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

\+ **W.P.(C) 3499/2018**

HDFC BANK LTD ..... Petitioner

Through: Mr Kunal Tandon, Mr Chetan Roy, Ms Niti Jain, Advocates.

versus

INDUS POYFILMS SPECIALISTS PVT LTD & ORS ..... Respondents

Through: Ms Ripu Adlakha, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **01.08.2018**

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia,* impugning an order dated 05.03.2018 (hereafter 'the impugned order') passed by the CMM (Central), Tis Hazari Courts, Delhi in CC No. 514112/2016 captioned '***HDFC Bank Ltd. v. M/s Indus Polyfilms Specialists Pvt. Ltd. and Ors.***'. The petitioner claims to be a secured creditor of the respondents and had filed an application under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereafter 'the SARFAESI Act') before the learned CMM (Central) Tis Hazari Courts, Delhi for taking possession of the ground floor

of the property bearing no. E-336, Greater Kailash II, New Delhi 110048 (hereafter 'the mortgaged property')

2. By the impugned order, the learned CMM has declined to pass an order as sought for by the petitioner for the reason that this Court had passed an order dated 17.01.2012 directing status quo in a Company Petition (being ***Co. Pet. 320/2008*** captioned "***Ester Industries Ltd. v. Indus Polyfilms Specialists Pvt. Ltd.***"). He proceeded on the basis that the said order directing status quo was also applicable to the motgaged property and held that judicial proprietory demanded the petitioner to seek an appropriate clarification from this Court.

3. The petitioner states that the order of status quo was passed in proceedings instituted by another creditor under Section 433 of the Companies Act, 1956 for winding up of respondent no.1 company (hereafter 'IPPL'). The learned counsel for the petitioner submits that the petitioner stands outside the winding up proceedings and has sought enforcement of the security interest under the SARFAESI Act. He contends that, therefore, the said proceedings could not be impeded on account of any winding up proceedings instituted against IPPL.

4. The aforesaid controversy arises in the context of the following facts:-

5. It is stated that IPPL had availed of financial assistance from erstwhile Centurion Bank of Punjab (since merged with the petitioner). In order to secure the financial assistance, respondent no.2, Sh. Sanjeev Mehta (since deceased) executed a Mortgage deed dated 29.01.2008 in respect of the ground floor of the mortgaged property in favour of the Centurion Bank of

Punjab.

6. It is stated that IPPL failed to discharge its obligations and consequently its accounts were declared as Non-Performing Assets (NPAs) on 01.05.2009. Thereafter, on 20.01.2010, the petitioner issued a notice under Section 13(2) of the SARFAESI Act calling upon the respondents to pay a sum of ₹99,43,175.70/- (as on 31.12.2009) within a period of 60 days. It is stated that initially the respondents submitted proposals for settlement of the dues. However, their offers were rejected.

7. Thereafter, on 22.03.2010, the respondents raised certain objections with regard to the notice issued by the petitioner under the SARFAESI Act.

8. On 18.05.2010, the petitioner filed a petition under Section 14 of the SARFAESI Act for seeking assistance for taking over possession of the mortgaged property (which was numbered as Petition No. 431/2/2010). Thereafter, on 04.08.2010, learned ACMM (Spl. Acts) Central appointed a Receiver for taking over the possession of the mortgaged property. On 15.11.2010, the petitioner filed an Original Application under Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 for recovery of debts amounting to ₹1,13,64,774.65/- due against the respondents. While proceedings were pending, on 19.11.2010, the respondents filed an appeal before the Debt Recovery Tribuanl (DRT) under Section 17 of the SARFAESI Act (being SA No. 29/2011).

9. On 09.01.2011, the petitioner filed a second application under Section 14 of the SARFAESI Act (being CC No. 514112/2016) seeking appropriate directions for extension of time in implementation of the order dated

04.08.2010 for taking over of possession of the mortgaged property. On 16.03.2012, the respondents also filed applications under Section 410 of Cr.P.C. and Section 340 of Cr.P.C.

10. An application filed by the respondents under Section 410 Cr.P.C. was dismissed on 04.06.2012. The application filed by the petitioner as well as the application filed by the respondents under Section 340 of Cr.P.C. was heard on several occasions. It was heard on several occasions by the learned ACMM from 05.06.2012 to 19.09.2016.

11. On 19.09.2016, the learned ACMM referred the matter to the learned CMM (Central), Tis Hazari Courts, Delhi. In the meanwhile, the respondents also filed an application for dismissal of the proceedings on the ground of lack of jurisdiction. In view of the delay in disposal of the application under Section 14 of the SARFAESI Act, on 26.08.2016, the petitioner also filed a writ petition (W.P. (C) 7634/2016), which was disposed of on 30.08.2016 directing the learned ACMM to dispose of the matter expeditiously.

12. On 04.01.2017, the learned CMM rejected all the objections/contentions advanced on behalf of the respondents in opposition to the petitioner's application under Section 14 of the SARFAESI Act. However, learned CMM declined to pass the necessary orders for taking possession of the mortgaged property in view of the status quo order passed by this Court in Company Petition No. 320/2008. And, the petitioner was directed to seek appropriate permission from this Court in those proceedings.

13. Thereafter, on 23.01.2017, the petitioner filed an application being CO. APPL. 193/2017 in Company Petition No. 320/2018 to seek appropriate permission to proceed against the respondents under Section 14 of the SARFAESI Act. The petitioner also filed a petition being CM (M) No. 258/2017, impugning the order dated 04.01.2017 passed by the Ld. CMM to the limited extent that the petitioner had been directed to seek permission from this Court in the winding up proceedings pending against IPPL.

14. The said petition, CM (M) 258/2017, was disposed of by this Court on 16.03.2017. The said order is set out below:-

> "Received on transfer.
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> Impugned order of 4th January, 2017 directs petitioner to approach the Company Court to lift the embargo put upon the property in question by the Company Court.
>
> The challenge to impugned order in this petition is on the ground that the Company Court has no jurisdiction over the subject matter of property in question as it is covered by The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as SARFAESI Act). To submit so, learned counsel for petitioner relies upon Supreme Court's decision in Pegasus Assets Reconstruction Private Limited v. Haryana Concast Limited and Another (2016) 4 SCC 47.
>
> During the course of hearing, learned counsel for respondents has brought to the notice of this Court that petitioner has complied with order brought to the notice of this Court that petitioner has complied with order of 4th January, 2017 and an application has been filed by petitioner before the Company Court to point out that property in question does not come within the jurisdiction of Company Court as it comes within the purview of the SARFAESI Act, 2002. It is

pointed out by learned counsel for petitioner that the recourse to Company Court has been made without prejudice to the rights of petitioner.

Be that as it may. It is open to the petitioner to bring Supreme

Court's decision in Pegasus Assets Reconstruction Private Limited v. Haryana Concast Limited and Another (supra) to the notice of the Company Court and thereafter obtain orders therefrom. Since the impugned order suffers from no illegality, therefore, this petition and application are disposed of with liberty to the parties to avail of the remedies before the Company Court. "

15. The petitioner's application before the Company Court (CO. APPL. 193/2017) in Company Petition No. 320/2008 was taken up on 08.05.2017 and this Court passed the following order :-

"Learned counsel appearing on behalf of the applicant states that as a secured creditor, he seeks leave to withdraw this application, with liberty to take appropriate action, as may be advised, in accordance with law.

Ms. Adhlakha, learned counsel appearing on behalf of the non-applicant/respondent-company states that the applicant is not a secured creditor and that the proceedings under the provisions of Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 have abated.

Be that as it may, since the applicant is dominus litus and in terms of the decision of the Hon'ble Supreme Court in ***Pegasus Asset Reconstruction Private Limited vs. Haryana Concast Limited & Another, reported as (2016) 4 SCC 47***, the applicant is granted leave to withdraw this application with liberty to institute appropriate proceedings, in accordance with law, if so advised. The application is dismissed as withdrawn and is disposed of accordingly."

16. The petitioner once again approached the learned CMM; however, the CMM once again declined to pass effective orders for taking possession of the mortgaged property on the ground that the petitioner had withdrawn the application filed before the Company Court with liberty to pursue appropriate proceedings in accordance with law. The Ld. CMM was of the view that position had remained the same and in absence of permission from this Court, the Court could not direct Receiver to take possession of the mortgaged property.

17. Ms Ripu Adlakha, the learned counsel appearing for the respondents contended that there was no infirmity in the impugned order. She submitted that the impugned order was in similar terms as the order dated 04.01.2017, which had been upheld by this Court on 16.03.2017. She earnestly contended that the petitioner had withdrawn its application for clarification before the Company Court and, therefore, had no order in its favour. She submitted that in terms of the order dated 04.01.2017, the petitioner was required to obtain a positive clarification that it could proceed with its application under Section 14 of the SARFAESI Act. Since, the petitioner had withdrawn its application, it was not open for the petitioner to once again approach the Learned CMM under Section 14 of the Act. Apart from the above, she also sought to contest the petitioner's right to file an application under Section 14 of the SARFAESI Act. In addition, she submitted that since respondent no.2 had expired, the earlier application filed by the petitioner had abated.

Reasons and conclusion

18. At the outset, it is necessary to observe that the question whether a secured creditor can take recourse to the SARFAESI Act for enforcement of its security interest without approaching the Company Court, is no longer *res integra*. The Supreme Court in the case of ***Pegasus Assets Reconstruction (P) Ltd. v. Haryana Concast Ltd. & Anr*** : ***2016 4 SCC 47*** has authoritatively held that in terms of SARFAESI Act, a secured creditor is vested with the powers to enforce its security interest without intervention of the Court. The *non obstante* provisions of the SARFAESI Act make it amply clear that a secured creditor is not required to approach the Company Court for seeking permission to enforce of its security interest under the SARFAESI Act. The following observations made by the Supreme Court in the aforesaid decision are relevant:-

> "23. A reading of Sections 9 and 13 of the SARFAESI Act leaves no manner of doubt that for enforcement of its security interest, a secured creditor has been not only vested with powers to do so without the intervention of the court or tribunal but detailed procedure has also been prescribed to take care of various eventualities such as when the borrower company is under liquidation for which proviso to sub-section (9) of Section 13 contains clear mandate keeping in view the provisions of Section 529 and 529A of the Companies Act, 1956."

19. Notwithstanding the above, the petitioner had approached the Company Court by filing an application (being application No. 193/2017 in Company Petition No. 320/2008) seeking clarification to proceed under Section 14 of the SARFAESI Act. It is in this context that the Court had observed in its order dated 08.05.2017 that petitioner was *dominus litis* in

terms of the decision of the Supreme Court in ***Pegasus Assets Reconstructions (P) Ltd. v. Haryana Concast Ltd.*** (*supra*). This clearly indicates that this Court had left it to the petitioner to take such proceedings under the SARFAESI Act as the petitioner was advised. It is in view of the aforesaid observations, the petitioner had withdrawn its application, as the Company Court was not called upon to adjudicate the disputes between the parties. Particularly, since IPPL was disputing that the petitioner was a secured creditor.

20. The observations made by the CMM in its impugned order to the effect that the position remained the same as on 04.01.2017 is erroneous, as this Court had clearly clarified in the order dated 08.05.2017 that the petitioner could take steps in terms of the decision of the Supreme Court in ***Pegasus Assets Reconstructions (P) Ltd. v. Haryana Concast Ltd.*** (*supra*). No further clarifications in this regard were required.

21. In the aforesaid view, the learned CMM was not precluded in entertaining petitioner's application under Section 14 of the SARFAESI Act and passing the necessary orders in accordance with law. As noticed above, this Court is not called upon to examine the disputes between the parties. It is sufficient to note that neither the winding up proceedings are pending before this Court nor any order passed therein would come in the way of the petitioner in seeking recourse to the SARFAESI Act and the Ld CMM is not precluded from passing any orders under the SARFAESI Act in accordance with law.

22. In view of the above, the impugned order dismissing the petitioner's

application is set aside to the limited extent that the said order proceeds on the basis that the petitioner has not complied with the order dated 04.01.2017. The matter is remanded to the Ld. CMM to consider the petitioner's application having regard to the aforesaid clarifications.

23. It is clarified that all other contentions of the parties are reserved.

24. The petition is disposed of in the above terms.

VIBHU BAKHRU, J

AUGUST 01, 2018
RK/pkv