

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.12 2018

Date of Decision : 20.12.2018

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THE HON'BLE MR.JUSTICE M.SUNDAR

O.A.Nos.854 and 855 of 2018
in
C.S.(Comm.Div) No.636 of 2018

Hanudev Investments Pvt. Ltd.,
represented by its Director
Mrs.Shobana Ravi,
having office at RR Tower III,
TVK Industrial Estate,
Guindy, Chennai-600 032.

.. Applicant in
both applications

Vs.

1.Oriental Bank of Commerce,
63, Dr.Radhakrishnan Salai,
Mylapore, Chennai-600 004.

2.JM Financial Asset Reconstruction Co. Ltd.,
represented by its Directors,
having office at 7th Floor, Cnergy,
Appasaheb Marathe Marg,
Prabhadevi, Mumbai-400 025.

.. Respondents in
both applications

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O.A.No.854 of 2018 is filed under Order XIV Rule 8 of the Original Side Rules read with Order XXXIX Rules 1 and 2 and Section 151 of the Civil Procedure Code seeking to grant an ad-interim temporary injunction restraining the respondents, their men, agents, partner, associate, officer, representative, servant and all other persons acting on respondents' behalf from in any manner from conducting the e-auction on 17.09.2018 or any other date pending disposal of the suit.

O.A.No.855 of 2018 is filed under Order XIV Rule 8 of the Original Side Rules read with Order XXXIX Rules 1 and 2 and Section 151 of the Civil Procedure Code seeking to grant an ad-interim temporary injunction restraining the respondents, their men, agents, partner, associate, officer, representative, servant and all other persons acting on respondent's behalf from in any manner violating the applicant's rights to a pari passu charge over the secured properties as identified in the letter dated 29.04.2009 issued by the 1st Defendant ceding such pari passu charge pending disposal of the suit.

For Applicant : Mr.Vineet Subramani

For Respondent : Mr.Srinath Sridevan for R-2
Mr.E.Venkatesh Babu for R-1

COMMON ORDER

This common order will dispose of two interlocutory applications, namely, O.A.Nos.854 and 855 of 2018.

2 In the main suit, there is a sole plaintiff and there are two defendants. Sole plaintiff in the main suit is the sole applicant in both these applications, i.e., O.A.Nos.854 and 855 of 2018. Likewise, defendants 1 and 2 are respondents 1 and 2 respectively in these two applications. In this common order, parties to these two applications shall be referred to by their respective ranks in the main suit for the sake of convenience and clarity.

3 Immovable property in the form of land admeasuring 165 grounds or thereabouts comprised in S.Nos.425-429 parts, Ambattur village and S.Nos.24, 26, 27, 29, 140, 141 to 151, 154, 167 and 169 parts of

Ambattur, Chennai-58 together with the building thereon as well as movable properties in the form of furnitures, fixtures, plant and machinery, electrical equipment, etc., situate therein is the nucleus of this lis and therefore, these immovable and movable properties together shall collectively be referred to as 'suit properties' for the sake of convenience and clarity.

4 Suit properties belong to an entity which goes by the name 'RR Info Park Private Limited' which shall hereinafter be referred to as 'borrower' for the sake of convenience and clarity. To be noted, borrower company is not a party in the main suit or in the instant two interlocutory applications.

5 Before this Commercial Division proceeds further with this common order, it is deemed appropriate to set out the factual matrix of this lis in a nutshell for the purpose of appreciating this order. Factual matrix of this lis in a nutshell is set out infra under the caption 'Precise of Facts'.

6 Precise of Facts :

(a) It is not in dispute that borrower company had borrowed from five different banks by mortgaging suit properties in favour of those banks. Borrower company has borrowed Rs.70 Crores from first defendant bank and Rs.50 Crores each from four other banks.

(b) Subsequently, in the light of the direction which the loan accounts took led to five creditor banks forming a consortium with first defendant as lead bank. The first defendant, in its capacity as lead bank of consortium of creditor banks, gave a letter dated 29.04.2009 (plaint document No.1) captioned 'LETTER CEDING PARI PASSU CHARGE', wherein and

whereby first defendant in its capacity as lead bank of the consortium, ceded pari passu charge in favour of plaintiff.

(c) Thereafter, plaintiff on 07.05.2009 lent Rs.50 Crores to the borrower company inter-alia on the basis of charge on suit properties. Such charge on suit properties, i.e., mortgage in favour of plaintiff has been duly registered with the jurisdictional Registrar of companies and the certificate in this regard dated 03.06.2009 has been placed before this Commercial Division as part of suit file and the same is plaint document No.4.

(d) Subsequently, first defendant and four other banks arraying themselves as five applicants filed an application in O.A.No.121 of 2011 before the Debts Recovery Tribunal-III ('DRT' for brevity), Chennai, arraying the borrower company and its Managing Director as respondents 1 and 2 respectively inter-alia seeking recovery certificates. In the proceedings before DRT, plaintiff filed an application in I.A.No.578 of 2012 seeking to implead itself and the DRT vide order dated 13.12.2012 held that first defendant and the other four banks have agreed to pay their proportionate share after sale of the property and realisation of the sale proceeds in accordance with law after admitting pari passu charge in favour of plaintiff and therefore, there is no need to implead the plaintiff. To be noted, there is no dispute or disagreement before this Commercial Division in the hearing that this order of DRT dated 13.12.2012 is operating and binding on parties to this lis. This order of DRT dated 13.12.2012 has been placed as part of suit file and it is plaint document No.5.

(e) When things stood as above, first defendant bank assigned the debt in favour of second defendant in its capacity as lead bank of consortium of banks and issued an intimation in this regard vide letter dated 29.04.2014 which is plaint document No.6. Pursuant to this, second defendant had written a letter dated 07.10.2015 to the plaintiff and one of the five banks stating that in relevant records, second defendant has now been shown as charge holder.

(f) When things stood as above, second defendant issued an auction notice scheduling the sale on 27.7.2017, this was assailed by plaintiff in DRT vide S.A.SR. No.6146 of 2017 and notice was issued in the same. Thereafter, the plaintiff had filed a suit in this Court in C.S.No.583 of 2017 in this regard and the suit came to be disposed of on 11.10.2017 as the auction did not take place. The suit was disposed of holding that the cause of action did not survive. However, while disposing of the suit, this Court had permitted the second defendant to reauction in accordance with law after following due procedure.

(g) In the interregnum, it is submitted that a creditor's winding up petition in Company Court (Madras High Court), was filed against the borrower company vide C.P.No.202 of 2013 by one Globe Detective Agency Private Limited, plaintiff filed an application therein in C.A.No.540 of 2016 and paid petitioning creditor two cheques. It is also not in dispute that this application taken out by plaintiff to stay the winding up proceedings was acceded to by an order dated 20.10.2016 made by Company Court after

hearing secured creditor of borrower company which includes second defendant and Corporation Bank.

(h) Under the aforesaid circumstances, an e-auction notice dated 13.8.2018 was issued by second defendant fixing auction on 17.09.2018 for auctioning the suit properties, realising the sale proceeds therefrom to satisfy the debts qua borrower company. It is also not in dispute that second defendant is an Asset Reconstruction Company ('ARC' for brevity) and that second defendant is an ARC within the meaning of Section 2(1)(ba) of 'The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002)' ('SARFAESI Act' for brevity).

(i) Under such obtaining circumstances, stating that the aforesaid e-auction notice dated 13.8.2018 is a trigger, instant suit has been filed by plaintiff with prayers for injunction and damages. Injunctive relief sought for is for an injunction restraining defendants from discharging plaintiff's pari passu charge over suit properties as adumbrated in letter dated 29.04.2009 (plaint document No.1) which has been referred to supra.

(j) When these two interlocutory applications were taken out along with the plaint, in O.A.No.854 of 2018, an ex parte interim order restraining conduct of e-auction on 17.9.2018 was granted and the same was extended until further orders on 26.9.2018 as both defendants had entered appearance on the said day.

(k) Both these applications are supported by a common affidavit dated 10.9.2018. Complaining that interim order is operating against

them and seeking disposal of these two interlocutory applications, a common counter affidavit dated 26.9.2018 has been filed by second defendant and first defendant has filed an adoption memo dated 05.10.2018 adopting the counter affidavit of second defendant. Plaintiff has filed a common reply dated 27.9.2018. Thus, pleadings were completed in these two interlocutory applications.

7 Having set out the factual matrix of this lis in a nutshell, this Commercial Division now moves on to rival submissions.

8 Mr.Vineet Subramani, learned counsel on behalf of plaintiff made submissions which can be summarised are as follows :

(a) The prayer in the main suit itself is very limited and the plaintiff only wants to protect its pari passu charge qua suit properties and this is evident from the limited prayer in the main suit.

(b) The e-auction notice dated 13.8.2018 issued by second defendant says that suit properties being sold by way of e-auction are free from encumbrance of plaintiff and this would tantamount to giving a go-by to plaintiff's pari passu charge over suit properties.

(c) If second defendant sells suit properties in the auction, giving a go-by to plaintiff's pari passu charge over suit properties, plaintiff will be left high and dry.

9 Submissions made by Mr.Srinath Srideven, counsel on record for second defendant which has been adopted by Mr.E.Venkatesh Babu, counsel on record for first defendant can be summarised as follows :

(a) Plaintiff has not come to Court with clean hands as plaintiff obtained the interim order without setting out all facts which are imperative.

(b) Plaintiff company holds 28% stakes in borrower company and therefore, plaintiff has filed the instant suit more to protect the borrower company than its own pari passu charge over suit properties.

(c) While Ms.Shobana Ravi, who has verified and signed the plaint in her capacity as Director of plaintiff company, her spouse Mr.Ravi is on the board of borrower company and is Managing Director of borrower company. These spouses are two Directors in plaintiff company and there are only two Directors in all in plaintiff company, which is a private limited company.

(d) Plaintiff has remedy before DRT against the e-auction notice inter-alia under Section 17 of SARFAESI Act and therefore, the instant suit is not

maintainable and it is hit by Section 34 of SARFAESI Act.

10 Having set out the rival submissions, this Commercial Division now proceeds to examine the rival submissions and find an answer to the issues that have been brought into sharp focus in these two applications. This Commercial Division does so under the caption 'Dispositive reasoning' infra.

11 Dispositive reasoning :

(a) In the course of dispositive reasoning, there shall be elaboration of rival submissions made by both sides. Rival submissions made by both sides have been summarised and set out supra so as to have focus on central issues which are imperative for deciding these applications. Therefore, elaboration of these submissions in the course of dispositive reasoning is necessary.

(b) Elaborating on the first submission of plaintiff that this suit has been filed with a limited prayer to injunct defendants from discharging plaintiff's pari passu charge over suit properties, learned counsel for plaintiff submitted that the primordial objective of the suit is protection of pari passu charge of plaintiff. Referring to e-auction notice dated 13.8.2018, plaintiff's counsel submitted that e-auction notice says that sale of suit properties will be free from encumbrance of plaintiff company.

(c) Responding to this, learned counsel for second defendant submitted that there would be no auction purchaser and even if there be one, price offered by such auction purchaser would get drastically reduced if the auction purchaser were to purchase the suit properties with task of clearing one more secured creditor who has charge over suit properties, the same will be seen as onerous by intending auction purchasers. Saying so, learned counsel submitted that sale proceeds would be distributed amongst consortium banks and the plaintiff proportionately. In other words, learned counsel submitted that pari passu charge of plaintiff will not be given a go-by. To support this contention, learned counsel submitted an affidavit dated 22.11.2018 sworn to by the Vice President of second defendant company, wherein it has been stated that the consortium of lenders, i.e., second defendant ARC, shall recognise plaintiff's right as a secured creditor. This affidavit says that this is subject to plaintiff withdrawing the present suit. It was pointed out that this affidavit was exchanged in the course of exploring the possibility of settlement and therefore, is now pressed into service for the limited purpose of affirming that the second defendant ARC confirms that sale proceeds will be distributed amongst consortium banks as well as plaintiff in its capacity as pari passu charge holder/ mortgagee.

(d) Responding to this, learned counsel for plaintiff submitted that an affidavit sworn to by the Director of plaintiff company dated 08.12.2018 has been placed before this Commercial Division which is in response to the aforesaid affidavit of second defendant. Averments touching

upon several conversations have been referred to in the said affidavit. However, these two affidavits are being referred to for the limited purpose of noticing the stated position of second defendant that pari passu charge in favour of plaintiff will not be given a go-by and that sale proceeds would be distributed strictly in accordance with pari passu charge amongst all mortgagees, i.e., consortium of banks and plaintiff.

(e) This stated position of second defendant is buttressed by the aforesaid affidavit. In all other aspects, these two affidavits shall not be looked into as they were exchanged in the course of exploring the possibility of settlement. Be that as it may, learned counsel for second defendant on instructions submitted that this stated position that sale proceeds will be distributed equally amongst consortium of banks as well as plaintiff strictly in accordance with pari passu charge is affirmed. This is taken on record.

(f) Second and third points raised by learned counsel for plaintiff about e-auction giving a go-by to pari passu charge and plaintiff being left high and dry if that happens forms part of the discussion qua first point supra.

(g) This takes us to the points raised by learned counsel for second defendant.

(h) Before we go into the points raised by second defendant, it is necessary to notice that it was submitted by second defendant that it has statutory backing to issue e-auction notice in the light of section 13(9) of SARFAESI Act which reads as follows :

“13.Enforcement of security interest.--

(9)Subject to the provisions of the Insolvency and

Bankruptcy Code, 2016, in the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors;

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529-A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529-A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of section 529-A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation.--For the purposes of this sub-section,---

(a)"record date" means the date agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding on such date;

(b)"amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor."

(i) Referring to section 13(9) of SARFAESI Act, learned counsel pointed out that even according to e-auction notice, while the total amount due to second defendant in its capacity as ARC is Rs.423,20,25,818.28, it is Rs.50 Crores in favour of plaintiff and therefore, second defendant certainly has more than the statutory requirement of 60% adumbrated in section 13(9) of SARFAESI Act. In this regard, learned counsel for plaintiff pointed out that the claim of plaintiff is not restricted to Rs.50 Crores, but it is entitled to interest also. Responding to this, learned counsel for second defendant, on instructions, submitted that distribution of sale proceeds as per pari passu charge amongst mortgagees will include interest, the only deduction being auction charge.

(j) The aforesaid reasoning in discussion is sufficient and good enough to dispose of these two applications. However, for the purpose of making this order as complete and as comprehensive as possible, this Commercial Division deems it appropriate to have a short discussion about the other points raised by learned counsel for second defendant.

(k) Learned counsel for second defendant submitted that plaintiff ought to have disclosed in the plaint that plaintiff holds 28% stakes in the second defendant company and that as between spouses, wife is a Director in plaintiff company and husband is Managing Director of borrower company. It is also his submission that the plaintiff ought to have disclosed the fact that DRT was approached against the sale scheduled last year, i.e., on 27.7.2017. In support of this submission, learned counsel pressed into service **Morgan Stanley** principle set out in **Morgan Stanley Mutual Fund v. Kartick Das** reported in (1994) 4 SCC 225. Relevant paragraph in this regard is paragraph 36 and the same reads as follows :

“Q. 4: What are the guiding principles in relation to the grant of an ad interim injunction in such areas of the functioning of the capital market and public issues of the corporate sector and whether certain ‘venue restriction clauses’ would require to be evolved judicially as has been done in cases such as Sanchaita case [(1982) 1 SCC 561 : 1982 SCC (Cri) 283] etc.?”

36. As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the court in the grant of ex parte injunction are—

- (a) whether irreparable or serious mischief will ensue to the plaintiff;
- (b) whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve;
- (c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;

- (d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;
- (e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application.
- (f) even if granted, the ex parte injunction would be for a limited period of time.
- (g) General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court."

According to learned counsel for second defendant, though **Morgan Stanley** facts pertain to Consumer Protection Act, the principles nonetheless apply.

(l) This Commercial Division is of the considered view that it would have been an ideal situation for the plaintiff to disclose about the plaintiff approaching DRT with regard to earlier auction notice last year. With regard to plaintiff holding 28% stakes in borrower company and plaintiff company's Director Ms.Shobana Ravi's spouse being Managing Director of borrower company, as plaintiff and second defendant are juristic persons, coupled with the trajectory these applications are now taking, it is considered not necessary to go into these aspects in these interlocutory applications.

(m) This takes us to the last point raised by second defendant with regard to suit itself not being maintainable and the suit being hit by Section 34 of SARFAESI Act and Order XXXIV Rule 1 of CPC which read as follows :

"Section 34 of SARFAESI Act :

34.Civil Court not to have jurisdiction.-- No Civil Court shall

have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).

Order XXXIV Rule 1 of CPC :

1. Parties to suits for foreclosure, sale and redemption.--

Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Explanation.--A *puisne* mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage."

(n) In support of the suit being hit by section 34 of SARFAESI Act, learned counsel for second defendant pressed into service a judgment of Hon'ble Supreme Court in ***Jagdish Singh Vs. Heeralal and others*** reported in **(2014) 1 SCC 479** and relevant paragraph is paragraph 19, which reads as follows :

"19. The expression "any person" used in Section 17 is of wide import and takes within its fold not only the borrower but also the guarantor or any other person who may be affected by action taken under Section 13(4) of the Securitisation Act. Reference may be made to the judgment of this Court in *Satyawati Tondon case* [United Bank of India v. *Satyawati Tondon*, (2010) 8 SCC 110 : (2010) 3 SCC (Civ) 260] ."

(o) Learned counsel for second defendant submitted that in the light of **Jagdish Singh** principle, nothing prevents the plaintiff and there is no impediment for the plaintiff to approach DRT against e-auction notice and therefore, this suit is clearly hit by Section 34 of SARFAESI Act.

(p) Learned counsel also pressed into service a judgment of Division Bench of Andhra Pradesh High Court in **Bank of India Vs. Development Credit Bank Ltd.** reported in **2012 SCC OnLine AP 71**. In the light of Supreme Court judgment in **Jagdish Singh** case, it may not be necessary to look into Andhra Pradesh High Court Division Bench judgment in **Bank of India** case.

(q) With regard to Order XXXIV Rule 1 of CPC, learned counsel for second defendant submitted that plaintiff ought to have arrayed borrower company as a party to the suit and plaintiff having filed the suit without making borrower company a party to the suit, particularly without joining borrower company as party to the suit is fatal and the suit is liable to be dismissed by way of rejection of plaint.

(r) Responding to this, learned counsel for plaintiff pointed out that second defendant cannot be heard to contend that the suit is not maintainable and that it is hit by Section 34 of SARFAESI Act and Order XXXIV Rule 1 of CPC without taking out an application for rejection of plaint inter-alia under Order VII Rule 11 CPC.

(s) In an attempt to meet this, learned counsel for second defendant relied on **Suresh Chandra Jaipuria case** being **The Municipal Corporation of Delhi Vs. Suresh Chandra Jaipuria and another** reported in **(1976) 4 SCC 719**. Learned counsel referred to paragraph 10 of **Suresh Chandra Jaipuria** case. Supreme Court left open the question as to whether the suit in that case was barred by Section 41(h) of the Specific Relief Act, 1963. That is a case where the plaintiff purchased a house in South Extension, New Delhi free from all encumbrances, but subsequently, it came to light that there were proceedings for realisation of certain dues and plaintiff filed a suit for permanent injunction against Municipal Corporation of New Delhi stating that assessment of house tax had proceeded on an erroneous basis. In this context, as the plaintiff has a remedy against wrong assessment, Section 41(h) of the Specific Relief Act, which lays down that an injunction which is a discretionary and equitable relief, cannot be granted when an equally efficacious remedy is obtainable in any other usual mode or procedure. In the considered opinion of this court, **Suresh Chandra Jaipuria** case is clearly distinguishable on facts as that was a case where it was noticed that a regular appeal is available under Section 169 of the Delhi Municipal Corporation Act, 1957. In the instant case, second defendant is relying on Section 34 of SARFAESI Act which is a case of ouster of civil court jurisdiction. To be noted, Section 34 of SARFAESI Act has already been extracted supra. Likewise the plea predicated on Order XXXIV Rule 1 of CPC is one that turns on non joinder of necessary parties. Therefore, the plea of second defendant for all practical purposes is that the suit is barred by law,

i.e., proviso to Order I Rule 9 of CPC. Therefore, the facts of this case are clearly distinguishable qua **Suresh Chandra Jaipuria** case. If it is a case of second defendant that the suit is barred by law, as rightly pointed out by learned counsel for plaintiff, second defendant has to necessarily take out an application inter-alia under Order VII Rule 11 of CPC. To be precise, under sub-clause (d) of Order VII Rule 11 of CPC and the same has to be tested on its own merits and on uncontroverted averments in the plaint.

(t) In this regard, this Commercial Division is of the considered view that whenever an application for rejection of plaint inter-alia under Order VII Rule 11 of CPC is taken out, that has to be first decided without reference to any other application and any other issues in the suit as the application for rejection of plaint goes to the root of the matter. It is made clear that if the second defendant had taken out such a rejection of plaint application in the instant case, the same would have been first decided and further proceedings in the instant suit and these interlocutory applications would have been only subject to the outcome of the reject the plaint application. In other words, if the prayer in the reject the plaint application had been acceded to, that would have been the end of the suit, subject of course to an intra-court appeal. Only if the prayer in the reject the plaint application had been negatived, these applications would have been taken up for consideration.

(u) However, all these are legal issues. In the light of the celebrated judgment of Hon'ble Supreme Court in **I.T.C. Limited Vs. Debts**

Recovery Appellate Tribunal reported in **AIR 1998 SC 634 : (1998) 2 SCC 70**, wherein Supreme Court held that an application for rejection of plaint can be taken out at any stage of the suit, this Commercial Division deems it appropriate to leave it open to second defendant to pursue such course and take out an application for rejection of plaint, if so advised and if second defendant desires to do so.

(v) After 1998, in **Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner** reported in **(2004) 3 SCC 137**, Supreme Court referred to **1998 ITC** principle and reiterated the same. Thereafter, recently in 2016, in **R.K.Roja Vs. U.S.Rayudu** reported in **(2016) 14 SCC 275**, though **1998 ITC** case has not specifically been referred to, the principle that an application for rejection of plaint can be filed at any stage of the suit has been laid down by Hon'ble Supreme Court.

(w) In the discussion thus far, there has been reference to submission made by learned counsel for second defendant and it has also been recorded supra that learned counsel for first defendant has filed a memo adopting the counter affidavit of the second defendant. Besides adopting the counter affidavit of second defendant, learned counsel for first defendant Mr.E.Venkatesh Babu, submitted that he adopts the submissions made by learned counsel for second defendant.

(x) From the dispositive reasoning, it emerges clearly that the interim order already granted deserves to be modified holding that second

defendant can proceed with the auction of suit properties by rescheduling the date of auction sale by issuing e-notification in this regard, but sale proceeds shall be distributed strictly in accordance with the pari passu charge of plaintiff. Such distribution will include interest and the deduction will be proportionate auction charges.

12 Conclusion :

(a) Second defendant can auction the suit properties of borrower company by rescheduling the date of auction sale, but subject to the condition that sale proceeds shall be distributed amongst all mortgagees including the plaintiff strictly in accordance with plaintiff's pari passu charge qua suit properties of borrower company which has been captured in first defendant's letter to plaintiff dated 29.04.2009.

(b) While issuing the notification for the rescheduled date of auction, it shall be made clear in the said notification that the plaintiff's (Hanudev Investments Pvt. Ltd.) pari passu charge over properties which are subject matter of auction, shall be cleared by ARC second defendant, albeit proportionately in accordance with the order of DRT dated 13.12.2012 in O.A.No.121 of 2011 which is admittedly operating between the parties.

13 Decision :

Both applications, namely, O.A.Nos.854 and 855 of 2018 are disposed of by modifying the interim order dated 12.09.2018 granted in

O.A.No.854 of 2018 to the effect that there can be sale pursuant to e-auction notice dated 13.8.2018, by rescheduling the original auction scheduled to be held on 17.09.2018 subject to the condition that sale proceeds should be distributed proportionately between second defendant and plaintiff in accordance with plaintiff's pari passu charge on suit properties as evidenced by first defendant's letter dated 29.04.2009 which is not disputed. Parties are left to bear their respective costs.

20.12.2018

Speaking order

Index : Yes / No

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