THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

COMPANY APPLICATION No. 624 OF 2018
IN
COMPANY PETITIONS No. 39 OF 2016 & 60 OF 2013

O R D E R:

This Application was filed by the applicant State Bank of India (hereinafter referred to as 'the bank – secured creditor') of M/s Apex Encon Projects Private Limited (hereinafter referred to as 'the company in liquidation') seeking directions to the Official Liquidator: a) to communicate necessary clarifications to the Sub-Registrar, Visakhapatnam to permit registration of sale certificate that may be produced by the secured creditor banks consequent upon conclusion of auction sales in respect of secured assets; and b) to other Sub-Registrars to whom the Official Liquidator hitherto communicate the instructions not to entertain the request for transfer, alienate and create any third party charge over the properties of the company without leave of the High court or until receipt of further common orders from the office of the Official Liquidator to permit registration of sale certificate that may be produced by the secured creditor bank consequent upon conclusion of auction sales in respect of secured assets.

The 2nd respondent company under liquidation was registered under the provisions of the Companies Act, 1956 and the same was directed to be wound up at the instance of the 1st respondent creditor in Company Petitions No. 39 of 2016 and 60 of 2013 *vide* orders of this Court dated 06.07.2017. The company under liquidation was extended various loan facilities by the applicant bank in consortium through its Overseas Branch, Visakhapatnam to the tune of Rs. 316 lacs and in consortium with IDBI branch to the tune of Rs.239 lacs, thus total outstanding being Rs.740 lacs. Subsequently, when the accounts with both the branches having become irregular and classified as NPA, suit for recovery of the said amount was filed before the Debts Recovery Tribunal, Visakhapatnam *vide* O.A. No. 192 of 2016 and proceedings under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) came to be initiated on 23.12.2015 and possession of the immovable properties at Visakhapatnam and Salur was taken over on 11.04.2016, 22.06.2016 and 23.06.2016 and further properties at Baddi and Mumbai were taken possession of on 28.09.2016 and 29.09.2016, after following the necessary procedure prescribed therefor and possession of property at Ahmednagar is yet to be taken. During the meeting conducted by the Official Liquidator with the secured creditor banks, the applicant bank declared its intention to remain outside the winding up proceedings and to exercise the rights conferred on the securities of the properties as a secured creditor of the company in liquidation.

However since the Official Liquidator had specifically instructed the applicant bank to approach the High Court seeking permission to stand outside the winding up proceedings, as required under Section 279 of the Companies Act, 2013, this Application was filed. In view of the provisions of the SARFAESI Act, the bank as the secured creditor, after duly adhering to the requisite process and procedure as mandated under Section 13 thereof, had sold one property at Visakhapatnam through *e*-auction on 18.11.2017 for Rs.3.81 crores and after receiving the entire consideration, the relative sale certificate dated 21.11.2017 and possession of the property was delivered to the auction purchaser. When the sale deed in favour of the auction purchaser was presented before the Sub-Registrar, Visakhapatnam, the latter had declined to receive and register the same on the ground that the letter dated 01.09.2017 was received from the Official Liquidator not to permit transfer, alienate and create any third party charge over the properties of the company without the leave of the Court.

In the counter-affidavit dated 09.11.2018, the Official Liquidator, while pointing out that as on date, no statement of affairs was filed by the erstwhile directors of the company, had stated that the applicant bank may be directed to undertake to pay the workmen portion under Section 529 of the 1956 Act as and when ascertained by the Official Liquidator and that while valuating the properties of the company, the Official Liquidator may be involved and further while conducting the auction, the Official Liquidator should be associated.

Thereafter, yet another counter-affidavit dated 13.12.2018 was filed by the Official Liquidator, wherein it is asserted that *e*-auction of the property of the company under liquidation was conducted by the applicant after the winding up order was passed, that as per Section 13 (2) and (4) of the 2002 Act, it is the duty of the secured creditor / applicant to associate with the Official Liquidator, but it failed to do so, that the applicant bank had failed to furnish the details of the company's assets and the stage of the proceedings against the said assets under the 2002 Act, that the applicant should treat the Official Liquidator as a borrower and should issue a notice before conducting sale, since the same was not done, a statutory notice was issued to the Sub-Registrar, Visakhapatnam about the winding up order of the company.

Heard Sri B.S. Prasad, learned counsel for the applicant bank and Sri M. Anil Kumar, learned counsel for the Officila Liquidator.

The Hon'ble Supreme Court in ***Pegasus Assets Reconstruction P. Ltd. v. M/s Haryana Concast Limited*** (Civil Appeal No. 3646 of 2011) had categorically held that a secured creditor is entitled to remain outside the winding up proceedings and can exercise the rights conferred in them as a secured creditor and sell the properties. However, they are required to associate with the Official Liquidator in the process of liquidating the securities. It is the assertion of the Official Liquidator that the applicant had failed to adhere to the procedure as laid down by the Supreme Court in terms of the Rules, thus, the sale cannot be confirmed.

However, considering the fact that the auction had taken place in 2017, the value for which the property was sold being just, and that the sale consideration has already been deposited with the bank, this Court deems it appropriate to direct the Official Liquidator to address the Sub-Registrar informing his no objection to register the document, for which suggestion, the Official Liquidator has readily expressed no objection.

The Company Application, in the facts of the present case, is therefore, allowed directing the Official Liquidator to address a letter to the Sub-Registrar, Visakhapatnam to register the sale deed in question. The Official Liquidator is also directed to take necessary steps therefor. However, this order shall not be treated as a precedent for the bank to proceed with auction of the remaining properties.

It is needless to say, the applicant bank shall not deal with any of the assets either movable or immovable of the company under liquidation without involving the Official Liquidator in all respects, particularly with respect to valuation and putting the same to auction, etcetera.

CHALLA KODANDA RAM, J

01st August 2019

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