

(2012) 09 DEL CK 0410

Delhi High Court

Case No: CO. APP. No. 58 of 2012 and CO. APP. No. 62 of 2012

Kotak Mahindra Bank Ltd.

APPELLANT

Vs

Megnostar Telecommunications

pvt. Ltd. and Another

Mohan Tractors Pvt Ltd. Vs Kotak

RESPONDENT

Mahindra Bank Ltd. and Others

Date of Decision: Sept. 17, 2012**Acts Referred:**

- Companies Act, 1956 - Section 125, 13(4), 13(9), 17, 29
- State Financial Corporations Act, 1951 - Section 29, 31, 32(10), 46B

Citation: (2013) 1 AD 445 : (2013) 176 CompCas 246 : (2012) 193 DLT 371**Hon'ble Judges:** Rajiv Sahai Endlaw, J; A.K. Sikri, J**Bench:** Division Bench

Advocate: Rana Mukherjee with Mr. D. Verma and Ms. Neha S. Verma, M Daisy Hannah, in CO. app. No. 58/2012 and Mr. Bhupesh Narula in CO. app. No. 62/2012, for the Appellant; Rajiv Bahl and Mr. Sanjay Katyal, Advocates for OL. Mr. Bhupesh Narula, Advocate for R-2 in CO. APP. No. 58/2012 and Mr. Rana Mukherjee with Mr. D. Verma and Ms. Neha S. Verma, M Daisy Hannah, Advocates for R-1 Mr. Rajiv Bahl and Mr. Sanjay Katyal, Advocate for OL. in CO. APP. No. 62/2012, for the Respondent

Final Decision: Allowed

Judgement

Rajiv Sahai Endlaw, J.

Both appeals impugn the judgment dated 26th April, 2012 of the learned Company Judge in Company Applications No. 1947/2011 and 1948/2011 in Company Petition No. 359/2009 for winding up of M/s Megnostar Telecommunications Pvt. Ltd. (hereinafter referred to as the Company in Liquidation). Company Appeal No. 58/2012 was admitted for hearing and vide order dated 29.05.2012 which continues to be in force, the operation of the impugned order stayed. Subsequently, notice was issued in Company Appeal No. 62/2012 also. The counsel for the appellants in

the two appeals and the counsels for the official liquidator have been heard. The company in liquidation was the owner of Plot No. 1297, admeasuring 502.33 sq. yards situated at Sector MIE, Bahadurgah, Haryana together with the super structure thereon; the same was mortgaged in the year 2006 to the appellant M/s Kotak Mahindra Bank Ltd (hereinafter called the bank) to secure the financial assistance granted by the bank to the company in liquidation.

2. The bank, on 18.12.2008 issued notice u/s 13 (2) of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) to the company in liquidation. Upon the company in liquidation failing to comply therewith, the bank on 16.06.2010 took over possession of the mortgaged property. Thereafter, the bank on 23.07. 2011 published notices in the newspapers for auction and sale of the mortgaged property on 24.08.2011.

3. However, before the auction could be held, the Company Judge of this court in the company petition aforesaid filed by one Magicon Impex Pvt. Ltd. (respondent No. 3 in Co.App. 62/2012), on 03.08.2011 appointed the Official Liquidator attached to this Court as the Provisional Liquidator of the company in liquidation.

4. Notwithstanding the aforesaid, the auction proceeded as scheduled on 24.08.2011 and the appellant in company appeal No. 62/2012, M/s Mohan Tractors (P) Ltd. (hereinafter called the auction purchaser) being the highest bidder for the sum of Rs. 80,00,000/-, was agreed to be sold the mortgaged property. The physical possession and title deeds of the mortgaged property were also handed over to the auction purchaser on the same day.

5. The Official Liquidator attempted to take possession of the aforesaid property on 28th and 29th August, 2011 and finally took possession on 30.08.2011.

6. It was then that Co. Applications No. 1947 and 1948, both of 2011 were filed by the auction purchaser and the bank respectively seeking de-sealing of the property and restoration of the possession thereof to the auction purchaser. Vide order dated 21.09.2011, the learned Company Judge directed maintenance of status quo qua the property. The Official Liquidator filed reply in CA No. 1948/2011 averring, (i) that though the official liquidator had been appointed as the Provisional Liquidator on 3.8.2011, it was not associated with the auction held subsequently on 24.08.2011; (ii) that there was nothing to show whether the auction had been conducted in a fair manner; (iii) that admittedly the sale of the property is not complete as the sale certificate is not yet registered and thus the auction purchaser had not become the owner of the property and the ownership remained with company in liquidation; (iv) that no statement of affairs of the company in liquidation had been submitted till then and thus it was not possible for the Official Liquidator to ascertain the status of liabilities of the company in liquidation including towards the bank; and, (v) that the bank had also not placed on record the documents evidencing valid registration of the loan documents in accordance with Section 125 of the Companies Act, 1956. The

bank filed a rejoinder to the said reply highlighting the documents evidencing action u/s 13(4) and Section 14(1) of the SARFAESI Act and pleading that it was not informed about the pendency of the company petition or about the appointment of the Provisional Liquidator; that SARFAESI Act is a special Act containing complete mechanism for recovery of bank dues through enforcement of security interest; that the auction was done in a fair and transparent manner at the office of the bank at New Delhi; that the bank had obtained valuation of the property in question prior to auction and according to which valuation the property was valued at Rs. 1,02,00,000/- and having distress value of Rs.75,00,000/-; that the entire sale consideration of Rs. 80,00,000/- was received from the auction purchaser on 24.08.2011 itself and sale confirmation letter issued to the auction purchaser on the same day; it was thus denied that the Company in Liquidation remained the owner of the property; that the bank was not required to await adjudication of its claims before enforcing its security interest; that the sale in favour of the auction purchaser was complete; it was clarified that the mortgage was equitable, by way of deposit of title deeds.

7. The learned Company Judge vide order dated 12.12.2011, without prejudice to the rights and contentions of the parties appointed a valuer from the panel of the Official Liquidator to evaluate the aforesaid property. The said valuer submitted a report dated 14.01.2012 valuing the property at Rs. 1,18,85,000/- out of which Rs. 75,750/- is the valuation of the movable assets viz. furniture, fittings, etc. in the property.

8. The learned Company Judge in the impugned judgment, relying on the judgment of the Division Bench of the Punjab & Haryana High Court in Haryana State Industrial & Infrastructure Development Corporation (HSIIDC) Vs. Haryana Concast Limited, Hisar (2010) ILR 2 P&H 284 has held that "once Official Liquidator had been appointed as the Provisional Liquidator of the company in liquidation, he should have been associated with the auction process and having not being so associated the sale by the bank on 24.08.2011 was bad". Consequently the bank has been directed to prepare a fresh draft sale notice in association with the Official Liquidator, after taking into account the valuation report obtained by the learned Company Judge and to refund the amount received from the auction purchaser. Axiomatically the applications of the bank as well as the auction purchaser have been dismissed.

9. The contention of the counsels for the bank and the auction purchaser before us is that the learned Company Judge has merely followed the judgment (supra) of the Division Bench of the Punjab & Haryana High Court without even discussing the arguments in differentiation thereof urged by them. It is contented that:-

i) the SARFAESI Act in Section 13(1) thereof provides for enforcement by a secured creditor of the security interest "without the intervention of the Court or Tribunal" and "in accordance with the provisions of this Act" i.e. the SARFAESI Act only;

ii) Section 13(8) enables the borrower to, even after measures u/s 13(4) have been taken, pay up the dues of the secured creditor;

iii) that such payment, being under the Statute, will not be treated as having been made by way of fraudulent preference;

iv) that the first proviso to Section 13(9) provides for the amount realized from the sale of the secured assets to be distributed in accordance with the provisions of Section 529A of the Companies Act;

v) the same is indicative of provisions of the Companies Act coming into play only post-sale;

vi) thus there is no requirement for association of the Official Liquidator in the sale by the secured creditor u/s 13 of the Act and the only requirement is to pay the workmen's dues to the Official Liquidator;

vii) the last proviso to Section 13(9) also provides only for an undertaking from the secured creditor to the Official Liquidator to pay the balance of the workmen's dues;

viii) it is thus argued that the Legislature, wherever desired to protect the interests of the workmen of the company in liquidation, has provided so and having expressly omitted to provide for the association of the Official Liquidator in the sale, this court by its judgment ought not to do so. Reference is also made to Rules 4, 6 & 8 of the Security Interest (Enforcement) Rules, 2002 (SIE Rules) to demonstrate that no provision is made therein also for involvement/association of the Official Liquidator. Attention is next invited to Sections 35 and 37 of the SARFAESI Act to contend that the provisions thereof have an over riding effect. It is contended that if the literal interpretation of a Statute is clear, the occasion for applying the rule of purposive interpretation does not arise. Attention is next invited to the Statement of Objects and Reasons of the SARFAESI Act particularly to the part where the intent of the said Act has been described as to enable the Secured Creditors to sell their secured interests without the intervention of the court.

ix) Reliance is placed on :-

a) [Allahabad Bank Vs. Canara Bank and Another](#), in support of the proposition that the provisions of SARFAESI Act override the provisions of the Companies Act;

b) [Bank of India Vs. O.L. of Phar East Laboratories Ltd. and Another](#) where a Single Judge of the Gujarat High Court held that subject to the compliance of the post-sale conditions specified in the second to the fifth proviso to Section 13 (9) of the Act, the secured creditor is entitled to retain the sale proceeds of the secured assets;

c) [Delhi Fin. Corpn. and Another Vs. Rajiv Anand and Others](#), and

d) AIR 2003 SC 2103

both in support of the contention that despite clear and specific scheme prescribed by the Parliament by providing for the interplay between the rights of secured creditor and the workmen, the impugned order seeks to create a casus omissus where none exists.

10. It is additionally argued by the counsel for the Bank that the Division Bench of the Punjab & Haryana High Court in Haryana Concast Limited (Supra) in turn relied on [Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another](#). It is contended that the said reliance is misconceived since Rajasthan Financial Corporation (supra) was concerned with Section 29 of the State Financial Corporations, Act 1951 (SFC Act) which does not have a provision similar to the fifth proviso to Section 13 (9) of the SARFAESI Act.

11. The counsels for the Official Liquidator have, highlighted the differences in the valuation obtained by the bank and submitted by the valuer of the Official Liquidator; referred to Asset Reconstruction Company (India) Ltd. Vs. The Official Liquidator, High Court as the Liquidator of Siv Industries Ltd. (2006) 134 CC 267 (Madras) where also, relying on Rajasthan Financial Corporation (Supra), the asset reconstruction company to which the bank/secured creditor had transferred the security interest was held to be entitled to be associated in the sale of the security interest by the official liquidator. With reference to S. 37 of SARFAESI Act it is argued that the same is in addition to the Companies Act and there is no inconsistency between the two.

12. The counsel for the auction purchaser in rejoinder has argued that there is not much difference between the two valuations and for this reason alone, the learned Company Judge ought not to have directed fresh sale of the property.

13. We will start with Allahabad Bank (supra). The question therein for consideration was of jurisdiction of Debt Recovery Tribunal (DRT) constituted under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act) vis-à-vis the Company Court. The Supreme Court in this judgment held that even where a winding up petition is pending or a winding up order has been passed against the debtor company, the adjudication of liability and execution of the certificate in respect of debts payable to banks and financial institutions are within exclusive jurisdiction of the DRT and the Recovery Officer under the DRT Act and in such a case the Company Court's Jurisdiction u/s 442, 446 and 537 of the Companies Act stood ousted and hence no leave of the Company Court is necessary for initiating proceedings under the DRT Act. It was further held that even the priorities amongst various creditors could be decided only by the DRT in accordance with Section 19 (19) of the DRT Act r/w S. 529A of the Companies Act and in no other manner. The Supreme Court took into account the fact that DRT Act, 1993 was a legislation subsequent in point of time to the introduction of Section 529A in the Companies Act by Act 35 of 1985 and thus DRT Act had over-riding effect. It was further noticed that Section 19 (19) of the DRT Act provides for the sale proceeds to be distributed

"in accordance with the provisions of Section 529A of the Companies Act". It was thus held that though Section 529A empowered the Company Court to distribute the sale proceeds in accordance therewith but by subsequent legislation i.e. the DRT Act, in relation to the banks and Financial Institutions, it was the DRT which was entrusted with the distribution in accordance with Section 529A of the Companies Act.

14. The three Judges Bench of the Supreme Court in Rajasthan Financial Corporation (Supra) was constituted owing to a prima facie conflict having been found by the two Judges Bench, before which the matter came first, between Allahabad Bank (supra) and [International Coach Builders Ltd. Vs. Karnataka State Financial Corpn.,](#) both of two Judges Benches.

15. In International Coach Builders Ltd. (supra), Supreme Court held that a right u/s 29 of the SFC Act against a debtor, if a company, is available to a financial corporation only so long as there is no order of winding up and that when the debtor is a company in winding up, the rights of financial corporations are affected by the provisions of Section 529 and 529A of the Companies Act. It was also held that the proviso to Section 529 creates a pari passu charge in favour of workmen to the extent of their dues and makes the Liquidator the representative of the workmen to enforce the charge. The earlier decision in Allahabad Bank was not noticed.

16. The two Judges Bench of the Supreme Court before which Rajasthan Financial Corporation came up first was of the opinion that while Allahabad Bank was an authority in support of the proposition that SFC Act would prevail over the Companies Act, it being a general law as against the special law i.e. the SFC Act, International Coach Builders Ltd. suggested otherwise. This led to the reference before the three Judges Bench. The Three Judges Bench however, in their judgment (Supra):-

(i) noticed that in the facts of that case, the Rajasthan Financial Corporation, though could have, had not invoked Section 29 or Section 31 of the SFC Act till the order of winding up and appointment of Official Liquidator - that in this situation Section 32(10) of the SFC Act (anti any preference to the Financial Corporation over other creditors) would apply. The principle "a mere right to take advantage of an enactment without any act done towards availing of that right cannot be deemed a right accrued" was held to apply.

(ii) found that the Rajasthan Financial Corporation, standing outside the winding up, was claiming rights under the SFC Act, by approaching the Company Court.

(iii) held that rights so claimed have to be considered in the light of Section 529A read with Section 529 of the Companies Act providing for preferential payment of workmen's dues and debts due to secured creditors in equal proportion.

(iv) noticed the judgments of the various High Courts holding that a) rights u/s 29 of the SFC Act are available to the SFC only when the debtor company is in charge and control of its assets and not when the debtor company has lost control over its assets by the intervention of the Company Court and the Official Liquidator and, b) Section 529A of the Companies Act prevailed over Section 29 of the SFC Act.

(v) held that there was no inconsistency between the decisions in Allahabad Bank and in International Coach Builders Ltd.

(vi) that there is no conflict on the question of applicability of Section 529A read with Section 529 of the Companies Act to cases where debtor is a company in liquidation.

(vii) the conflict is in Allahabad Bank holding that DRT could sell the properties of company in terms of DRT Act and International Coach Builders Ltd. holding that since Sections 529 and 529A create pari passu charge in favour of workmen to the extent of their dues and makes the liquidator the representative of the workmen to enforce the charge, sale by the SFC in exercise of powers u/s 29 could only be with the concurrence of the Company Court.

viii) held that the view taken in Allahabad Bank was in the light of the DRT Act being a subsequent legislation and a special law, which prevails over the general law i.e. the Companies Act; however, this argument is not available as far as the SFC Act is concerned - Section 529A was introduced in the year 1985 and the over-riding provision therein would prevail over the SFC Act of the year 1951 as amended in the year 1956 and notwithstanding Section 46B of the SFC Act.

ix) held that as regards distribution of assets, there is no conflict - whether the assets are realized by a secured creditor proceeding under the DRT Act or the SFC Act, the distribution could only be in terms of Section 529A of the Companies Act and by recognizing the right of the Liquidator to calculate the workmen's dues and collect it for distribution among them pari passu with the secured creditors.

x) held that the right to sell under the SFC Act or under the DRT Act by a creditor is different from the distribution of the proceeds of the sale of the security and the distribution in a case where the debtor is a company in the process of being wound up, can only be in terms of Section 529A read with Section 529 of the Companies Act.

xi) held that to ensure proper working out of the scheme of distribution, it is necessary to associate the Official Liquidator with the process of sale so that he can ensure that a proper price is fetched for the assets of the company in liquidation.

xii) held that the DRT and the District Court entertaining an application u/s 31 of the SFC Act should issue notice to the liquidator and hear him, as a representative of the creditors in general, before ordering a sale.

17. Though we have already dissected as aforesaid the dicta in Rajasthan Financial Corporation but we still feel the need to cull out the ratio thereof as understood by

us, as under:-

A. The right of a secured creditor under the DRT Act or the SFC Act to sell is distinct from distribution of sale proceeds of such sale.

B. The provisions of Section 529A of the Companies Act do not apply to a sale under the DRT Act owing to the DRT Act being a subsequent legislation. However, the same are made applicable to a sale under the DRT Act also by virtue of Section 19(19) of the DRT Act itself.

C. That since the proceeds of sale under the DRT Act also are to be distributed in accordance with the provisions of Section 529A of the Companies Act, the Official Liquidator should be associated with the sale itself to ensure that a proper price is fetched.

18. When we apply the aforesaid ratio to the SARFAESI Act, we find that the SARFAESI Act being a legislation even subsequent to the DRT Act, the provisions of Section 529A of the Companies Act would not apply to the SARFAESI Act also. The SARFAESI Act however also in the first proviso to Section 13(9), in the case of a company in liquidation requires "the amount realized from the sale of secured assets" to "be distributed in accordance with the provisions of Section 529A of the Companies Act". The language of the said proviso clearly makes applicable Section 529A after "the amount" has been "realized from the sale". The question that falls for consideration is whether just like in the case of a sale under the DRT Act and the SFC Act the Supreme Court has directed the Official Liquidator to be associated with the process of sale, he should be so held to be required to be associated with sale under the SARFAESI Act also. This has to be determined in the light of the ratio aforesaid of Rajasthan Financial Corporation that right to sell and distribution of sale proceeds are two different things.

19. Associating the Official Liquidator in sale is not to be a mere formality and such association cannot be an empty exercise. If such association is to be given a meaningful interpretation it would necessarily entail adjudication by the Company Court of all issues arising, relating to such sale, including of valuation, modality, publication etc. The sale, will then become "with the intervention" of the Company Court.

20. However, the very genesis of the SARFAESI Act is to enable sale of financial assets by the secured creditor without the intervention of the Court (see [Mardia Chemicals Ltd. Vs. Union of India \(UOI\) and Others Etc. Etc.,](#) . What we have wondered is whether an exception can be carved out in the case of a company in liquidation.

21. Even though the DRT Act also does not provide for associating the Official Liquidator with sale and Section 19(19) thereof requires the DRT to only order the sale proceeds to be distributed in accordance with the provisions of Section 529A

but the Supreme Court still directed association of the Official Liquidator in the sale. According to us the said ratio of the Supreme Court in the context of DRT Act and SFC Act, would not apply to a sale under the SARFAESI Act because while the sale under the DRT Act or the SFC Act is with the intervention of the Court i.e. the DRT or the District Judge, the sale under the SARFAESI Act is to be by the secured creditor i.e. the Bank/Financial Institution itself, without the intervention of the Court. We also find express pointers in the SARFAESI Act against associating the Official Liquidator in such sale. The second proviso to Section 13(9) permits a secured creditor, who opts to realize his security interest instead of relinquishing his security and proving his debt under proviso to sub-section (1) of Section 529 of the Companies Act, to retain the sale proceeds after depositing the workmen's dues with the Official Liquidator in accordance with the provisions of Section 529A. The third proviso to Section 13(9) requires the Official Liquidator to intimate to the secured creditor the workmen's dues or an estimate thereof in accordance with Section 529A of the Companies Act. The fourth proviso to Section 13(9) makes the secured creditor liable to pay the balance if any of the workmen's dues if the deposit earlier with Official Liquidator is on an estimate. The sixth proviso to Section 13(9) also requires the secured creditor to furnish an undertaking to the liquidator to pay the balance of the workmen's dues if any. We are of the opinion that were the Official Liquidator intended to be associated with the sale (making the same possible only with the intervention of the Company Court and which would be contra to the purpose of the SARFAESI Act) the sale proceeds would have been received by the Official Liquidator and the need for the provisos aforesaid would not have arisen. The provisos aforesaid are indicative of the secured creditor, while on the one hand being entitled to exercise the right to sell without intervention even of the Official Liquidator/Company Court and on the other hand being made liable for the dues of the workmen. The language of Section 13(9) and provisos thereto is thus clearly suggestive of the role of the Official Liquidator being confined only to determination of workmen's dues and receiving payment thereof and undertaking from the secured creditor. The Supreme Court in Rajasthan Financial Corporation as aforesaid, has already carved out a difference between the "right to sell" and the "distribution of sale proceeds". The SARFAESI Act does not even vest the power of such distribution in the Official Liquidator. Significantly, Section 13(9) permits sale only under agreement between the secured creditors representing not less than three-fourth in value of the amount outstanding and makes the said agreement binding on all the secured creditors. The question thus of distribution by the Official Liquidator to other secured creditors also does not arise.

22. As far as the reason behind associating the Official Liquidator in sale, of ensuring that a proper price is fetched for the assets, is concerned, we find the SARFAESI Act and the Rules framed thereunder to be a complete code in that respect. Rules 5 & 8 of the SIE Rules require the Authorized Officer of the Bank/Financial Institution to obtain the estimated value of the asset from an approved valuer and in consultation

with the secured creditor fix the reserve price of the property. The mode of sale has similarly been prescribed exhaustively particularly in Rule 8 relating to sale of immovable assets. We are of the view that requiring the Official Liquidator to be associated in sale will lead only to conflict.

23. Though sale of the secured asset by the secured creditor under the SARFAESI Act is without the intervention of the Court but a safety valve preserving the rights of the debtor/borrower/mortgagor or for that matter any other person (see [United Bank of India Vs. Satyawati Tondon and Others](#), aggrieved from the measures taken by the Bank/Financial Institution u/s 13(4) of the Act is provided in Section 17 of the Act. The legislature in making the sale under the SARFAESI Act without the intervention of the Court, constituted DRT only as the forum for redressal of grievances. We are of the view that if the debtor/borrower/mortgagor himself/herself/itself has not been given any right of participation in the sale except in the manner provided in Section 17 of the Act, the question of our interpreting the provisions in a manner vesting such right in the Official Liquidator who is but a successor-in-interest of the debtor/borrower/ mortgagor and also representing the interest of the workmen and other creditors of such debtor/borrower/mortgagor, does not arise. Significantly, the legislature in enumerating in Section 31 the cases/situations in which the provisions of the SARFAESI Act are not to apply, did not choose to list the case/situation where the debtor/borrower/mortgagor is a company in liquidation.

24. Though the language of Section 17 of the SARFAESI Act suggests that the right to appeal thereunder is only against the measures u/s 13(4) of the Act but the Supreme Court in [Authorized Officer, Indian Overseas Bank and Another Vs. Ashok Saw Mill](#), has held that the remedy u/s 17 is not confined to the stage contemplated u/s 13 (4) but is available qua action taken by the secured creditor after the stage contemplated u/s 13 (4) also. The scrutiny by the DRT u/s 17 is thus not confined only to whether the measures u/s 13 (4) are in accordance with the SARFAESI Act and the Rules framed thereunder but also extends to the actions of the secured creditor under Sections 13 (5) to (13). It is thus not as if the debtor/borrower/ mortgagor or for that matter, in the case of such a debtor/borrower/mortgagor being in liquidation, the liquidator is without any remedy or that the sale is merely at the whim and fancy of the secured creditor and his Authorized Officer. Not only are the modalities of sale prescribed but a forum for redressal of grievances with respect thereto is also provided in the form of DRT. The Official Liquidator, thus if of the view that appropriate price is not being or has not been fetched or relating to issues of distribution, has the remedy before the DRT.

25. If it were to be held that the Official Liquidator (who acts under the dictates of the Company Court) is to be also associated with the sale, it will naturally open up the fora of the Company Court also for entertaining matters relating to such sale and which as aforesaid is not only likely to lead to conflicts but is also contrary to the

spirit of the SARFAESI Act of sale being without the intervention of the Court.

26. Reference in this regard can be made to Allahabad Bank where the Supreme Court in para 25 held that "the adjudication of liability and the recovery of the amount by execution of the certificate are respectively within the exclusive jurisdiction of the Tribunal and the Recovery Officer and no other Court or authority much less the Civil Court or the Company Court can go into the said questions relating to the liability and the recovery except as provided in the Act". To the same effect are paras 31 and 51 of the judgment. Similarly in para 50 of the judgment it was held that the DRT Act to the extent inconsistent with the provisions of the Companies Act, the Companies Act has to yield to the provisions of the DRT and this position holds good during the pendency of the winding up petition against the debtor company and also after a winding up order is passed. We are of the view that what has been held in the said judgment qua the DRT Act applies with equal, if not more, force to the SARFAESI Act.

27. We may notice that the Division Bench of the High Court of Madras also in *Asset Reconstruction Company (India) Ltd. supra*, following *Rajasthan Financial Corporation* held that a securitization company if seeks to sell the assets of a debtor company in liquidation, in exercise of powers u/s 13 of the SARFAESI Act, the said power could be exercised only after obtaining appropriate permission from the Company Court and acting in terms of the directions issued by that Court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and distribution thereof among the creditors in terms of Section 529A and 529 of the Companies Act. We are however, for the reasons stated above unable to agree with the said view. It was not considered therein that the SARFAESI Act and the Rules framed thereunder contain a complete code for sale including as to valuation, holding and distribution of sale proceeds and any objections with respect where to lie before the DRT u/s 17 of the Act and if it were to be held that the Company Court also has jurisdiction, conflict is a foregone conclusion.

28. We are therefore of the view that, (even where the debtor/borrower/mortgagor is a company in liquidation) there is no necessity of associating the Official Liquidator in the sale in exercise of powers by a secured creditor u/s 13(4) of the SARFAESI Act. The sale, without associating the Official Liquidator cannot thus held to be bad or illegal. The dicta in *Rajasthan Financial Corporation* of associating the Official Liquidator in sale, in the context of the SFC Act and the DRT Act in both of which sale is through the intervention of the District Judge or the DRT, is not applicable to a sale under the SARFAESI Act, sale whereunder is without the intervention of the Court. As far back as in *Herrington Vs. British Railways Board* 1972 (2) WLR 537 it was observed that there is always a peril in treating the words of a judgment as though they are words in a legislative enactment and it is to be remembered that judicial utterances are made in the setting of facts in a particular

case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases and disposal of cases by blindly placing reliance on a decision is not proper. The Apex Court in [Bharat Petroleum Corporation Ltd. and Another Vs. N.R. Vairamani and Another](#), cited Lord Denning with approval opining that each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. It was further held that the temptation to decide cases by matching the colour of one case against the colour of another is to be avoided. Similarly in [Official Liquidator Vs. Dayanand and Others](#), it was held that even one additional fact may make a lot of difference in the precedential value of a decision. The same sentiment was reiterated in [Sushil Suri Vs. C.B.I. and Another](#), as well as in [U.P. State Electricity Board Vs. Pooran Chandra Pandey and Others](#),

29. The remedies of the Official Liquidator with respect to such a sale are only before the DRT in accordance with Section 17 of the SARFAESI Act and not before the Company Court. SARFAESI Act being a latter legislation to the incorporation of Section 529A in the Companies Act thus prevails over the Companies Act and sale as provided for under the SARFAESI Act holds good during the pendency of winding up petition against the debtor/borrower/mortgagor and also after a winding up order is made and remains unaffected therefrom.

30. We are therefore, with respect, unable to agree with the dicta of Punjab & Haryana High Court in Haryana Concast Limited (supra) and axiomatically allow these appeals and set aside the judgment of the Learned Single Judge. The applications filed by the Bank and the auction purchaser for de-sealing of the property would thus stand allowed. However, the sale proceeds in custody of the bank are subject to the claims if any under Sections 529 and 529A of the Companies Act. The bank to accordingly comply, specially with the provisos to Section 13(9) of the SARFAESI Act. We may highlight that the Supreme Court recently in [Employees Provident Fund Commissioner Vs. O.L. of Esskay Pharmaceuticals Limited](#), has also held the dues under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 to be a first charge on the assets of an establishment and to be paid in priority to all other debts while distributing the sale proceeds. However, since we have differed from the view taken by other High Courts, to give time for approaching the Supreme Court, we grant eight weeks time to the Official Liquidator to de-seal the premises and to put the auction purchaser into possession of the property. The Official Liquidator, if of the view that the sale by the Bank is in contravention of the SARFAESI Act and the Rules framed thereunder, shall also have liberty to approach the DRT u/s 17 thereof, within the said time of eight weeks.

No costs.