

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 10th August, 2020
+ CO.APP. 10/2020, CM No.18562/2020 (for condonation of delay of 114 days in filing the appeal) & CM No.18564/2020 (for stay)

R.K. AGGARWAL Appellant

Through: Mr. Mayank Kumar, Adv.

Versus

OFFICIAL LIQUIDATOR & ORS. Respondents

Through: Ms. Ruchi Sindhwani & Ms. Megha
Bharara, Advs. for R-1.
Mr. Pushpender Aggarwal, Manager
(Law) of R-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

JUSTICE RAJIV SAHAI ENDLAW

CM No.18563/2020 (for exemption)

1. Allowed, subject to just exceptions and as per the extant rules.
2. The application is disposed of.

CO.APP.10/2020, CM No.18562/2020 (for condonation of delay of 114 days in filing the appeal) & CM No.18564/2020 (for stay)

3. This appeal, under Section 483 of the Companies Act, 1956 read with Rule 9 of the Companies (Court) Rules, 1959, impugns the order dated 13th March, 2020 of the Company Court, allowing Company Application No.3550/2016 of respondent no.2 RIICO Ltd. for direction to the respondent no.1 Official Liquidator (OL) to hand over possession of secured assets of the company in liquidation i.e. Nirmal Steel and Tubes (I) Ltd. to respondent
- CO.APP No.10./2020

no.2 RIICO Ltd., in terms of Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest (SARFAESI) Act, 2002 and to permit respondent no.2 RIICO Ltd. to sell the secured assets by public auction under the provisions of SARFAESI Act and to distribute the sale proceeds in accordance with provisions of Section 529 and 529A of the Companies Act. The challenge to the order is made by the erstwhile Director of the company in liquidation i.e. Nirmal Steel Tubes (I) Ltd. namely Mr. R.K. Aggarwal.

4. The counsel for the respondent no.1 OL, on seeing the matter in the cause list and stating that no advance copy has been delivered and Mr. Pushpender Aggarwal, Manager (Law) of respondent no.2 RIICO Ltd. on advance notice, appear. Though none appears for respondent no.3 State Bank of India (SBI) and respondent no.4 Rajasthan Financial Corporation Ltd. (RFCL), but being *prima facie* of the opinion that the appeal is not maintainable and that the presence of the respondent no.3 SBI and respondent no.4 RFCL is not relevant for the purpose of the appeal, we have proceeded to hear the counsel for the appellant at length.

5. The counsel for the appellant has contended, that (i) the company in liquidation Nirmal Steel Tubes (I) Ltd., on 31st December, 1991 filed a reference under Section 15 of the Sick Industrial Companies Act, 1985 (SICA) before the Board for Industrial and Financial Reconstruction (BIFR); (ii) the company in liquidation Nirmal Steel Tubes (I) Ltd. had availed of financial facility from respondent no.2 RIICO Ltd., by securing the assets of the company being plant, machinery and premises of the company at A-353A, RIICO Industrial Area, Bhiwadi District, Alwar, Rajasthan; (iii) since

the company in liquidation filed a reference before the BIFR, the account of the company with respondent no.2 RIICO Ltd. is deemed to have become NPA as on 31st December, 1991; (iv) BIFR, vide order dated 23rd May, 1994 recommended the company Nirmal Steel Tubes (I) Ltd. for liquidation and Company Petition No.112/1994 was registered in this Court; (v) vide order dated 11th February, 2002 of the Company Court of this Court, a provisional liquidator was appointed and took over possession of all the assets of the company including the assets aforesaid secured with respondent no.2 RIICO Ltd.; (vi) the Company Court, vide order dated 28th September, 2004, ordered liquidation of the company and appointed the Official Liquidator attached to this Court as the liquidator of the company; (vii) besides respondent no.2 RIICO Ltd., respondent no.3 SBI and respondent no.4 RFCL were also the secured creditors of the company; (viii) respondent no.3 SBI initiated recovery proceedings against the company and its guarantors before the Debt Recovery Tribunal (DRT), Rajasthan and got a recovery certificate issued from DRT, Rajasthan; (ix) respondent no.2 RIICO Ltd. never initiated any proceedings for recovery of its dues from the company; (x) however after remaining quiet since 31st December, 1991, respondent no.2 RIICO Ltd. issued a notice dated 20th July, 2015 under Section 13(2) of the SARFAESI Act to the respondent no.1 OL only and thereafter filed Company Application No.3550/2016 supra for direction to the respondent no.1 OL to put respondent no.2 RIICO Ltd. into possession of the property for purposes of sale under Section 13(4) of the SARFAESI Act; (xi) On 26th August, 2015 RFCL gave consent to RIICO Ltd. in terms of Section 13(9) of the SARFAESI Act for taking action under Section 13(4); (xii) the appellant, being the ex-management of the company in liquidation Nirmal Steel and

Tubes (I) Ltd. and also holding 75% of the share capital of the company in liquidation Nirmal Steel and Tubes (I) Ltd., filed Company Application No.835/2017 in Company Petition No.112/1994 contending that the proceedings initiated under the SARFAESI Act were time barred; the same objection was also taken in the reply filed to Company Application No.3550/2016 supra; and, (xiii) in the meanwhile the appellant, being the ex-management of the company in liquidation Nirmal Steel and Tubes (I) Ltd., entered into an One Time Settlement (OTS) with respondent no.3 SBI and filed CA No.387/2018 in the Company Court informing the said OTS arrived at with respondent no.3 SBI; however the appellant was unable to pay the entire amount of OTS.

6. It is the contention of the counsel for the appellant that the SARFAESI proceedings are barred by time and though the said plea was taken in reply to Company Application No.3550/2016 as well as by way of CA No.835/2017 which is still pending but the Company Judge, in the impugned order has not dealt with the same at all and hurriedly passed the impugned order allowing Company Application No.3550/2016, accepting the undertaking of respondent no.2 RIICO Ltd. to distribute the sale proceeds of the secured assets in accordance with Sections 529 and 529A of the Companies Act.

7. On enquiry, as to the Article of the Schedule to the Limitation Act, 1963 applicable, the counsel for the appellant states that Article 62 would apply and which provides limitation of 12 years commencing from the date when the monies sued for becomes due. It is contended that the money became due to respondent no.2 RIICO Ltd. on 31st December, 1991 and 12 years therefrom lapsed much prior to 20th July, 2015 when notice under

Section 13(2) of the SARFAESI Act was issued first by respondent no.2 RIICO Ltd. and that too to the OL only.

8. We have enquired from the counsel for the appellant, whether not the respondent no.2 RIICO Ltd., on reference under BIFR being made and on liquidation being ordered, could not possibly have initiated any proceedings for recovery and limitation for initiation whereof remained suspended.

9. The counsel for the appellant has referred to **Somnath Manocha Vs. Punjab and Sind Bank** 2012 (129) DRJ 654 (DB) and has read out paragraph 17 thereof to contend that the SARFAESI Act proceedings can also become time barred. He has also referred to **Benares Cotton & Silk Mills Ltd. Vs. Sulbha Devi Gupta** (1986) 60 CompCas 639, Rule 151 of the Companies (Court) Rules and to Section 36 of the SARFAESI Act in this regard.

10. We have examined the aforesaid judgments. While **Benares Cotton & Silk Mills Ltd.** supra is of before even coming into force of the SARFAESI Act in the year 2002 and thus not concerned with limitation for initiation of action thereunder, in **Somnath Manocha** supra, the secured creditor initiated recovery suit under Order 37 of the Code of Civil Procedure, only for recovery of money, saving the right to sue subsequently on mortgage and which suit was never filed and it was in this context that it was held that the initiation of proceedings under SARFAESI Act was barred by time.

11. Prima facie, the reliance placed by the counsel for the appellant on Article 62 of the Schedule to the Limitation Act is misplaced. Article 62 provides limitation for a suit to enforce payment of money secured by a

mortgage or otherwise charged upon immovable property. The proceedings under the SARFAESI Act are not for recovery of money but are more akin to a proceeding for foreclosure of mortgage, limitation for a suit wherefor provided in Article 63 (a) of the Schedule to the Limitation Act is of 30 years commencing from the date when the money secured by the mortgage became due. It thus appears that Article 63(a) and not Article 62 of the Schedule to the Limitation Act would apply.

12. However, it is not deemed apposite to deal further on the said aspect because we have also enquired from the counsel for the appellant, whether not the challenge to the SARFAESI Act proceedings, on the ground of the same being barred by limitation, is required to be made by way of a proceeding under Section 17 of the SARFAESI Act and before the DRT and the jurisdiction of this Court would be barred by Section 34 of the SARFAESI Act. We may in this context notice that the SARFAESI Act came into force only in the year 2002 and going by Article 63(a) of the schedule to the Limitation Act, it cannot be said that the limitation of 30 years, even if counted from 31st December, 1991 has not expired or had expired, for that matter, even by 20th July, 2015 when the notice under Section 13(2) of the SARFAESI Act was issued. In this context it is worthwhile to also mention that respondent no.2 RIICO Ltd., being admittedly a secured creditor, was / is entitled to stay outside the winding up process and was required to approach the Company Court only to take possession from the Official Liquidator, of the secured assets, for the purposes of sale and in accordance with Sections 529 and 529A of the Companies Act. As far back as in ***M.K. Ranganathan Vs. Government of***

Madras AIR 1955 SC 604 it was held, (i) that the mortgagee of a company in liquidation is in a position to say “the mortgaged property is to the extent of the mortgage my property. It is immaterial to me whether my mortgage is in winding up or not. I remain outside the winding up and shall enforce my rights as mortgagee”; (ii) this is to be contrasted with the case in which such a creditor prefers to assert his right, not as mortgagee, but as a creditor saying “I will prove in respect of my debt”, in which case he comes into the winding up; (iii) when the mortgagee sells, with or without the concurrence of liquidator, in exercise of a power of sale vested in him by the mortgage, it is not necessary to obtain liberty to exercise the power of sale, although orders giving such liberty have sometimes been made; and, (iv) the secured creditor is thus outside the winding up and can realize his security without the leave of winding up Court, though if he files a suit or takes other legal proceedings for the realization of his security, he is bound to obtain the leave of the winding up Court before he can do so although such leave would almost automatically be granted. Though the said judgment was rendered with reference to the provisions of the Companies Act, 1913 but the corresponding provisions of the Companies Act, 1956 are *pari materia* with the earlier Act and the position of law has not changed. It thus follows that the claim of a secured creditor is against his security of which he is already the owner to the extent of the security, and not against the company and thus a secured creditor stands outside the winding up. However by amendments of the year 1985 in Section 529 and with the incorporation of Section 529A in the Companies Act, 1956, a *pari passu* charge on the security of the secured creditors, in favour of the workmen to the extent of the workman’s portion in the security was created.

13. Reference is this regard may be made to ***A.P. State Financial Corpn. Vs Official Liquidator*** (2000) 7 SCC 291 holding that though the State Financial Corporations Act, 1951 is a special Act vis-à-vis the Companies Act but since the amendment to Section 529 and incorporation of Section 529A in the Companies Act, 1956 is of the year 1985 and contains a non-obstante clause, it would prevail over the State Financial Corporations Act and the statutory right of the State Financial Corporation to sell the property under Section 29 of the State Financial Corporations Act has to be exercised with the right of *pari passu* charge to the workmen created by the proviso to Section 529 of the Companies Act and that Section 529A confers upon a Company Court the duty to ensure that the workmen's dues are paid in priority to all other debts. In ***International Coach Builders Ltd. Vs. Karnataka State Financial Corpn.*** (2003) 10 SCC 482 it was further held that the Official Liquidator, as the representative of the workmen to enforce such *pari passu* charge, would have the right of representing the workmen equally with the rights of the secured creditor and therefore State Financial Corporation cannot act independently or by ignoring the Official Liquidator, for enforcing their security and the realization of the security can only be done by both the charge holders joining. In ***Rajasthan State Financial Corpn. Vs Official Liquidator*** (2005) 8 SCC 190 it was further clarified that though the right of the State Financial Corporation to sell the secured assets has not been taken away, notwithstanding the winding up, but the same stands restricted by the requirement of the Official Liquidator being associated with it, giving the Company Court the right to ensure the distribution of the assets in terms of Section 529A of the Companies Act. In ***Laxmi Fibres Ltd. Vs. A.P. Industrial Development Corpn. Ltd.*** (2015) 16

SCC 464 it was yet further clarified that after ensuring that the social purpose of Sections 529 and 529A is achieved or ensured, the State Financial Corporation can continue to enjoy their statutory rights as secured creditors and they will not be reduced to the status of unsecured creditors and will not be required to prove their debts or to stand in line with other unsecured creditors.

14. We may notice, since the possession of the secured assets was with the respondent no.1 OL pursuant to the recommendation of the BIFR and the order of liquidation, respondent no.2 RIICO Ltd., for the purpose of proceedings under the SARFAESI Act, was in any case required to apply to the Company Court for direction to the respondent no.1 OL to handover possession of the property for sale under the SARFAESI Act.

15. We have not been able to decipher any clear reply from the counsel for the appellant to our aforesaid queries, qua jurisdiction of the Company Court or of this Court in appeal against the order of the Company Court, to go into the aspect of bar of limitation, if any to the proceedings under the SARFAESI Act and jurisdiction therefor being exclusively of the DRT or qua limitation.

16. We however entertain no doubts in this regard and merely because the borrower qua the secured interest is in liquidation, would not vest the Company Court, as whose appellate Court we are exercising jurisdiction, with the jurisdiction over matters which can be raised under Section 17, before the DRT.

17. The counsel for the respondent no.1 OL, after learning of the controversy from the hearing before the Court, has also referred to ***Pegasus Assets Reconstruction Pvt. Ltd. Vs. Haryana Concast Ltd.*** (2016) 4 SCC 47 at paragraph 17, to contend that the sale of the secured assets has to be carried out by the secured creditor and only the workmen dues have to be ensured and which has been done in the impugned order by recording the undertaking of respondent no.2 RIICO Ltd. qua distribution of sale proceeds in accordance with Sections 529 and 529A of the Companies Act.

18. On going through ***Pegasus Assets Reconstruction Pvt. Ltd.*** supra we also find the same to be a precedent on the query made by us to the counsel for the appellant. The question for adjudication therein was, “whether a Company Court, directly or through an Official Liquidator, can wield any control in respect of a sale of a secured asset by a secured creditor in exercise of powers available to such creditor under the SARFAESI Act”. It was held, (i) that the Recovery of Debts due to Banks & Financial Institutions Act is of 1993 i.e. later to the Companies Act and creates a special machinery for speedy recovery of dues of banks and financial institutions and which by an amendment of 2004 includes a registered securitization or reconstruction company envisaged under SARFAESI Act and Section 18 thereof bars the jurisdiction of ordinary Courts or authority in respect of matters falling within the jurisdiction of Debt Recovery Tribunal as specified in Section 17 thereof; (ii) an Appellate Tribunal is provided under Section 20; (iii) the power of such Tribunals extends to determining the debt due as well as its realization; (iv) Section 34 confers overriding effect upon this Act over any other law in force; (v) SARFAESI Act was enacted in 2002 to regulate

securitization and reconstruction of financial assets and enforcement of security interest, to clothe the banks and financial institutions with power to take possession of securities and sell them; (vi) a reading of Sections 9 and 13 of the SARFAESI Act leaves no manner of doubt that for enforcements of its security interest, a secured creditor has been not only vested with the power to do so without the intervention of the Court or Tribunal but detailed provisions have also been prescribed to take care of various eventualities such as when the borrower company is under liquidation and for which, proviso to Sub-Section (9) to Section 13 contains clear mandate keeping in view the provisions of Sections 529 and 529A of the Companies Act; (vii) thus the SARFAESI Act also has a overriding effect over other laws; (viii) the Rules under the SARFAESI Act ensure that Official Liquidator is in knowledge of the proceedings under the SARFAESI Act in case the borrower happens to be a company under winding up; (ix) thus no order is required by the Company Judge, for association of the OL, in order to protect the interest of workers and to realize their dues; (x) in the event, in the capacity of a borrower, the OL is not satisfied with the decisions or steps taken by the secured creditor, it has sufficient opportunity to avail right of appeal under Section 17 of the SARFAESI Act before the DRT; (xi) any other view will lead to a conflict of rights and interest and the appellate fora shall also differ, leading to a situation of uncertainty and conflict between the two Acts; (xii) SARFAESI Act is a complete Code and there is thus no need to borrow anything from the Companies Act; (xiii) the required provisions of the Companies Act have been incorporated in the SARFAESI Act, for harmonizing this Act with the Companies Act in respect of the dues of the workmen; and, (xiv) in the circumstances, there is no plausible reason to take

recourse to any provisions of the Companies Act and permit interference in the proceedings under the SARFAESI Act either by the Company Judge or the OL.

19. Once as per the aforesaid judgment, even the OL in the capacity of the borrower, if aggrieved from steps taken by the secured creditor under the SARFAESI Act is required to approach the DRT under Section 17 of the SARFAESI Act, there is no doubt that the appellant claiming to be ex-management of the company in winding up, also has to approach the DRT to contend that the action under the SARFAESI Act is barred by time.

20. Though we have referred to and dealt with the argument of limitation urged, to the limited extent aforesaid but are refraining ourselves from giving further reasons so as not to prejudice the remedy, if any availed of by the appellant before the DRT under Section 17 thereof.

21. The counsel for the respondent no.1 OL at this stage also contends that if the appeal has been filed by Mr. R.K. Aggarwal in his capacity as ex-management, as stated by him in the affidavit accompanying the appeal, the appeal is not maintainable on this ground alone. Reference in this regard is made to order dated 16th November, 2018 of a Division Bench of this Court in Co. App. 24/2018 titled **V.K. Sharma Vs. Official Liquidator**. It is stated that though a erstwhile shareholder of a company in liquidation is entitled to appeal but not the ex-Director and since the appellant in the affidavit has described himself as ex-Director, even though the appeal contains an averment that he holds 75% of the shares of the company in liquidation, the appeal is not maintainable.

22. We may add that the Supreme Court also in ***Innoventive Industries Ltd. Vs. ICICI Bank*** (2018) 1 SCC 407 has held that the appeal at the behest of erstwhile Directors of a company in insolvency is not maintainable.

23. Mr. Pushpender Aggarwal, Manager (Law) of respondent no.2 RIICO Ltd. only states that he needs time to engage an advocate. However since no merit has been found in the appeal for lack of jurisdiction, we need not grant any such time.

24. Dismissed.

RAJIV SAHAI ENDLAW, J.

ASHA MENON, J.

AUGUST 10, 2020
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