IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.329 OF 2015
IN
CRIMINAL WRIT PETITION NO.1709 OF 2014
IN
CRIMINAL REVISION APPLICATION NO.432 OF 2013

Harikrishnan Selvakumar]
C-125A, Sector-Z,]
Noida, U.P. 201301]
Also at
T-608, Purva Park Apartments,]
No.53, Colony, Cox Town, BG-5,]
Bangalore, Karnataka – 560005]
Also at
1307, 13th Floor, The Imperial,]
North Tower, B.B. Nakashe Marg,]
Tardeo, Tulsiwadi, Mumbai 400 034.] …. Petitioner
Versus
1. L & T Infrastructure Finance]
Company Limited,]
A company registered under the]
Companies Act, 1956, having its]
corporate office at 3B, Laxmi Towers,]
2nd Floor, Bandra-Kurla Complex,]
Bandra (East), Mumbai 400 051.]
]
2. State of Maharashtra]
Through Government Pleader] …. Respondents
And
Phoenix ARC Private Limited,]
A company incorporated under the Companies]
Act, 1956 and registered as a Securitization]
and Asset Reconstruction Company under the]
provisions of Section 3 of the Securitization]
and Reconstruction of Financial Assets and]
Enforcement of Security Interest Act, 2002,]
acting in its capacity as Trustee of Phoenix]
Trust FY 14-9 and also a Financial Institution]

as defined under Section 2(h)(ia) of the	]	
Recovery of Debts Due to Banks and	]	
Financial Institutions Act, 1993, having	]	
its registered office at Dani Corporate	]	
Park, 7th Floor, 158 CST Road, Kalina,	]	…. Applicant /
Santacruz (E), Mumbai 400 098.	]	[Proposed Resp. No.1]

Mr. Shailendra Singh for the Petitioner in WP/1709/2014 and for the Respondent in APPW/329/2015.

Mr. Charles D'Souza a/w. Ms. Aneesa Cheema for the Applicant.

Mr. H.J. Dedia, A.P.P., for Respondent No.2-State.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

RESERVED ON : 29TH FEBRUARY 2016.

PRONOUNCED ON : 7TH MARCH 2016.

P.C. :

1. Applicant is a Company incorporated under the Companies Act, 1956 and is engaged in the business of acquisition of distressed financial assets from secured creditors (Banks and Financial Institutions) and reconstructing the said assets in accordance with the provisions contained in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, *(for short "SARFAESI Act")*, and various R.B.I. Guidelines. Applicant is also registered as a Securitisation and Asset Reconstruction Company pursuant to Section 3

of the SARFAESI Act and as a Financial Institution, as defined under Section 2(h)(ia) of Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

2. Respondent No.1 herein, i.e. L & T Infrastructure Finance Company Limited has, by and under the Assignment Agreement dated 27th June 2014, assigned in favour of the Applicant all its rights, titles, interests and claims in the financial documents, all agreements, including the claim in respect of the financial assistance provided to Harikrishnan Selvakumar against whom Respondent No.1 had filed a Criminal Case No.1747 of 2011 for the offence under Section 138 r/w. 141 of Negotiable Instruments Act, 1881, in respect of dishonor of the cheque. Therefore, by virtue of this Agreement of Assignment, Applicant claims to have stepped into the shoes of Respondent No.1 and has got right to prosecute the complaint filed by Respondent No.1 against Harikrishnan Selvakumar and others pending in the Metropolitan Magistrate Court. In view thereof, the Applicant filed an application before the learned Magistrate in the said case to permit him to be substituted as the Complainant and the learned Magistrate, by his order dated 27th November 2014, allowed the said application and permitted the Applicant to be substituted as Complainant in the said case.

3. As this Writ Petition No.1709 of 2014 is arising out of the said

criminal case, having been preferred by the Accused therein Mr. Harkrishnan Selvakumar, challenging the order of issue process, the Applicant wants to be substituted as Respondent No.1 in this Writ Petition also in place of Original Complainant - L & T Infrastructure Finance Company Limited.

4. In support of its application, Applicant has produced on record the copy of the Agreement of Assignment and relied upon various provisions of SARFAESI Act.

5. This application is opposed by the Original Accused, who is Petitioner in Writ Petition No.1709 of 2014, by raising various contentions challenging the locus standi of the Applicant to be substituted in place of Original Complainant and further challenging the Assignment Agreement itself on the count that it is not executed for due and valid consideration.

6. It is submitted that, as per the said Assignment Agreement, the right, interest and title is granted to the Applicant towards recovery of financial assets of more than Rs.70 crores for a meager consideration of Rs.5 crores. Secondly, it is urged that, under Section 5 of SARFAESI Act, the Applicant can have right to prosecute only the civil proceedings but not the criminal proceedings. Hence, according to learned counsel for Respondent No.1, this application itself is not tenable.

7. At the outset itself, it has to be observed that, when on the basis of the same Assignment Agreement dated 27th June 2014, the Applicant is already substituted in place of Original Complainant - L & T Infrastructure Finance Company Limited in the proceedings in Criminal Case No.1747 of 2011 pending on the file of the Trial Court, as this Writ Petition is arising out of the said criminal case, it necessarily follows that the Applicant is entitled to be substituted in this Writ Petition also in the place of Original Complainant; otherwise it would lead to absurd results. Hence, the very opposition raised by learned counsel for Respondent No.1 to the substitution of Applicant in this Writ Petition is misconceived and on this ground itself, it is required to be rejected.

8. Even on merits, if one takes a look at the provisions of Section 5 of SARFAESI Act, under which the Applicant is claiming substitution, it is apparent that the claim of the Applicant for substitution is fully justified. For easy and ready reference, Section 5 of the SARFAESI Act can be reproduced as follows :-

> ***Section 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 securitisation 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 orders for the substitution of the securitisation company or reconstruction company in such pending suit, appeal or other proceedings.

9. Thus, it is evident that the provisions of this Section are having overriding effect, as sub-section (1) of Section 5 of the Act starts with *non-obstante clause* and empowers Securitisation or Reconstruction Company to acquire financial assets of any Bank or Financial Institution by entering into an agreement with such Bank or Financial Institution for transfer of such financial assets on such terms and conditions as may be agreed between them.

10. In the instant case, there is no dispute that an Assignment

Agreement was executed between Original Complainant - L & T Infrastructure Finance Company Limited and the present Applicant on 27th June 2014 and by virtue of the said Agreement, Applicant agreed to acquire the loans and assets mentioned therein for consideration. Whether that consideration is adequate or not is totally beyond the scope of the inquiry into deciding this application. That can be, at the most, the subject matter before the Trial Court, but definitely not the subject matter of the writ jurisdiction.

11. Moreover, sub-section (2) of Section 5 of the Act contains a deeming clause or fiction, according to which, as soon as such Assignment Agreement is entered into by Securitisation or Reconstruction Company, such Securitisation or Reconstruction Company shall, on such acquisition, be deemed to be the lender and all the rights of such Bank or Financial Institutions shall vest in such Company in relation to such financial assets. Consequently, whatever financial assets or rights the Original Complainant - L & T Infrastructure Finance Company Limited had in respect of recovery of the amount towards the dishonoured cheque against original accused, Applicant has, by virtue of this deeming provision, acquired them in view of the Assignment Agreement. The use of the word “shall” in sub-section (2) makes it clear that it is a mandatory provision or a fiction provided by the Statute itself.

12. Further, in view of sub-section (3), Assigning Company, i.e. the Applicant herein, steps into the shoes of the Assigner, i.e. the Original Complainant L & T Infrastructure Finance Company Limited and has acquired all the rights with full force and effect against the Petitioner herein, who is Original Accused in the criminal case pending before the Trial Court.

13. Further, Sub-section (4) very clearly provides that any suit, appeal or proceedings of whatever nature relating to said financial assets pending by or against the Bank or Financial Institutions, shall not abate or be discontinued, but shall be continued prosecuting and enforced by or against the Securitiaation Company / Assignee, as the case may be, and, therefore, it automatically follows that the Applicant becomes entitled to continue the proceedings, which the Assigner Company, i.e. L & T Infrastructure Finance Company Limited, has filed against the Petitioner herein for dishonour of the cheque.

14. The contention of learned counsel for Respondent No.1, that sub-section (4) applies only to the civil proceedings and not to the criminal proceedings is apparently misconceived, because the words used in sub-section (4) are *"in suit, appeal or proceedings of whatever nature"*. Therefore, the proceedings may be civil or criminal and not necessarily

civil only. Giving the interpretation which Respondent No.1's counsel wants this Court to give to this sub-section would amount to adding or deducing something in the said Section, which is not provided in this sub-section. The said sub-section protects the pendency of any proceedings of any nature which can includes therefore the complaint under Section 138 of Negotiable Instruments Act filed by the Original Complainant against the present Petitioner. Now by virtue of the Assignment Agreement, present Applicant has acquired the right to continue the said proceedings by stepping into the shoes of the Original Complainant.

15. The last submission advanced by learned counsel for Respondent No.1 is that the Applicant herein is neither the Payee, nor the Holder in due course of the disputed cheques and, therefore, is not competent to be substituted in the place of Original Complainant. However, this line of argument also cannot be accepted, in view of the provisions of Section 9 of the Negotiable Instruments Act, which defines *“holder in due course”* to mean *“any person, who, for consideration, becomes possessor of cheque or the payee or the endorsee thereof”*.

16. Here in the case, it cannot be disputed that the cheque was a negotiable instrument, which was payable either on order or to the bearer. As the Applicant has acquired the rights and the said instrument of cheque for consideration, he becomes the possessor of the said cheque

and, therefore, by virtue of Section 5 of the SARFAESI Act, he becomes entitled to prosecute the criminal case lodged by the Original Complainant. Just as legal heirs of the Original Complainant are not the Payee nor Holder in due course of the dishonoured cheques, yet they are competent to be substituted in the place of Original Complainant, in the instant case also, by virtue of Section 5(4) of the SARFAESI Act, the Applicant also, even if not a Payee, he becomes holder in due course and, therefore, entitled to prosecute the said complaint.

17. Thus, looking at it from any angle, this application needs to be allowed. Accordingly, this Criminal Application is allowed. The Applicant is permitted to be substituted as Respondent No.1 in place of L & T Infrastructure Finance Company Limited. The Petitioner is, accordingly, directed to amend the present Writ Petition No.1709 of 2014, so as to substitute the present Applicant as Respondent No.1 in place of Original Complainant - L & T Infrastructure Finance Company Limited, within two weeks from the date of this order.

[DR. SHALINI PHANSALKAR-JOSHI, J.]