

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

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Date of decision: 30.05.2011

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WP (C) No.3752 of 2011

M/s. J.B. TEXTILE INDUSTRIES PVT. LTD. ...PETITIONER

Through: Ms. Maneesha Dhir with
Mr. R.S. Paliwal &
Mr. Mayank Grover, Advocates

Versus

THE GENERAL MANAGER,
CENTRAL BANK OF INDIA & ORS.

...RESPONDENTS

Through: Mr. Mukesh Anand &
Ms. Shuchismita, Advocates
for Respondent No.4.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

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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 |

SANJAY KISHAN KAUL, J. (Oral)

CM No.7856/2011

Allowed subject to just exceptions.

WP (C) No.3752/2011

1. The writ petition under Article 226 of the Constitution of India is directed against the impugned order dated 19.5.2010 passed by the AAIFR on an appeal of the petitioner. We may note that since some common questions of law were involved a number of appeals had

been dealt with in this common order though facts of each case had been dealt with separately.

2. We may note that the petitioner had laid a challenge to the impugned order earlier by filing WP (C) No.613/2011, which was listed for the first time on 1.2.2011 when learned counsel sought to withdraw the writ petition with leave to file a proper petition setting out the complete facts along with the relevant documents. We have recorded that the ambiguity in the writ petition *inter alia* was on account of the issue whether there was not even a second charge created in favour of Central Bank of India (for short 'CBI'). The present writ petition has now been filed after three and a half months of that order. We may also note that even the initial challenge was, thus, laid after about seven (7) months and the present challenge has been laid three (3) months thereafter. The result is that the present petition has come up as a proper petition after a period of more than one year and in our considered view this petition suffers from delay & laches.
3. That apart we have also heard learned counsel for the petitioner on merits. The challenge laid by the petitioner before the AAIFR was to the order of the BIFR dated 14.10.2008 whereby the BIFR had abated the reference pending against the petitioner company in accordance with the 3rd proviso to Section 15 (1) of The Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as the 'SICA') on the ground that the CBI had already taken action under Section 13 (4) of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act').

4. The petitioner company claimed to have fallen into financial difficulties and thus had approached the BIFR under SICA. On consideration of the matter a scheme for rehabilitation was framed and sanctioned by the BIFR on 17.2.1993. However, in the subsequent proceedings held on 26.6.2000 the BIFR formed a *prima facie* opinion that the petitioner company was not likely to make its net worth exceed its accumulated losses and hence it was just, equitable and in public interest for the petitioner company to be wound up, for which, a show cause notice was issued to the petitioner company. Thereafter a fresh rehabilitation proposal filed, was examined, and thus the petitioner was permitted the opportunity of making its net worth positive latest by 31.3.2003; keeping the winding up proceedings in abeyance. Even these directions were not complied with but the petitioner succeeded in the challenge laid before the AAIFR for reconsideration by the BIFR. However, in the proceedings of 14.10.2008, the CBI informed of the action taken under Section 13 (4) of the SARFAESI Act by taking over possession of the charged assets which resulted in the impugned order.
5. It was the say of the petitioner that the proceedings under the SARFAESI Act had not attained finality as the same had been stayed by an order of the DRT dated 18.11.2008 and thus the action for abatement was premature. The petitioner also sought to challenge the creation of charge in favour of CBI which was the substratum of the action taken under the SARFAESI Act.
6. The factual position was explained in the impugned order, that the, interim order granted stay against physical possession of assets with

the condition to deposit ₹5.00 lakh within four (4) weeks. The petitioner company having failed to deposit the amount the interim order had dissolved.

7. In so far as the issue of the charge in favour of the CBI is concerned, the DRT had passed the decree in favour of the CBI and held that the bank had a second charge on the property of the petitioner. This order dated 1.4.2004 has remained unchallenged to date. The DRT in the said judgement noticed the relevant facts in para 5, which reads as under:

”5. Defendant No.1 is the owner of fixed assets located at Plot No.E-45/46, MIDC, Tarapur, District Thane. Defendant No.4 had granted Term Loan to Defendant No.1. In consideration thereof, Defendant No.1 has charged the said fixed assets by way of first charge in favour of Defendant No.4 by letter dated 27.7.1993. Defendant No.4 consented to have a second charge of the Applicant Bank on the same terms and conditions as per the letter dated 27.7.1993.”

8. The DRT thereafter concluded as under:

“11....There is valid and subsisting second charge of the Applicant Bank over the assets of Defendant No.1 company as there is first charge of Defendant No.4, who too (illegible) Defendant No.1. So, it is hereby declared that the Applicant bank having second charge over the hypothecated plant, machinery and other assets to Defendant No.1 company....”

9. Learned counsel for the petitioner seeks to raise the same issues before us by contending that the undisputed position was that the State Industrial and Investment Corporation of Maharashtra Limited (for short ‘SICOM’) had the first charge in the share of the debt and the debt of SICOM was 72 per cent while that of CBI was 28 per cent. Learned counsel submits that the petitioner company has settled the matter with SICOM and only the debt of CBI remained.

Learned counsel seeks to refer to a letter of SICOM dated 28.3.2011 to the effect that the loan given to the petitioner was not secured.

10. Learned counsel for the petitioner has further contended before us that even though the judgment of the Division Bench of this court in the case of Punjab National Bank and Others Vs. AAIFR and others AIR 2008 Delhi 1992 has held that the issue, as to whether the measures taken under Section 13(4) of the SARFAESI Act have been rightly taken by the secured creditors, can only be determined in consonance with the provisions of the SARFAESI Act or by a Writ Court while exercising jurisdiction under Article 226 of the Constitution of India, the said principle has been whittled down by the Supreme Court in the appeal preferred against the very same judgment.
11. We may only notice that one of the parties in the case of Punjab National Bank (supra) was Bestavision Electronics Limited, which had carried the matter in appeal to the Supreme Court.
12. We have considered the aforesaid submission made by the learned counsel for the petitioner. We find no merit in the said submission.
13. However, in order to appreciate the contention of the learned counsel for the petitioner, it may be pertinent to extract the observations of the Division Bench of this court in the case of Punjab National Bank (supra) as contained in paragraph Nos.10(a) and 10(b). These observations read as follows:

“10(a) We are also of the view that once the jurisdiction of the BIFR was divested by the mandatory impact of the 2nd (sic) proviso to Section 15(1), the BIFR could not pass any orders under the SICA notwithstanding the subsequent developments. Orders sought by the petitioner from the BIFR

could have been passed either under the SARFEASI or by a writ court exercising jurisdiction under Article 226 of the Constitution.

10(b) The phrase have taken measures obviously contemplates a measure already adopted and cannot be construed to mean that the jurisdiction of the BIFR would depend upon subsequent alteration in the composition of the consortium of the creditors once such measures are taken. The submission of the petitioner that subsequent events such as the reduction in the percentage of creditors, could enable continuance of the proceedings in the BIFR would mean that there would be a constant reshuffling of jurisdictions between the SARFAESI Act and SICA depending entirely upon the varying percentage of debtors based upon subsequent satisfaction of such debts by the debtor. Such a meaning could never have been intended by the legislature and the jurisdiction of the BIFR/AAIFR once divested by the operation of the 2nd proviso to Section 15(1) could not resuscitate by virtue of subsequent developments. We, Therefore, agree with the conclusion of the Bombay High Court but for the reasons enumerated above.”

14. As would be apparent on a bare perusal of the observations made by the Division Bench that this court categorically observed that it was not for the BIFR to determine as to whether measures under section 13(4) of the SARFAESI Act had been correctly triggered by the secured creditors. The ratio of the decision of the judgment is, if any party were to join an issue as to whether or not the measures under section 13(4) of the SARFAESI Act have been correctly taken then, the appropriate forum would be that which is provided under the SARFAESI Act or the High Court which is vested with jurisdiction to deal with such like matters under Article 226 of the Constitution of India.
15. On a reading of the order of the Supreme Court dated 24.04.2001 passed in SLP Nos.20026-20029/2008 entitled M/s. Bestavision Electronics Ltd. Vs. Punjab National Bank and Ors., we have not

been able to persuade ourselves to come to the conclusion that Supreme Court has taken a view contrary to that of the Division Bench of this Court. If a reference abates on the ground that the secured creditors have taken measures under section 13(4) of the SARFAESI Act, it is not for the BIFR to determine whether the requisite conditionalities contained in SARFAESI Act are fulfilled in particular, as to whether the secured creditor singly or in a consortium hold 3/4th or more of the value of the amount outstanding on the record date. In our opinion, the observations of the Division Bench in the case of Punjab National Bank (supra) are clear and these observations have not been upset by the Supreme Court as contended by the learned counsel for the petitioners. In the said case all that the Supreme Court did was to remit matter to the BIFR to consider the petitioner's reference under Section 15 of the SICA since most of the creditors had settled with the petitioner; the remaining debts of the creditors were satisfied; and only the issue of payment of interest was outstanding. It is only for that limited purpose, the matter was remitted to the BIFR.

16. In our view, the judgement of this Court has not been disturbed. The reason being; firstly, this is only an order in the facts of the case and no principle of law has been laid down for it to constitute a precedent; secondly, there is, in fact, no such direction issued even in this order, as is sought to be canvassed by learned counsel for the petitioner. The ratio of the judgement of the High Court has not been upset.

17. Learned counsel for the petitioner also refers to the judgement of the Division Bench of the Bombay High Court in WP No.2049/2010 titled Nouveaw Exports Pvt. Ltd. Vs. AAIFR & Ors. decided on 19.5.2010. In para 12 of the judgement there are observations that BIFR can examine the issue as to whether the party claiming to have more than 75 per cent of the secured debt, in fact, have that percentage of debt. We may note that this is a passing reference made in the judgement, which, in any case, has no relevance in the facts of the present case since the undisputed position is that there were only two secured creditors out of which one has been satisfied and thus CBI being the only remaining secured creditor holds 100 per cent of the secured debt. The issue is, thus, squarely covered by the decision of this Court in Punjab National Bank & Ors. case (supra) dealing with M/s. Bestavision Electronics Limited case.
18. In so far as the plea of CBI being a secured creditor or not, we cannot rely upon a communication of SICOM as is sought to be canvassed by learned counsel for the petitioner before us. This issue is no more *res integra* in view of the judgement of the DRT dated 1.4.2004. Undisputedly, this judgement has never been assailed to date before any forum and is, thus, binding *inter se* the parties. Even SICOM was a party in those proceedings and thus none of the parties can dispute the findings recorded therein; (though the learned counsel for the petitioner states that SICOM was proceeded *ex parte*).
19. We may note that the petitioner does not dispute CBI's second charge over the plant and machinery. The petitioner only seeks to dispute CBI's second charge on the land in respect of which action has been

taken under Section 13 (4) of the SARFAESI Act. A finding has been, however, recorded in the order dated 1.4.2004 passed by DRT that even in respect of plant and machinery CBI has 2nd charge.

20. We are, thus, of the considered view that the writ petition has no merit and is one more endeavour of the petitioner to evade the liability to pay public money which has been advanced by the CBI to the petitioner. We would have imposed costs for the benefit of the CBI but for the fact that the said entity is unrepresented before us.

21. Dismissed.

CM No.7855/2011 (Stay)

In view of the dismissal of the writ petition, the application does not survive for consideration and the same is also dismissed.

SANJAY KISHAN KAUL, J.

MAY 30, 2011
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RAJIV SHAKDHER, J.