

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

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Reserved on: 23.07.2012

Date of decision: 17.09.2012

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W.P.(C) 1487/2011

CHEMSTAR ORGANICS INDIA LIMITED

..... Petitioner

Through: Mr.Sumesh Dhawan, Mr.Akshay Ringe
and Mr.Arn timer Kumar, Advocates.

versus

BANK OF BARODA & ORS.

..... Respondents

Through: Mr.R.P.Agrawal, Ms.Priyadarshini
Varma and Mr.Krishna Dev Pandey,
Advocates for R-1/Bank of Baroda.

Mr.Amit Mahajan, Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VIPIN SANGHI

SANJAY KISHAN KAUL, J.

1. M/s Chemstar Organics India Limited (COIL), petitioner-company, availed of term loans from both Gujarat Industrial Investment Corporation (GIIC) and Bank of Baroda (BOB), R-2 and R-1 respectively with R-2 being the lead financial institution. It is the say of the petitioner that more than 75% of the long term financial assistance was obtained from R-2 while the remaining was availed from R-1.

2. The petitioner-company had financial difficulties and failed to adhere to the discipline of the terms of the loan. This resulted in a notice being issued by BOB to the petitioner-company dated 15.06.2006 under Section 13(2) of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Act, 2002 (SARFAESI Act). This notice is stated to be qua the residential property of the promoters of the petitioner-company – Mr. Ashutosh Majmudar and Mrs. Ami Majmudar – in respect of which equitable mortgage had been created in favour of BOB. It may be noticed that some dispute has been raised by the petitioner/company qua the alleged equitable mortgage, but the fact remains that in pursuance to the said notice, BOB took over symbolic possession of the residential property of the promoters under Section 13(4) of the SARFAESI Act on 12.01.2007. The promoters of the petitioner/company, who are the owners of the residential property thus approached DRT-I, Mumbai under Section 17 of the SARFAESI Act by filing SA No.4/2007 on 09.02.2007 alleging that no security/equitable mortgage had been created qua the residential property and that BOB could not have issued the notice or taken symbolic possession of the residential property as they did not constitute 3/4th of the secured creditors and did not have the consent of the majority creditors i.e. GIIC as per the requirements of Section 13(9) of the SARFAESI Act before initiating the process under Section 13(4) of the SARFAESI Act. In these proceedings, the DRT on 08.03.2007 granted an order of status quo prohibiting the BOB from taking further action in pursuance to the symbolic possession taken by them of the residential property.

3. The second set of legal proceedings emanated from the claim of the petitioner-company that its net worth had been wiped out and thus it filed a reference before the Board for Industrial and Financial Reconstruction (BIFR) in April, 2007 under Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 {SICA}. The reference was still pending consideration when a second notice was issued on 05.04.2008 by BOB under Section 13(2) of the SARFAESI Act qua the assets of the petitioner-company situated at Village Nandesari, District: Vadodara and at Umraya, Taluka: Padra, District: Vadodara. The notice was replied to by the petitioner-company through their counsel on 21.04.2008 alleging that the assets over which BOB was claiming security interest had been secured by GIIC and that the requirement of the statute of consent of at least 3/4th of the secured creditors was not satisfied as no consent by GIIC had been forwarded to the petitioner. A more detailed reply dealing with the other aspects was sent by the petitioner on 22.05.2008 and since no response had been received in respect of the query raised by the petitioner/company, a stand was sought to be taken that the right to take any further action against the petitioner-company had lapsed. In the proceedings held before the BIFR on 03.07.2008, it is alleged, conflicting stands were put forth by the BOB and GIIC inasmuch as the representatives of BOB submitted that the symbolic possession of the assets of the petitioner-company had been taken over with the consent of the GIIC while on the other hand the representative of the GIIC states that till that date they did not give the consent to BOB for taking any action under Section 13(4) of the SARFAESI Act. The GIIC, however, simultaneously stated that in the proceedings before

the Gujarat High Court emanating from the provident fund recovery, an agreement had been recorded that the land, building, plant & machinery to be sold by public auction and the proceeds realized shall, after squaring the amount of provident fund, be distributed between GIIC and BOB having *pari passu* charge over the assets. The BIFR consequently called upon the BOB to submit a copy of the consent letter obtained from GIIC for taking action under Section 13(4) of the SARFAESI Act.

4. The petitioner-company immediately on the next date of hearing on 04.09.2008 sought release of the possession of the properties taken over under Section 13(4) of the SARFAESI Act.
5. The promoters of the petitioner-company on 22.08.2008 moved an application in SA No.4/2007 predicated on the plea that since the petitioner-company's reference was pending before the BIFR, there was protection qua the proceedings under the SARFAESI Act in view of Section 22 of SICA which benefit was available even to the guarantors. An additional plea was also taken that BOB did not represent 3/4th of the value of the total outstanding of the financial assistance rendered to the petitioner-company. The petitioner-company claims that the issue of absence of consent stood clarified as BOB itself filed an affidavit affirmed on 01.09.2008 to the effect that it was under an impression that the consent and approval of GIIC was available qua the proceedings initiated for realization of security under the SARFAESI Act, but the GIIC vide letter dated 17.07.2008 had conveyed that the issue of consent had been put up to the higher authorities of GIIC and instructions were awaited. This fact was noticed in the proceedings before the BIFR held on 04.09.2008 when

the orders were reserved. The orders were pronounced by the BIFR on 12.11.2008 dismissing the reference as non-maintainable. The basis for this order was that the petitioner/company had not been able to dispute that its factory was lying closed since 2001 and both the industrial units had been taken over by GIIC in 2001 and 2004. The closure had resulted in the loss of industrial character of the petitioner-company as envisaged under Section 3(2)(b) of SICA r/w Section 3(d) of the Industries (Development and Regulation) Act, 1951 which defines an “industrial undertaking” in the following terms:

“ ‘industrial undertaking’ means any undertaking pertaining to a scheduled industry carried on in one or more factories by any person or authority including Government.”

The petitioner-company, thus, filed an appeal u/s 25 of the SICA being Appeal No. 246/2008 before the appellate authority i.e. AAIFR on 03.12.2008.

6. In the other parallel proceedings pending before the DRT emanating from the notice of BOB under Section 13(4) of the SARFAESI Act where an application had been filed on 22.08.2008 in SA No.4/2007, the DRT on 06.10.2009 dismissed the stay application. The petitioner-company filed miscellaneous appeal no.274/2009 before the DRAT, Mumbai against that order and partly succeeded when the DRAT on 20.04.2010 directed the DRT to proceed with SA No.4/2007 keeping all contentions of the parties open including the issue raised in the miscellaneous application.

7. The proceedings initiated before the AAIFR against the order of the BIFR dated 12.11.2008, however, failed when the appeal was dismissed on 14.01.2011. The petitioner-company raised the issue of the proceedings under Sections 13(2) and 13(4) of the SARFAESI Act being bad in law as the notice dated 15.06.2008 had been issued by BOB alone apart from the fact that it was qua the residential property alleged to have been given as collateral security and not qua the company's assets. This residential property was owned by the guarantors who were the promoters of the petitioner-company. BOB did not have the permission of the GIIC which was 75% charge holder of the assets of the petitioner-company. This position was contested by BOB stating that the account of the petitioner-company was declared NPA on 30.09.2000 though the notice under Section 13(2) & 13(4) of the SARFAESI Act was issued much later. Symbolic possession of the factory, land & building had also been taken over on 30.06.2008. This had been followed up by an order dated 06.10.2009 of the DRT, Mumbai in SA No.4/2007 where the application of the petitioner-company filed on 22.08.2008 had been dismissed observing that in view of the third proviso to Section 15(1) of SICA, the reference pending before BIFR would stand abated. The third proviso was observed to equally apply to the proceedings before the AAIFR. The AAIFR noted the undisputed fact of there being *pari passu* charge over the factory premises and in view of the escalation of dues, GIIC had taken over possession of the units of the petitioner-company – Nandesari unit on 01.10.2002 and the Umraya Unit on 23.06.2004 under Section 29 of State Financial Corporation Act, 1951.

8. A reference has also been made to the proceedings before the Gujarat High Court where consent had been recorded for sale of the assets of the petitioner-company by public auction and the endeavour of the petitioner-company to seek a recall of that order dated 10.08.2007 clarifying that the order would not come in the way of the petitioner-company in the proceedings before the BIFR or AAIFR i.e. it should not be treated as an order granting permission to sell the property of the company. The stand of the GIIC before the AAIFR was that since possession of the unit had been taken over by the GIIC under Section 29 of the State Financial Corporation Act, 1951, the petitioner-company could not have been employing more than 50 workers as the factory was lying closed for more than three years. The electricity meters were found to be lying locked and thus obviously the factory was not running. The GIIC also stated that subsequently on 30.10.2009 it had given consent to BOB to take action under the SARFAESI Act subject to certain terms and conditions.
9. The AAIFR took up the issue of abatement of proceedings first which arose from the action taken by BOB under Section 13(4) of the SARFAESI Act. In this context, the stay had been declined on 06.10.2009 by the DRT in SA No.4/2007 but the DRAT vide order dated 20.04.2010 had disposed of the appeal with the observations that in view of the legal position enunciated in M/s.Patheja Bros.Forgings and Stamping and Anr. v. ICICI Ltd and Ors.; AIR 2000 SC 2553, the matter required to be examined in that context. The only prayer made on behalf of the petitioner/company was that the observations/findings of the Tribunal should not be taken as final between the parties so as to preclude the petitioner from raising the

point before the Tribunal when SA No.4/2007 is taken up for final disposal. The DRAT directed that SA No.4/2007 be taken up in accordance with law and all the contentions of the parties were kept open including the ones raised at the time of disposal of the interim stay application on 06.10.2009 which order would not influence the final adjudication. If we may say so, the effect of this order was only thus that the observations made at the interlocutory stage would not prejudice the final adjudication of the SA. In view of the aforesaid order, the AAIFR drew the conclusion that the DRT would be called upon in SA No.4/2007 to decide whether the action taken under Section 13(4) of SARFAESI Act was legal or not which in turn would be dependent on whether the consent of the secured creditors representing 3/4th of value of the total outstanding of the financial assistance rendered to the petitioner-company, was or was not taken. The AAIFR, thus, refused to assume concurrent jurisdiction under SICA to decide the same issue relying upon its earlier order in Appeal No.229/2008 Sheel International Limited decided on 19.05.2010 where it was held that whether the parameters of Section 13(9) of the SARFAESI Act on consent of 3/4th of the secured creditors was or was not fulfilled has to be determined under the SARFAESI Act. Insofar as the BIFR/AAIFR is concerned, it cannot look into the correctness or legality of that action as otherwise it would be using the powers to be exercised under Section 17 of SICA which it could not do. The conclusion thus was that once action is taken under Section 13(4) and symbolic possession is also taken, then in view of the third proviso to Section 15(1) of SICA the reference would abate but with a clarification that if such action is taken under Section 13(4) is set

aside by the competent court, the petitioner would be at liberty to seek revival of the appeal before the AAIFR and the AAIFR would in turn be free to decide the question of dismissal of reference as not being maintainable.

10. The further development which we would like to note arising post filing of the writ petition is that SA No.4/2007 has been dismissed by the DRT, Mumbai vide order dated 07.02.2012.
11. The DRT found that a proper equitable mortgage by deposit of title documents has been created qua the residential property to secure the outstandings and original documents had been deposited in that behalf apart from it being recorded in the Memorandum of Entry dated 30.01.2012. The plea of inability to create equitable mortgage on account of negative lien in favour of GIIC has been rejected as no negative lien was found. The second aspect on which finding has been recorded by the DRT is that the securitization proceedings had been initiated only against the guarantors qua the residential property owned by them for which no consent of GIIC was necessary. The GIIC had got the first charge over the fixed assets including land and building, plant & machinery leaving the second charge for BOB while the residential property was mortgaged exclusively to BOB and thus the notice under Section 13(2) and 13(4) of SARFAESI Act qua the residential property could be proceeded with or without any consent of GIIC.
12. Insofar as the relevance of judgment in M/s.Patheja Bros.Forgings and Stamping and Anr. v. ICICI Ltd and Ors's case (supra) is concerned, it laid down that a suit against the guarantor of a loan or advance granted to concerned industrial company would not be

maintainable or be proceeded with, without the sanction of the BIFR or the appellate authority. Thus, Section 22 of SICA was held to be wide enough to cover a suit for enforcement of a guarantee in respect of a loan or advance to the industrial company.

13. We would also like to note the judgment referred to by learned counsel for the respondent of the learned Single Judge of the Karnataka High Court in WP(C) No.21646/2005 M/s Saketh India Limited v. Indian Bank & Anr, decided on 20.03.2008. In the said case also, similarly two questions had been raised i.e. the secured creditors cannot proceed under Section 13(2) of the SARFAESI Act without the consent of 3/4th of the value of the secured creditors outstanding in view of Section 13(9) of the SARFAESI Act and second, the notice under Section 13(2) of the SARFAESI Act is not maintainable where a reference is pending before the BIFR under SICA. In order to appreciate the said orders, it is relevant to state that the Chapter III of the SARFAESI Act deals with enforcement of security amount. The relevant parts of Section 13 read as under:

“13.ENFORCEMENT OF SECURITY INTEREST.-

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-

performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

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(4) 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 following measures to recover his secured debt, namely:—

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

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(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:

.....”

14. In fact, in the present case, the consent from the other secured creditors is stated to have been obtained subsequently which was contended to be of no avail. However, all these pleas were negated. It was held that Section 13(9) of the SARFAESI Act would apply to creditors where all the financiers have jointly financed a financial asset and thus a single creditor cannot exercise any or all of the rights conferred on him under Section 13(4) of the SARFAESI Act. Thus, if a Bank is proceeding against the debtor, only in respect of the properties offered as security to it, by exercising powers under the provisions of Section 13(4) of the SARFAESI Act, the debtor cannot contend that such proceedings are bad in law in view of Section 13(9) of the SARFAESI Act.
15. A second limb of the conclusion was that if the provisions of Section 13(9) of the SARFAESI Act can be exercised by any other Bank or financial institutions who have advanced loans to the creditor in order to safeguard their interest, a borrower cannot avoid payment by relying upon Section 13(9) of the SARFAESI Act. In that case, no other bank or financial institution had raised such a contention before the Court. In the present case also, there is ultimate consent by the GIIC and the initial action taken against the residential property was qua an asset which had been given as security only to BOB while in respect of the assets of the company, there was a *pari passu* charge of

GIIC and BOB. It has also been held that the proceedings before the BIFR stand abated when the financial institution has been permitted to proceed under Section 13 of the SARFAESI Act.

16. On the other hand, the petitioner has relied upon the judgment of the Division Bench of the Madras High Court in WP(C) No.29330/2010 M/s India Radiators Ltd v. India Bank & Ors and connected matters, decided on 13.06.2011 where it was held that the BIFR and AAIFR had committed error in closing the proceedings by declaring them as abated without awaiting orders of the DRT. It has thus been held that the BIFR should have ensured that a factual adjudication was made by the statutory authority with regard to the contention raised by the petitioner that the banks do not represent 3/4th in value of the amount of outstandings as a positive finding in this behalf is necessary before the proceedings would abate and thus the BIFR was not justified in declaring the proceedings as abated even before the disposal of the SARFAESI appeal.

CONCLUSION

17. The most important aspect to be kept in mind is that there are two different sets of assets. The first is the residential property owned by the promoters of the petitioner-company qua which equitable mortgage has been created only in favour of BOB. The second set of assets are the factory premises over which GIIC and BOB had *pari passu* charge. Thus, the initialization of the proceedings under the SARFAESI Act was separate. BOB issued notice under the SARFAESI Act qua the residential property on 15.06.2006 and took over symbolic possession on 12.01.2007. The second notice issued

qua the factory premises by BOB was dated 05.04.2008. It is qua the second notice really that the question arose as to whether the requirement under the statute of consent of at least 3/4th of the secured creditors was not satisfied as a consequence of absence of consent of GIIC. BOB sought to take a stand that the consent of GIIC was available, while the stand of GIIC was that till date they had not given the consent to BOB. However, GIIC also simultaneously took a stand that an agreement had been recorded that the land, building, plant and machinery be sold at public auction and the proceeds realized therefrom after squaring the amount of provident fund, be distributed between GIIC and BOB having *pari passu* charge over the assets. This aspect was, however, clarified thereafter by BOB stating that it was under an impression that the consent and approval of GIIC was available, but as it transpired, the issue of consent had been placed before the higher authority of GIIC and instructions were awaited.

18. The rationale for dismissal of the reference as non maintainable by the order dated 12.11.2008 of BIFR was, however, that the petitioner-company had not been able to dispute that its factory was lying closed since 2001 and both the units had been taken over by GIIC in 2001 and 2004 which had resulted in the loss of industrial character of the petitioner-company in view of Section 3(2)(b) of SICA r/w Section 3(d) of the Industries (Development and Regulation) Act, 1951. It is this order which was assailed by the petitioner in Appeal No.246 of 2008 before the AAIFR. The appeal was, however, dismissed on 14.01.2011 which order is now sought to be assailed in the present writ petition filed under Article 226 of the Constitution of India.

19. The order of the AAIFR dated 14.01.2011 records the plea of the petitioner-company that qua the mortgaged property owned by the petitioner-company, the notice dated 15.06.2006 issued by BOB was bad in law as the consent of GIIC having *pari passu* charge had not been obtained. Thus, the consent of 75% of the charge holders of the assets of the petitioner-company was not available. The AAIFR took note of the GIIC having taking over possession of the units of the petitioner-company under Section 29 of State Financial Corporation Act, 1951 – Nandesari unit on 01.10.2002 and the Umraya Unit on 23.06.2004. The order of the DRT, Mumbai dated 06.10.2009 dismissing the application of the petitioner-company was also taken note of where it had been observed that in view of the third proviso to Section 15(1) of SICA, the reference pending before BIFR would stand abated, the said provision equally applying to proceedings before the AAIFR. Another aspect taken note of by the AAIFR is the consent recorded for sale of assets of the petitioner-company before the Gujarat High Court coupled with endeavour of the petitioner-company to seek recall of that order dated 10.08.2007 clarifying that the order would not come in the way of the petitioner-company in the proceedings before the BIFR or AAIFR i.e. it should not be treated as an order granting permission to sell the property of the company.
20. The facts germane, taken note of by the AAIFR qua the closure of the factory of the petitioner-company, were the taking over of possession of the units by GIIC under Section 29 of the State Financial Corporation Act, 1951 and the impossibility of the petitioner employing more than 50 workers on account of the factory lying closed for more than 3 years. Even the electricity meter was found to

be lying locked and the factory could not be said to be running. Insofar as the abatement of proceedings before the BIFR is concerned, it was noticed that the notice issued by BOB under Section 13(4) of SARFAESI Act qua the assets of the company was material and stay had been declined by the DRT on 06.10.2009 in SA No.4/2007. The DRAT while dealing with the appeal in its order dated 20.04.2010 considered the prayer for the petitioner-company that the observations/findings of the DRT should not be taken as final between the parties so as to preclude the petitioner-company from raising the point before the DRT at the stage of final disposal of SA No.4/2007. The DRAT, thus, only ensured the legal principle that the decision on an interim application should not prejudice the ultimate decision on the appeal.

21. The AAIFR was of the opinion that the aforesaid proceedings imply that the DRT would ultimately be called upon in SA No.4/2007 to decide whether the action taken under Section 13(4) of SARFAESI Act was legal or not, which in turn was dependent upon the consent of the 3/4th value of the secured creditors and thus the AAIFR refused to assume concurrent jurisdiction as that was an aspect to be decided under the SARFAESI Act and not under SICA.
22. The AAIFR has, thus, concluded that once interim findings have been arrived at against the petitioner-company in the proceedings before the DRT/DRAT under the SARFAESI Act, with possession being taken over, the reference would abate in view of the third proviso to Section 15(1) of SICA. This was, however, with a clarification that if the action taken under Section 13(4) of the SARFAESI Act is ultimately set aside, the petitioner-company would be at liberty to

seek revival of the appeal before the AAIFR and the question of dismissal of reference being erroneous would be examined.

23. We may also note that a further material development which has taken place during the pendency of the present writ petition is that SA No.4/2007 has been dismissed by the DRT, Mumbai vide order dated 07.02.2012. Thus, the final order has also been passed by the DRT, Mumbai. Various pleas of petitioner-company about absence of equitable mortgage qua residential property, inability to create equitable mortgage on account of negative lien in favour of GIIC (negative lien not having been found), all stand rejected. In fact, the DRT has observed that the securitization proceedings being initiated only against guarantors qua the residential property owned by them and mortgaged with BOB, did not require consent of GIIC.
24. We have set out the salient facts in view of the multiplicity of proceedings which had been initiated. To our mind, the crucial question is the very object of introduction of the SARFAESI Act and as to how Section 13(9) of the said Act has to be read in that context. The purpose of enactment of SARFAESI Act was to enable the banks and financial institutions to realize long term assets, manage problems of liquidity, asset liability mis-match and improve recovery by exercising powers to take possession of the securities and realize proceeds through sale. This was to assist in reduction of non-performing assets by adopting measures for recovery or reconstruction. Chapter III deals with enforcement of security interest and Section 13 forms a part of this Chapter. Any security interest in favour of secured creditors has, thus, been made enforceable without intervention of court or tribunal in accordance with the provisions of

SARFAESI Act. If Section 13(9) is read in that context, it is obvious that this is a beneficial provision for the secured creditors and not the debtor. The reason for the same is that there may be more than one secured creditor or joint financiers and one secured creditor should not be able to appropriate the proceeds of the secured assets or take a decision in that behalf without concurrence of the other secured creditors. The benchmark provided herein is of three-fourth value of the secured creditors. Thus, if this benchmark is met, a secured creditor exercises all rights conferred on him in pursuance to Section 13(4) of the said Act. This protects the interests of the other secured creditors as also gives weightage to their opinion. The only infirmity qua the action of BOB relied upon by the petitioner-company in the present case is the absence of consent beforehand from other secured creditor viz. GIIC so as to meet the benchmark of three-fourth in value of the secured creditors. It is, however, not in dispute that consent was accorded by GIIC. The provisions of Section 13(9) of the SARFAESI Act are not meant to be an instrument of defence by a borrower to avoid payment where ultimately three-fourth of the value of the secured creditors are at idem on the action proposed or taken. We have to also keep in mind that with regard to the initial notice of BOB qua the residential property of the promoters of the petitioner-company, GIIC had no interest. Qua the other assets, there was a *pari passu* charge of GIIC and BOB as is admitted by GIIC. It is obvious that the petitioner-company is using the absence of earlier consent of GIIC as a ruse to deny payment of liability to both the creditors.

25. We are in complete agreement with the view of the learned single Judge of the Karnataka High Court in M/s Saketh India Limited Vs.

Indian Bank and Another's case (supra) where it has been observed in para 21 as under:

“ 21. After carefully considering Section 13(9) of the Securitization Act, this Court is also of the opinion that the petitioner cannot raise such a contention because the petitioner has not availed the loan from various financial institutions jointly or separately offering the very same properties as security. When the respondent No.1 Bank is proceeding against the petitioner only in respect of the properties offered as security by exercising its power under the provisions of the Securitization Act, the petitioner cannot contend that such a proceeding is bad in law in view of Section 13(9) of the Securitization Act. Moreover, the petitioner cannot press the provisions of Section 13(9) of the Act. Since such a right can be exercised by any other Bank or financial institutions who have advanced loan like the respondent No.1 in order to safeguard their interest and a borrower cannot avoid payment to respondent No.1 relying upon Section 13(9) of the Act. In the instant case no other bank or financial institution have raised such a contention before this Court.”

26. Now coming to the view taken by the Division Bench of the Madras High Court in M/s India Radiators Ltd v. India Bank & Ors's case (supra) requiring the BIFR to await the orders of the DRT qua the issue of secured creditors of three-fourth value, before abating proceedings, we are of the view that the AAIFR in the present case has taken due precaution to give leave to the petitioner-company to revive the appeal in case of a favourable verdict by the DRT and the AAIFR would in turn be free to decide the question of dismissal of reference as not being maintainable. We have adopted this view, as a prima facie view has already been arrived at by the DRT unfavourable to the petitioner-company which had been approved by the DRAT.

No doubt the final view of the DRT was awaited. Thus, the approach adopted by the AAIFR cannot be said to be patently erroneous so as to call for interference under Article 226 of the Constitution of India. In fact, the subsequent development of the DRT having dismissed SA No.4/2007 vide the order dated 07.02.2012 leaves no manner of doubt.

27. We are thus of the view that the impugned order of the AAIFR dated 14.01.2012 does not call for any interference by us in exercise of jurisdiction under Article 226 of the Constitution of India especially as, while directing that the reference has abated, due care has been taken by the AAIFR by simultaneously clarifying that if the action taken under Section 13(4) of SARFAESI Act is set aside by the competent court (as it transpires now, the result is to the contrary as the appeal stands dismissed), the petitioner-company would have liberty to seek revival of the appeal before AAIFR and the AAIFR would be free to decide dismissal of reference as not maintainable.
28. The writ petition is accordingly dismissed leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

SEPTEMBER 17, 2012
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VIPIN SANGHI, J.