THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

THE HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

ORIGINAL SIDE APPEAL Nos. 18 and 20 of 2014

COMMON JUDGMENT: ***(Per VRS,J)***

Both these Original Side Appeals arise out of an order passed by the learned company Judge, dismissing an application taken out by the Official Liquidator in a company petition for winding up,

to declare the sale of certain properties of the Company in liquidation by the State Bank of India under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the SARFAESI Act'), as null and void. While one appeal is by a third party, who got impleaded as the 4th respondent in the application to set aside the sale, the other appeal is by the Official Liquidator.

2. Heard Mr. Ch. Ramesh Babu, learned counsel appearing for the appellant in O.S.A.No.18 of 2014, Mr. M. Anil Kumar, learned counsel appearing for the Official Liquidator, who is the appellant in the next appeal, and Mr. M. Narender Reddy, learned senior counsel, representing

Mr. M. Srikanth Reddy, learned standing counsel for the State Bank of India.

3. By an order dated 09.11.2012 passed in Company Petition No.171 of 2011, a Company, by name, Pioneer Alloy Castings Limited, was ordered to be wound up and the Official Liquidator attached to this Court was appointed as the Liquidator, by virtue of Section 449 of the Companies Act, 1956.

4. In the course of the proceedings taken by the Official Liquidator, it was found that the State Bank of India brought to sale some of the properties of the Company in liquidation on the ground that those properties had been mortgaged/hypothecated creating a security interest in them. After examining the records of the Company, including Form-VIII filed by the Company before the Registrar of Companies, the learned Official Liquidator thought that some properties, which were not secured assets, had also been brought to sale by the State Bank of India under the SARFAESI Act. Therefore, the Official Liquidator took out an application in Company Application No.525 of 2013 seeking to declare the sale of those properties by the Authorized Officer of the Bank as null and void, in terms of Sections 536 and 537 of the

Companies Act, 1956.

5. During the pendency of the said application, a Company, by name, Innovative Foundaries Private Limited, came up with an application in C.A.No.1083 of 2013 for impleading itself as a party respondent to the application C.A.No.525 of 2013 on the ground that some of the properties leased out by them to the Company in liquidation, had also been sold illegally by the State Bank of India under the SARFAESI Act. This impleading application was allowed by the company Court, by an order dated 31.12.2013.

6. Thereafter, the company Court took up the main application C.A.No.525 of 2013 for hearing along with certain other applications, about which we are not now concerned. By a common order passed on 28.02.2014, the learned company Judge dismissed C.A.No.525 of 2013 filed by the Official Liquidator on a short ground that the remedy of the Official Liquidator lies only before the Debts Recovery Tribunal, under Section 17 of the SARFAESI Act. Aggrieved by the said order, the impleaded 4th respondent, namely, Innovative Foundaries Private Limited, came up with

O.S.A.No.18 of 2014 and the Official Liquidator came up with O.S.A.No.20 of 2014.

7. The short question that arises for consideration in both these appeals is as to whether the remedy of the Official Liquidator to challenge a sale made by secured creditor under the

SARFAESI Act lies only before the Debts Recovery Tribunal or before the company Court and, if so, under what circumstances?

8. The question, which we have framed now, can be split into two parts. The first part would relate to the exercise of power by the secured creditor over the secured assets under the SARFAESI Act, and the second part would concern the exercise of power by the secured creditor over the assets allegedly not mortgaged/ hypothecated.

9. Mr. M. Anil Kumar, learned counsel for the Official Liquidator, has no quarrel with the proposition that his remedy would lie only before the Debts Recovery Tribunal, if the assets are actually secured assets. This is in view of the law categorically laid down by the Supreme Court in ***Pegasus Assets Reconstruction Private***

Limited Vs. Haryana Concast Limited and another[1].
In paragraph 42.4 of the said decision, the Supreme Court affirmed the judgment of the Delhi High Court in ***Kotak Mahindra Bank Limited Vs. Megnostar Telecommunications (P) Limited ((2012) 193 DLT 371)*** to the effect that the powers under the Companies Act cannot be wielded by the company Judge to interfere with the proceedings by a secured creditor to realize its secured assets as per the provisions of the SARFAESI Act.

10. Even a Division Bench of this Court has taken a view way back on 11.11.2014 in ***Indian Bank Vs. the Sub-Registrar (Writ Appeal Nos.1420 and 1424 of 2013, O.S.A.Nos.34 and 35 of 2013)*** that the remedy of the Official Liquidator would only be before the Debts Recovery Tribunal and not before the company Court.

11. But the main contention of the learned counsel for the Official Liquidator is that in respect of cases falling under the 2nd Category, namely, the properties, which were not offered as security or brought to sale under the SARFAESI Act, the decision in ***Pegasus (1 supra)*** would not apply. In support of his contention, the learned

counsel for the Official Liquidator places reliance upon the decision of the Supreme Court in ***Bakemans Industries Private Limited Vs. New Cawnpore Flour Mills and others***[2].

12. We have carefully considered the submissions of the learned counsel appearing for the Official Liquidator.

13. It is too late in the day to question the fact that the SARFAESI Act is a special enactment. Section 34 of the said Act bars the jurisdiction of Civil Courts to entertain any suit or proceeding in respect of any matter, which a Debts Recovery Tribunal is empowered by or under the Act to determine.

14. Though Section 37 of the SARFAESI Act states that the provisions of the Act and the Rules made thereunder shall be in addition to and not in derogation of the Companies Act, it does not mean that the statute contains an exception. If Section 37 is to be understood in the manner in which the learned counsel seeks to project it, then, even the ratio laid down in ***Pegasus (1 supra)*** has to be doubted.

15. For all practical purposes, the company Court is treated as a Civil Court, which is entitled to pass all types

of orders that a Civil Court is competent to pass. Therefore, the bar of jurisdiction under Section 34, to the extent necessary, would also cover a company Court. The purport of Section 37 is for certain purposes, such as, the distribution under Sections 529, 529-A, 530, etc.

16. The question as to whether a security interest was created over a particular asset or not, is a question of fact. There are several questions of fact, which are left by the SARFAESI Act, to be determined by the Debts Recovery Tribunal. For instance, Section 31 of the SARFAESI Act lists out the circumstances in which the provisions of the Act will not apply. Let us take for instance a case where there is a dispute as to whether the land, over which security interest was created, is an agricultural land or not. Then, the question as to whether Section 31(i) is attracted or not, would be a question of fact, which the Debts Recovery Tribunal alone will be competent to determine. Otherwise, borrowers will be permitted to go to Civil Courts first to contend that the land was an agricultural land and falling within the exception under Section 31(i) and, once they fail, then they will have to go before the Debts Recovery Tribunal. This kind of a forum haunting is not what is contemplated by the SARFAESI Act.

17. Let us take a hypothetical case as an example. Suppose, after a roving enquiry, the learned company Judge comes to a conclusion that the properties in question were actually mortgaged to the Bank, then, all further proceedings will have to go only before the Debts Recovery Tribunal. Therefore, for determination of one question, the company Court cannot exercise jurisdiction, leaving all other questions to be determined by the Debts Recovery Tribunal.

18. Therefore, we are of the considered view that the application of the law laid down by ***Pegasus (1 supra),*** even to cases where there is a dispute as to whether security interest was actually created or not, would be the correct approach to the provisions of both the enactments. Hence, we dismiss both the Original Side Appeals, upholding the order of the learned company Judge.

19. Since the Official Liquidator initiated proceedings way back in 2013 and the matter is pending either before the company Judge or before the Division Bench for the past three years, this period should be excluded while calculating the period of limitation for the Official Liquidator

to file an appeal under Section 17.

Consequently, miscellaneous petitions if any pending in the appeals shall stand dismissed. There shall be no order as to costs.

V. RAMASUBRAMANIAN, J

A. SHANKAR NARAYANA, J.

21st June, 2016
cbs

THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

THE HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

Original Side Appeal Nos. 18 & 20 of 2014

(Per VRS,J)

21st June, 2016

cbs

---

[1] (2016) 4 SCC 47

[2] (2008) 144 Company Cases 71 (SC)