THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE MS JUSTICE J.UMA DEVI

WRIT PETITION NO.28426 OF 2017

ORDER: {Per the Hon'ble the Acting Chief Justice Ramesh Ranganathan}

Heard Sri B.S.Prasad, learned counsel for the petitioners and Smt. V.Dyumani, learned Standing Counsel for the first respondent-Bank. In this Writ Petition, the validity of the order passed by the Debts Recovery Appellate Tribunal, Kolkata (DRAT) in Application No.331 of 2017 dated 12.07.2017 is under challenge.

Facts, to the limited extent necessary, are that both the petitioners, along with respondents 3 and 4, are the directors of the second respondent-Hospital, a private limited company incorporated under the Companies Act, 1956. The second respondent was extended a loan by the first respondent-Bank on hypothecation of the medical equipment in the hospital. The land and buildings, in which the hospital is located, is not under mortgage to the first respondent-bank. For the loan advanced by the first respondent to the second respondent, respondents 3 and 4 and both the petitioners are said to have furnished their respective properties as collateral security. While the first respondent-Bank is said to have already sold the collateral security furnished by respondents 3 and 4, their attempts to bring the other property, belonging to the petitioners herein, to sale was interdicted by the petitioners who initially filed S.A.No.1108 of 2017 challenging the E-auction sale notice dated 07.01.2017. They filed I.A.No.302 of 2017 in S.A.No.1108 of 2017 to appoint the first petitioner as a Manager/Receiver, including by way of lease, pending disposal of the S.A. As no bidder came forward to purchase the subject property in the auction held, pursuant to the sale notice dated 07.01.2017, the first respondent-Bank issued another E-auction notice dated 22.02.2017 proposing to bring the subject property to sale on 30.03.2017. Aggrieved thereby, the petitioners herein filed S.A.No.1136 of 2017. They filed I.A.No.610 of 2017 therein seeking stay of all further proceedings, including the auction sale of the petition schedule property proposed to be held on 30.03.2017.

By its order dated 28.03.2017, the Debts Recovery Tribunal, Hyderabad (DRT) granted interim stay of all further proceedings, including the auction sale of the petition schedule property proposed to be held on 30.03.2017, subject to the petitioner depositing 30% of the dues of Rs.71,00,000/- in two equal instalments – the first instalment of 15% to be deposited on or before 30.03.2017, and the second instalment of 15% within two weeks thereafter directly to the respondent-Bank. The DRT made it clear that, in case of failure to comply with any of the said conditions, the interim stay would stand vacated; and the respondent-Bank may proceed to put the secured assets to sale. It is not in dispute that the petitioners have complied with the said interim order; and no auction was held on 30.03.2017, or on any date thereafter. Both S.A.Nos.1136 and 1108 of 2017 are still pending on the file of the Debts Recovery Tribunal-II, Hyderabad (DRT-II).

As noted hereinabove, the petitioners filed I.A.No.302 of 2017 in S.A.No.1108 of 2017 to appoint the first petitioner as the

Manager/Receiver, including by way of lease, pending disposal of the S.A. By its order dated 31.07.2017, the DRT-II observed that, while the petitioners' claimed that the third respondent had mismanaged the second-respondent hospital, by diverting hospital funds, respondents 3 and 4 claimed that the first petitioner worked with Yashoda Hospitals against the interests of the second respondent; he diverted patients of the second respondent-Hospital to Yashoda Hospital; both the parties had levelled counter-allegations against each other; the *inter-se* disputes, between the petitioners on the one hand and respondents 3 and 4 on the other, could not be adjudicated in proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the SARFAESI Act" for brevity); it was a matter of record that the Memorandum of Understanding dated 25.04.2016 had been arrived at between the parties; the third respondent had lodged a complaint against the first petitioner for cheating and misappropriating the funds, of the second respondent-Hospital, to a tune of Rs.11.00 lakhs; the concerned police had investigated the case, and had filed a charge sheet against the petitioners and others; and, in such circumstances, the management of the second respondent-Hospital could not be entrusted to the first petitioner. The DRT-II left it open to the first respondent to entrust the management, of the second respondent-Hospital, to any third party to safeguard the hypothecated equipments and machinery. The I.A. was dismissed.

Aggrieved thereby, the petitioners herein carried the matter in appeal. The DRAT, in the impugned order dated 12.07.2017, observed that I.A.No.302 of 2017, filed by the appellant, was contested by the first respondent-Bank stating that they were interested in recovery of their dues, and not in management of the hospital; and all the other Directors had also contested the matter raising various allegations against the appellant for committing fraud, misappropriation of money etc. The DRAT held that the dispute was among the Directors relating to the management. It, therefore, declined to pass any order as it found that the impugned order did not suffer from any error necessitating interference.

Sri B.S.Prasad, learned counsel for the petitioners, would submit that, in the light of the law declared by the Supreme Court in **Mardia Chemicals Ltd. v. Union of India**[1], the first respondent-Bank has an obligation to act fairly; the interests of the borrower cannot be given a go-by; as the Bank is required to exercise a high degree of good faith and fair play, and the borrowers cannot be left remediless, it is always open to them to plead deficiencies on the part of the first respondent-Bank; the first petitioner's request to be appointed as a Manager/Receiver, to run the second respondent-hospital, should have been favourably considered by the first respondent-Bank; failure of the Bank to appoint the first petitioner as the Manager/Receiver necessitated interference by the DRT; since such a measure of appointment of a Manager/Receiver is stipulated both under Section 13(4) and Section 17(3) of the SARFAESI Act, both the orders of the DRT and the DRAT are liable to be set aside; a direction should be issued to the first respondent-Bank to appoint the first petitioner as the Manager/Receiver of the second respondent-Hospital; and the *inter*

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[1] 2000/MANU/SC/0323/2004

se disputes between the parties had no relevance to the relief sought for in the I.A.

On the other hand Smt. V.Dyumani, learned Standing Counsel appearing on behalf of the first respondent-Bank, would contend that it is only after the account of the borrower was declared as a Non-Performing Asset (NPA), did the first respondent-Bank initiate proceedings under the SARFAESI Act; as the loan extended by the first respondent-Bank was only on hypothecation of the medical equipment in the hospital, and not the Hospital in its entirety, the Bank did not choose to exercise its powers under Section 13(4) of the SARFAESI Act to appoint a Manager/Receiver for the Hospital; the first respondent is interested in realising its dues, and does not wish to appoint a Manager/Receiver to administer/run the second respondent-hospital; and, under the guise of seeking appointment of a Manager/Receiver, the petitioners have sought to interdict the Bank's attempt to put the subject property to sale for recovery of its dues.

While Sri B.S.Prasad, learned counsel for the petitioners, would submit that the loan account of the second respondent-Hospital has since been regularised, Smt. V.Dyumani, learned Standing Counsel for the first respondent-Bank, would deny the said contention, and submit that the loan account continues to be a non-performing asset. This submission, urged on behalf of the first respondent-Bank, has considerable force since it is only if the debt due to a secured creditor is classified as an NPA can the secured creditor issue a Section 13(2) notice to the borrower to discharge in full his liability within 60 days from the date of the notice, failing which the secured creditor would be entitled to enforce the security interest without intervention of the Court or Tribunal; and to take recourse to all or any of the measures referred to under Section 13(4) of the SARFAESI Act.

It is not in dispute that a notice was issued under Section 13(4) of the SARFAESI Act; and it is only thereafter did the first respondent-Bank bring the subject property to sale. Section 13(4) of the SARFAESI Act enables the secured creditor (the first respondent-Bank), in case the borrower fails to discharge his liability in full within the period specified in the notice issued under Section 13(2) of the Act, to take recourse to one or more measures, referred to in Clauses (a) to (d) thereunder, for recovery of its secured debt. The power conferred on the secured creditors under Section 13(2) of the SARFAESI Act is an enabling power. Further, the measures which the Bank can take recourse to, for recovery of its secured debt, under Clauses (a) and (d) of Section 13(4), are in the alternative as the words ***"one or more of the following measures"***, referred to in Section 13(4) of the SARFAESI Act, indicate. It is, therefore, not obligatory for the first respondent-Bank to resort only to the measure under Clause (b) of Section 13(4) of the SARFAESI Act i.e to take over management of the business of the borrower; or under clause (c) to appoint any person to manage the secured asset. It is only in cases where the Bank chooses to exercise its powers under clause (c) of Section 13(4) of the SARFAESI Act, to take over possession of the secured asset, would the question of appointing any person, to manage the secured asset, arise. In the present case the assets, for which the first respondent-Bank had extended a loan to the 2nd respondent, have merely been hypothecated to the first respondent-Bank. As held hereinabove, the first respondent-bank is not obligated to appoint a person as a Manager under Clause (c) of Section 13(4), as it can take recourse to any of the other measures stipulated in clauses (a), (b) and (d) of Section 13(4) also. Even otherwise, the word ***'any'*** in Clause (c) can only mean that it is for the Bank to decide on the person it should entrust the management of the secured asset, that too after it takes over possession thereof. No right is conferred on the petitioner to claim that the first respondent-Bank should either take over the management of the business under clause (b) or to appoint a Manager or Receiver under clause (c) of Section 13(4); or that the person, to be appointed as a Manager, should only be the first petitioner herein. No right is conferred on the petitioners' to claim that the first petitioner should alone be appointed as the Manager or that the first respondent-Bank should be directed to take recourse to the measure referred to in Clause (c) of Section 13(4) of the SARFAESI Act alone.

In **Mardia Chemicals Ltd.**[1], the Supreme Court observed:-

"………Arguments have been advanced as to how far principles of lender's liability are applicable. Whatever be the position, however, it cannot be denied that the financial institutions namely, the lenders owe a duty to act fairly and in good faith. There has to be a fair dealing between the parties, and the financing companies/institutions are not free to ignore performance of their part of the obligation as a party to the contract. They cannot be free from it. Irrespective of the fact as to whatever may have been held in decisions of some American courts, in view of the facts and circumstances and the terms of the contract and other details relating to those matter, that may or may not strictly apply, nonetheless, even in absence of any such decisions or legislation, it is incumbent upon such financial institutions to act fairly and in good faith complying with their part of obligations under the contract. This is also the basic principle of concept of lender's liability. It cannot be a one-sided affair shutting out all possible and reasonable remedies to the other party, namely borrowers and assume all drastic powers for speedier recovery of NPAs. Possessing more drastic powers calls for exercise of higher degree of good faith and fair play. The borrowers cannot be left remediless in case they have been wronged against or subjected to unfair treatment violating the terms and conditions of the contract. They can always plead in defence deficiencies on the part of the banks and financial institutions…………"

The duty of the first respondent-Bank to act fairly cannot extend to a direction being granted, either by the DRT or this Court, that the first respondent-Bank should take recourse to a particular measure when the choice of the measures, available to be taken under clauses (a) to (d) of Section 13(4), has been left to the first respondent-Bank by Parliament, as is evident from the use of the words ***"any one or more"*** in Section 13(4) of the SARFAESI Act. This Court, in the exercise of its power of judicial review under Article 226 of the Constitution of India, would also not sit in judgment over the decision of the first respondent-Bank in resorting to any one or more of the measures referred to in Section 13(4) of the SARFAESI Act, or to direct the first respondent-Bank to take recourse to any one particular measure referred to in Section 13(4) of the SARFAESI Act.

Reliance placed by Sri B.S.Prasad, Learned Counsel for the petitioners, on Section 17(3) of the SARFAESI Act is also misplaced. Section 17(1) enables any person, aggrieved by any of the measures referred to in Section 13(4) of the SARFAESI Act taken by the secured creditor, to approach the DRT having jurisdiction in the matter within 45 days from the date on which such measures were taken. The right to invoke the jurisdiction of the DRT, under Section 17(1) of the SARFAESI Act, would arise only when the first respondent-Bank takes any one of the measures referred to in Clauses (a) to (d) of Section 13(4) of the SARFAESI Act. The jurisdiction of the DRT could not have been invoked under Section 17(1) seeking a direction to the first respondent-Bank to take a particular measure. The power conferred on the DRT under Clause (a) and (d) of Section 17(3) of the SARFAESI Act to declare recourse to any of the measures under Section 13(4) of the SARFAESI Act, being taken by the first respondent, as invalid and to restore possession of the secured asset to the borrower, can be exercised only when it comes to the conclusion that any of the measures taken by the respondent-Bank, under Section 13(4) of the SARFAESI Act, are not in accordance with the provisions of the SARFAESI Act or the Rules made thereunder; and only then to restore possession of the secured asset, or management of the secured asset, to the borrower. It is only in cases where the Bank has exercised its powers under Section 13(4)(b) of the SARFAESI Act to take over management of the Hospital, or under Section 13(4)(c) of the SARFAESI Act to appoint a Manager, can the DRT, if it is satisfied that the action so taken by the first respondent-Bank is not in accordance with the provisions of the SARFAESI Act and the Rules made thereunder, restore management/possession either to the borrower or to any other aggrieved person after declaring that the recourse taken, to any of Clauses (a) to (d) of Section 13(4) of the SARFAESI Act, by the first respondent-Bank is invalid. What can be subjected to challenge, under Section 17(1) of the SARFAESI Act, are any of measures, taken by the first respondent-bank, as are referred to in clauses (a) to (d) of Section 13(4) of the SARFAESI Act. The jurisdiction of the DRT cannot be invoked seeking a direction to the first respondent-Bank to take recourse to a particular measure from among the four alternative measures stipulated under Clause (a) to (d) of Section 13(4) of the SARFAESI Act. We are satisfied, therefore, that the DRT committed no illegality in refusing to grant the petitioners the relief sought for in the I.A.

The Writ Petition fails and is, accordingly, dismissed. Needless to state that the DRT shall examine the petitioners' claim, in both the S.As, on its merits uninfluenced by any observations made in this order. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand dismissed.

(RAMESH RANGANATHAN, ACJ)

(J.UMA DEVI, J)

30th August 2017
RRB