

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

+ **CRL. M.C. No.651/2012**

Reserved on: 25th April, 2014

% **Date of Decision: 4th July, 2014**

MAN SINGH TUSARIA Petitioner
Through: Mr.Rakesh Saini, Adv.

versus

J M FINANCIAL ASSET RECONSTRUCTION CO.PVT. LTD.
& ANR Respondents
Through: Mr.Sonal Jain, Adv.

CORAM:
HON'BLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

1. By way of this petition under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'Cr. P.C.'), the petitioner seeks setting aside of order dated 10.01.2012 passed by learned Additional Sessions Judge, Dwarka Courts, New Delhi whereby the criminal revision filed by the respondent herein was allowed and it was ordered that the respondent No.1 be substituted in place of the complainant-UCO Bank (respondent No.2) before the Trial Court and further that respondent No.1 shall continue the proceedings of the complaint.

2. Briefly stated, the facts of the case as borne out from the petition are that on 14.07.2005 the petitioner took a loan of Rs.61.15 lakhs under UCO Rent Scheme and a tripartite agreement was signed between the bank, petitioner and the tenant namely M/s Live Wire Call Center Services Pvt. Ltd. under which the tenant made the repayment directly to the bank by way of cheque. On 26.9.2005, second tripartite agreement was signed between the respondent No.2, petitioner and the tenant namely M/s Hindustan Auto Finance pursuant to which a loan of Rs.1.11 crore was sanctioned to the petitioner. After about four months, M/s Hindustan Auto Finance vacated the premises and the premises were occupied by M/s ICI Paint (India) Ltd. who were making the payment of rent to respondent No.2. Under both the agreements, tenants directly paid the rent to the respondent No.2 upto October, 2006. In November, 2006 the building was sealed by MCD. In February, 2008 respondent No.2 took the symbolic possession of the building towards the end of 2008 and the building was de-sealed by MCD. Thereafter on 8.5.2009 the respondent No.2 took the physical possession of the premises. A cheque bearing No.277809 dated 10.7.2007 for Rs.3,50,625/- was obtained by the bank despite complete knowledge of the fact that the petitioner did not have sufficient funds in his account. The manager assured the petitioner that the cheque has been obtained to complete the loan account formalities. Attempts were made for the sale of the property by publication of notices in newspapers by the bank (respondent No.2). The petitioner offered much below the market price due to which the sale could not be effected. Despite assurances, the cheque No.277809 dated 10.7.2007 for Rs.3,50,625/- was presented by respondent No.2, the same was

dishonoured with the remarks 'insufficient funds'. On 11.9.2007, the respondent No.2 filed a complaint under sections 138/142 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'NI Act'). On 16.7.2011, the matter was adjourned to 16.8.2011 for cross-examination of the petitioner. On 16.8.2011 adjournment was once again allowed, subject to payment of cost of Rs.2,000/- to be deposited by respondent no.2 and matter was renotified to 21.9.2011.

3. On 21.9.2011, nobody appeared on behalf of respondent No.2 and an application for substitution was filed on behalf of the respondent No.1 alleging that the loan account of the petitioner has been assigned by the complainant/respondent No.2 bank in favour of respondent No.1 vide Assignment Deed dated 29.3.2011. Vide order dated 1.11.2011, the learned Metropolitan Magistrate dismissed the said application of respondent No.1 as not maintainable.

4. Respondent No.1 challenged the order dated 1.11.2011 by filing Crl. Revision 105/2011. The said appeal, however, was allowed by learned Additional Sessions Judge, Dwarka courts, New Delhi vide order dated 10.1.2012, which is the impugned order in the present petition.

5. Learned counsel for the petitioner urged that a Negotiable Instrument cannot be transferred by assignment and only those documents recognized by custom of trade to be transferable by delivery or endorsement are negotiable. An assignment is a transfer or setting over of property or of some right or interest from one person to another. A complaint under section 138 read with 142 of the NI Act can be filed either by a payee or holder in due course and respondent No.1 is neither the payee nor a holder in due course. A person can

become a holder in due course in respect of a cheque only before it becomes payable. The cheque dated 10.7.2007 was valid only for a period of 6 months and ceased to be payable prior to the execution of the assignment deed.

6. Learned counsel for the petitioner further contends that the action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as “SARFAESI Act”) is a civil action while the proceedings under the NI Act is a criminal remedy. The words “other proceedings of whatever nature” under section 5 of the SARFAESI Act, 2002 would thus cover only civil proceedings and not the proceedings under the NI Act.

7. It was lastly contended by learned counsel for the petitioner that the value of the assets of the petitioner for which physical possession was taken over on 8.5.2009 is about thrice the loan amount of Rs.1.65 crores as was standing on 24.10.2009. Thus, the petitioner cannot be fastened with double liability.

8. Per contra, learned counsel for the respondent No.1 urged that the entire loan amount of the petitioner, including the liability of the dishonored cheque has been acquired by the respondent No.1 and therefore, as per section 5 of the SARFAESI Act, the proceedings initiated by respondent No.2 against the petitioner can be continued by the respondent No.1. A ‘holder in due course’ is any person, who for consideration, becomes the possessor of the promissory note/cheque. If the bank gives debt to a company, it would be considered as a ‘holder in due course’. Thus, the respondent No.1, on transfer of all debts against the petitioner by respondent No.2 to them become holder

in due course and are rightly entitled to pursue the complaint filed by respondent No.2.

9. It was further contended by the counsel for respondent No.1 that as per section 5(4) of the SARFAESI Act, if any suit, appeal or other proceedings of whatever nature relating to the acquired financial asset is pending by or against the bank the same shall not abate and may be continued, prosecuted and enforced by or against the Securitization or Reconstruction company. Section 5 of this Act was framed to strengthen the principle of the lawful rights of the bank cannot be dissipated, diminished or decimated when the assignment of rights takes place.

10. It was lastly contended by learned counsel for the respondent No.1 that section 35 of the SARFAESI Act provides for the overriding effect of this Act over other Acts and Section 31 of this Act carves out exhaustive exceptions does not mention Negotiable Instruments Act or the proceedings therein, as an exception to Section 35 of the SARFAESI Act.

11. I have given my thoughtful consideration to the submission made by the learned counsel for the parties.

12. The SARFAESI Act was enacted to provide a speedy and summary remedy for recovery of thousands of crores which are due to the bank. The Act enables the banks and the financial institutions to realize long term assets, manage problems of liquidity, assets liability mismatch and to improve recovery of debt by exercising powers to take possession of securities, sell them and thereby reducing non-performing assets by reconstruction. The SARFAESI Act empowers banks and financial institutions to recover their non-performing assets

without the intervention of the Court by three main alternative recovery methods namely, securitization, assets reconstruction and enforcement of security without intervention of the court. The Act also provides for setting up of securitization companies/reconstruction companies which acquires the non-performing assets (NPA) from the banks and financial institutions by raising funds from qualified institutional buyers (as defined by the Act) by issue of security receipts. The Act enables securitization companies/reconstruction company to take possession of the secured assets of the borrowers including right to transfer and realize the secured assets. These companies act as a debt aggregator or agents of the banks or financial institutions focussed in the resolution of the NPA's. These companies by the imparted assets from banks and financial institutions, thereby cleaning the balance sheets of the banks and permitting them to focus on their normal banking business.

13. At this juncture it is necessary to reproduce the relevant provisions of section 5 of the SARFAESI Act, which reads as follows:-

“5. Acquisition of rights or interest in financial assets.-(1) Notwithstanding anything contained in any agreement or any other law for the time being in force, any securitisation company or reconstruction company may acquire financial assets of any bank or financial institution,—

(a) by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or

(b) by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.

(2) If the bank or financial institution is a lender in relation to any financial assets acquired under sub-section (1) by the securitisation company or the reconstruction company, such securitisation company or reconstruction company shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets.

(3) Unless otherwise expressly provided by this Act, all contracts, deeds, bonds, agreements, powers-of-attorney, grants of legal representation, permissions, approvals, consents or no-objections under any law or otherwise and other instruments of whatever nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset under sub-section (1) and to which the concerned bank or financial institution is a party or which are in favour of such bank or financial institution shall, after the acquisition of the financial assets, be of as full force and effect against or in favour of the securitisation company or reconstruction company, as the case may be, and may be enforced or acted upon as fully and effectually as if, in the place of the said bank or financial institution, securitisation company or reconstruction company, as the case may be, had been a party thereto or as if they had been issued in favour of securitisation company or reconstruction company, as the case may be.

(4) If, on the date of acquisition of financial asset under sub-section (1), any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to sub-section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the securitisation company or reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the securitisation company or reconstruction company, as the case may be.

[(5) On acquisition of financial assets under sub-section (1), the securitization company or reconstruction company, may with the consent of the originator, file an application before the Debts Recovery Tribunal or the Appellate Tribunal or any court or other authority for the purpose of substitution of its name in any pending suit, appeal or other proceedings and on receipt of such application, such Debts Recovery Tribunal or the Appellate Tribunal or Court or Authority shall pass an orders for the substitution of the securitization company or reconstruction company in such pending suit, appeal or other proceedings.]”

14. From perusal of section 5 of the SARFAESI Act it is clear that this section empowers a securitization company or reconstruction company to acquire the financial assets of any bank or financial institutions notwithstanding anything contained in other laws. On such acquisition, such securitization company is deemed to be the lender and all the rights of such bank or financial institutions gets vested in the company. Section 5(3) of the SARFAESI Act further provides that all contracts, deeds etc. relating to the said financial asset which were subsisting would get transferred in the transferee company who would step into the shoes of assignee and would acquire all rights with full force and effect against the defaulter. Lastly, as per sub-section (4) of section 5 of the SARFAESI Act, any suit, appeal or proceedings of whatever nature relating to the said financial asset pending by or against the bank or financial institution shall not abate or be discontinued rather, shall be continued, prosecuted and enforced by or against the securitization company/assignee, as the case may be.

15. In the instant case, respondent No.2, UCO Bank has assigned all its rights, title and interest, including the financial assistance granted to the petitioner, to the respondent No.1 by virtue of the assignment deed dated 29.3.2011 which was duly registered before the Sub-

Registrar, Delhi. Thus by virtue of this agreement the respondent No.1 had acquired all claims and interests in the loan recoverable from the petitioner. Further, the respondent No.1 steps into the shoes of respondent No.2 and becomes a lender of the financial assets in place of UCO Bank and has all rights of respondent No.2 in relation to financial assets which were acquired by it. The dishonoured cheque was issued against the liabilities of the loan amount and once the said right to deal with the financial asset gets transferred to respondent No.1, it would be highly inappropriate to state that any liability against the said amount would continue to vest with respondent No.2. UCO Bank had advanced loan to the petitioner, who in discharge of their liability had issued the cheque in question which was dishonoured. By virtue of assignment deed, the financial interest including the recovery of the loan would fall within the ambit of Section 5(2) of the SARFAESI Act. Consequently, any cheque given by the petitioner to respondent No.2 towards its discharge of liabilities would create a financial interest of respondent No.1 in such instrument, clearly falling under Section 5(2) of the SARFAESI Act.

16. Further Section 35 of the SARFAESI Act provides as under :

“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.”

17. A perusal of this section clearly shows that provisions of this Act have an overriding effect with any other law. Section 5(4) of the SARFAESI Act also provides that any suit, appeal or proceedings of whatever nature relating to the said financial asset pending by or

against the bank or financial instrument shall not abate or discontinued but shall be continued, prosecuted and enforced by or against the securitization company. The contention that sub-section (4) does not apply to criminal proceedings is apparently misconceived. Such an interpretation would amount to addition to something not provided in this sub-section. Further section 31 of the said Act does not include the proceedings under the NI Act from the provisions of the SARFAESI Act.

18. The proceedings for dishonour of cheques under NI Act are quasi criminal in nature giving option to the complainant to compound the offence subject to the payment of the said amount. When the complete loan account of borrower is taken over by the securitization/reconstruction company, there can be no reason why the liabilities arising out of such a loan amount and so also the proceedings arising therefrom, cannot be transferred and why respondent No.1 cannot be substituted as a complainant in place of the bank, whose financial interests it has acquired, even in complaint under section 138 of the NI Act, filed before agreement of assignment is entered. Once the interest in itself stands transferred, the bank would have no interest in prosecuting the complaint any further and if, respondent No.1 is not allowed to be substituted in place of respondent No.2, it would have an effect of giving an undue advantage to the scrupulous borrower. Section 5(4) of the SARFAESI Act is wide in its ambit and the words 'other proceedings of whatever nature' would be wide enough to cover the complaint proceedings under section 138 of the NI Act.

19. Looking at the purpose of the SARFAESI Act and reading of section 5(4) of the Act in the light of section 35 of the said Act, it

would not be improper to hold that respondent No.1 steps slowly and completely in the shoes of respondent No.2 and once respondent No.2 is no longer interested in the loan amount, respondent No.1 can be substituted in their place with regard to any proceedings that arise out of such financial assets. The view of the learned Addl. Sessions Judge, New Delhi that the LR's of the complainant can pursue the complaint on death of the complainant despite the fact that the LR's of the complainant are not the payee or holder in due course. Likewise, the respondent No.1 stands on a much better footing having an interest in the loan amount on which the said cheque was issued and should be allowed to substitute in place of respondent No.2, finds favour with this Court. Otherwise also section 35 of the SARFAESI Act gives an overriding effect over other enactments.

20. In the light of the aforesaid decision, I do not find any legality or infirmity in the impugned order passed by learned Sessions Judge, Dwarka courts, New Delhi.

21. The present petition is, therefore, dismissed.

(VED PRAKASH VAISH)
JUDGE

July 4th, 2014
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