Diksha Rane

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11371 OF 2014

Poorti Rent a Car and Logistics
Pvt. Ltd. & ors. ..Petitioners
vs.
Kotak Mahindra Bank Ltd. & ors. ..Respondents

WITH

CIVIL APPLICATION NO. 2681 OF 2017
IN
WRIT PETITION NO. 11371 OF 2014

Kotak Mahindra Bank Ltd. & ors. ..Applicants
vs.
Poorti Rent a Car and Logistics
Pvt. Ltd. & ors. ..Respondents

Mr. Sidharth Samantaray a/w. Ms. Jagruti Bhise i/b. Mr. Vivek V. Phadke for the petitioners.

Mr. Sanjay Anabhawane a/w. Ms. Medha Rane a/w. Ms. Dimple Tejani a/w. Ms. Trupti Nandoskar for respondent no.1 and for applicant in CAW/2681/2017.

CORAM : DIPANKAR DATTA, CJ &
M. S. KARNIK, J.

DATE : FEBRUARY 24, 2022.

P.C. :

1. Civil Application No. 2681 of 2017 has been filed in Writ Petition No. 11371 of 2014 by the respondent no.1 in

such writ petition, being the secured creditor, seeking diverse reliefs for obtaining possession of the secured asset (Flat No. 1702, 17th floor, "A" Wing of 'Sweet Home Co-operative Housing Society Ltd.').

2. While hearing this civil application, we have heard the writ petition on its own merits. By this common order, we propose to dispose of the civil application as well as the writ petition.

3. The question involved in the writ petition is short but interesting. However, before we formulate the same for an answer, it would be proper to notice the basic facts.

4. The petitioner no. 1 is a partnership firm whereas the other petitioners are the partners of such firm. The firm carries on business of renting cars. It obtained financial assistance from the respondent no.2, which is a non-banking financial company, upon creation of mortgage in respect of the aforesaid flat. Admittedly, the petitioners defaulted in repaying the dues of the respondent no.2. However, the respondent no.2 did not pursue legal action for recovery of its dues; instead, on July 18, 2012, it assigned the debt to the respondent no.1, a "bank" within the meaning of section 2(c) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereafter 'the SARFAESI Act' for short). The respondent no.1, after such assignment, issued a notice dated April 22, 2014 under section 13(2) of

the SARFAESI Act demanding from the petitioners an amount of Rs.5,66,20,900/- as on April 22, 2014 along with future interest as per details specified therein. The petitioners responded to the said demand notice. While raising various points, it was *inter alia* asserted that the original lender, i.e. the respondent no.2, was not a "financial institution" within the meaning of section 2(m) of the SARFAESI Act and, therefore, not a "secured creditor" within the meaning of section 2(zd) thereof; hence, it was the petitioners' contention that since the respondent no.1 had stepped into the shoes of the respondent no. 2, the respondent no. 1 had no authority to proceed under section 13 of the SARFAESI Act. The objection did not evoke any favourable response from the side of the respondent no. 1; on the contrary, it proceeded to file an application before the Chief Metropolitan Magistrate, Esplanade, Mumbai (hereafter 'the magistrate", for short), under section 14 of the SARFAESI Act, whereupon an order was passed by the magistrate on October 1, 2014. The respondent no. 1 was permitted to take possession of the secured asset with the assistance of a public official. An Assistant Registrar of the Court was directed to take and hand over possession in terms of the directions contained therein. The petitioners, thereafter, presented this writ petition on December 15, 2014 impugning the demand notice dated April 22, 2014 and the order dated October 1, 2014 referred to above and prayed for *inter alia* the following relief:

> "a. that this Hon'ble Court be pleased to issue direction calling the papers and proceeding of the case No.363/SA/2014 filed by Respondent No.1 before Ld. Chief Metropolitan Magistrate, Esplanade, Mumbai and after examining the legality and propriety thereof, be pleased to quash and set aside the impugned notice dated 22nd April, 2014 and Order dated 29th September, 2014 (sic, 1st October 2014) passed by the Ld. Chief Metropolitan Magistrate, Esplanade, Mumbai under the provisions of Section 14 of the SARFAESI Act;
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> b. that this Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ Order or direction directing the Respondent No.3 to take appropriate action against Respondent No.1 including declaring that the Respondent no.1 being the assignee of the Respondent No.2 is not a secured creditor within a definition of the SARFAESI Act."

Upon the writ petition being moved on March 22, 2016, a coordinate Bench of this Court directed that no coercive step be taken in respect of the secured asset till the next date. By a further order dated December 12, 2017, another coordinate bench directed *status-quo* to be maintained in respect of the secured asset till the next date. Such order has been continued by subsequent orders.

5. Appearing in support of the writ petition, Mr. Sidharth Samantaray, learned advocate submits that the issue raised by the petitioners that the respondent no.1 could not have initiated action under section 13 of the SARFAESI Act, consequently the impugned demand notice and the order of

the magistrate are bad in law, is no longer *res integra*. In support of such contention, Mr. Samantaray places reliance on the Division Bench decision of this Court dated July 16, 2015 in Writ Petition No. 722 of 2015 (**Kotak Mahindra Bank Ltd. V/s. Trupti Sanjay Mehta and others**).

6. It is the further the contention of Mr. Samantaray that the decision dated July 16, 2015 has been carried in appeal before the Supreme Court and initially the operation of the order was stayed; however, presently no order of stay is operative, and that certain arrangements entered into by and between the parties are being worked out in view of interim directions lastly issued on April 20, 2017. He also submits that the civil appeal is stated to be pending.

7. Since paragraph 3 of the decision in **Kotak Mahindra Bank Ltd.** (supra) captures the issue arising for consideration before the Division Bench, this Court considers it appropriate to quote the said paragraph in its entirety as well as the answer thereto, found in paragraph 27 of the decision, hereinbelow:

> "**3.** The short question which falls for consideration before us is : whether the Bank to whom a debt has been assigned by the Non-Banking Financial Corporation ("NBFC") is entitled to adopt proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI, Act")?
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> **27.** For the aforesaid reasons the question framed in para 3 of this judgment is answered in the negative. We therefore decline to interfere with the

order passed by DRT and confirmed by DRAT. Writ Petition is dismissed."

8. If we are persuaded to follow the decision in **Kotak Mahindra Bank Ltd.** (supra), the writ petition has to be allowed. However, in case of a difference in opinion, the writ petition has to be referred to a larger bench.

9. Much water has flown under the bridge since the decision in **Kotak Mahindra Bank Ltd.** (supra) was delivered, is the submission before us on behalf of the respondent no.1 by Mr. Sanjay Anabhawane, learned advocate. According to him, by issuance of a notification dated August 27, 2018 by the appropriate department in the Ministry of Finance, Government of India, the respondent no.2 has since been recognized to be a "financial institution" within the meaning of section 2(m) of the SARFAESI Act. Next, he contends that the decision in **Kotak Mahindra Bank Ltd.** (supra) no longer holds the field and, therefore, need not be followed.

10. Mr. Anabhawane refers to the decisions of the Supreme Court reported in (2017) 16 SCC 741 (**M. D. Frozen Foods Exports Pvt. Ltd. and others Vs. Hero Fincorp Ltd.**) and in (2018) 14 SCC 783 (**Indiabulls Housing Finance Limited Vs. M/s. Deccan Chronicle Holdings Limited and others**) to contend that the decision in **Kotak Mahindra Bank Ltd.** (*supra*) stands impliedly overruled. While inviting our attention to the relevant paragraphs of the said two decisions, Mr.

Anabhawane submits that the action of the respondent no.1 in proceeding against the petitioners, being the defaulting borrowers, under section 13 as well as 14 of the SARFAESI Act [despite the respondent no.2 not being a "financial institution" within the meaning of section 2(m) of the SARFAESI Act at the relevant time] is not unauthorized. He, thus, prays that this writ petition ought to be dismissed.

11. On these rival contentions, the precise question that emerges for our decision is, whether by reason of assignment of the debt of the respondent no.2 to the respondent no.1 at a point of time when the respondent no.2 could not have been treated to be a "financial institution" within the meaning of section 2(m) of the SARFAESI Act, a *fortiori*, a "secured creditor" within the meaning of section 2(zd) thereof, did the respondent no.1 as on April 22, 2014 (date of issuance of the demand notice) have the authority or sanction in law to initiate action for enforcement of security interest under Chapter III of the SARFAESI Act by issuing a demand notice under section 13(2) as well as approaching the magistrate under section 14?

12. We have heard learned advocates for the parties, perused the materials on record and considered the decisions of the Supreme Court that have been cited by Mr. Anabhawane as well as the decision on which Mr. Samantaray has relied.

13. A debt is a sum of money that is owed or due. Once a loan agreement is entered by and between a borrower (customer) and a lender (bank/financial institution) and mortgage is created, an outstanding in the account of the borrower is a debt due and payable by the borrower to the lender. Such debt is an asset in the hands of the lender. As the owner of the debt, the lender can always transfer its asset unless a law or the loan agreement prohibits the same. Such transfer in no manner affects any right or interest of the borrower. Here, the respondent no.2 assigned its rights under a contract and its own asset, namely, the debt, to the respondent no.1. It is not the case of the petitioners that in so assigning, their rights as borrowers flowing from the loan agreement has in any manner been affected or even the asset affected. It has also not been shown by the petitioners that the rights that the respondent no.2 assigned to the respondent no.1 were incapable of assignment, either under any law or under an agreement between the petitioners and the respondent no.2. Law is well-settled that a claim to a simple debt is assignable even if the debtor has refused to pay, and that the practice of assigning or 'selling' debts to debt collecting agencies and credit factors could hardly be carried on if the law were otherwise.

14. Be that as it may, bearing the above principles as well as all other statutory provisions in mind, it needs examination as to whether assignment of the debt by the

respondent no.2 to the respondent no.1 could preclude the former from taking recourse to Chapter III of the SARFAESI Act.

15. However, prior to venturing to examine the issue, it would be appropriate at this stage to take notice of the relevant discussions in **M. D. Frozen Foods Exports Pvt. Ltd.** (*supra*) and **Indiabulls Housing Finance Limited** (*supra*) to which our attention has been invited by Mr. Anabhawane.

16. The point that fell for consideration in **M. D. Frozen Foods Exports Pvt. Ltd.** (*supra*) was, whether section 13 of the SARFAESI Act could be resorted to in respect of a debt which had arisen out of the loan agreement/mortgage created prior to enactment of the SARFAESI Act. The Court noticed various authorities on the point of retrospectivity and retroactivity and was firmly of the view that the SARFAESI Act having being brought into force to solve the problem of recovery of large debts arising out of classification of accounts as non-performing assets, such enactment would apply to all claims which are alive at the time when it was brought into force. On facts before it, the Court held that "*qua* the respondent or other NBFCs, it would be applicable similarly from the date when it was so made applicable to them". While concluding the judgment, the Court held that "the date on which a debt is declared as an NPA would again have no impact" and "that the provisions of the SARFAESI Act would become applicable

qua all debts owing and live when the Act became applicable to the respondent".

17. Incidentally, in paragraph 41 of the decision in **M. D. Frozen Foods Exports Pvt. Ltd.** (*supra*), the Court accepted the proposition that the provisions of the SARFAESI Act would become applicable to a borrower in terms of the parameters contended by learned senior counsel for the respondent which were enlisted at serial Nos. (i) to (iv) in paragraph 18 which reads as follows: -

> "i. Existence of a present actionable debt;
>
> ii. Status of the person invoking the jurisdiction is that of a secured creditor;
>
> iii. Assets have been secured in satisfaction of the debt; and
>
> iv. That the debtor/borrower should have been declared an NPA."

18. In **Indiabulls Housing Finance Limited** (*supra*), the facts reveal that M/s. Indiabulls Financial Services Limited (for short, 'IBFSL') was the original lender which later on merged with the appellant. The contention that succeeded before the Andhra Pradesh High Court was that IBFSL not being a "financial institution" within the definition of the term in the SARFAESI Act on the date money was lent, it had no right to initiate action under the SARFAESI Act; hence, the appellant as successor-in-interest, while stepping into the shoes of IBFSL, also cannot initiate any action under the SARFAESI Act. The Supreme Court, for the reasons assigned in the judgment concluded as follows:

> "36. In the aforesaid backdrop, the factor which assumes importance and has to be kept in mind is that the appellant is an assignee of a debt through the amalgamation of original lender with the appellant which was effected invoking the statutory provisions of the Companies Act. Once this is kept in mind, there would not be any difference as far as consequences in law are concerned from the case of ***M.D. Frozen Foods*** and this case. Therefore, ***M.D. Frozen Foods*** would apply to the facts of this case in all force.
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> 43. The aforesaid discussion, thus, leads us to conclude that respondent no. 1 would be treated as 'borrower' within the meaning of Section 2(1)(f) of the SARFAESI Act; the arrangement would be classified as 'security arrangement' under Section 2(1)(zb); the agreements created 'security interest' under Section 2(1)(zf); and the appellant became 'secured creditor' within the meaning of Section 2(1)(zd) of SARFAESI Act."

19. Mr. Samantray has sought to distinguish the decisions in **M. D. Frozen Foods Exports Pvt. Ltd.** (*supra*) and **Indiabulls Housing Finance Limited** (*supra*) by submitting that the facts were different and law is well-settled that one different or additional fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.

20. Indeed, the facts in this case are a little different from the facts in **M. D. Frozen Foods Exports Pvt. Ltd.** (*supra*) and **Indiabulls Housing Finance Limited** (*supra*). In the former, there was no question of assignment involved whereas in the latter, there was an amalgamation under the

Companies Act leading to the appellant becoming the successor-in-interest of the original lender (IBFSL); however, for the reasons that follow, these minor differences of facts are found by us to be insignificant.

21. A security interest can be enforced by a secured creditor by initiating steps in terms of Chapter III of the SARFAESI Act upon certain conditions being fulfilled. In the present case, it is not the petitioners' case that they have not defaulted in clearing the debt or that the account has not been classified as 'Non-performing Asset' by the respondent no.1. It is also not their case that no security interest was ever created that could be enforced taking recourse to Chapter III of the SARFAESI Act and/or that the debt is not alive. The limited ground of challenge, as noticed above, is that they had secured a loan from a company which does not answer the definition of the term "financial institution" so as to fit in the definition of the term "secured creditor"; hence, the respondent no.1 stepping into the shoes of the respondent no.2 cannot also be treated as a "secured creditor" and, thus, the SARFAESI Act could not have been invoked by the respondent no.1.

22. We do not find the challenge of the petitioners to be of any substance at all. If indeed the provisions of the SARFAESI Act can be applied even in respect of loan agreements entered into before such enactment was brought into force, we see nothing in any law to hold that the provisions thereof can never be resorted to by a bank

like the respondent no.1 in circumstances such as the present. Upon noticing default being committed, the account of the petitioners was classified as a non-performing asset by the respondent no.1. The rights of the respondent no.2 enforceable against the petitioners for default in payment of debt having passed on to it, the respondent no.1 did have the authority or sanction in law to resort to the provisions of the SARFAESI Act. Applying the parameters as laid down in paragraph 18 of the decision in **M. D. Frozen Foods Exports Pvt. Ltd.** (*supra*), since accepted in **Indiabulls Housing Finance Limited** (*supra*), we find that all such parameters in the present case are fulfilled with the result that initiation of action under Chapter III of the SARFAESI Act by the respondent no.1, being a "secured creditor" within the meaning of section 2(zd) thereof for the purpose of enforcing the security interest that was created earlier, is legally permissible. That the respondent no. 1 is the successor-in-interest of the respondent no.2, which was not a "financial institution" at the material time would make no difference insofar as consequence in law is concerned.

23. The arguments canvassed before the Division Bench in **Kotak Mahindra Bank Ltd.** (*supra*), to our mind, seem to be the same as those which the Andhra Pradesh High Court had the occasion to consider and which stands reversed by reason of the decision in **Indiabulls Housing Finance Limited** (*supra*). In such view of the matter, we need not

keep this writ petition pending awaiting a decision of the Supreme Court in the pending appeal arising out of the decision in **Kotak Mahindra Bank Ltd.** (*supra*). Incidentally, at one point of time, the appeal arising from **Kotak Mahindra Bank Ltd.** (*supra*) and the appeal in **Indiabulls Housing Finance Limited** (*supra*) were tagged together by the Supreme Court for hearing. However, the same got segregated and the decision in **Indiabulls Housing Finance Limited** (*supra*) came to be pronounced, which in our opinion, brings about a quietus to the issue. The decision in **Kotak Mahindra Bank Ltd.** (*supra*) must, therefore, be and is held to have been impliedly overruled.

24. For the reasons aforesaid, we are of the opinion that the action taken by the respondent no.1 to issue demand notice under section 13 (2) of the SARFAESI Act as well as to approach the magistrate under section 14 is legal and valid and it cannot be invalidated based on the decision of this Court in **Kotak Mahindra Bank Ltd.** (supra). We, thus, answer the question formulated in paragraph 11 in the affirmative.

25. The writ petition consequently stands dismissed. Interim order, if any, stands vacated. No costs.

26. In view of the above order, no separate order is passed on the civil application. It stands disposed of, also without costs.

(M. S. KARNIK, J.) **(CHIEF JUSTICE)**