IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:15.04.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P.Nos.11663, 9062, 9085 of 2017
and 36591 of 2015

W.P.No.11663 of 2017:

Mallika Gunasekaran .. Petitioner

Vs

1. Phoenix ARC Private Limited,
   7th Floor, Dani Corporate Park,
   158, CST Road,
   Kalina, Santa Cruz (E),
   Mumbai-400 098,
   rep. by its Director.

2. M/s.Taurus GKK Exports Private Limited,
   rep. by its Director,
   Having its registered office at
   No.40/7, Ramakrishna Street,
   T.Nagar, Chennai - 600 017.

3. M.S.Gunasekaran
4. M.S.G.Bhuvan Kumar

5. The Axis Bank,
   Credit Management Branch,
   Karumuthu Centre,
   No.192, Anna Salai,
   Chennai - 600 002. ..Respondents

   (Respondent No.5 impleaded suo motu
   as per the order dated 04.05.2017)

W.P.Nos.9062 and 9085 of 2017:
Mallika Gunasekaran,
rep. by her Power Agent
M.S.Gunasekaran ..Petitioner
in W.P.Nos.9062 and
9085 of 2017

Vs

1. Phoenix ARC Private Limited,
   7th Floor, Dani Corporate Park,
   158, CST Road,
   Kalina, Santa Cruz (E),
   Mumbai-400 098.

2. Axis Bank,
   Credit Management Branch,
   Karumuthu Centre,
   No.192, Anna Salai,
   Chennai - 600 002. .. Respondents in W.P.Nos.9062 and 9085 of 2017

W.P.No.36591 of 2015:

Phoenix ARC Private Limited,
7th Floor, Dani Corporate Park,
No.18, C.S.T. Road, Kalina,
Santacruz(E), Mumbai-400 098,
rep. by its Authorized Officer
Amit Kumar Gupta. .. Petitioner

Vs

1. M/s.G.K.K.Exports Private Limited,
   No.83/2, Poonamallee By-Pass Road,
   Chennai-600 056.

2. Taurus G.K.K. Leathers Private Limited,
   No.18/6, Madras Krishnagiri By-Pass Road,
   Ranipet-632 401,
   Vellore District.

3. M.S.Gunasekharan

4. The Deputy Commissioner of Police,
   Theagaraya Nagar Police District,
   T.Nagar, Chennai - 600 017.

5. The Assistant Commissioner of Police,
   Teynampet Range, T.Nagar Police District,
   Anna Salai, Teynampet,
   Chennai - 600 017.

6. The Inspector of Police,
R-4, Pondy Bazaar Police Station,
T.Nagar, Chennai - 600 017. .. Respondents

W.P.No.11663 of 2017 Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus to call for the records of the Debt Recovery Appellate Tribunal, Chennai in respect of the order dated 28.04.2017 in AIR No.820 of 2015 and quash the same and consequently keep all connected and pending proceedings on the file of the Debts Recovery Tribunal II, Chennai in abeyance.

W.P.No.9062 of 2017 filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus to call for the records of the Debt Recovery Appellate Tribunal, Chennai in IA 181/2017 dated 27.3.2017 and quash the same and consequently allow MA No.112 of 2015 on the file of the Debts Recovery Tribunal II, Chennai.

W.P.No.9085 of 2017 filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus to call for the records of the case in respect of Deed of Assignment dated 08.09.2011 executed by the second respondent in favour of the first respondent and quash the same and consequently direct the second respondent to restructure the loan facility availed by the borrower company.

W.P.No.36591 of 2015 filed under Article 226 of the Constitution of India for issuance of a Writ of Mandamus directing the respondents 4 to 6 herein to render necessary assistance as and when requested by the Advocate Commissioner appointed by the Chief Metropolitan Magistrate, Chennai by order dated 21.04.2014 in Crl.M.P.No.1546 of 2014 under Section 14 of the SARFAESI Act and the Warrant dated 07.09.2015 issued in terms of the said order and restrain the respondents 1 to 3 from in any manner defying the said order, to enable the petitioner to take physical possession of the secured asset as set out in the said order.

For Petitioner in
W.P.No.11663,9062
and 9085/2017 : Mr.P.V.Balasubramanian
for M/s.BFS Legal

and Respondent No.3
in W.P.No.36591/2015 : Mr.OM Prakash(SC) for
Mr.P.Elayarajakumar

For Respondent No.1 in W.P.Nos.11663,9062 and 9085/2017 : Mr.E.Om. Prakash Senior Counsel for Mr.Elayarajakumar M/s. Ramalingam & Associates

For Respondent No.5 in W.P.No.11663/2017 Respondent No.2 in W.P.No.9062 & 9085/2017 : Mr.Chethan Sagal for M/s.V.V. Sivakumar

For Respondent Nos.2 to 4 in W.P.No.11663/2017 and for Respondent Nos.1,2 and 4 to 6 in W.P.No.36591/2015 : No Appearance

W.P.No.36591/2015(R3) : Mr.P.Balasubramanian for M/s.BFS Legal

COMMON ORDER

(Order of the Court was made by the Hon'ble Chief Justice)

This is an example of how the system is abused by or at the behest of borrowers to virtually turn things on their head after obtaining credit facilities from a bank or financial institution and be in default for nearly a decade without showing any inclination to pay up. There is no doubt that further roadblocks would be put in place, with official assistance, if necessary.

2. Two companies and some private individuals are involved along with a bank and the subsequent assignee of the debt due to such bank. Credit facilities were obtained by the two companies in 2006 and 2009, the limits being of Rs.5 Crore and Rs.1.5 Crore respectively. A common security was furnished by a guarantor, who was the principal person in control of both the companies and is arrayed as the third respondent in assignee's writ petition, W.P.No.36591 of 2015.

3. By or about September 13, 2010, both the accounts were classified as non performing assets and notices were subsequently issued to the principal debtors and the guarantor, but to no avail. In anticipation that the NPA declaration was coming, the companies resorted to the age-old trick of declaring themselves sick within the meaning of the then Sick Industrial Companies (Special Provisions) Act, 1985. The attempt, doubtless, was to ensure that such borrowers could enjoy the moratorium under Section 22(1) of the Act of 1985 that

prohibited suits or other proceedings being brought against sick industrial companies. The irony of the situation was that though the said Act of 1985 was enacted to ensure that ameliorative measures could be taken to protect an industrial company so that the workers thereat did not lose their employment, promoters of industrial companies used the provisions of such Act to not only ride roughshod over the employees, but also keep all forms of creditors at bay.

4. On or about September 8, 2011, the erstwhile creditor, Axis Bank, assigned the debts due from the two borrower companies to Phoenix Asset Reconstruction Company Private Limited, the writ petitioner in W.P.No.36591 of 2015. In 2014, such assignee instituted two sets of proceedings under Section 19 of the then Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (since renamed as Recovery of Debts and Bankruptcy Act, 1993) against the two corporate debtors and the guarantor. In O.A.No.78 of 2014, a certificate in the sum of Rs.7.38 crore together with further interest has been issued on May 4, 2017 and there is no challenge to such certificate. There need not be, in the light of the larger gain that the borrowers and, principally, the primary person in control of the borrowers had earned. They have blocked the secured asset and done so quite successfully for more than a decade since the accounts turned NPA in September, 2010.

5. The other three petitions arise out of O.A.No.79 of 2014 in which the assignee lodged a claim for recovery of a sum of Rs.2.55 crore. On January 6, 2015, an order came to be made by the relevant Debts Recovery Tribunal for setting the matter down for ex parte hearing since the principal debtor and guarantor had not filed any written statement or the like and showed little interest in the matter. As was to be expected, the reaction was prompt. On January 7, 2015, an application for recalling or setting aside the order for ex parte hearing was filed but, true to form, such application was made defective so that some more time could be wasted. The defects in the application for setting aside the order requiring the matter to be taken up ex parte were not removed till or about June 6, 2015 when an exasperated Debts Recovery Tribunal passed an ex parte certificate, allowing the assignee's claim.

6. In July, 2015, a miscellaneous application numbered as M.A.No.112 of 2015 was carried to the Debts Recovery Tribunal by the borrowers in O.A.No.79 of 2014 seeking the ex parte order to be set aside. On September 25, 2015, the Debts Recovery Tribunal agreed to consider the application for setting aside the ex parte decree subject to the deposit of a sum of Rs.50 lakh.

7. Though such an order would have devastated an ordinary party that it would be required to deposit a substantial amount for recalling an ex parte order, the borrowers in this case treated it as a boon and carried the order of September 25, 2015 by way of an appeal to the Debt Recovery Appellate Tribunal. Such appeal, A.I.R.No.820 of 2015, resulted in an initial order of March 27, 2017 requiring a pre-deposit of Rs.70 lakh for the appeal to be considered. The Debt Recovery Appellate Tribunal justified the order by saying that it had to go by Section 21 of the 1993 Act that required a pre-deposit to be made based on the claim of the bank or financial institution or the amount adjudged to be due by the Debts Recovery Tribunal. The apparently hilarious case that the borrowers have approached the Writ Court with is that to undo a conditional order for deposit of Rs.50 lakh, the Appellate Tribunal has required a pre-deposit of Rs.70 lakh. The argument attempted on behalf of the borrowers is that it is inconceivable that an appellant would suffer more prejudice at the outset to challenge an order that would otherwise cause it less prejudice.

8. There does not appear to be any infirmity in the order passed by the Debt Recovery Appellate Tribunal which has been challenged by way of W.P.No.9062 of 2017. An appeal is a creature of a statute and if the right to file an appeal is hedged with certain conditions, the conditions have to be complied with to exercise the right of appeal. The conditions may appear to be onerous, but as long as the conditions are not set aside as being arbitrary or giving the illusory hope of a remedy, the conditions need to be adhered to.

9. On the basis of the wording of Section 21 of the 1993 Act, the order dated March 27, 2017 passed by the Debt Recovery Appellate Tribunal cannot be faulted or interfered with. Quite appropriately and within the limited discretion available to such Tribunal, the Appellate Tribunal had required a pre-deposit of Rs.70 lakh to be made. The Appellate Tribunal had granted time. The borrowers failed to make the deposit and perceived that the filing of a writ petition against the order of March 27, 2017 would earn them more time. Unfortunately, it has given the borrowers more than four years' time.

10. W.P.No.9085 of 2017 came to be filed by the borrowers to challenge the deed of assignment of September 8, 2011 by which Axis Bank assigned its debts against the borrowers herein in favour of the assignee. The principal grounds urged were that the borrowers had not been consulted or given notice before such assignment was effected. An ancillary point is also taken that since both the borrower companies had been referred to the Board for Industrial and Financial Reconstruction under the said Act of 1985, their accounts could not be made NPA, nor any steps

taken against them in view of the complete embargo under Section 22(1) of the said Act of 1985.

11. Finally, W.P.No.11663 of 2017 was filed by the borrowers against an order of April 28, 2017 passed by the Debt Recovery Appellate Tribunal for non deposit of the amount of pre-deposit as directed by the Debt Recovery Appellate Tribunal order of March 27, 2017.

12. As far as the deed of assignment is concerned, there is no law that requires the borrower to be given notice by the creditor or the borrowers permission being sought by the creditor before the creditor can assign the debt due from the borrower to any other. In any event, Section 5 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is quite clear and the provisions of the said Act of 2002 apply to this case since the assignee has resorted to measures under Section 13(4) of the Act and has, indeed, applied to the relevant Chief Metropolitan Magistrate under Section 14 of the said Act of 2002.

13. As to the other ground that Section 22(1) of the Act of 1985 prohibited the two corporate borrowers' accounts to be declared NPA, it does not appear that such an embargo can be read into the relevant provision, though it prohibits the institution of any suit or recovery proceedings or the like against a sick industrial company during the currency of a reference before the Board for Industrial and Financial Reconstruction or an appeal under Section 25 of the Act of 1985 before the then Appellate Authority for Industrial and Financial Reconstruction.

14. The Debt Recovery Appellate Tribunal's final order of April 28, 2017 followed in the usual course upon the pre-deposit not being lodged. Since the initial order of the Debt Recovery Appellate Tribunal of March 27, 2017 is found to be in order, the subsequent order of April 28, 2017 has to be seen as merely consequential and no additional prejudice has been caused thereby to the borrowers or any of them. It may be noticed here that since the provisions of the Act of 2002 apply, both principal debtors and the guarantors under such Act are collectively defined as borrowers.

15. There is no basis to the petitioners in W.P.Nos.9062, 9085 and 11663 of 2017 complaining of anything improper or irregular. The Debt Recovery Appellate Tribunal's order of March 27, 2017 was most appropriate and justified. The deed of assignment executed by the erstwhile creditor and its assignee did not require any stamp of imprimatur from the borrowers. Equally, the order dated April 28, 2017 passed by the Debt

Recovery Appellate Tribunal follows from the original order dated March 27, 2017 and no independent grievance can be maintained against the consequential order when the original order has been upheld.

16. W.P.Nos.9062, 9085 and 11663 of 2017 are dismissed. The petitioners will jointly and severally pay costs assessed at Rs.5 lakh to the respondent bank. No part of the costs awarded should be adjusted against any interest or principal sum that may be found due from the borrowers to the assignee. The challenges carried in the writ petitions against the relevant orders of the Debts Recovery Tribunal, Debt Recovery Appellate Tribunal and assignment executed by the original secured creditor and the assignee are repelled.

17. In the assignee's application complaining of the ground level authorities not rendering adequate assistance to the secured creditor to obtain possession of the asset, it appears that an appropriate direction ought to be issued. Since it appears that the Chief Metropolitan Magistrate applied his mind before making an order dated April 21, 2014 in Criminal M.P.No.1546 of 2014 under Section 14 of the Act of 2002, it is necessary that the relevant order be carried out. It will be open to the petitioner to approach the same Chief Metropolitan Magistrate for such authority to issue any further directions or notice to the revenue officials at the block or taluk level to ensure that the possession of the relevant immovable property is made over to the assignee, for the assignee to take steps in respect thereof in accordance with law. The Chief Metropolitan Magistrate will direct such police assistance as may be adequate for such purpose, and ensure that the possession of the secured asset is obtained by the assignee within six weeks of a copy of this order being presented before the appropriate Chief Metropolitan Magistrate.

18. W.P.No.36591 of 2015 is disposed of without any order as to costs.

W.M.P.Nos.10027, 11636, 12688, 10026, 12689 and 9987 of 2017 are closed.

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

To:

1. The Deputy Commissioner of Police,
   Theagaraya Nagar Police District,
   T.Nagar, Chennai - 600 017.

2. The Assistant Commissioner of Police,
   Teynampet Range, T.Nagar Police District,
   Anna Salai, Teynampet,
   Chennai - 600 017.

3. The Inspector of Police,
   R-4, Pondy Bazaar Police Station,
   T.Nagar, Chennai - 600 017.

4. Axis Bank,
   Credit Management Branch,
   Karumuthu Centre,
   No.192, Anna Salai,
   Chennai - 600 002.

5. The Debts Recovery Tribunal
   Tribunal II, Chennai

6. The Chief Metropolitan Magistrate, Chennai

+6 CCS to M/s. Ramalingam Associates sr 22856 to 22858.

W.P.Nos.11663, 9062, 9085 of 2017
and 36591 of 2015

JP(CO)
SP(28/04/2021)