IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION (L) NO.232 OF 2017
IN
COMPANY PETITION NO.961 OF 2014

Axis Trustee Services Limited ….Applicant

IN THE MATTER BETWEEN :

Tata Capital Financial Services Ltd. ….Petitioner
Vs.
Elder Pharmaceuticals Limited ….Respondents

Mr. Aseem Naphade I/b. M/s. M.V. Kini and Co. for applicant.
Ms. Benedicta Lobo I/b. M/s. Katariya and Associates for original petitioner.
Mr. Rahul M. Kadam I/b. W.S. Kane and Company for noticee.
Mr. Mahendhar Aithe, Company Prosecutor for Official Liquidator present.

CORAM : K.R.SHRIRAM, J.
DATE : 10th JULY 2018

P.C.:

1 The application is taken out by a secured creditor, in effect, under sub Section 4 of Section 13 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act) in respect of its secured assets as mentioned in the affidavit in support of the application and to direct Official Liquidator to hand over possession of the secured asset (s) to applicant.

2 The counsel for applicant states that a Division Bench of this Court in the matter of ***Akola Oil Industries V/s. State Bank of Maharashtra***[1] has held that the provisions of the Securitisation Act will prevail over the Companies Act and the secured creditor even if it had

1. 2006 (1) Bom. C.R. 362

preferred an application for leave or moved under the provisions of the Securitisation Act, no leave was required. It was open to the applicant to initiate proceedings before the Tribunal under the debts Recovery Act or for realisation of the security under the provisions of the Securitisation Act without seeking leave of the Company Court. The relevant portion of paragraph 5 of the said judgment reads as under :

> *5.........The Apex Court, however, chose not to answer the issue and considering the law as it stands it is immaterial at what stage the official liquidator is appointed. If that be the position, we have no doubt in our mind that, considering the provisions of the securitisation Act, and the provisions of the companies Act, the provisions of the securitisation Act will prevail and no leave of the company Court is required either before winding up or after winding up for selling the secured assets. The respondent, therefore, even if had preferred an application for leave or moved under the provisions of the Securitisation Act, that really was not required. No leave was also required under the provisions of the R. D. B. Act. It was open to the respondent to initiate proceedings before the Tribunal under the debts Recovery Act or for realisation of the security under the provisions of the securitisation Act without seeking leave of the Company Court. It may also be noted that under the provisions of the proviso to section 13 (9) of the Securitisation Act, the workmen's dues are protected. In other words this, by itself will be an indication that the provisions of the Securitisation Act, will prevail over the Company Act. It was therefore, within the competence of the respondent to proceed to dispose of the assets under the provisions of the securitisation Act ...."*

3 The counsel also relied on an unreported order of a Single Judge of this Court in ***Mineral Sales Pvt. Ltd. V/s. Otoklin Plants & Equipment Ltd. (in liqn.)***[2] wherein it is also held that a secured creditor, while proceeding under the RDB Act or Securitization Act, does not need the

2. Company Petition No.970 of 1997 dt. 26.11.2009

permission of the Company Court. Paragraph 3 of the order reads as under :

> *"3. The Applicant has exercised powers under the Securitization Act. The Supreme Court, in its judgment in* ***Allahabad Bank vs. Canara Bank****, AIR 2000 SC 1535, held that the provision of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would override the powers of the Company Court under the Companies' Act, 1956. The position of a secured creditor who exercised his powers under the Securitization Act has been considered by a Learned Single Judge in* ***Akola Oil Industries vs. State Bank of India****, 2005(5) Bom.C.R 706. The Learned Single Judge held that a secured creditor, while proceeding under the RDB Act or Securitization Act does not need the permission of the Company Court. Besides, it may be noted that Section 35 of the Securitization Act gives overriding effect to the provisions of the Act, notwithstanding anything inconsistent therewith contained in any other law for the time being in force."*

4 The counsel for petitioning creditor stated that the Apex Court in the matter of ***Rajasthan Financial Corporation & Anr. Vs. Official Liquidator & Anr.***[3] has in paragraph 18 stated as under :

> *18. In the light of the discussion as above, we think it proper to sum up the legal position thus:-*
>
> *i) A Debt Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the liquidator appointed by the Company Court and after hearing him.*
>
> *ii) A District Court entertaining an application under Section 31 of the SFC Act will have the power to order sale of the assets of a borrower company-in- liquidation, but only after notice to the Official Liquidator or the liquidator appointed by the Company Court and after hearing him.*
>
> *iii) If a financial corporation acting under Section 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the company court and acting in terms of the directions issued by that court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of*

3. 2006 (1) Bom. CR (S.C.) 531

> *the sale proceeds and the distribution thereof among the creditors in terms of Section 29A and Section 529 of the Companies Act.*
>
> *iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the concerned creditor is to approach the company court for appropriate directions regarding the realization of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company-in-liquidation.*

The counsel submitted that the concerned creditor, therefore, has to approach the Company Court for appropriate directions.

5 The indisputable fact is that the secured creditor has approached this Court for directions regarding the asset which is mortgaged to the secured creditor and which is in possession of Official Liquidator.

6 Therefore, application is allowed and accordingly disposed in terms of prayer clause – (a) which reads as under :

> (a) That this Hon'ble Court be pleased to pass an order under the provisions of the Companies Act, 1956 permitting the applicant to realize their dues out of the secured assets mortgaged in their favour by standing outside the winding up proceedings of the respondent.

7 Official Liquidator to hand over possession of the assets. The secured creditor, viz., applicant shall keep Official Liquidator promptly inform as and when it takes any action relating to the assets sufficiently in advance. If Official Liquidator wishes to participate in any of the auction, Official Liquidator should be permitted. Once the sale is completed, applicant shall file a report giving complete details of the sale including offers received and how the sale was conducted and what is the price

received to Official Liquidator within two weeks of completion of the sale. The undertaking of applicant made through Mr. Naphade that applicant shall also comply with the provisions of Section 529 (a) of the Companies Act 1956 is accepted.

8 Applicant to reimburse Official Liquidator for security charges and valuation charges, if any, already incurred by Official Liquidator and this amount to be paid within one week of receiving a communication from Official Liquidator. Official Liquidator to hand over possession only upon being paid these charges.

9 Notwithstanding disposal of the application, applicant to remove all office objections and get the application numbered within two weeks from today.

Gauri Amit Gaekwad

Digitally signed by Gauri Amit Gaekwad
Date: 2018.07.19 17:51:54 +0530

(K.R. SHRIRAM, J.)