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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON: 01.07.2009

PRONOUNCED ON: 04.03.2010

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W.P. (C) 8276/2007 &
CM Nos. 15625/2007, 12866-12867/2008

K.K.ORGANICS P. LTD.

..... Petitioner

Through: Mr. Rahul Gupta with Mr. Gagan Gupta, Advocates.

versus

SMALL INDUSTRIES DEVELOPMENT BANK OF

INDIA & ANR

..... Respondents

Through: Mr. Dinesh Agnani with Mr. Harsh Parekh, Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | YES |
| 2. | To be referred to Reporter or not? | YES |
| 3. | Whether the judgment should be
reported in the Digest? | YES |

MR. JUSTICE S.RAVINDRA BHAT

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1. The writ petitioner seeks a direction that the continued management of the venture capital assistance agreement between it and the first respondent (hereafter called the SIDBI), through a letter dated 31.3.1997 and the agreement dated 25.6.1997, are illegal and arbitrary. A direction is sought to SIDBI to transfer the petitioner's account from its establishment to that of the second respondent (hereafter called "SIDBI Venture"). A further declaration is claimed that SIDBI's

action in invoking the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereafter called SARFAESI Act) is void, illegal and without jurisdiction.

2. The petitioner was incorporated in 1990 and was established for manufacturing and dealing in Gel Bone and its allied products. It converted into a Private Limited Company on 14.5.1991. It is stated that on 7.2.1990, the Central Government in exercise of its powers under Section 2 (c) (xvii) of the Industrial Development Bank of India Act, ("IDBI Act") specified that financial assistance by way of venture capital, risk capital, factoring and discounting were deemed to be "industrial concerns". The SIDBI was established on 7.3.1990 under the provisions of Small Industrial Development Bank of India Act, 1989 (hereafter called "SIDBI Act") as a principal financial institution for the promotion, financing and development of industries in the small scale sector and for coordinating functions of the institutions engaged in their promotion.

3. In 1992, the SIDBI launched a venture capital scheme. Sometime in 1997, the petitioner had sought financial assistance for its venture at Village Doha, Tehsil Firozpur, Gurgaon, Haryana, for setting up a project for manufacturing Gel Bone and its allied products for a capacity of 27000 tons per annum. The SIDBI communicated its approval for grant of venture capital assistance to the tune of Rs.141 Lakhs comprising of a conditional loan of Rs.93 Lakhs and direct subscription to equity (in the petitioner company) to the extent of Rs.48 Lakhs. The terms and conditions were broadly outlined; they required the parties to enter into a Memorandum of Understanding.

4. The conditional loan component mentioned in the appendix to the letter stated *inter alia* that royalty was payable to SIDBI @ 0.5 % of the total sales for five years. The repayment was to be in 20 quarterly installments starting from 1.9.1999 and ending on 1.6.2004; each installment was to be of Rs.4.65 Lakhs. The Appendix stipulated that the loan was to be secured by first charge on all movable assets - present and future - of the petitioner and also first charge by way of mortgage of all immovable properties owned by the company situated at Village Doha, Tehsil Firozpur, Gurgaon, Haryana. It is an undisputed fact that subsequently a conditional loan agreement was entered into by the petitioner with SIDBI on 25.6.1997, which elaborated all the terms and conditions. These were:

- (i) Clause 1.4 stipulated that the petitioner undertook to repay the principal amount in accordance with the amortization schedule in the second schedule to the agreement;

- (ii) Clause 1.14 granted the option to SIDBI to convert the loan into equity in case of default or mismanagement;
- (iii) Clause 2.1 reiterated that the first mortgage and charge on all the immovable properties as well as the movable properties and stocks was to be created to secure the loan;
- (iv) Clause 3 empowered the SIDBI to appoint its nominee on the petitioner's Board of Directors;
- (v) Article 4 spelt out venture conditions which restrained the petitioner borrower from assigning or transferring the technical knowhow of the product developed by it through the arrangement or title to its product and also imposed other restrictions as to its functioning;
- (vi) Clause 6 obliged the petitioner borrower to pay royalty to SIDBI @ 0.5% of the total sales and any related income for five years commencing from 1999-2000;
- (vii) Delay in payment of such royalty was to result in levy of penal interest.
- (viii) Schedule-II stated that equity or promoters was to be to the tune of Rs.72 Lakhs; equity from SIDBI was Rs.48 Lakhs and SIDBI's conditional loan was Rs.93 Lakhs. The total amount of loan was Rs.243 Lakhs of which Rs.30 Lakhs was in the form of State subsidy.

5. The petitioner submits that after signing the agreement and in accordance with its terms, SIDBI started releasing funds in tune with its obligations. SIDBI also converted the conditional loan into share application money as and when required to finance the venture. It nominated its officials as Directors in the management of the petitioner company; the details of such individuals are disclosed in the pleadings. In the meanwhile, submits the petitioner, SIDBI incorporated a subsidiary, i.e. SIDBI Venture Capital on 19.6.1999 which was registered with Securities and Exchange Board of India (SEBI) in terms of Regulations, i.e. SEBI (Venture Capital Funds) Regulation, 1996 (hereafter called 1996 Regulations). The petitioner claims that in keeping with the said 1996 Regulations, all SIDBI's venture capital assistance transactions were transferred to the SIDBI Venture Capital Ltd. for management. The petitioner's account, however, continued to be managed by SIDBI.

6. The petitioner mentions about its various Board meetings where the SIDBI's nominee Director was represented where the problems faced by the project were discussed. The progress

of the project and reports thereon, as well as the directions by the Haryana State Pollution Control Board for closure of the Unit, were all aspects that were considered. It is argued that the modality for further assistance to venture capital fund were deliberated, for putting up an effluent treatment plan. Reference is made to Board Resolutions dated 31.8.2000, 12.2.2001 and 20.12.2001. Other such discussions have been described in detail in the petition. SIDBI, in the meanwhile, alleges the petitioner, stopped participation in the affairs of the joint venture, i.e. the petitioner and filed an application for recovery in respect of the conditional loan transaction with the Debt Recovery Tribunal, i.e. being O.A. No.90/2003. Another application in respect of the equity transaction being O.A. No.92/2003 was also filed.

7. When the said proceedings were pending, the SIDBI issued notice under Section 13 of the SARFAESI Act on 30.07.2007, proposing to take over and deal with the petitioner's properties. The petitioner alleges that the notice was misconceived as the SARFAESI Act could not have been applied. It accordingly objected through its letter dated 26.9.2007 specifically drawing attention of SIDBI to the venture capital nature of the transactions as oppose to a debt.

8. The petitioner argues that the continued management of the venture capital transactions with it was contrary to the 1996 Regulations. Reliance is placed on Regulation 2 (m) which defines a venture capital fund as one established in the form of a trust or company and registered in its terms, having a dedicated pool of capital and also such capital being raised in the manner specified in the Regulations. It is emphasized that with the coming into force of the Regulations, every venture capital fund had to be registered by virtue of Regulation-3. It is submitted that the SIDBI had created venture capital fund in 1992 for carrying on such activity. It was required to obtain certificate or registration from SEBI under Section 12 (1) (b) of the SEBI Act and after notification of the 1996 Regulations, within three months. A condition for registration is that the undertaking should not carry on any activity other than venture capital under Regulation 8 (b). However, SIDBI is empowered to carry on 31 business activities under Section 13 of the SIDBI Act. It is, therefore, argued that the continuation of the venture capital fund without permission or registration in relation to the present transactions offends provisions of law.

9. It is also argued that in terms of the 1996 Regulations, only a company or trust being a separate corporate entity was entitled to carry on venture capital business. It is further argued that only a company or a trust can issue notice under Section 13 of the SARFAESI Act and that the venture capital funds of SIDBI being neither, could not have resorted Section 12. Similarly, in

the absence of any separate permission or certificate from SEBI, the entire venture capital activity is illegal and SIDBI cannot invoke any coercive powers much less under the SARFAESI Act. The petitioner relies upon a SIDBI's report to say that a substantial amount was transferred to the venture capital fund from out of its income. A copy of the report has been produced in these proceedings. It is pointed out that in 1993-94, SIDBI earned a total income of Rs.851.8 Crores and posted net profit as Rs.135.1 Crores of which Rs.10 Crores was transferred to the venture capital fund. Likewise, says the petitioner, the materials disclose that further amount of Rs.20 Crores each was transferred in 1996-97 and 1997-98.

10. It is submitted that the transaction between the petitioner and SIDBI in terms of the agreement being a venture capital arrangement does not amount to a debt, under Section 2 (g) of the Recovery of Debts Due to Banks Financial Institutions Act, 1993 read with Section 2 (h) (a) of the SARFAESI Act so as to attract provisions of SARFAESI Act. The petitioner elaborates by saying that the definition does not include a transaction of financial assistance in which the creditor is a participant in the business venture.

11. Relying on the judgments of the Supreme Court in *Mardia Chemicals Ltd. & Ors. v. UOI & Ors.*, (2004) 4 SCC 311 and *Transcore v. Union of India*, (2008) 1 SCC 125, it is submitted that Section 13 (2) of the SARFAESI Act can be invoked only when the amount is declared as non-performing asset in terms of Reserve Bank of India guidelines. Since the relationship between the parties was not that of debtor and creditor, the amounts were not non-performing assets but were covered by the venture capital regulations of 1996.

12. It is submitted that merely because the SIDBI continued to carry on venture capital activity, did not imply that the same was legal or permitted by law, with the advent of the 1996 Regulations. Learned counsel submitted that the very setting up of the SIDBI Venture Capital Ltd. and transfer of funds, as well as existing transactions to its management, showed that SIDBI was alive to the need for compliance with the SEBI Regulations and yet chose to single out the transaction with the petitioner in an arbitrary manner in its supervision. Such action is unauthorized and, therefore, the entire effort at recovery of the alleged amounts due through the coercive process of the SARFAESI Act, is illegal and unjustified.

13. The SIDBI resists the writ petition stating that the petitioner is disentitled to any relief. SIDBI highlights that in respect of the same transaction, a suit was filed before the City Civil

Court, Nuh for stalling the action under the SARFAESI Act. SIDBI submits that after issuing the impugned notice under Section 13, it has proceeded to take possession of the properties.

14. SIDBI relies upon Section 2 (h) of the SIDBI Amendment Act, 2000 which defines an industrial concern as meaning one within Section 2 (c) (xvii) of the IDBI Act; the Central Government was empowered to specify any activity to be an industrial concern. Further to that power, a Notification was issued on 7.2.1990 deeming that the activity of rendering financial assistance through venture capital, risk capital etc., as amounting to an industrial concern. This definition was incorporated in the SIDBI Act with the repeal of the IDBI Act in 2003. Being a principal financial institution, SIDBI claims to operate number of schemes which include venture capital assistance tailored for the benefit of small scale industries. The objective of the scheme is to provide a window within SIDBI to entrepreneurs that have ventured on the special activities, and to assist such of them who are unable to get traditional means of finance. SIDBI specifically argues that no funds were raised by it for the purpose of venture capital activities. It claims that 1996 Regulations do not apply as it is neither a company nor a trust.

15. The SIDBI's position is that there is no bar under the SEBI ACT or the 1996 Regulations from its participating and carrying on venture capital activity. It underlines that the agreement between the parties dated 25.6.1997 is contractual and project specific. In terms of the transaction, the amount of Rs.93 Lakhs being a conditional loan was repayable with interest @ 10% per annum during the first two years and subsequently @ 20%. The SIDBI highlights that such conditions are not contained in the equity component of the participation with the petitioner.

16. The SIDBI contends that there is nothing in the terms of the SARFAESI Act preventing it from recouring its provisions and issuing notice under Section 12, as the conditional loan component of Rs.93 Lakhs qualifies for being called "debt". It is argued that the management of certain venture capital or other transactions to SIDBI Venture Capital Ltd. had nothing to do with its (SIDBI's) own activity since it was legitimate and pursuant to the Notification of the Central Government authorizing it to carry on venture capital assistance as part of industrial concern. Counsel highlights that unlike in the case of Rs.48 Lakhs extended to the petitioner by SIDBI which is not secured, the conditional loan - part of the transaction is fully secured through mortgage of immovable property and charge of the movable properties. It is also emphasized that the default clauses stipulating consequences for non-payment are only in respect of the loan

transaction and not the equity amount paid to the petitioner. Learned counsel emphasized that a look at the appendix A and Schedule II - which the latter spelling out amotorization schedule clarifies that the amount of Rs.93 Lakhs was always agreed and understood as an outstanding loan repayable by the petitioner.

17. Certain undisputed facts emerging from the above discussion are: -

1. The petitioner and SIDBI entered into an agreement for project finance in 1997; these were through a letter dated 31.3.1997 followed up by an agreement signed by the parties on 25.6.1997;
2. SIDBI agreed to extend financial assistance of Rs.141 Lakhs which was divided into two parts. The first comprised its equity investment (into the petitioner's share capital) to the extent of Rs.48 Lakhs and secondly conditional loan to the extent of Rs.93 Lakhs;
3. The Agreement dated 25.6.1997 secured only the conditional loan transaction by charge/interest over movables and mortgage of the petitioner's immovable properties described in the agreement;
4. The parties agreed that the sum of Rs.93 Lakhs was repayable in terms of the agreement; the tenure for repayment, the rate of interest and other conditions were also stipulated;
5. The agreement dated 25.6.1997 also contained other conditions which *inter alia* entitled SIDBI's say in the affairs and the business of the petitioner company;
6. The SIDBI approached the DRT for recovery of outstanding amount in 2003 against the petitioner;
7. On 30.7.2007 and 3.10.2007, SIDBI issued letters to the petitioner, proposing to take action under the SARFAESI Act.

18. The first question to be decided is the true nature of the transaction between the parties vis-à-vis the component of Rs.93 Lakhs concededly relieved by the petitioner. It is argued in support of the petition that the entire transaction being one of the venture capital, and having regard to the terms and conditions which empowered SIDBI great deal of power in the running of the petitioner's business, the real transaction was not a loan but in the form of a joint venture between the parties, and that the petitioner does not owe a "debt" under the SARFESI Act. The SIDBI, on the other hand, emphasizes that even though the parties entered into one agreement,

the stipulations were clear that the equity component amounted to an investment and was not secured in any manner whatsoever. This, in turn, showed that the said Rs.48 Lakhs could not be treated as a loan. On the other hand, Rs.93 Lakhs paid to the petitioner was expressly agreed to be a conditional loan with the choice with the SIDBI to treat it as equity investment, in terms of the agreement. However, the petitioner's obligation to return the amount was clear enough, as evidenced by the security of its immovable property by mortgage and also the repayment schedule.

19. There is no doubt that two documents, i.e. the letter dated 31.3.1997 and 25.6.1997 show that the parties wanted SIDBI to render financial assistance for setting up of a project, i.e. Gel Bone and its allied products Unit in Haryana. The SIDBI agreed to assist the petitioner to the extent of Rs.141 Lakhs. That the two letters specifically point to the parties agreeing to treat the two amounts differently, thus the agreement of 25.6.1997 specifically concerns itself only with the terms relating to the loan of Rs.93 Lakhs. There is absolutely, no mention about the respective rights of the parties vis-à-vis the other substantial amount of Rs.48 Lakhs.

20. The loan agreement dated 25.6.1997 shows in the second recital that the petitioner had asked for release of Rs.93 Lakhs as a conditional loan. The interest on the loan is agreed under Clause 1.2. The repayment schedule is stipulated and agreed upon under Clause 1.4 read with the amortization Schedule (Schedule-II). That Schedule - produced at page 99 of the paper book sets forth specific dates between 1.9.1999 and 1.6.2004 for the repayment of the principal amount in equated installments of Rs.4.65 Lakhs every quarter. No doubt, Clause 1.14 empowers the SIDBI to convert the loan into equity in case of default. However, the option is not compulsive and SIDBI has discretion to either treat the outstanding as equity contribution or proceeded to insist upon its repayment.

21. Article-II deals with the various aspects of clearing the loan which includes mortgage and charge of the petitioner's property and an irrevocable guarantee of its Directors in favour of SIDBI. There are certain conditions (notably Article (iv) styled as a venture conditions) which empower the SIDBI some degree of control over the management of the petitioner concern. Similarly, Article (vi) stipulates the rate of royalty to be paid to the SIDBI.

22. On an overall consideration of the various clauses, the Court is of the opinion that the assistance by SIDBI to the extent of Rs.93 Lakhs constituted a loan in clear and unambiguous terms. That some conditions were agreed upon in the said agreement entitling the SIDBI a degree

of control in the petitioner company or also entitling it to claim royalty would not detract from the essential characteristic of the amount being an advance. The power to convert outstanding amounts into equity significantly is an option and not an automatic consequence in the event of default by the petitioner. On the other hand, the condition with regard to the repayment - in specified intervals, the stipulation as of interest and what is more, the security of the petitioner's assets as well as the obligation to furnish irrevocable guarantees to the SIDBI, all serve to highlight that the real transaction intended by the parties was indeed an advance or loan.

23. So far as the argument that since the SIDBI advanced the amount as part of the overall assistance and that it is not a debt is concerned, it would be necessary to extract as to what is the meaning of the said expression under section 2(1)(ha) of the SARFAESI Act: -

"debt" shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993"

Section 2 (of the said Recovery of Debts Due to Banks and Financial Institutions Act, 1993) is the interpretation section. Section 2(g) defines "debt" to mean any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting and legally recoverable on the date of the application.

24. It would be necessary to notice some of the definitions under the SARFAESI Act. They are as follows: -

The term "borrower" has been defined in clause (f) of Section 2(1), which provides as under:

"2. (1)(f) 'borrower' means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance;"

“Financial assistance” has been defined in clause (k), which reads as under:

“2. (1)(k) ‘financial assistance’ means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution;”

Similarly, the term “default” is defined in clause (j), as quoted below:

“2. (1)(j) ‘default’ means non-payment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured creditor in accordance with the directions or guidelines issued by the Reserve Bank;”

“Non-performing asset” has been defined in clause (o) of Section 2(1) which means:

“2. (1)(o) ‘non-performing asset’ means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset, in accordance with the directions or under guidelines relating to asset classifications issued by the Reserve Bank;”

“Reconstruction company” has been defined in clause (v) of Section 2(1) which means:

“2. (1)(v) ‘reconstruction company’ means a company formed and registered under the Companies Act, 1956 (1 of 1956) for the purpose of asset reconstruction;”

“Secured asset” has been defined in clause (zc) of Section 2(1) which means:

“2. (1)(zc) ‘secured asset’ means the property on which security interest is created;”

“Secured creditor” has been defined in clause (zd) of Section 2(1) which means:

“2. (1)(zd) ‘secured creditor’ means any bank or financial institution or any consortium or group of banks or financial institutions and includes—

- (i) debenture trustee appointed by any bank or financial institution; or*
- (ii) securitisation company or reconstruction company; or*

(iii) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance;”

“Secured debt” has been defined in clause (ze) of Section 2(1) which means:

“2. (1)(ze) ‘secured debt’ means a debt which is secured by any security interest;”

25. It is clear that the term “financial assistance” has been defined widely to include loans or advances granted or even debentures of bonds subscribed or any guarantees given. A debt is defined by incorporating the definition provided under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The definition under that Act says that debt is any liability (inclusive of interest) claimed as due from any person by a bank or a financial institution during the course of any business activity undertaken by the bank or the financial institution under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, and is legally recoverable.

26. Now, for the petitioner to succeed in establishing that the liability is not a debt, it has to point to a clear bar in the recovery of amounts payable under the conditional loan agreement. Such a bar could be on facts, i.e. that amounts had been paid and are being wrongly claimed, or that the period of limitation has expired; it could be a legal bar, through some statutory provision which prohibits recovery of the amounts. The petitioner is unable to point to neither, and is instead arguing that the SIDBI, consistent with the 1996 SEBI regulations, could not have continued with its venture capital agreement, or arrangement, and that the same, is therefore, unsupportable in law. Although the petitioner has pointed to several provisions of the SEBI Regulations, it was unable to show anything which prevents the SIDBI or any such statutory corporation, enabled to engage in various financial assistance operations – including venture capital funding, from recovering what is to due to it, legitimately, as recoverable.

27. In this context, it would be necessary to extract Section 31 of SARFESI, which sets out under what circumstances that enactment cannot apply:

“31. Provisions of this Act not to apply in certain cases

The provisions of this Act shall not apply to--

(a) a lien on any goods, money or security given by or under the Indian Contract Act, 1872 (9 of 1872; or the Sale of Goods Act, 1930 (3 of 1930) or any other law for the time being in force;

- (b) a pledge of movables within the meaning of section 172 of the Indian Contract Act, 1872 (9 of 1872);
- (c) creation of any security in any aircraft as defined in clause (1) of section 2 of the Aircraft Act, 1934 (24 of 1934);
- (d) creation of security interest in any vessel as defined in clause (55) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958);
- (e) any conditional sale, hire-purchase or lease or any other contract in which no security interest has been created;
- (f) any rights of unpaid seller under section 47 of the Sale of Goods Act, 1930 (3 of 1930);
- (g) any properties not liable to attachment (excluding the properties specifically charged with the debt recoverable under this Act) or sale under the first proviso to sub-section (1) of section 60 of the Code of Civil Procedure, 1908 (5 of 1908);
- (h) any security interest for securing repayment of any financial asset not exceeding one lakh rupees;
- (i) any security interest created in agricultural land;
- (j) any case in which the amount due is less than twenty per cent of the principal amount and interest thereon. ”

Section 35 of the SARFESI Act enacts that it overrides all other laws:

“35. The provisions of this Act to override other laws

The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

The effect of SARFESI on other laws, in the event of any perceived conflict, was explained in *Transcore* (supra) as follows:

“34. In our view, Section 17(4) shows that the secured creditor is free to take recourse to any of the measures under Section 13(4) notwithstanding anything contained in any other law for the time being in force e.g. for the sake of argument, if in the given case the measures undertaken by the secured creditor under Section 13(4) come in conflict with, let us say the provision under the State land revenue law, then notwithstanding such conflict, the provision of Section 13(4) shall override the local law. This position also stands clarified by Section 35 of the NPA Act which states that the provisions of the NPA Act shall override all other laws which are inconsistent with the NPA Act. Section 35 is also important from another angle. As stated above, the NPA Act is not inherently or impliedly inconsistent with the DRT Act in terms of remedies for enforcement of securities. Section 35 gives an overriding effect to the NPA Act with all other laws if such other laws are inconsistent with the NPA Act. As far as the present case is concerned, the remedies are complementary to each other and, therefore, the doctrine of election has no application to the present case.”

28. The above discussion would reveal that though the petitioner denies that the amounts are recoverable from it, by the SIDBI under SARFESI, it does not deny the transaction, the true nature of which is a loan, as held in the earlier part of the judgment. It has been unable to show any prohibition in any law, preventing SIDBI from recovering the dues. On the other hand, the combined effect of Section 31 and 35 of SARFESI read with the definition of “debt” is so as to preclude such contentions, and confer overriding effect to the SARFESI Act. In these circumstances, the Court is of opinion that the arguments of the petitioner about the loan transaction by SIDBI to it, squarely attract the *in pari delicto* doctrine, (*pari deucto portior est conditio defendentis*), i.e. courts refuse to enforce an illegal agreement at the instance of a person who is a party to the illegality. The doctrine was explained in *Sita Ram v. Radha Bai*, (1968) 1 SCR 805 thus:

“11. The principle that the Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud is expressed in the maxim in pari deucto portior est conditio defendentis. But as stated in Anson’s Principles of the English Law of Contracts, 22nd Edn., p. 343: there are exceptional cases in which a man will be relieved of the consequences of an illegal contract into which he has entered — cases to which the maxim does not apply. They fall into three classes: (a) where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it; (b) where the plaintiff is not in pari delicto with the defendant; (c) where the plaintiff does not have to rely on the illegality to make out his claim’.”

29. Here, as held earlier, the transaction between the parties was one granting a loan to the petitioner; no illegality can be discerned, even though the petitioner asserts it to be so. On an assumed illegality, too, the petitioner cannot succeed, because clearly it has enjoyed the benefit of the loan, on an application of the *pari delicto* principle; the case does not also fall within the three exceptions, listed by the Supreme Court, in *Sita Ram* (supra).

30. For the above reasons, the writ petition has to fail. It is accordingly dismissed, with costs, quantified at Rs. 55,000/- to be paid to the respondents, within four weeks. All pending applications are dismissed accordingly.

S. RAVINDRA BHAT
(JUDGE)

March 04, 2010

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