

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

% **Judgment reserved on: 29th August, 2016**
Judgment pronounced on: 6th September, 2016

+ **O.M.P.(I) 412/2015**

S. E. INVESTMENTS LTD. Petitioner
Through Mr.P.Nagesh, Adv.

versus

PARAMOUNT PRINTPACKAGING LTD & ORS Respondents
Through Mr.Neeraj Kishan Kaul, Sr. Adv.
with Mr.I.P.S. Oberoi, Ms.Gunjan
Sinha Jain & Mr.Mukesh Kumar,
Advs. for R-5/SBI.
Mr.Rakesh Taneja, Adv. for R-1
to 4.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (ORAL)

1. By way of this order, I propose to decide the petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") filed by the petitioner for seeking the following directions against the respondents including the respondent No.5, State Bank of India:-

" (a) Restrain the Respondents including Respondent No.5, their agents or anybody claiming through them in handing over the physical possession of the said machineries i.e. Bobst SPERIA 106, having serial No. 053800805 and Bobst SPERIA 1080E, having serial No. 055206206 are lying in the premises at A-309, MIDC, TTC Industrial Area, Mahape, Navi Mumbai- 400701;

(b) restrain the Respondents including State Bank of India in interfering with the Petitioner's right in taking the physical possession of the said machineries i.e. Bobst SPERIA 106, having serial No. 053800805 and Bobst SPERIA 1080E, having serial No. 055206206 are lying in the premises at A-309, MIDC, TTC Industrial Area, Mahape, Navi Mumbai- 400701;

(c) direct the Respondents including State Bank of India to co-operate and assist the petitioner in taking the physical possession of the said machineries by the petitioner."

2. Admittedly, respondent No.5 is not a party to the Arbitration Agreement. It was also not in the picture when the loan was taken by the borrower i.e. respondent No.1 from the petitioner. The respondent No.5 was also not a party to the arbitration proceedings conducted between the petitioner-lender and borrower wherein the consent award was published on 1st November, 2014.

3. Brief facts of the case which are necessary to refer and are pertaining to the litigation between petitioner and borrower are as under:-

- (i) On 19th January, 2013, the Loan Agreement was signed between the petitioner-Company and the respondent No.1. The respondent Nos. 2 to 4 signed the Guarantee Agreement for the Loan of Rs.2,03,50,000/- repayable in 30 monthly instalments with interest @ 10.75% per annum at flat rate basis and in case of default in repayment, late fee @ Rs.2/- per thousand per day would be calculated from the day of delay till the repayment.
- (ii) Deed of Hypothecation-Machinery and irrevocable Power of Attorney were executed by the respondent No.1 on 20th September, 2013 for the purpose of hypothecating the assets in favour of the petitioner and rescheduling the loan. Charge was

also registered with Registrar of Companies (ROC) by filing Form-8.

(iii) This Court passed an order on 12th September, 2014 in Section 9 petition being O.M.P. No. 619/2014 filed by the petitioner for permitting the petitioner to sell the attached hypothecated goods and to adjust the sale proceeds against the agreed amount.

(iv) On 1st November, 2014, the consent award was passed by the sole Arbitrator, Mr. L.C.Jain, Ex. President, District Consumer Forum, Delhi.

4. In para 10 of the petition which pertains to respondent No.5, it is stated that the execution of the award dated 1st November, 2014 is being frustrated on account of the acts of State Bank of India who is obstructing the order of sale of machinery despite of the orders of this Court which was passed earlier, therefore, interim directions are sought against the respondent No.5, thus the present petition is maintainable.

5. The respondent Nos.1 to 4 are supporting the prayer made by the petitioner. An affidavit of Mr.Divyesh Ashwinbhai Sukhadia, S/o Late Sh. Ashwinbhai Babulal Sukhadia, R/o 401, 4th Floor, Nath Dwara Niwas, Poddar Lane, Santacruz (W), Mumbai-400054, on behalf of the respondent Nos.1 to 4 has been filed who is one of the directors of the respondent No. 1- Company. He has stated that a settlement was reached between the petitioner and the respondent Nos. 1 to 4 herein in the proceedings being O.M.P. No. 619 of 2014 before this Court which was disposed of in terms of a consent order dated 12th September, 2014 and in terms of the said settlement, the

petitioner was permitted by this Court to sell the machines Bobst SPERIA 106, having serial No. 053800805 and Bobst SPERIA 1080E, having serial No. 055206206 since attached and hypothecated to the petitioner to adjust the sale proceeds against the agreed amount to be recovered from the respondent No.1-Company. By way of a Deed of Hypothecation, dated 20th September, 2013, the above mentioned machinery had been hypothecated in favour of the petitioner and further a charge was created/registered over these hypothecated assets with ROC as the security for the repayment of the loan amount. It is deposed in the affidavit that both the above machines are currently located at the manufacturing unit of the respondent No.1-Company at A-309, MIDC, TTC Industrial Area, Mahape, Navi Mumbai-400701. It is not disputed by him that the State Bank of India is holding a charge on the building where the above said machines are placed and therefore, a request had been made by way of a letter dated 3rd July, 2015 to the State Bank of India for co-operating with the petitioner to facilitate them in taking possession of the above said machines for disposal in terms of the order passed by this Court on 12th September, 2014 in O.M.P. No. 619 of 2014.

6. Reply on behalf of the respondent No.5 has been filed wherein it is stated that the petition is a gross misuse and abuse of the process of law *inter alia* on the following grounds:-

- i. The respondent No.5 was not a party in the earlier petition being O.M.P. No. 619/2014 under Section 9 of the Act before this Court between the petitioner and other respondents wherein a consent order dated 12th September, 2014 was obtained by the petitioner against the respondents therein i.e.

Paramount Print Packaging Ltd and its Directors, at the back of respondent No.5.

- ii. The permission to sell the alleged hypothecated goods vide said order dated 12th September, 2014 of this Court has been obtained by the concealment of material facts that the entire assets of the respondent No.1-Company already stood hypothecated to the consortium of banks and also that the State Bank of India had already issued statutory Demand Notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002.
- iii. The said consent order is now being misused to prevent the respondent No.5 from exercising its further statutory rights for recovery of its dues from the respondent No.1-Company in terms of the SARFAESI Act, 2002.
- iv. Even the respondent No.5 was not a party in the alleged arbitration proceedings between the petitioner and the other respondents. The present petition has been filed in the context of the consent award dated 1st November, 2014 of the sole Arbitrator passed in the said arbitration proceedings. The said Award was obtained by the petitioner in the said alleged arbitration proceedings at the back of the respondent No.5. The said Award is now being misused to thwart the actions being taken by respondent No.5 in terms of its statutory rights under the SARFAESI Act, 2002 for the recovery of its huge dues from the respondent No.1-Company.
- v. The respondent No.5 is also not a party to the contract between the petitioner and the respondent No.1-Company,

which resulted in the arbitration proceedings between the said parties. Thus, the present petition cannot lie against the respondent No.5 and the same should be dismissed qua the respondent No.5. The respondent No.5 cannot be prevented from exercising its statutory rights under the law against the respondent No.1.

7. It is alleged by the petitioner in rejoinder that charge of the respondent No. 5 over the aforesaid asset is only a "Floating Charge" and cannot supersede or override the "Fixed Charge" of the petitioner-Company, as the petitioner had got its charge registered with the Registrar of Company by filing Form-8 for creation of charge on 26th September, 2013. As the respondent No. 1 had started defaulting in the repayment of the loan and after holding a series of discussions with the petitioner-Company, the said respondent entered into the Deed of Hypothecation-Machinery on 20th September, 2013 while undertaking to provide the machineries as additional security.

8. The existence of fixed charge of the petitioner-Company over the hypothecated assets can further be ascertained from the facts that the date of purchase of machinery SPERIA 106 was 10th March, 2005 which was financed by ORIX Auto Infrastructure Services Limited under Equipment Loan Financing.

9. It is further submitted in the rejoinder that as per the settled law, a fixed charge is against a specific, clearly identifiable and defined property. The property under charge is identified at the time of creation of charge itself. The nature and identity of the property does not change during the existence of the charge. The Company can transfer the property so charged; only subject to that charge, so

that the charge holder or mortgagor must be paid first whatever is due to him before disposing off that property.

10. Learned counsel for the petitioner submits that the priorities in the matter of charge are to be ascertained by applying the principle that a registered floating charge ranks after the prior or subsequent charge which is also duly registered. It is not denied by him that though under the SARFAESI Act, consecrated and unfettered powers have been conferred on the banks and financial institutions to recover their outstanding dues from the defaulting-Borrower, however he stated that such powers cannot be exercised so as to deprive other lenders of their secured fixed charge. As mandated under Section 37 of the SARFAESI Act, the provision of the Act or Rules made thereunder shall be in addition to, and not in derogation with the Companies Act, 1956.

11. It is further stated by the counsel that the effect of Section 37 would be that in addition to the provisions contained under the said Act. It will be in order for a party to fall back upon the provisions of the other Acts mentioned in the Section 37 itself. Thus, the recovery proceedings initiated by the respondent No. 5 against the respondent No. 1 shall not prejudice the petitioner from enforcing its fixed charge, and particularly when an order has already been passed in favour of the petitioner-Company by this Court.

12. Let me now deal with the rival submissions of the petitioner, respondent No.1 to 4 and respondent No.5. Admittedly, the case of the respondent No.5 is that the respondent No.1 is a defaulted-borrower of the respondent No.5 and its account has been classified as NPA in terms of the guidelines of RBI. The respondent No.5 had initiated actions against the said respondent in terms of the

provisions of the SARFAESI Act, even before filing of the present petition and the earlier petition being O.M.P. No. 619/2014 as well. As per the Memorandum of Association of the respondent No.1-Company which was provided by the Company to the Bank, the Company was incorporated in March, 2006. One of the main objects of the Company as stated in the said Memorandum, amongst others, is *"To take over the existing partnership firm, M/s Paramount Printing Press and register under the provisions of Part IX of the Companies Act, 1956"*. A copy of the updated Memorandum of Association of the respondent No.1-Company has been filed as Annexure R-5/1.

12.1. At the request of the respondent No.1-Company, the Commercial Branch, Vile Parle (East), Mumbai of the respondent No.5 had sanctioned fresh credit facilities of Rs. 24.43 crores to the respondent No.1-Company, which was conveyed vide sanction letter dated 20th October, 2010. A copy of the said sanction letter dated 20th October, 2010 which was duly accepted by the respondent No.1-Company and its Directors/Guarantors has been filed as Annexure R-5/2. In Annexure A to the said letter, under the heading 'Terms and Conditions', the primary security is mentioned as **'Hypothecation of Stocks, Book Debt, Plant & Machinery & fixed asset on pari passu basis'**. As the respondent No.1-Company had taken over the earlier entity known as 'M/s Paramount Printing Press' and it appears that the respondent No.1-Company was earlier known as M/s Paramount Printing Press, the name of the owner of the assets to be hypothecated as security to the respondent No.5 in the sanction letter is mentioned as M/s Paramount Printing Press Pvt. Ltd.

13. It appears from the pleadings and documents that for the purpose of availing the credit facilities, the respondent No.1-Company had passed the resolutions in meeting of its Board of Directors held on 18th November, 2010 wherein the sanction of the various limits by State Bank of India consortium comprising of State Bank of India, Commercial Branch, Vile Parle and The Shamrao Vithal Co-operative Bank Limited, Vakola Branch with State Bank of India as the Lead Bank was informed to the Board. As per the said resolution, it was resolved to (i) borrow and avail the said facilities, (ii) approve the draft of the Working Capital Consortium Agreement and the Facility Agreement, (iii) authority to Mr. Divyesh A. Sukhadia for the execution of the Working Capital Consortium Agreement, (iv) approve the execution of the Joint Deed of Hypothecation/Facility Agreement in respect of all movables and (v) file the requisite particulars of charge with ROC, Mumbai in respect of the Joint Deed of Hypothecation/Facility Agreement/ Mortgage Deed after execution within the time prescribed by law. A copy of the minutes of the said meeting of the Board of Directors dated 18th November, 2010 has been filed as Annexure R-5/3.

14. Pursuant to the aforesaid resolution passed by its Board of Directors, the respondent No.1-Company had executed the Working Capital Consortium Agreement on 18th November, 2010 in favour of the aforesaid Consortium of Banks and a copy of the same has been filed as Annexure R-5/4. The Article II of the said Working Capital Consortium Agreement covenants the creation of first pari passu charge on the assets of the respondent No.1-Company, which are further described in Schedule II and Schedule III of the said Consortium Agreement. The respondent No.1-Company had also

executed the Facility Agreement (Consortium Term Loan) on 29th November, 2010 in favour of the aforesaid consortium of banks and the same has been filed as Annexure R-5/5. In Article III, named 'Security' in the Facility Agreement, the primary security has been stated as 'Hypothecation of Stocks, Book Debt, Plant & Machinery and Fixed Asset on pari passu basis' valued at Rs. 19.40 crores as per the audited balance sheet of 31st March, 2010.

15. The respondent No.1-Company had filed the necessary Form-8 with ROC for registering the charge on its aforesaid assets in favour of the State Bank of India Consortium. A Copy of the said Form-8 filed under the signature of its Director Mr. Divyesh Ashwinbhai Sukhadia, in terms of the Resolution dated 18th November, 2010 of the Board of Directors of the Company, on the strength of aforesaid Facility Agreement dated 29th November, 2010, has been filed as Annexure R-5/6. The particulars of the property/assets so charged as mentioned in para 15 of the said Form-8 are as under:-

"15. Short particulars of the property or asset (s) charged (including complete address and location of the property) -

The whole of the Current Assets of the Borrower namely, Stocks of Raw Materials, Stock in Process, Semi Finished & Finished Goods, Stores & Spares not relating to Plant & Machinery (Consumable Stores & Spares), Bills Receivable & Book Debts & all other movables, both present and future whether now lying loose or in cases or which are now lying or stored in or about or shall hereinafter from time to time during the continuance of the security of these presents be brought into or upon or be stored or be in or about of the Borrower's factories, premises and godowns situated at A-309, MIDC, TTC Industrial Area, Mahape, Navi Mumbai 400 071 in the State of Maharashtra or wherever else the same may be or be held by any party to the order or disposition of the Borrower or in the course of transit or on high seas or on order or delivery, howsoever and wheresoever in the

possession of the Borrower and either by way of substitution or addition. (Other description as per the Annexure A attached)."

16. No doubt the details of the assets referred in Form-8 excludes the plant and machinery. However, in the Annexure A to the said Form-8, the particulars of property/assets charged (including plant and machinery lying at that time and to be purchased in future) are reproduced here as under:-

"15. Short particulars of the property or asset(s) charged (including complete address and location of the property).

All tangible movable, machinery, plant machinery, fixtures, fittings, other installations, cranes, furnitures, computers and other accessories vehicles together with spares with spares tools and accessories and all other articles lying on the premises or in the godowns of the borrower or in the custody of any person who are mercantile agents of the borrower or in the course of transit which may hereinafter be brought stored or be lying or upon the said premises of the borrower and also including those more particularly mentioned in the Annexure I in Joint deed agreement.

Primary Security - Hypothecation of stocks, book debts, plant and machinery & fixed asset on pari passu basis.

17. Subsequently, the respondent No.1-Company had filed a fresh Form-8 for creation of charge exclusively in favour of respondent No.5 for the facility of Rs.4 crores under the signature of its Director Mr. Divyesh Ashwinbhai Sukhadia, in terms of Resolution dated 13th February, 2012 of the Board of Directors of the Company. The respondent No.1-Company had filed another Form-8 for creation of the charge in favour of the Consortium of Banks for the facility of Rs.50,30,00,000/- under the signature of its Director Mr. Divyesh

Ashwinbhai Sukhadia, in terms of the Resolution dated 13th June, 2012 of the Board of Directors of the Company.

17.1. In February 2011, after the registration of charge in favour of the respondent No.5 for the first time, it had got conducted a search/inspection of the records of Ministry of Corporate Affairs in respect of the respondent No.1-Company through a Company Secretary, who had submitted his report along with copy of the receipt dated 10th February, 2011 of the Ministry of Corporate Affairs in respect of the inspection of the said public documents. The respondent No.1-Company had filed the charge on 31st December, 2010 in favour of the State Bank of India Consortium, on the strength of Joint Deed of Hypothecation/Facility Agreement dated 29th November, 2010 for the amount of Rs. 40,43,00,000.00 on the assets of the borrower-Company described in detail therein, including all tangible movable, machinery, plant machinery etc. and the charge was registered on 13th January, 2011 with ID No. 10258950.

17.2. The respondent No.5 had got conducted a fresh search on 16th January, 2016 with the MCA 21 site and it confirmed the registration of the charge in favour of State Bank of India (respondent No.5) on 13th January, 2011, 23rd February, 2012 and 14th June, 2012 and also showed a subsequent charge registered on 20th September, 2013 in favour of the petitioner.

17.3. The respondent No.1-Company had provided to the respondent No.5, copies of its Audited Balance Sheets/Auditor's Reports for the financial years ending 31st March, 2012, 31st March, 2013 and 31st March, 2014. In these reports, the factum of hypothecation of the above said assets in favour of the respondent No.5 has been

specifically recorded. The relevant extracts from the notes of the aforesaid three balance sheets have been reproduced here as under:-

"i. Balance Sheet as of 31.03.2012 - Term Loan from banks being Rs. 8,26,58,122.

"Term Loans and Working Capital Loan from banks (including current maturities of Rs. 3,94,09,500/-) (previous year current maturities of Rs. 2,46,71,175/-) from consortium banks are primarily secured on pari pasu basis by hypothecation charge on stock, book debts, any receivables current and future, existing plant & machineries & fixed assets of the company."

ii. Balance Sheet as of 31.03.2013 – Term Loan from banks being Rs. 13,92,53,229.

"Term Loans and Working Capital Loans from banks (including current maturities) from consortium banks are primarily secured on paripasu basis by hypothecation charge on stock, book debts, any receivables current and future, existing plant & machineries & fixed assets of the company. "

iii. Balance Sheet as of 31.03.2014 – Term Loan from banks being Rs. 13,30,86,000.

"Term Loans and Working Capital Loans from banks (including current maturities) from consortium banks are primarily secured on paripasu basis by hypothecation charge on stock, book debts, any receivables current and future, existing plant & machineries & fixed assets of the company.""

17.4. It is stated by the respondent No.5 that in terms of the aforesaid notes in the audited balance sheets of the respondent No. 1-Company, it is clearly recorded and admitted by the respondent No.1-Company that its entire plant and machineries were under hypothecation charge in favour of the State Bank of India

Consortium, as a security for the term loans facilities availed by the Company from the banks during the periods covered by the aforesaid balance sheets and continues to be so.

17.5 It is also alleged in the reply that in the aforesaid 3 Balance Sheets/Auditors Reports, there is no noting/recording at all in respect of exclusion of any specific properties/assets of the respondent No.1-Company from the hypothecation charges in favour of the Banks. In view thereof, after hypothecation of the entire machineries including machineries in question on 18th November, 2010 itself in favour of the Banks, the same being recharged again on 23rd February, 2012 and thereafter on 14th June, 2012, the petitioner cannot claim the two specific machineries from the respondent No.5 by way of the present proceedings, on the basis of alleged Deed of Hypothecation in their favour which was executed much later on 20th September, 2013. The respondent No.5 submits that in view of the aforesaid, the present proceedings are liable to be dismissed at threshold qua the respondent No.5-Bank with exemplary cost.

18. The said documents are prior to the date of loan sanctioned by the petitioner to the respondent Nos.1 to 4 and the date of hypothecation dated 20th September, 2013. Hence, it is rightly pointed by Mr.Neeraj Kishan Kaul, learned Senior counsel for the respondent No.5 that if at place the plant and machinery is excluded, the same has no consequences because of the reason that the relevant date in the present case is 20th September, 2013 when the charge of plant and machinery was already with the respondent No.5. Mr.Kaul submits that prior to 20th September, 2013, the petitioner was not in picture at all.

19. The other aspect of the matter is that admittedly the borrowal accounts of the respondent No.1-Company had been classified as NPA in accordance with the directives/guidelines of Reserve Bank of India, consequent to the default committed in the repayment of the principle debt and interest thereon. The respondent No.5 had issued a statutory demand notice bearing reference CBVP/CM/2012-13/566 dated 17th May, 2013 under Section 13(2) of the SARFAESI Act, demanding an aggregate amount of Rs. 27,73,80,884.23/- from the respondent No.1-Company and its Directors, who are the respondent Nos. 2 to 4 in the present petition. In the closing para of the said notice, it was *inter alia* specifically stipulated as under:-

"You are also put in notice that in terms of Sub-section 13 of Section 13 you shall not transfer by sale, lease, or otherwise the said secured assets detailed in Section 'C' of this notice without obtaining written consent of the Bank. "

Sub-section (13) of Section 13 of the SARFAESI Act has been reproduced here as under:-

"(13). No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor."

The other lender member of the State Bank of India Consortium, namely The Shamrao Vithal Co-operative Bank Limited had also issued the statutory demand notice bearing reference CO:PVR:L&R:2013-14/216 dated 24th August, 2013 under Section 13 (2) of the SARFAESI Act for an amount of Rs. 14,64,92,989.31/- to the respondent No.1-Company and its Directors. A copy of the Demand Notice dated 24th August, 2013 of S.V.C. Bank Ltd. has been filed as Annexure R-5/16.

20. It has come on record that the respondent No.1-Company had given reply in response to the aforesaid demand notice dated 17th May, 2013 issued by the respondent No.5 through its counsel vide letter dated 8th July, 2013. Thus, the respondent No. 1 was fully aware of the proceedings being undertaken by the Lender Banks including the respondent No.5 towards realization of their dues in terms of SARFAESI Act. Despite of the above said proceedings, the respondent No.1-Company, with a malafide intention to defraud the Lender Banks including the respondent No.5 has allegedly executed another subsequent Deed of Hypothecation on 20th September, 2013 in favour of the petitioner in respect of two specified machineries in question herein.

The respondent No.5 replied vide letter dated 30th August, 2013 to the respondent No.1's letter dated 8th July, 2013 through its counsel wherein it was reiterated that the respondent No.1-Company had created charge over its movable assets, as specified in the aforesaid demand notice dated 17th May, 2013. A copy of the said reply dated 30th August, 2013 has been filed as Annexure R-5/18.

21. It is clear that the proceedings have arisen despite of the full knowledge between the petitioner and respondent No.1 in order to frustrate the proceedings of the Lender-Banks including the respondent No.5 and therefore, it is a matter of serious concern as it is apparent that the respondent No.5 had invoked the provisions under Section 13(4) of the SARFAESI Act and has issued a customary pre-possession notice dated 17th September, 2013, demanding from the respondent No.1-Company to hand over the possession of the secured assets to the Authorised Officer of the respondent No.5 for which the date was fixed to be 23rd September,

2013 and the Authorised Officer of the respondent No.5 took the symbolic possession of the properties/assets of the respondent No.1-Company on 23rd September, 2013 by pasting the prescribed possession notice [under Rule 8(1)] at the factory premises wherein all the hypothecated secured assets including the two machineries in question are stored. The description of the relevant property in the said possession notice has been stated as:-

"Hypothecation of Movable Properties: (i) Stocks, Stocks in Trade, receivable, entire current assets, plant and machineries etc of the company."

A copy of the said pre-possession notice dated 23rd September, 2013 has been filed as Annexure R-5/20. The extract of the said possession notice was also published in newspaper, namely The Free Press Journal, Mumbai dated 25th September, 2013 and a copy of the cutting of the relevant portion/page of the said newspaper has been filed as Annexure R-5/21.

22. On the face of record, it appears to the Court that the respondent Nos.1 to 4 had with a malafide intention to pre-empt the proposed action of the respondent No.5 to take physical possession of the entire hypothecated assets of the respondent No.1-Company, including the said two machineries, in terms of Section 13 (4) of the SARFAESI Act, the respondent No.1-Company in connivance with the petitioner has played fraud on respondent No.5 by executing on 20th September, 2013 the alleged Deed of Hypothecation in respect of the two specific machineries in favour of the petitioner. This Deed of Hypothecation was executed by the respondent No.1-Company with the petitioner without any knowledge and consent of the respondent No.5 and in complete contravention of the provisions of Section 13

(9) of the SARFAESI Act and in terms of Section 29 of the SARFAESI Act which reads as under:-

"29. If any person contravenes or attempts to contravene or abets the contravention of the provisions of this Act or of any rules made thereunder, he shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both. "

23. The following are the relevant dates and events provided by the respondent No.5 which speaks for itself:-

- a) The respondent No.1-Company had been granted credit facilities by the respondent No.5 jointly along with S.V.C Bank Ltd. in the year 2010. The respondent No.1-Company had executed security/loaning documents in November, 2010 whereby, hypothecation charge had been created in favour of the consortium of banks on the assets of the Company, including entire plant and machinery in question, as a security on *pari passu* basis.
- b) The said hypothecation charge in favour of the banks had been registered with the Registrar of Companies on 13th January, 2011 and further charged on 23rd February, 2012 and 14th June, 2012 in favour of the consortium of Banks led by the respondent No.5.
- c) The factum of the hypothecation charge in favour of the banks on the existing plant and machineries of the Company had been duly recorded and acknowledged in the audited balance sheets of the Company dated 30th May, 2012 as on 31st March, 2012, dated 29th May, 2013 as on 31st March, 2013 and dated 17th May, 2014 as on 31st March, 2014.

- d) The Statutory Demand Notice under Section 13 (2) of the SARFAESI Act had been issued by the respondent No.5 to the respondent No.1-Company on 17th May, 2013 and by S.V.C. Bank Ltd. on 24th August, 2013.
- e) The alleged Deed of Hypothecation had been executed fraudulently by the respondent No.1-Company on 20th September, 2013 in favour of the petitioner is of much later date from the date of hypothecation charge on entire plant and machineries created by the respondent No.1-Company in favour of the consortium of banks in November 2010, which is continuing.
- f) The alleged Deed of Hypothecation is also subsequent to the Statutory Demand/Notice issued to the respondent No.1-Company by the respondent No.5 and by S.V.C. Bank Ltd. under Section 13(2) of the SARFAESI Act in respect of the said entire plant and machineries amongst others.
- g) The symbolic possession of the aforesaid assets comprising, *inter alia*, of the plant & machineries of the respondent No.1-Company was taken under Section 13 (4) of the SARFAESI Act on 23rd September, 2013.
- h) The respondent No.5 is statutorily empowered to initiate further steps for the sale of the aforesaid secured assets of the respondent No.1-Company in terms of the applicable provisions of the SARFAESI Act and the Rules framed there under.
24. Despite of the above facts, it is apparent that the respondent No.5 was not made a party in the earlier petition being O.M.P. No. 619/2014 under Section 9 of the Act filed by the petitioner, who did

not inform the Court about the actual position at the time of hearing. The petition was disposed of by this Court by a consent order dated 12th September, 2014 which was obtained at the back of the respondent No.5. The respondent No.5 was the aggrieved party the effect of the said order dated 12th September, 2014, as the attached goods allegedly hypothecated by the respondent No.1-Company in favour of the petitioner on 20th September, 2013 are part of the entire plant and machineries of the Company which had already been under hypothecation charge in favour of the respondent No.5 along with S.V.C. Bank Ltd. on pari passu basis since November 2010 and continue to be so till date.

24.1 The order dated 12th September, 2014 of this Court is a consent order on the basis of alleged settlement arrived at between the parties to the said O.M.P. No. 619/2014 and in the said order, it was recorded as under:

"Parties have submitted that they have reached a settlement by which it is agreed that the respondent would pay to the petitioner a sum of Rs. 2 crore 30 lakh against all the claims of the petitioner by 31.12.2014"

The said order dated 12th September, 2014 further reads as under:-

"In terms of the settlement, the petitioner is permitted to sell the attached hypothecated goods and to adjust the sale proceeds against the agreed amount."

24. From the aforesaid order, it is clear that the same is a mere permission granted by this Court to sell the goods on the prayer of the petitioner and is not an adjudicated order or directions of this Court to sell the same. From the present proceedings, it is further clear that the alleged agreed amount of Rs.2,30,00,000/- has not

been paid by the respondent No.1 to the petitioner by 31st December, 2014 in terms of their settlement recorded in the order dated 12th September, 2014 and accordingly, the said settlement has also become redundant.

25. If now the petition under Section 9 of the Act can be filed by the petitioner against respondent No.5, in which the respondent Nos.1 to 4 despite of receiving of the notices under Section 5 of SARFAESI Act wherein the said respondent are singing in the same tune as the petitioner, then why in earlier petition filed under the same provision the respondent No.5 was not made a party wherein the consent order was passed on behalf of the petitioner and respondent Nos.1 to 4. Their only intention, it appears, was that the possession of the machinery be not taken by respondent No.5. It is because of the reason that respondent Nos.1 to 4 were aware that the amount due to respondent No.5 is a larger amount than that of the petitioner, therefore, the consent award was passed. Had the Court who was dealing with the earlier OMP was aware about the case of respondent No.5, I am doubtful whether the order dated 12th September, 2014 would have been passed. All the submissions of the petitioner are misconceived and not sustainable once facts and circumstances are considered on merit and as per the law.

26. Even in the present petition, the petitioner has selectively attached the said order dated 12th September, 2014 of this Court passed in O.M.P. No. 619/2014 without disclosing the true facts of the case as stated hereinabove. During the proceedings in the said OMP on 3rd September, 2014, the petitioner had requested this Court for sending the matter to Mediation Centre. While making this request for mediation, the petitioner had concealed the fact that the

parties had already initiated the arbitration proceedings in respect of the same set of controversies.

27. It is also a matter of fact that the Court had recorded in order dated 3rd September, 2014 in the said O.M.P. No. 619/2014, as follows:

"At this stage, learned counsels for the parties have submitted that there are chances of settlement between the parties. It is requested that the matter may be sent for mediation. In view of this, the matter is referred to the Delhi High Court Mediation and Conciliation Centre. Parties are directed to appear there on 08.09.2014 at 3 pm".

28. In the Award dated 1st November, 2014 published by the sole Arbitrator in Arbitration Case No. ARB/LCJ/21/14, in the first para thereof, it is mentioned that the matter has been assigned by the Claimant (petitioner herein) by the reference notice dated 13th August, 2014. It is also stated in unnumbered para 23 that the Sole Arbitrator had sent notice dated 20th August, 2014 to all the parties for appearance on 16th September, 2014. Thus, while making a request to this Court in the proceedings held on 3rd September, 2014 for sending the matter for mediation, the petitioner and the respondent No.1-Company have concealed from this Court the fact that the same matter/controversies had already been assigned for arbitration and the sole Arbitrator had already issued a notice for appearance on 16th September, 2014.

29. By order dated 28th May, 2014 in O.M.P. No. 619/2014, Mr. Samresh Agarwal, an employee of the petitioner was appointed as the Receiver, who was authorised to take over the custody of the specified hypothecated assets from the custody of the respondents, wherever they are located. In further proceedings held on 3rd September, 2014, the counsel for the petitioner had submitted that

the Receiver had taken over the possession of the hypothecated articles pursuant to the order dated 28th May, 2014 and it was recorded in the order that the report of the Receiver has been supplied.

30. The said Receiver Mr. Samresh Agarwal had visited the factory premises of respondent No.1-Company at A-309, TIC Industrial Estate, MIDC, Mahape Road, Navi Mumbai - 400701, Maharashtra on 5th June, 2014 and had sealed the machineries and filed his report before this Court on 8th July, 2014. However, respondent No.5 submits that the symbolic possession of the entire assets of the respondent No.1-Company had already been taken on 23rd September, 2013 by the respondent No.5 in terms of SARFAESI Act and the aforesaid assets were not in the custody of the respondents arrayed in O.M.P. No. 619/2014 when the order dated 28th May, 2014 was passed.

31. The respondent No.5 further submits that the aforesaid action of the Receiver in having sealed the machineries which were under symbolic statutory possession of the respondent No.5 is illegal and the same is causing great prejudice to the respondent No.5 while coming in its way in exercising its statutory rights in terms of SARFAESI Act.

32. The main crux of the matter is that if the petitioner and respondent No.1 had apprised this Court of the correct and true position of facts as stated herein by the respondent No.5, this Court might not have passed the above said order appointing an employee of the petitioner-Company as the Receiver to take possession of the machineries in question. The respondent No.5 was not a party in the alleged arbitration proceedings held between the petitioner and the

respondent Nos. 1 to 4 and therefore the said award dated 1st November, 2014 is not binding on the respondent No.5. It appears that the said arbitration proceedings were manipulated proceedings between the two colluding parties i.e. the petitioner and the respondent No.1 to avoid the proceedings where the steps were taken by respondent No.5, which is a statutory body.

33. As stated earlier, it is stated in the para 1 of the award that the matter had been assigned by the Claimant by reference notice dated 13th August, 2014, and it is further stated in para 23 that the sole Arbitrator had sent notice dated 20th August, 2014 to the parties for appearance on 16th September, 2014. It is further stated in para 24 of the award that in the proceedings held on 16th September, 2014, both the parties submitted that a settlement has been arrived in between them and had sought an adjournment to file the MOU arrived at between them. It is further recorded in para 25 that in view of the settlement arrived at between the parties in the shape of MOU dated 6th September, 2014, no reply has been filed by the respondents and no further proceedings took place after filing of the reference notice of arbitration dated 13th August, 2014 except the filing of the said MOU.

34. It is apparent that the arbitration proceedings were conducted between the petitioner and the respondent No.1-Company which are an abuse of the provisions of law as well as the process of the Court, in order to circumvent the provisions of the SARFAESI Act and thwart the steps being taken by the respondent No.5 against the secured assets of respondent No.1-Company.

In para 27 of the said award, it is recorded in the last sentence of the para as under:

"It is specifically mentioned in clause 7 of the MOU dated 6.9.2014 which is Ex. 'X' that in case the respondent No.1 fails to repay the entire outstanding dues till 30.6.2015 then this MOU will come to an end and the existing loan agreement dated 19.1.2013 will come into operation and all the terms and conditions of the loan agreement and accompanying documents shall continue to apply to all the parties irrespective of modifications of terms by this MOU. "

35. It appears that the respondent No.1-Company has failed to repay the entire outstanding dues to the petitioner by 30th June, 2015 and that in terms of the self-destructive clause 7 of the alleged MOU dated 6th September, 2014, the said MOU has come to an end and the alleged existing Loan Agreement dated 19th January, 2013 (between the petitioner and respondent No.1-Company) has come into operation.

36. Even otherwise, if the petitioner wishes that it is a valid award, the petitioner would be entitled to recover the amount from the respondent No.1 only. As far as the relief sought by the petitioner against the respondent No.5 is concerned, the same cannot be granted because when the charge of entire plant and machineries including the said two machineries was registered in favour of respondent No.5, the petitioner was never in the picture. The petition is highly misconceived; the same is even not maintainable under Section 9 of the Act and is accordingly dismissed with cost of Rs.20,000/- which shall be deposited by the petitioner with the Prime Minister's National Relief Fund within two weeks from today.

(MANMOHAN SINGH)
JUDGE

SEPTEMBER 06, 2016