

(2018) 12 DEL CK 0327

In the Delhi High Court

Case No : Company Petition No. 7482 Of 2009

Surinder Singh Marwah & Anr

APPELLANT

Vs

Aerens Entertainment Zone Limited

RESPONDENT

Date of Decision : 03-12-2018

Acts Referred:

Companies Act, 1956 — Section 529A
Securitisation and Reconstruction of Financial Assets and Enforcement of Securities
Interest Act, 2002 — Section 13(4), 17

Citation : (2018) 12 DEL CK 0327

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Siddharth Bhatt, Harsh Kackar, Rakshit Srivastava, Akhil Sibal, Tanmay Mehta, Jatin Sehgal, Devna Soni, Viren Bansal, Shriya Mishra, Ashish Bhagat, Ritik Malik, Akhil Suri, Aayushman Vatsayayan, .Gursat Singh, Adwaita Sharma, Suresh Dobhal, Saaranish Parashar, Umesh Mishra, Raghav Gumber, Neeraj

Judgement

JAYANT NATH, J

CA 2597/2016

1. This application is filed by Phoenix ARC Private Limited seeking direction to the Official Liquidator to set aside the alleged action of the Official Liquidator of taking possession of the mortgaged property being entire land measuring 54903 sq. yards situated at village Kadian and Fanguwall, NH-1, G.T.Road, Ludhiana, Punjab together with existing and future building thereon, structure, fixture, fitting etc. It is also stated that the Official Liquidator may not interfere with the rights of the applicant/Phoenix ARC Private Limited under the provisions of Sarfaesi Act 2002, in any manner, whatsoever. It is the case of the applicant that the respondent company availed different credit facilities to the tune of Rs.100 crore from a Consortium of Banks. In order to secure due repayment of the said credit facilities, company in liquidation created equitable mortgage over the entire land measuring 54903 sq.yards situated at village Kadian and Faguwall,

NH-1, G.T.Road, Ludhiana, Punjab. Due to defaults committed by the company in liquidation the loan account of the respondent company was classified as Non-performing Asset. As the secured creditors had rights under SARFAESI Act, 2002, the symbolic possession of the mortgaged property was taken on 1.7.2010. It is pleaded that the mortgaged property has been put to auction on eight previous occasions. Learned counsel for the applicant now states that after filing of the application a total of 14 attempts have been made to auction the property under SARFAESI Act. It is also pointed out that the respondent company has also filed objections before DRT under the SARFAESI Act. The DRT has rejected the contention of the said respondent company on 2.9.2014. Against the said order dated 2.9.2014 two appeals were filed by the respondent company before DRAT. The said appeals were also dismissed on 22.4.2015. The writ petition also filed against the said order dated 22.4.2015 was also dismissed. Certain third parties have also filed applications before the DRT, Chandigarh challenging the action taken by the secured creditors. Same have been dismissed by DRT Chandigarh.

2. However, it is pleaded that on 04.07.2016 applicant was shocked to receive a letter from the OL stating that on 14.4.2016 they have taken possession of the mortgaged property. It is pointed out that two of the original secured creditors, namely, Allahabad Bank and Indian Overseas Bank had assigned their debts to the applicant. Regarding the third bank ICICI it has assigned its debt to Energee Realty Ventures (P) Ltd. which is not an ARC. Hence, it is pleaded that the said creditor now ceases to be a secured creditor and the applicant in question is the only secured creditor. Hence, the present application has been filed.

3. I have heard learned counsel for the parties. Learned counsel for the applicant relies upon a judgment of the Supreme Court in Pegasus Assets Reconstruction Private Limited vs. Haryana Concast Limited and Another, (2016) 4 SCC 47 and Kotak Mahindra Bank Ltd. vs. Megnostar Telecommunications Pvt. Ltd., 2012 193 DLT 371 to plead that the OL cannot interfere in the present proceedings. Learned counsel has also pointed out that before DRAT in appeal No. 447/2016 on 25.10.2017 the OL had given his consent for the sale being undertaken by the applicant under SARFAESI Act.

4. Learned counsel appearing for the OL, however, submits that apart from Section 529 A of the Companies Act there are unsecured creditors who also have rights in the property whose interests have to be protected. He submits that the applicant appears to be under valuing the property for the sale purpose to somehow recover its dues leaving the other creditors to also have some rights in the lurch.

5. A Division Bench of this Court in Kotak Mahindra Bank Ltd. vs. Megnostar Telecommunications Pvt. Ltd. has held as follows:-

"29. We are therefore of the view that, (even where the debtor/borrower/mortgagor is a company in liquidation) there is no necessity of associating the Official Liquidator in the sale in exercise of powers by a secured creditor under

Section 13(4) of the SARFAESI Act. The sale, without associating the Official Liquidator cannot thus held to be bad or illegal. The dicta in Rajasthan Financial Corporation of associating the Official Liquidator in sale, in the context of the SFC Act and the DRT Act in both of which sale is through the intervention of the District Judge or the DRT, is not applicable to a sale under the SARFAESI Act, sale whereunder is without the intervention of the Court. As far back as in *Herrington v. British Railways Board* 1972 (2) WLR 537 it was observed that there is always a peril in treating the words of a judgment as though they are words in a legislative enactment and it is to be remembered that judicial utterances are made in the setting of facts in a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases and disposal of cases by blindly placing reliance on a decision is not proper. The Apex Court in *Bharat Petroleum Corporation Ltd. v. N.R. Vairamani* (2004) 8 SCC 579 cited Lord Denning with approval opining that each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. It was further held that the temptation to decide cases by matching the colour of one case against the colour of another is to be avoided. Similarly in *Official Liquidator v. Dayanand* (2008) 10 SCC 1 it was held that even one additional fact may make a lot of difference in the precedential value of a decision. The same sentiment was reiterated in *Sushil Suri v. CBI* (2011) 5 SCC 708 as well as in *U.P. State Electricity Board v. Pooran Chandra Pandey* (2007) 11 SCC 92.

30. The remedies of the Official Liquidator with respect to such a sale are only before the DRT in accordance with Section 17 of the SARFAESI Act and not before the Company Court. SARFAESI Act being a latter legislation to the incorporation of Section 529A in the Companies Act thus prevails over the Companies Act and sale as provided for under the SARFAESI Act holds good during the pendency of winding up petition against the debtor/borrower/mortgagor and also after a winding up order is made and remains unaffected therefrom."

6. I may note that the judgment of the Division Bench of this court in *Kotak Mahindra Bank Ltd. vs. Megnostar Telecommunications Pvt. Ltd.* (supra) was approved by the Supreme Court in the case of *Pegasus Assets Reconstruction Private Limited vs. Haryana Concast Limited and Another* (supra), wherein the Supreme Court had held as follows:-

"29. On behalf of the respondent Bank, Kotak Mahindra as well as Respondent 2, the auction-purchaser, the judgment in *Rajasthan State Financial Corpn. [Rajasthan State Financial Corpn. v. Official Liquidator, (2005) 8 SCC 190 : AIR 2006 SC 755]* was distinguished by placing reliance upon factual and legal situation prevailing in that case as noted in para 2 of the judgment. It was pointed out that Section 32(10) of the SFC Act contains ample clarification that if liquidation proceedings have commenced in respect of the borrower before an

application is made under sub-section (1) of Section 31, the Financial Corporation will not get any preference over the other creditors unless it is conferred on it by any other law. In that case no proceeding had been initiated under the SFC Act and all developments had taken place in the liquidation proceeding. Rajasthan State Financial Corporation was, therefore, unable to take any advantage of provisions under the SFC Act. At the end of para 2, this Court rightly held that: (SCC p. 193)

"2. ... A mere right to take advantage of an enactment without any act done towards availing of that right cannot be deemed a right accrued."

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 [Ed.: The reference appears to be to Allahabad Bank v. Canara Bank, (2000) 4 SCC 406.] by the High Court. We are in agreement with the submissions advanced on behalf of respondent Kotak Mahindra Bank as well as Respondent 2 that there is no lacuna or ambiguity in the Sarfaesi 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 RDB Act vis-à-vis the Companies Act, cannot be held applicable on all fours to the Sarfaesi 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 Sarfaesi 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 sub-section (9) a sort of consensus is required amongst the secured creditors, if 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 Sarfaesi 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 Company 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 Sarfaesi 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 no plausible reason as to take recourse

to any provisions of the Companies Act and permit interference in the proceedings under the Sarfaesi Act either by the Company Judge or the liquidator. As noted earlier, the Official Liquidator as a representative of the borrower company under winding up has to be associated, not for supplying any omission in the Sarfaesi Act but because of express provisions therein as well as in the Rules. Hence, the exercise of harmonising that this Court had to undertake in the context of the SFC Act or the RDB Act is no longer warranted in respect of the Sarfaesi Act vis-à-vis the Companies Act."

7. Hence, as per the judgment of this court which has been approved by the Supreme Court the remedy of the OL if he has a grievance in respect of a sale effected by the secured creditor under SARFAESI Act is before DRT in accordance with section 17 of the SARFAESI Act and not before the Company Court.

8. Keeping in view the above facts, in my opinion, the plea taken by the OL cannot be accepted. The above judgment of the Supreme Court clearly provides that there is no plausible reason to take recourse to any provisions of the Companies Act and permit interference in the proceedings under the SARFAESI Act either by the Company Judge or the OL. The OL will hence not interfere in the auction of the proceedings by the applicant. However, in case the OL has any grievance the OL is free to approach the DRT with an appropriate application. It is also made clear that the applicant will comply with the provisions of Section 529 A of the Companies Act as clarified by the Supreme Court in the case of Pegasus Assets Reconstruction Private Limited vs. Haryana Concast Limited and Another (supra).

9. Application stands disposed of.

10. The OL has already sealed the mortgaged property. The applicant will take possession of the property on 10.12.2018. In case the applicant does not take possession, the OL is free to withdraw the security w.e.f. 10.12.2018. At this stage, learned counsel appearing for the OL states that security has been deployed at the premises since 14.4.2016. The aspect of liability of the secured creditor to pay for the security charges shall be gone into on the next date, namely, 14.1.2019. A copy of the OLR No.288/2018 and copy of the bill of the security agency which had provided security would be handed over to the learned counsel for the applicant.

CA 1277/2018

Learned counsel for the non-applicant states that he has already filed reply. List for arguments on 11.12.2018. On that date CA 788/2017 will also be taken up.

CA 1279/2018

Let a copy of this application be given to the OL. OL will file his reply. List on 21.2.2019.

OLR 437/2018

This application is disposed of as infructuous.

OLR 286/2017