportunity he seeks to participate in the "Transfer of Account Receivable" from one bank to the other.

(emphasis supplied)

13. We have given our thoughtful consideration to the matter and find that the writ petition is completely meritless. We must note at the inception that this Court is exercising jurisdiction under Article 226 of the Constitution of India and not as an Appellate Forum and, thus, occasion for invocation of such a jurisdiction in the context of the statutory provisions of the SARFESI Act would only arise when there is perversity in the impugned order. We find no such perversity in the impugned order of the Debts Recovery Appellate Tribunal. Rather, the order is completely valid and legal in the context of the provisions of the said Act and the jurisdiction invoked by the petitioner u/s 17 of the SARFESI Act before the Debts Recovery Tribunal.

14. In so far as the principles which would govern such a transaction are concerned, we are unequivocally of the view that they would be completely guided by the pronouncement of the Hon'ble Supreme Court in ICICI Bank Ltd.'s case (supra) and to the extent that there are any observations contrary to the same by the Allahabad High Court, the same would be no more good law.

15. In our view, the provisions of the SARFESI Act are quite clear. Section 5

permits acquisition of rights or interest in financial assets by any securitization company or re-construction company or any bank or financial institution through the mode prescribed therein. Clause (b) to sub section (1) of section 5 of the SARFESI Act permits entering into agreement for such transfer. The petitioner is no one to question the same. In fact, if one may say, the occasion to enact the SARFESI Act arose on account of the long pendency of recovery proceedings by public financial institutions against debtors who fail to clear the dues. The bank may at times feel handicapped in the process or would not like to wait for the decision in the legal proceedings and, thus, assign debts for a lump sum to the ARC. As to what profit the ARC would make is none of the business of the petitioner as observed by the Hon'ble Supreme Court. The Hon'ble Supreme Court also noticed that NPAs are creation of the breaches committed by a borrower.

16. We are unable to appreciate the plea advanced by learned senior counsel for the petitioner that though an acquisition by the ARC takes place u/s 5, qua the same transaction, the assignment is actually taking place by the bank u/s 13(4) of the said Act as there is no other provision for the said assignment. This is a complete mis-reading of the provisions of the said Act and assignment of the debt is to be fully governed by the provisions of Section 5 of the said Act. Section 13 is only for enforcement of the security interest. In fact, it falls in chapter III which deals with enforcement of security interest and Section 13(4) envisages the action to be taken on failure of a borrower to discharge his liability within the specified time. In view of this provision of law, any application filed u/s 17(1) of the SARFESI Act arising from the action taken by the bank u/s 13(4) of the SARFESI Act would naturally be confined to the enforcement of security interest and any interim order would, thus, have to be read into that context. The Debts Recovery Tribunal had nothing to do with the issue of assignment of debt, while dealing with the application of the petitioner u/s 17(1) of the said Act as has been rightly concluded by the Debts Recovery Appellate Tribunal.

17. We are, thus, of the view that the petitioner has been unnecessarily prolonging the dispute on one pretext or the other and the pleas on which the present writ petition has been filed are completely misconceived. We had made it clear to the learned senior counsel for the petitioner at the inception itself that we are actually not even required to examine the validity of the assignment in the present proceedings as the issue is one of the alleged violation of the interim orders of the Debts Recovery Tribunal. As to what would happen to the counter-claim; against whom it would proceed, and the manner of such proceedings are the aspects the petitioner should urge before the appropriate forum, but certainly not in the present proceeding. But our plea was to no avail! We, thus, dismiss the writ petition and impose costs quantified at Rs. 50,000/- on the petitioner payable to respondents No. 2 and 3 in equal share.

Sd/- Augustine George Masih, J.