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Calcutta High Court

Case No: M.A.T. No. 1594 of 2007

Imperial Tubes (P) Ltd. and Another		APPELLANT
	Vs	
Board for Industrial and Financial Reconstruction and Others		RESPONDENT

Date of Decision: Oct. 12, 2007

Acts Referred:

- Constitution of India, 1950 - Article 226
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) - Section 13(2), 13(4), 17
- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 15, 25, 5

Citation: AIR 2008 Cal 15 : (2008) 1 CHN 480 : (2010) 159 CompCas 596 : (2010) 3 CompLJ 144

Hon'ble Judges: Bhaskar Bhattacharya, Acting C.J.; Rudrendra Nath Banerjee, J

Bench: Division Bench

Advocate: P.K. Mallick, Bhaskar Sen, S. Talukdar and P.K. Sarogi, for the Appellant;Ashok Banerjee, Victor Dutta, K.K. Banerjee, L.K. Chatterjee and Sanjoy Modal, for the Respondent

Final Decision: Dismissed

Judgement

Bhaskar Bhattacharya, Actg. C.J.

1. This mandamus appeal is at the instance of unsuccessful writ-petitioners and is directed against order dated 11th April, 2007 passed by a learned single Judge by which His Lordship dismissed the writ-application filed by the appellants in which they basically challenged the order dated 18th December, 2006 passed by the Board for Industrial and Financial Reconstruction (hereinafter referred to as the "BIFR") in Case No. 230 of 2004 recording that the said case had abated in terms of Section 15

of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as the SICA) and further challenged the action on the part of the respondent/secured creditors in taking action in terms of Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "Securitisation Act").

2. There is no dispute that the appellant No. 1 took loan from the Bank of India and the Central Bank of India but could not repay the said debt. In the month of November 2003 and December 2003, the aforesaid two Banks issued two different notices u/s 13(2) of the Securitisation Act and subsequently without taking any further action under the provisions of the Securitisation Act, initiated proceeding before the Debt Recovery Tribunal for realisation of the respective dues.

3. Subsequently, on 8th May, 2004, the writ petitioner/appellants in order to rehabilitate itself initiated proceedings before the BIFR u/s 15 of the SICA and by order dated 14th June, 2006, the BIFR appointed the Central Bank of India as the operating agency of the appellants. On 27th November, 2006, the BIFR issued notice upon all the parties thereby fixing the hearing of the application on 18th December, 2006.

4. In the meantime, on 13th December, 2006, the Bank of India on the basis of the earlier notice issued u/s 13(2) of the Securitisation Act took action in terms of Section 13(4) of the Securitisation Act and consequently the BIFR on 18th December, 2006 passed an order holding that the proceedings under the SICA had abated in view of action taken u/s 13(4) of the Securitisation Act at the instance of the secured creditors.

5. As indicated earlier, being dissatisfied, the writ petitioners filed an application under Article 226 of the Constitution of India challenging the said order passed by the BIFR and the consequential steps taken by the secured creditors in terms of Section 13(4) of the Securitisation Act.

6. The learned Single Judge by the order impugned herein has dismissed such application holding that there was no reason to interfere with the order passed by the BIFR or the secured creditors.

Being dissatisfied, the writ petitioners have come up with the present mandamus appeal.

7. Mr. Mallick, the learned senior advocate appearing on behalf of the appellants strenuously contended before us that the action of the secured creditors in taking steps in terms of Section 13(4) of the Securitisation Act was a mala fide exercise of power only with the oblique motive of making the proceeding before the BIFR infructuous. Mr. Mallick contends that the BIFR having already appointed one of the secured creditors as the operating agency in terms of the provisions contained in the SICA, there was no just reason for invoking the provision contained u/s 13(4) of

the Securitisation Act long after the expiry of two years from the date of issue of the notice u/s 13(2) of that Act.

8. In other words, Mr. Mallick contends that knowing fully well that a favourable order would be passed in the proceedings before the BIFR in favour of the appellants, the secured creditors without any sufficient reason exercised power u/s 13(4) of the Securitisation Act. Mr. Mallick further contends that once a secured creditor has become an operating agency in terms of the provision of the SICA, it cannot exercise its power u/s 13(4) of the Securitisation Act. He, therefore, prays for setting aside the order impugned in the writ application and for restraining the secured creditors from taking any further steps in terms of Section 13(4) of the Securitisation Act.

9. Mr. Chatterjee and Mr. Banerjee, the learned senior advocates appearing on behalf of the secured creditors vehemently opposed those contentions advanced by Mr. Mallick and submitted that there is no legal bar in exercising the power u/s 13(4) of the Securitisation Act once a notice has been issued in terms of Section 13(2) thereof. The learned Counsel further submit that the law has recognised the right of the secured creditor to invoke Section 13(4) of the Securitisation Act by adding proviso in Section 5 of the SICA and thus, their clients did not commit any illegality in availing of such benefit conferred by the legislature. They further contend that the writ application was otherwise not maintainable in view of the fact that an appeal lies against the order of the BIFR dated 18th December, 2006 in terms of Section 25 of the SICA while the appellants can also approach the Debt Recovery Tribunal if dissatisfied with the decision of the secured creditor in proceeding u/s 13(4) of the Securitisation Act as provided in Section 17 of the Securitisation Act. They further point out that the sole object of the appellants was to drag the matter and for that reason, the learned Single Judge rightly dismissed the writ application.

10. Therefore, the question that falls for determination in this mandamus appeal is whether the learned Single Judge was justified in dismissing the writ application filed by the appellants whereby they challenged the order dated 18th December, 2006 passed by the BIFR by declaring the proceeding before it as ''abated''.

11. After hearing the learned Counsel for the parties and after going through the provisions contained in Section 15 of the SICA, we find that the legislature has specifically incorporated the proviso to Section 15 by permitting a secured creditor to invoke Section 13(4) during the continuance of proceeding before the BIFR and, therefore, invocation of provision contained in Section 13(4) of the Securitisation Act cannot be branded as mala fide. We are of the view that merely because the BIFR had appointed the secured creditor as the operating agency, such fact cannot take away the right of the secured creditors to invoke the provision contained in Section 13(4) of the Securitisation Act, inasmuch as, the Securitisation Act has the overriding effect upon the provision contained in the SICA.

12. In the case before us, huge amount of money is due and payable and in such circumstances, the act on the part of the secured creditor cannot be said to be without jurisdiction so as to maintain a writ application without availing of the statutory remedy contained in Section 17 of the Securitisation Act or Section 25 of the SICA.

13. We further had substance in the contention of the learned Counsel for the secured creditors that the two Banks mentioned above being the sole secured creditors as would appear from the balance-sheet of the writ petitioners which they annexed to the stay application, the proviso to Section 15 of the SICA was clearly attracted, inasmuch as, they invoked the full amount of the secured loan of the debtor. Therefore, we find no reason to interfere with the order passed by the learned Single Judge.

14. This mandamus-appeal, thus, is devoid of any substance and is dismissed accordingly. In the facts and circumstances, there will be, however, no order as to costs.

15. Interim order earlier granted stands vacated.

Rudrendra Nath Banerjee, J.

16. I agree.