

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on : 08.07.2014

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W.P.(C) 2385/2012

DENA BANK

..... Petitioner

Through : Sh. Ramesh Kumar, Advocate.

versus

AAIFR & ORS.

..... Respondents

Through : Sh. Dilip Kumar Sharma, AR, for
Resp. No.2.

Ms. Soma Mullick, Advocate, for Resp.
No.3.

Sh. S.K. Tanwar, Advocate, for Resp. No.6.

Sh. Nitesh Jain, Advocate, for Resp. No.9.

Ms. Kittu Bajaj and Sh. Izhar Ahmad,
Advocate, for Resp. No.12.

Ms. Dolly Sharma, Advocate, for Resp.
No.17.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VIBHU BAKHRU

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. Heard counsel for the parties.
2. The petitioner is aggrieved by an order of the Appellate Authority for Industrial and Financial Reconstruction (AAIFR)

dated 30.12.2011, which held that the proceedings before Board for Industrial and Financial Reconstruction (BIFR) had not abated.

3. The brief facts are that M/s. Rajat Pharmachem Ltd., the second respondent had availed of credit facilities from various banks, including the petitioner bank. The petitioner bank had *inter alia* extended these credit facilities in February 2007. The transaction was secured through mortgage of the borrower's property by deposit of title deeds on 15.06.2007. It is averred that the petitioner enhanced the credit limits, subsequent to requests by the respondent through letters dated 12.05.2008 and 13.08.2008. Subsequently, its loans were even restructured in January 2009.

4. While so, the respondent borrower approached the BIFR in terms of *Sick Industrial Companies (Special Provisions) Act, 1985* (SICA) on 02.04.2009. This reference was registered on 09.04.2009. Thereafter on 02.07.2009, the bank issued a notice under Section 13(2) of the *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002* (SARFAESI), demanding an amount in excess of ₹36.5 crores; upon non-compliance, measures under Section 13(4) of the SARFAESI were sought to be taken through a notice. The respondent borrower, aggrieved by this, approached the Debt Recovery Tribunal (DRT) under Section 17 of the SARFAESI on 16.09.2009. This led to the order dated 22.09.2009 by the

DRT, directing *status quo* with respect to the said property which is a subject matter of this case. The DRT modified the said order of stay on 18.02.2010 and clarified that all action under Section 13(4) of the SARFAESI were stayed.

5. In the meanwhile, the petitioner bank moved an application before the BIFR, contending that the proceedings before it had abated. After hearing the parties, which included the creditor banks and other third parties interested, such as the Employees' Provident Fund Organization (EPFO) and other statutory creditors, the BIFR held that the proceedings had abated. Its observations *inter alia* are to the following effect:

“16. Having considered the facts on record and the submissions made in today's hearing, the Bench observed that Dena Bank, representing not less than three-fourth of the secured loan outstanding against the company, had taken possession of the company's assets u/s 13(4) of the SARFAESI Act, 2002 on 12.9.2009. All the secured and unsecured creditors present in the hearing supported the action taken by Dena Bank u/s 13(4) of the SARFAESI Act, 2002. DRT, Mumbai vide its order dated 17.9.2009 directed for maintenance of status quo in the matter. Therefore, the possession of the assets of the company remained with Dena Bank and the action u/s 13(4) of the SARFAESI Act, 2002 was complete. The order of the Hon'ble Orissa High Court in the case of M/s. Nobel Aqua Pvt. Ltd. and Ors. v. SBI did not apply to the instant case, as the company was yet to be declared sick. The Bench relied on the orders of the Hon'ble Delhi High Court in the case of PNB & Ors. and the Hon'ble Kerala High Court in the case of SBI v. M/s. Prima Agro Ltd. (WPC No. 27033 of 2008)

dated 9.7.2009. The Bench noted that the Hon'ble Kerala High Court, after distinguishing/disagreeing with Hon'ble Orissa High Court judgment held that once action u/s 13(4) of SARFAESI is taken, reference to BIFR abates under 3rd proviso of Section 15(1) of SICA at any stage of the proceeding but certainly in cases when company has not yet been declared sick. The Hon'ble Kerala High Court further held that once reference before BIFR has abated in this manner, even Hon'ble AAIFR has no jurisdiction to entertain an appeal against the formal recording of the factum of abatement by BIFR. The Bench hence abated the reference filed by the company under third proviso to Section 15(1) of the SARFAESI Act, 2002.”

6. The respondent borrower approached the AAIFR, contending that the order of the BIFR was contrary to law. Its contention was that in view of the petitioner bank approaching the Debts Recovery Appellate Tribunal (DRAT) against the *status quo* order dated 22.09.2009, the measure under Section 13(4) of the SARFAESI could not be said to have been taken. The AAIFR took note of this contention and held as follows:

“8. The question that arises for consideration is whether the stay granted by the DRT in the present case would nullify or invalidate the action that had already been taken by Dena Bank u/s 13(4) of SARFAESI Act. A perusal of the record of this case shows that the appellant company had filed an appeal u/s 17 of the SARFAESI Act before the DRT-I, Mumbai, which is registered as S.A. No. 12/2009. The DRT, Mumbai, vide its order dated 22.09.2009 directed the parties to maintain status quo and the said order was continued vide DRT's order dated 11.01.2010 wherein the same was confirmed and extended till disposal of S.A. No. 12/2009. Thereafter,

the order dated 22.09.2009 was modified by DRT-I, Mumbai vide its order dated 18.02.2010 wherein the DRT held as follows:

“Therefore, I am of the view that the order passed by this Tribunal dated 11.01.2010 is required to be modified to the extent that the order dated 11.01.2010 means and includes that all action under Section 13(4) of the SARFAESI Act are stayed until final disposal of S.A. No. 12/2009 including valuing the secured assets under the said Act.”

9. Clearly, by the above order, the DRT has stayed until final disposal of S.A. No. 12/2009 all actions u/s 13(4) of the SARFAESI Act. Section 13(4) of the SARFAESI Act envisages that in case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the measures enumerated in the Section to recover his secured debt. The measures are enumerated at 13(4)(a), (b), (c) and (d) which include taking possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset. Since the DRT has stayed all actions under Section 13(4), it means that the action taken by Dena Bank u/s 13(4) in terms of taking possession of the charged assets of the appellant company has also been stayed and this implies that till such time as the stay is lifted, there is no effective action u/s 13(4) of the SARFAESI Act. In our opinion, such a stay will nullify or invalidate the action already taken by the Dena Bank, even though at the point of time when the impugned order was passed the order dated 18.02.2010 had not been passed. However, thereafter, the DRT modified its order and stayed all actions u/s 13(4) of

the SARFAESI Act. Therefore, since Section 13(4) action has been stayed, the reference would not abate.

10. In view of our above findings on the preliminary objection raised by the appellant company, we do not consider it necessary to go into the merits of other contentions raised by the appellant company. Therefore, in this event, the abatement of the reference will not be justified. We, therefore, set aside the impugned order and direct the BIFR to take further necessary action according to law.”

7. Learned counsel for the petitioner urges that the impugned order and the reasoning of the AAIFR is unsustainable. It is submitted that so long as the measures contemplated under Section 13(4) of the SARFAESI are taken and the satisfaction recorded in the form of secured creditors, representing not less than 3/4th of the amount outstanding, agreeing to the abatement of the proceedings under SICA, no further enquiry can be gone into. It was submitted in this regard that if measures under Section 13(4) of SARFAESI to recover the secured debt and under Section 15(1) of SICA were to depend upon the vagaries and intricacies of litigation initiated at the behest of borrower or even the creditor to resist the order, there would be no certainty about the objective event. Arguing that such fact is dependent upon interpretation of Section 15(1) would defeat the intention expressed by the legislature, learned counsel submitted that the scope of enquiry ought to be limited to whether the secured creditors entitled to recover 3/4th of the value of the outstanding amounts, had consented to the

abatement of the proceedings or not. As long as that is done, and the Section 13(4) measures are said to have been initiated, there can be no question of the continuation of the proceedings. Learned counsel for the respondents urged that the petitioner bank had itself approached the DRAT, complaining against the said order of the DRT, made in September 2009. Those proceedings have not concluded. In these circumstances, when the validity of conditions under Section 13(4) is itself doubtful, the question whether proceedings by the bank under SICA have abated, cannot arise. Learned counsel also relied upon the recent ruling of this Court in *M/s. Global Infrastructure v. Kotak Mahindra Bank Ltd. and Ors.* in W.P.(C) 4862/2013 (decided on 16.04.2014), to state that the conditions of Section 15(1) have to be satisfied before an abatement can be inferred. In the present case, the borrower appears to have approached the BIFR just before the proceedings under SARFAESI were initiated by the petitioner bank. In fact, the registration of this application under SICA took place on 09.04.2009. The notice under Section 13(2), demanding the outstanding amounts was issued on 02.07.2009; much close on its heels, the bank issued notice under Section 13(4). No doubt, the DRT, upon being approached by the borrower, directed a *status quo*. However, in the opinion of this Court, mere direction to maintain *status quo vis-a-vis* a particular property would not mean that the legal effect of the notice has been effaced – at least that is the essential purport or intent of third proviso to Section 15(1) of

SICA. The Court notices that the intention of the Parliament while enacting the third proviso to Section 15(1) of SICA was to avoid possible conflict between the provisions of SICA and SARFAESI given that both could potentially be construed as special enactments and that there was a degree of overlap, especially in the case of sick industrial debtors. To obviate this conflict, an express provision, making abatement conditional rather than universal was provided for. In terms of the third proviso to Section 15(1) of the SICA read with Section 40(1) of SARFAESI, the proceedings would be deemed to abate if and only if secured creditors, where more than one exists obviously, who are entitled to recover at least 3/4th or more of the outstanding amounts, consent to such step. In other words, where there is more than one secured creditor who is entitled to a certain amount, the consent of such of the creditors who would be entitled to recover not less than 3/4th value of the outstanding disbursed to the borrower, alone can dictate whether proceedings under BIFR can continue or not. In the present case, this objective factor alone – apart from the measures to be taken under Section 13(4) was the subject matter of enquiry before the BIFR. As is evident from the extract of the BIFR's order, all the secured creditors unanimously consented to the abatement of the proceedings. In these circumstances, the submission of the borrower that the petitioner did not represent the views of the 3/4th or more of such secured creditors has no force. In the absence of any

special form or proceeding to record such consent, it has to be held that if such consent is expressed in the course of proceedings, especially before the BIFR or any other authority under the SICA, such consent is deemed valid.

8. As far as the main contention – which apparently found favour with the AAIFR – with respect to the *status quo* order which operated in respect of Section 13(4) notice is concerned, this Court is of the opinion that the reasoning is meritless. The validity of Section 13(4) or for that matter any statutory matter cannot be judged on the basis of what an interim order states or purports to state. An interim order is only an aid or an arrangement which entitles the parties to the main proceedings, to work-out the modalities till final adjudication. Till the measures themselves are set-aside under Section 13(4), it cannot be said to be invalid or illegal. It goes without saying that a statutory order, till declared to be so in a legally constituted proceedings, would have to be accepted and given effect to (refer *State of Punjab and Ors. v. Gurdev Singh* 1991 4 SCC 1). For these reasons, the observations of the AAIFR to the contrary, are held to be without force.

9. For the foregoing reasons, the impugned order is set-aside. It is held that the proceedings before BIFR stood abated upon the service of the notice under Section 13(4).

10. The concerned DRT is hereby directed to proceed with the main appeal preferred by the respondent borrower under

Section 17 and pronounce its final orders within three months from today. The writ petition is allowed in the above terms.

**S. RAVINDRA BHAT
(JUDGE)**

**VIBHU BAKHRU
(JUDGE)**

JULY 8, 2014

