Delhi High Court
M/S. Global Infrastructure ... vs Kotak Mahindra Bank Ltd. & Ors. on 16 April, 2014
Author: R.V. Easwar

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 13th March, 2014
% Date of Decision: 16th April, 2014

\+ W.P.(C) 4862/2013

M/S. GLOBAL INFRASTRUCTURE
TECHNOLOGIES LTD. ..... Petitioner
Through: Ms. Maneesha Dhir with Ms.
Geeta Sharma, Ms. Vinita
Sasidharan and Ms. Mithu Jain,
Advocates.

versus

KOTAK MAHINDRA BANK LTD. & ORS. .....Respondents
Through: Mr. T.K. Ganju, Sr. Advocate with
Mr. Sanjay Bhatt and Mr.
Abhishek, Advocates for R-1.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.

1. In this writ petition, the petitioner impugns the order passed by the Appellate Authority for Industrial and Financial Reconstruction, New Delhi (hereinafter referred to as "AIFR") passed on 12.06.2013 as also the order passed by the Board of Industrial and Financial Reconstruction (hereinafter referred to as "BIFR") passed on 04.10.2010. The order passed by the AIFR is in an appeal preferred by the petitioner against the order passed by the BIFR.

2. The brief facts are that the petitioner filed a reference before the BIFR on 11.05.2002 under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA"). The company was declared as a sick company. An application had been filed before the BIFR by the Kotak Mahindra Bank Ltd., hereinafter referred to as KMBL, seeking abatement of the reference made by the petitioner under the third proviso to Section 15(1) of SICA. The application had been filed on the ground that KMBL held more than 3/4ths in value of the outstanding secured debts of the petitioner and had also taken action under Section 13(4) of the Securitisation of Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act"). The application filed by KMBL was allowed by the BIFR and the reference stood abated.

3. The petitioner challenged the order passed by the BIFR before the AIFR and contended:

(a) that KMBL is not a secured creditor as the assignment of the debt to it by the State Bank of India was invalid and, therefore, KMBL cannot be called a secured creditor;

(b) that KMBL does not hold 3/4th or more of the total secured debts of the petitioner (as required by the 3rd proviso to section 15(1) of the SARFAESI Act and, therefore, even if some action had been taken against the petitioner under Section 13(4) of the SARFAESI Act, the reference cannot abate; and

(c) that the BIFR having passed an order on 19.08.2008 that the reference cannot be abated, could not have changed its view by holding to the contrary in its order passed on 04.10.2010.

These arguments having been rejected by the AIFR, the petitioner has approached this Court with a writ petition.

4. The learned counsel for the petitioner confined her argument, without giving up the other contentions, to the question whether KMBL fell within the third proviso to Section 15(1) of SICA, by fulfilling the criterion required by the said proviso i.e. that it should represent not less than three-fourths in value of the amount outstanding against financial assistance disbursed to the petitioner. There is no dispute that KMBL had taken action under Section 13(4) of the SARFAESI Act. It had taken possession of the assets of the petitioner situated at Survey No.111, Plot 1-197, Vishrantwadi, Taluka Haweli, Pune on 07.03.2008; in its order passed on 19.08.2008 on the application filed by KMBL seeking abatement of the reference, the BIFR noted that the bank had taken over only a plot of land and not the factory premises, accepting the submission of the petitioner that the factory located at another location i.e. Wagholi, Pune, which was lying closed for the past three years, was still in the possession of the petitioner and that KMBL had taken possession of only a piece of land which was charged to SBI Home Finance Ltd. which had assigned the debt to SBI, which in turn had assigned the debt to KMBL. In this view of the matter the request for abatement of the reference was rejected by the BIFR.

5. The primary question for consideration is the nature of the interplay between Section 13(9) of the SARFAESI Act and the third proviso to Section 15(1) of the SICA.

6. A brief reference to the statutory provisions may be made. The SARFAESI Act came into force in the year 2002. Chapter III provided for "enforcement of security interest". Section 13(1) permitted the enforcement of any security interest created in favour of a secured creditor (including banks) without the intervention of the Court or the Tribunal. Such enforcement has to be in accordance with the provisions of the SARFAESI Act. Sub-section (4) of Section 13 provides for certain measures which can be taken by the secured creditor to recover the secured debt in case the borrower fails to discharge his liability in full within the specified period. Briefly, the secured creditor can take possession of the secured assets or take over the management of the business of the borrower or appoint any other person to manage the secured assets or require any person who has acquired the secured assets from the borrower and some money is due or outstanding to the

borrower on this count, to pay such money to the secured creditor sufficient to discharge the debt. Section 13(9) is in the following terms: -

> "Section 13(9) - In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, 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 three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors."

7. Section 15 of the SICA provides for reference of a sick industrial company to BIFR on the passing of a resolution to that effect by the Board of Directors of the company. The second proviso prohibits any reference being made to the BIFR after the introduction of the SARFAESI Act in the year 2002. The third proviso (with which we are concerned) is as under: -

> "Provided also that on or after the commencement* of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Reconstruction, such reference shall abate if the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under sub- section (4) of section 13 of that Act.]"

8. The contention of the learned counsel for the petitioner is that Section 13(9) of the SARFAESI Act, when it refers to amount outstanding in respect of "financing of a financial asset" can only refer to three-fourth of the amount outstanding in relation to the financing of a financial asset whereas the third proviso to Section 15(1) of SICA, when it refers to three-fourth in value of the amount outstanding, mandates the calculation to be based on the "financial assistance disbursed to the borrower of such creditors". According to her there is a sea of difference between the two provisions and what is required to be fulfilled by KMBL, in order to successfully seek abatement of the reference is to show that it represents three-fourth in value of the amount outstanding against financial assistance disbursed to the petitioner as a whole and not merely with reference to the financing of a financial asset. This contention is articulated in ground "J" in the writ petition. It is further contended that KMBL has taken the measure listed in Section 13(4) of the SARFAESI Act in respect of a plot of land belonging to the petitioner and no measure has been taken against the entire unit of the petitioner which is intact.

9. A first look at both section 13(9) of the SARFAESI and the 3 rd proviso to section 15(1) of the SICA shows that they operate in different situations. Section 13(4) of the SARFAESI Act, which permits the secured creditor to take any of the measures specified therein, applies subject to two conditions and these are prescribed in section 13(9). The first condition is that "a financial asset" must have been financed by the secured creditor either singly or jointly with other secured creditors. In case it is financed by a single creditor, there would be no difficulty - he can take any of the measures

permitted by section 13(4) without reference to any other person. In a case where the financial asset is financed by more than one secured creditor or where the financial asset is jointly financed by several secured creditors, there is the further condition that action can be taken under section 13(4) only if the exercise of such action is agreed upon by secured creditors representing not less than 3/4ths in value of the amount outstanding. For instance, if a borrower has acquired a machinery under financing by a bank which has lent Rs. 50 lakhs for the acquisition, and no other bank or financial institution has advanced any monies for the acquisition, that bank can take action under section 13(4) independently because it has financed the financial asset to the extent of 100%. But supposing two banks have advanced Rs. 25 lakhs each to the borrower to enable him to acquire the asset, then none of the two banks can take independent action because none of them has advanced 3/4ths of amount outstanding; they have to join together to take such action. To continue the same example, if Bank "A" has advanced Rs. 10 lakhs, Bank "B" has advanced Rs. 25 lakhs and Bank "C" has advanced the balance of Rs. 15 lakhs, action under section 13(4) can be taken only if at least Bank "B" and Bank "C" agree or all the three Banks agree; in that case, they would represent more than 3/4ths of the value of the amount outstanding. The series of actions permitted to be taken by the secured creditors is subject to this basic condition being fulfilled. A look at the various "measures" contemplated by section 13(4) reveals that they all speak of the "secured assets". Subject to fulfilment of the condition prescribed in section 13(9), the secured creditors can take possession of "the secured assets" or appoint a manager to manage "the secured assets the possession of which has been taken over" or call upon any person who has acquired any of "the secured assets" from the borrower to pay over the monies to them. The taking over of the management of the business, if such a step is taken by the secured creditors who satisfy the condition laid down in section 13(9), can only be to the extent relatable to the security of the debt, provided the business is severable.

10. Thus, sub-sections (4) and (9) of section 13 of the SARAFAESI Act, read conjointly show that their object is to lay down what measures can be taken by the secured creditors to recover the amount advanced to finance a financial asset acquired by the borrower and the conditions subject to which such measures can be taken. The computation of 3/4ths of the amount outstanding has to therefore be based only with reference to that amount and not with reference to the entire outstanding debts of the borrower.

11. Section 15 of the SICA has an entirely different purpose to serve. It provides for a reference of a sick industrial company (as a whole) to the BIFR on a resolution being passed by the board of directors of the company within a particular time-frame from the finalisation of the audited accounts. Originally it had only one proviso, but two more provisos were added in the year 2002 by the SARAFAESI Act. We are concerned with the 3rd proviso so inserted. It provides for abatement of a reference to the BIFR, where secured creditors representing not less than 3/4ths in value "of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under sub-section (4) of section 13 of the Act" (the reference is to the SARAFAESI Act). If this condition for abatement is applied to the present case, it seems to us that KMBL can successfully claim abatement of the reference of the petitioner's case pending before the BIFR only if it represents (as a secured creditor) at least 3/4ths (in value) of the amount outstanding against financial assistance disbursed to the petitioner and has also taken any of the measures outlined in section 13(4) of the SARAFAESI Act. KMBL has taken

such action by taking possession of a plot of land belonging to the petitioner. But it is further necessary to examine whether KMBL also represents 3/4ths in value of the amount outstanding against the financial assistance disbursed to the petitioner by the secured creditors, as required by the 3rd proviso to section 15(1) of SICA and not merely to examine whether KMBL has satisfied the condition prescribed by section 13(9) of the SARAFAESI Act. Both the BIFR and the AIFR do not appear to have examined this aspect.

12. While section 13(9) of the SARAFAESI Act speaks of financing of "a financial asset", the 3rd proviso to section 15(1) of the SICA speaks of "financial assistance disbursed to the borrower of such secured creditors". The reference can only be to the total amount borrowed by the petitioner from all the secured creditors which is outstanding and therefore the enquiry should be to find out if KMBL also satisfies the condition that it shall represent in value not less than 3/4ths of the total amounts borrowed by the petitioner from all secured creditors. It is only then that it can fall within the 3rd proviso and apply to the BIFR for abatement of the reference of the petitioner's reference. Satisfaction by a secured creditor of the condition laid down in section 13(9) of the SARAFAESI Act cannot automatically be taken as satisfaction of the condition prescribed in the 3rd proviso to section 15(1) of the SICA for the simple reason that both conditions prescribe different thresholds.

13. Section 35 of the SARAFAESI Act provides for over-riding effect of that Act over other laws which are inconsistent therewith. It cannot certainly be said (nor was it so suggested before us) that the SICA as a whole is inconsistent with the SARAFAESI Act. It was not also the contention of the respondent that the 3rd proviso to section 15(1) is inconsistent with the SARAFAESI Act. Even otherwise, it is difficult to imagine that a provision which was inserted into the SICA in the year 2002 by the SARAFAESI Act itself would be inconsistent with that Act; we cannot attribute to the legislature an act that is violative of section 35 of the SARAFAESI which already existed in that Act since inception. That leads to the conclusion that section 13(9) of the SARAFAESI Act and the 3rd proviso to section 15(1) of the SICA operate on distinct fields without overlap.

14. There is also another aspect. SARAFAESI Act is concerned mainly with the recovery of the debt by banks and financial institutions without recourse to any court or tribunal. It permits securitisation of the debt and aims at minimising the non-performing assets. The SICA, a pre-existing legislation, provides for timely detection of sick and potentially sick companies owning industrial undertakings and the speedy determination by the BIFR of remedial and ameliorative measures and enforcement of such measures. We have to keep in mind the different purposes of the two Acts while examining the inter-play between the provisions of the two and eschew, if permissible, a readiness to hold that their provisions overlap or tread over each other.

15. We will now turn to some of the authorities cited before us. In none of them does the precise question appear to have come up for consideration. In Asset Reconstruction Co. India P. Ltd. vs Shamkeen Spinners Ltd. (AIR 2011 Del. 17), cited on behalf of the petitioner as supporting it, a Division Bench of this court did examine the third proviso to section 15(1) of the SICA but that was in a different context: whether, in the absence of any specific provision in the 2 nd proviso, the limit of 3/4ths of the value of the secured debt set by the 3 rd proviso should be read into the 2nd proviso. This court held that if such a limit is not read into the 2nd proviso, it will result in this position,

namely, that a purchaser of a miniscule of the debt of the sick company will be able to frustrate the revival of a sick company though he may not be able to pursue its remedy under the SARAFAESI Act because he would not have the cut-off percentage of 75% prescribed by Section 13(9) of that Act. That is a different question, though it does appear that the decision would indirectly support the submission made on behalf of the petitioner, because it (the decision) is based on the assumption that abatement of a reference pending before the BIFR requires a larger threshold compared to that necessary to take any of the measures permitted by section 13(4) of the SARFAESI Act to be taken by a secured creditor. But that is as far as it can go. In Chemstar Organics India Limited vs. Bank of Baroda & ors. (W.P.(C) No. 1487/2011 decided on 17-9-2012) another Division Bench of this court examined the relevant provisions but again in a different context; the interplay between the provisions of the two Acts with which we are concerned was not the subject-matter of consideration there. The judgement of the Division Bench of this court in Alpine Industries Ltd. vs. Appellate Authority for Industrial & Financial Reconstruction and ors. (2011) 162 Comp. Cas. 563 (Del.) cited on behalf of the respondent would at first blush appear to support him, but on a closer reading shows that it does not. The underlying assumption of the decision is that the requirement of 3/4th of the secured creditors taking measures for the abatement of a reference under the 3 rd proviso to section 15(1) of the SICA is not independent of the measures taken by 3/4ths of the secured creditors under section 13(9) of the SARFAESI Act; consequently, it was held that once the measure taken by the secured creditor is not disputed by the borrower, and no appeal was taken to the Debt Recovery Tribunal under section 17 of the SARFAESI Act questioning the measure taken by the secured creditor on the ground that the secured creditor did not represent 3/4ths in value of the amount outstanding, the matter ended there and cannot be independently examined by the BIFR. This decision is not authority for the proposition as to whether the threshold limits set by the 3 rd proviso to section 15(1) of the SICA and section 13(9) of the SARFAESI Act are identical. That question appears to have passed sub silentio. It is that question which is urged before us on behalf of the petitioner, in which we find merit. Once it is held that the threshold limits are drastically different in the two sets of provisions, then there is no difficulty in reaching the logical conclusion that it would be open to the BIFR/AIFR to examine if the requirements of the 3rd proviso to section 15(1) of the SICA are satisfied. Those authorities would be deciding an issue which properly falls within their jurisdiction.

16. Apart from authority, it seems to us that it would be incongruous to hold that a secured creditor or group of secured creditors who represent 3/4ths in value of the financial assistance in respect of "a financial asset" and thus are entitled to recover the debt from the borrower without recourse to any tribunal or court and by taking any of the measures to recover the debt contemplated by section 13(4) of the SARFAESI Act can also scuttle the revival of a sick industrial company by asking for abatement of the reference pending before the BIFR without satisfying the more stringent requirement of the 3rd proviso to section 15(1) of SICA. To continue the example given earlier, if the total debts due by the borrower to the secured creditors is Rs. 100 crores, and if the contention of the respondent is right, then Bank "B" and Bank "C" which together have advanced Rs. 40 lakhs against the machinery can not only take steps to recover the debts under the SARAFAESI Act but also successfully ask for abatement of the reference pending before the BIFR, though they woefully fall short of the threshold limit of Rs. 75 crores set by the 3 rd proviso to section 15(1) of the SICA. One fails to understand what purpose would be served if such an interpretation canvassed on behalf

of the respondent is accepted.

17. The question whether the threshold limits/conditions set by the 3rd proviso to section 15(1) of SICA are satisfied is necessarily to be based on data reflected by the accounts of the petitioner and any other relevant material. That is an exercise which can only be embarked upon by the BIFR. While therefore setting aside the orders of the BIFR and the AIFR, we restore the matter to the BIFR for a decision, to be taken after giving a fair and reasonable opportunity to the parties to put forth their respective cases and place on record the accounts and all other relevant material. It shall be open to both sides to raise all other contentions and arguments (on the merits of which we express no opinion) which shall be considered and decided by the BIFR. It would be expedient that the decision is rendered by the BIFR within four months from today.

18. The writ petition is allowed in the above terms with no order as to costs.

(R.V. EASWAR) JUDGE (S. RAVINDRA BHAT) JUDGE APRIL 16, 2014 hs