

(2016) 08 KL CK 0080

In the High Court Of Kerala

Case No : C.A. Nos. 535 and 212 of 2016 in C.P. No. 23 of 2010

SBT, Kottayam

APPELLANT

Vs

Coods Agro Pvt. Ltd.

RESPONDENT

Date of Decision : 31-08-2016

Acts Referred:

Companies Act, 1956 — Section 529, Section 529A
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13, Section 17, Section 18

Citation : (2017) 1 DRTC 111

Hon'ble Judges : Alexander Thomas, J.

Bench : Single Bench

Advocate : Mr. Sathish Ninan, Mr. Santhosh Mathew and Mr. Arun Thomas and Mr. Jennis Stephen, Advocates, for the Appellant; Mr. Anil Sivaraman and Mr. K. Moni (Counsel for Official Liquidator), Advocates, for the Respondents

Final Decision : Disposed Off

Judgement

Alexander Thomas, J. - The aforecaptioned CA No. 535/2016 has been filed by the Appellant, who is the secured creditor (State Bank of Travancore) seeking orders of this Court for confirmation of the sale pursuant to the auction made by the said secured creditor and the prayer for such confirmation is made in view of Annexure-A8 letter dated 9th May, 2016 whereby the Official Liquidator has instructed the Applicant/secured creditors move this Court for appropriate relief regarding confirmation of sale of the property of the company (in liquidation), etc. It is not in dispute that secured creditor stood outside the winding-up proceedings and this Court as per order dated 2nd November, 2012 in CA No. 273/2011 in CP No. 23/2010 (Annexure-A1 in these Company Applications) has granted leave to the Applicant to sell the secured assets which are mortgaged to the Bank, subject to the directions issued by the Apex Court in paras 17 and 18 of the ruling in the case Rajasthan State Financial Corporation v. Official Liquidator, (2005) 8 S.C.C. 190. The direction which is relevant in this case is direction No. 1 para 18 of the Rajasthan State Financial Corporation's case

(supra) which reads as follows :

"18. In the light of the discussion as above, we think it proper to sum up the legal position thus :

(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the liquidator appointed by the Company Court and after hearing him.

xxxx xxxx xxxx"

The Official Liquidator has filed a statement dated 26th August, 2016 in this application stating that the provisions contained in Sections 529 and 529-A of the Companies Act, 1956 should be effectuated. The said provisions mandate that security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and providing his debts opts to realise his security, the Liquidator shall be entitled to represent the workmen dues and enforce such charge, etc.

2. One of the Ex-Directors of the company (Dr. P.K. Abraham) has also filed a counter-affidavit dated 13th July, 2016 in this matter wherein it is essentially contended in para 4 thereof that the Bank has erroneously interpreted the aforesaid Annexure-A1 order passed by this Court on 2nd November, 2012 as if the secured creditor has been permitted by this Court to act independently without the junction of the Debts Recovery Tribunal (DRT) and has proceeded to sell the properties mortgaged by the company (in liquidation) simply by intimating the Official Liquidator of the e-tender sought to be conducted, and of the result thereof. Therefore it is contended by the said Ex-Director of the company that having obtained leave from this Court as per Annexure-A1 order, the Applicant Bank was bound to approach the DRT and to proceed only in compliance with any such orders as has been rendered by that Tribunal in strict compliance with the SRFAESI Act and by sidelining the DRT, and by conducting an e-tender and sale of certain lands of the company (in liquidation) without permission from that Tribunal, the Applicant cannot be allowed to cover up its omissions by getting sanction from this Court, etc.

3. The issue as to whether secured creditors like the present Applicant require orders from this Court including that for confirmation sale, etc., has been considered in a recent ruling of the Apex Court in Pegasus Assets Reconstruction Pvt. Ltd. v. Haryana Concast Ltd., (2016)4 S.C.C. 47 and it will be profitable to refer to paras 23, 30 and 31 thereof which read as follows:

23. A reading of Sections 9 and 13 of the SRFAESI Act leaves no manner of doubt that for enforcement of its security interest, a secured creditor has been not only vested with powers to do so without the intervention of the Court or

Tribunal but detailed procedure has also been prescribed to take care of various eventualities such as when the borrower company is under liquidation for which proviso to sub-section (9) of Section 13 contains clear mandate keeping in view the provisions of Sections 529 and 529-A of the Companies Act, 1956, Since significant amendments were introduced in Section 529 while inserting Section 529-A through Amendment Act 35 of 1985, effective from 24th May, 1985 and with the aid of a non obstante clause in sub-section (1) of Section 529A workmen's dues were given preference over other dues and made to stand pari passu with dues of the secured creditors, in case of apparent conflict, this Court through various judgments has upheld the proceedings under the RDDBFI it happens to be a later Act with overriding effect over other laws. The interest of the workmen in respect of dues payable to them as per Sections 529 and 529-A of the Companies Act has been protected by permitting, whoever necessary, association of the Official Liquidator with the proceedings before the Debts Recovery Tribunal under the RDDBFI Act. In our considered judgment the same view is required to be taken in context of the SRFAESI Act also for the additional reason that Section 13 requires notice to the borrower at various stages which in the case of a company under winding up being a borrower would mean requirement of notice to the Official Liquidator. The Security Interest (Enforcement) Rules, 2002 (for brevity "the Rules") framed under the provisions of the SRFAESI Act also require notice upon the borrower or his agent at different stages. For sale of immovable secured assets, as per Rule 8, the authorised officer can take possession by delivering a possession notice to the borrower and by affixing possession notice on the outer door or at some conspicuous place of the property. Before the sale also, the authorised officer is required to serve to the borrower a notice of 30 days. Thus, the Rules also ensure that the Official Liquidator is in knowledge of the proceedings under the SRFAESI Act in case the borrower happens to be a company under winding up. As a borrower, the Official Liquidator has ample opportunity to get the details of the worker's dues as ascertained under the Companies Act, placed before the authorised officer and seek proper distribution of the amount realised from the sale of secured assets in accordance with various provisos under sub-section (9) of Section 13 of the SRFAESI Act.

30. Since we have held earlier in favour of views of the Delhi High Court, it is not necessary to burden this judgment with the case law which supports that view and have been noted by the High Court. We are in agreement with the submissions advanced on behalf of Respondent Kotak Mahindra Bank as well as Respondent No. 2 that there is no lacuna or ambiguity in the SRFAESI Act to warrant reading something more into it. For the purpose it has been enacted it is a complete code and the earlier judgments rendered in the context of the SFC Act or the RDDBFI Act vis-a-vis the Companies Act, cannot be held applicable on all fours to the SRFAESI Act. There is nothing lacking in the Act so as to borrow anything from the Companies Act till the stage the secured assets are sold by the secured creditors in accordance with the provisions in the SRFAESI Act and the

Rules. At the post-sale stage, the rights of the persons or parties having any stake in the sale proceeds are also taken care of by sub-section (9) of Section 13 and its five provisos (not numbered). It is significant that as per subsection (9) a sort of consensus is required amongst the secured creditors, they are more than one, for the exercise of rights available under sub-section (4). If the borrower is a company in liquidation, the sale proceeds have to be distributed in accordance with the provisions of Section 529-A of the Companies Act, even where the company is being wound up after coming into force of the SRFAESI Act, if the secured creditor of such company opts to stand out of the winding-up proceedings, it is entitled to retain the sale proceeds of its secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of Section 529-A of the Companies Act. The third proviso is also meant to work out the provisions of Section 529-A of the Companies Act, in case the workmen's dues cannot be ascertained by relying upon communication of estimate of such dues by the liquidator to the secured creditor, who has to deposit the amount of such estimated dues with the liquidator and then it can retain the sale proceeds of the secured assets. The other two provisos also are in aid of the liquidator to discharge his duties and obligations arising under Section 529-A of the Companies Act. Thus, it is evident that the required provisions of the Companies Act have been incorporated in the SRFAESI Act for harmonising this Act with the Companies Act in respect of dues of workmen and their protection under Section 529-A of the Companies Act. In view of such exercise already done by the Legislature, there is plausible reason as to take recourse to any provisions of the Companies Act permit interference in the proceedings under the SRFAESI Act either by the Company Judge or the liquidator. As noted earlier, the Officer Liquidator as a representative of the borrower company under winding up has to be associated not for supplying any omission in the SRFAESI Act but because of express provisions therein as well as in the Rules. Hence, the exercise of harmonising that this Court has to undertake in the context of the SFC Act or the RDDBFI Act is no longer warranted in respect of the SRFAESI Act vis-a-vis the Companies Act.

31. The aforesaid view commends itself to us also because of the clear intention of Parliament expressed in Section 13 of the SRFAESI Act that a secured creditor has the right to enforce its security interest without the intervention of the Court or Tribunal. At the same time, this Act takes case that in case of grievance, the borrower which in the case of a company under liquidation would mean the liquidator, will have the right of seeking redressal under Sections 17 and 18 of the SRFAESI Act.

Therefore, no orders are required from the hands of this Court regarding conformation of the sale in question. But the Apex Court has already held in Pegasus" case (supra) that at the post-sale stage, the rights of the persons or parties having any stake in the sale proceeds are also taken care of by sub-section (9) of Section 13 and its five provisos contained in the provisions of the SRFAESI Act. It has also been held by the Apex Court that even where the

company is being wound up after coming into force of the SRFAESI Act, if the secured creditor of such company opts to stand out of the winding-up proceedings, it is entitled to retain the sale proceeds of its secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of Section 529-A of the Companies Act, 1956. Therefore, it is now well-settled by the Apex Court that as per Section 13 of the SRFAESI Act that a secured creditor has the right to enforce its security interest without the intervention of the Court or Tribunal and at the same time, this Act takes care that in case of grievance. The borrower, which in the case of a company under liquidation would mean the liquidator, will have the right of seeking redressal under Sections 17 and 18 of the SRFAESI Act. In the light of these aspects, it is only to be held that orders from this Court for confirmation of the sale in question is not necessary and the matters in this regard will be regulated by the position as settled by the Apex Court in the afore stated ruling.

4. CA No. 212/2016 filed in the Company Petition is for orders from this Court permitting the Applicant to distribute and appropriate the sale proceeds in accordance with Sections 529 and 529-A of the Companies Act, 1956 with the involvement of the Official Liquidator. As already noted herein above, the Apex Court has clearly held in para 30 of the afore stated ruling in the case Pegasus, case (supra) that at the post-sale stage, the rights of the persons or parties having any stake in the sale proceeds are also taken care of by sub-section (9) of Section 13 and its five provisos contained in the provisions of the SRFAESI Act, etc., and therefore, prayer in the application is allowed. Needless to say, any action taken by the secured creditor will be subject to any orders that may be passed by the Debts Recovery Tribunal in accordance with law, more particularly the provisions of the SRFAESI Act.

With these observations and directions, the Company Application stands finally disposed of.