

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**COMPANY APPLICATION NO. 26 of 2013****In****COMPANY PETITION NO. 18 of 1998****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE S.R.BRAHMBHATT**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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KOTAK MAHINDRA BANK LTD....Applicant
Versus
OFFICIAL LIQUIDATOR OF STANROSE STEEL LTD &
1....Respondents

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Appearance:

MR NAVIN K PAHWA, ADVOCATE for the Applicant No. 1
MR JS YADAV, ADVOCATE for the Respondent No. 1
MR RD DAVE, ADVOCATE for the Respondent No. 2
OFFICIAL LIQUIDATOR for the Respondent No. 1

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CORAM: HONOURABLE MR.JUSTICE S.R.BRAHMBHATT**Date : 31/03/2014****ORAL JUDGMENT**

1. The applicant who happen to be assignee of four secured creditors of the Company in Liquidation namely State Bank

of India, State Bank of Saurashtra, State Bank of Travancore, Union Bank of India, has filed this application for permission to appropriate the sale proceeds for the sale of assets made under the provisions of the Securitization and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the SARFAESI Act') amongst the applicant and respondent no.2 and any other parties that may be entitled on terms and conditions that may be determined by the Court.

2. The affidavit, in support of the Judge's Summons, has filed by the applicant, which contains specific averments on oath that the Company in Liquidation came to be wound up by an order dated 01.07.2004 made in Company Petition No.18 of 1998 and in Company Petition No.76 of 2002. The secured creditors of the Company in Liquidation included State Bank of India, State Bank of Saurashtra, State Bank of Travancore, Union Bank of India and respondent No.2 i.e. GIIC. All the secured creditors except No.2 i.e. GIIC assigned the debts due to them from the Company in Liquidation in favour of the applicant and thus, the applicant is entitled to seek enforcement of the rights accrued there from.

3. It is further mentioned and averred on oath that this Court vide judgment and order dated 15.10.2003 made in Company Application No.55 of 2003 allowed SBI to sell the assets of the Company in Liquidation under the provisions of the SARFAESI Act. Thus, the proceedings initiated under the SARFAESI Act by State Bank of India and followed by

the applicant pursuant to the assignment of debt by SBI in its favour, this Court vide order dated 29.02.2008 made in Company Application No.318 of 2007 and 100 of 2008, permitted the applicant to proceed further with sale of assets of the Company in Liquidation under the SARFAESI Act subject to the stipulations as contained in the said order. The Court also substituted the applicant in place of Union Bank of India. The committee was constituted consisting of the applicant in its capacity as assignee of the State Bank of India, GIIC and the Official Liquidator. When the committee proceeded further to hold the auction, a petition being Special Civil Application No.7979 of 2008 came to be filed by some persons claiming to be guarantors in relation to the dues of the Company in Liquidation before this Court, challenging the proceedings taken out under the provisions of the SARFAESI Act. This Court vide order dated 21.07.2009 passed in Special Civil Application No.7979 of 2008 rejected the petition on the ground of availability of efficacious, alternative, statutory remedy under the Securitization Act. An appeal being Letters Patent Appeal No.1951 of 2009 was preferred, challenging the said order, which came to be dismissed vide order dated 03.11.2009. A Special Leave to Appeal (Civil) No.8207 of 2010 came to be filed before the Hon'ble Supreme Court, challenging the order of the Division Bench passed in Letters Patent Appeal No.1951 of 2009, which came to be withdrawn under order dated 07.05.2010. The said order passed by the Hon'ble Supreme Court is taken on record.

4. The auction was required to be rescheduled after

Company Application No.168 of 2010 came to be filed against the auction and this Court vide order dated 12.07.2010 rejected the same. The meeting of the sale committee was held on 14.05.2010 and it was agreed that the sale of the assets was to be conducted by public auction and it was to be carried out in accordance with the provisions of the SARFAESI Act. The minutes of the meeting was placed on record. The bid document was issued on 10.06.2010 and public notice for sale was published. The Official Liquidator was member of the sale Committee and he actively participated therein. The auction was held on 13.07.2010 in presence of the Official Liquidator. The applicant filed Company Application No.192 of 2010 for confirmation of sale in favour of one Eva Group of Companies and this Court vide order dated 13.08.2010 thought it fit to order one more attempt for fetching higher price. The report seeking confirmation in favour of Eva Group of Companies is also placed on record. It was forming part of this Company Application No.192 of 2010. The auction was held on 27.08.2010 before this Court and the bid of Eva Group Companies came to be approved by this Court at a consideration of Rs.10.85 Crores on the terms and conditions as contained in the tender document. A clarification was sought by the auction purchaser by filing Misc. Civil Application No.201 of 2010 before this Court. The applicant filed O.J.M.C.A. No.214 of 2010 before this Court for recalling of the order dated 05.10.2010 made in Misc. Civil Application No.201 of 2010 and a relief was made for appropriation of the sale proceeds towards the dues of the workmen, if any, as per the provisions of Section 13(9) of the SARFAESI Act and

dues of the secured creditors. This Court vide judgment and order dated 28.04.2011, passed in O.J.M.C.A. No.214 of 2010, disposed of the same. Thereafter, applicant preferred O.J. Appeal No.45 of 2011, which came to be disposed of by this Court vide order dated 01.08.2011. An SLP filed against the said order before the Supreme Court being S.L.P. No.25599 of 2011, has been dismissed vide order dated 19.09.2011. The copy of the order of SLP is also taken on record. The Division Bench while disposing of the O.J.Appeal No.45 of 2011 made observations under which it was envisaged that the applicant was to move an application before the Company Judge for seeking appropriation of sale and hence the present application is filed.

5. Court heard learned counsels appearing for the parties and perused the proceedings. The Division Bench's order dated 01.08.2011 passed in O.J.Appeal No.45 of 2011 In Misc. Civil Application No.214 of 2010 In Misc. Civil Application No.201 of 2010 needs to be set out as under;

1.The present appeal is directed against the order dated 28.04.2011 passed by the learned Company Judge in OJ Miscellaneous Civil Application No.214/10 in OJ Miscellaneous Civil Application No.201/11 in Company Application No.192/10 so far as it relates to not permitting the appropriation of the amount to the appellant as observed at para 8 of the impugned order.

2.At the outset we may record that the original Term Deposit Advice drawn in the name of OL of Stanrose Steels Ltd. amounting to Rs.11,50,37,299.95 has been handed over to the OL since the grievance was raised by Mr.Yadav for OL that the original Term Advice is upto now not handed over which was required to be

handed over pursuant to the order passed by the learned Company Judge in the proceedings of the Company Application.

3. We have heard Mr. Pahwa, learned counsel appearing for the appellant and Mr. Yadav for the OL.

4. It appears that the learned Company Judge at paragraph 8 of the impugned order has observed thus -

"So far as the second prayer regarding appropriation of sale consideration is concerned, several contentions are raised by the learned counsel appearing for both the parties. Various decisions have been cited in support of their rival contentions. However, it is premature to decide this issue and grant the relief as prayed for at this stage. The Official Liquidator has raised very strong objections against grant of relief regarding appropriation of sale consideration. The claims are invited but same are still not verified by the Chartered Accountant. The applicant Bank has also not lodged its claim with the Official Liquidator. As contended before the Court, an affidavit of proof of debt alongwith supporting evidence is not filed with the Official Liquidator. The status of the applicant bank as secured creditor is still not beyond any dispute. An issue regarding assignment of debt is yet to be settled in view of the pendency of O.J. Appeals before the Division Bench of this Court, after the same were remanded by the Supreme Court."

5. Under the circumstances, it appears that it is on account of the status of the applicant Bank not crystallised as that of the secured creditor and it is on account of the issue of the assignment deed and the rights in the immovable property after following the provisions of the Transfer of Properties Act read with the Registration Act having not been finalised, the learned Company Judge has

exercised the discretion declining the appropriation at this stage.

6.Mr.Pahwa, learned counsel appearing for the appellant submitted that on both counts, the doubt as shown by the learned Company Judge is not correct and he submitted that the procedure under the Transfer of Properties Act read with the Registration Act for assignment of right as mortgagee in the property together with the assignment of the deed has been followed.

7.We find that no motion is made on such aspect by the applicant bank before the learned Company Judge. If the applicant Bank is accepted as the secured creditor or is accepted as lawful assignee, after following the procedure under the Transfer of Properties Act read with the Registration Act, the question may be required to be examined as to whether the secured creditor who has invoked power under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 Act and has realised amount should be allowed to appropriate the amount and if yes to what extent keeping in view the rights of the OL to represent the workers' interest as well as of the proceedings under the Companies Act. Until these questions are finalised, we find that the exercise of the discretion by the learned Company Judge vide impugned order and more particularly at paragraph 8 of the order against which the grievance is raised in the present appeal, cannot be said as perverse. If the amount is permitted to be appropriated before deciding the aforesaid questions, irreversible situation may arise.

8.Hence, we find that it is not a case for interference in exercise of the appellate jurisdiction at this stage.

9.Hence, the appeal is dismissed. It is observed that in the event any application is made before the learned Company Judge, the rights and contentions of both the sides shall remain open.

6. There is no dispute amongst all the counsels that now the controversy which was originally existing and for which the Company Court as well as appellate Bench did not approve the prayer for appropriating the sale proceeds, now does not exist any more. Therefore, now, there was only objection raised on behalf of the Official Liquidator was to the effect that the present applicant being an assignee of the secured creditors, the permission to appropriate the sale proceeds would not be justified at this stage, as applicant's status and entitlement to receive the sale proceeds under SARFAESI Act as an assignee of secured creditor on the basis of the assignment deed is very much at large before the Division Bench in O.J. Appeal No.156 of 2007 and allied matters and the Division Bench is in seisin of the matter and, therefore, this Court may not permit the applicant as well as the other secured creditors to appropriate the sale proceeds. Barring this objection, there was no other objections raised on behalf of the Official Liquidator, which this Court proposes to deal with as under;

7. Learned counsel appearing for the applicant and GIIC Ltd. contended that in view of the Supreme Court decision in case of **ICICI Bank Limited V/s. Official Liquidator of APS Star Industries Limited and others**, reported in (2010) 10 SCC page-1, the question qua assignees' right entitlement and enforcement thereof under SARFAESI Act on the basis of the assignment deeds cannot be said to be now open for further consideration, in view of the observations of the Apex Court made in the matter.

8. Learned counsel appearing for the applicant as well as GIIC Ltd. contended that so far as Official Liquidator's office is concerned their objection is only qua the present applicant's right to step in the shoes of the secured creditors on the basis of the deeds of

assignment and so far as their preliminary objection qua discrepancy in the figure, has now been resolved on account of latest affidavit coming forward on record. It has been specifically averred in paragraph nos.2 and 4 and as those averments are made on oath they are clearly indicating the correct position which would be binding on all i.e. the applicant as well as GIIC. In view thereof, when there is a clear observations of the Court qua the assignees' right and the reliance is placed upon the order passed by this Court, in view of the assignees' right, Court may permit the appropriation of the amount, as agreed and allow this application.

9. Learned counsel Shri Dave submitted that their respective clients are ready and willing to file appropriate undertaking in expressly mentioning therein that the permission to appropriate the amount so far as the applicant is concerned and the receipt of the amount on account of GIIC, shall be made subject to the final outcome of the directions and observations that may be passed in Company Petition No.18 of 1998. In addition thereto, detailed undertaking incorporating the fact that the O.J. Appeal is pending, the applicant and the GIIC shall have to file an additional usual undertaking incorporating in that very undertaking that this appropriation would also be subject to result and outcome of the O.J.Appeal.

10. This Court has considered rival contentions and the Court has not impressed upon the canvass made on behalf of the Official Liquidator that the assignees' right, title

entitlement and enforcement of the rights under the SARFAESI Act. The Court has passed the order on 28.03.2014 in Company Application No.224 of 2012 in Company Petition No.47 of 1992, wherein at length this very aspect is discussed. Suffice it to say herein, in this petition, that the Supreme Court has in case of **ICICI Bank Limited V/s. Official Liquidator of APS Star Industries Limited and others**, reported in (2010) 10 SCC page-1, observed as under;

44. Thus, in our view on reading the provisions of the BR Act, 1949 with the Guidelines of RBI issued from time to time in relation to Advances and Restructuring/Management of NPAs we are of the view that the BR Act, 1949 is a complete Code on banking and that dealing in NPAs inter se by the banks needs to be looked in the larger framework of "Restructuring of banking System". Thus, we need not go into the provisions of the said TP Act. In fact, it is the case of the borrower(s) that provisions of the said TP Act has no application. (See Written Submissions filed on 31.8.2010).

Invocation of Section 130 of TP Act, 1882

45. In the alternative, since the borrower(s) has relied on Section 130 of the said TP Act, one needs to analyse the contentions raised in that regard. According to the borrower(s) assignment of Financial Instruments in possession of ICICI Bank Ltd. To Kotak Mahindra Bank Ltd. Transfers not merely the right to recover the debt but also transfers the obligations under the Financial Instruments "as if they were executed by the clients of ICICI Bank in favour of the assignee", I.e., Kotak Mahindra Bank Ltd. According to the borrower(s), an assignment of a debt can never carry with it the assignment of the obligations of the assignor unless there is a novation of the contract by all parties. Therefore, according to the borrower(s), the impugned Deed of Assignment is legally unsustainable without novation of original contract between ICICI Bank Ltd. (assignor) and the borrower(s) (assignee). We find no merit in the above arguments.

46. As stated above, an outstanding in the account of a borrower(s) (customer) is a debt due and payable by the borrower(s) to the bank. Secondly, the bank is the owner of such debt. Such debt is an asset in the hands of the bank as a secured creditor or mortgagee or hypothecatee. The bank can always transfer its asset. Such transfer in no manner affects any right or interest of the borrower(s) (customer). Further, there is no prohibition in the BR Act, 1949 in the bank transferring its assets inter se. Even in the matter of assigning debts, it cannot be said that the banks are trading in debts, as held by the High Court(s). The assignor bank has never purchased the debt(s). It has advanced loans against security as part of its banking business. The account of a client in the books of the bank becomes Non Performing Asset when the client fails to repay. In assigning the debts with underlying security, the bank is only transferring its asset and is not acquiring any rights of its client(s). The bank transfers its asset for a particular agreed price and is no longer entitled to recover anything from the borrower(s). The moment ICICI Bank Ltd. Transfers the debt with underlying security, the borrower(s) ceases to be the borrower(s) of the ICICI Bank Ltd. And becomes the borrower(s) of Kotak Mahindra Bank Ltd. (assignee).

47. At this stage, we wish to once again emphasize that debts are assets of the assignor bank. The High Court(s) has erred in not appreciating that the assignor bank is only transferring its rights under a contract and its own asset, namely, the debt as also the mortgagee's rights in the mortgaged properties without in any manner affecting the rights of the borrower(s)/mortgagor(s) in the contract or in the assets. None of the clauses of the impugned Deed of Assignment transfers any obligations of the assignor towards the assignee.

48. In the case of Khardah Company Ltd. v. Raymon & Co. India (P) Ltd, the Supreme Court has held that the law on the subject of assignment of a contract is well settled. An assignment of a contract might result by transfer either of the rights or by transfer of obligations thereunder. There is a well recognized distinction between the two classes of assignments. As a rule, obligations under a contract cannot be

assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. That, rights under a contract are always assignable unless the contract is personal in its nature or unless the rights are incapable of assignment, either under the law or under an agreement between the parties. A benefit under the contract can always be assigned. That, there is, in law, a clear distinction between assignment of rights under a contract by a party who has performed his obligation thereunder and an assignment of a claim for compensation which one party has against the other for breach of contract.

49. In the case of *Camdex International Ltd. v. Bank of Zambia*, the following observation which is relevant to the present case needs to be quoted:

“The assignment of a debt will not be contrary to public policy solely on the grounds that the assignee has purchased the debt for a considerably discounted price or because that price is only payable after a period of credit. Nor will the assignment be contrary to public policy simply because the assignee may make a profit on the transaction at the end of the day. If there was no prospect of a profit, *Hobhouse LJ* observed, commercial entities would never purchase debts.”

50. Similarly, the following proposition in *Chitty on Contracts*, 27th Edn. (1994) at para 19.027 is relevant to be noted.

“It is also well established that a claim to a simple debt is assignable even if the debtor has refused to pay. The practice of assigning or ‘selling’ debts to debt collecting agencies and credit factors could hardly be carried on if the law were otherwise.”

51. In view of the above exposition of law, we find that under the impugned deed of Assignment only the account receivables in the

books of ICICI Bank Ltd. has been transferred to Kotak Mahindra Bank Ltd. The obligations of ICICI Bank Ltd. towards its borrower(s) (customer) under the loan agreement secured by deed of hypothecation / mortgage have not been assigned by ICICI Bank Ltd. To the assignee bank, namely, Kotak Mahindra Bank Ltd. Hence, it cannot be said that the impugned deed of dssignment is unsustainable in law. The obligations referred to in the impugned deed of assignment are the obligations, if any, of ICICI Bank Ltd. towards Kotak Mahindra Bank Ltd. (assignee) in the matter of transfer of NPAs. For example, when an account receivable is treated as NPA and assigned to the assignee bank, the parties have to follow certain guidelines issued by RBI. If there is a breach of the guidelines or statutory directions issued by RBI by Assignor in regard to transfer of NPA then the assignee bank can enforce such obligations vis a vis the assignor Bank. It is these obligations which are referred to in the impugned deed of assignment. That, an account receivable becomes an NPA only because of the default committed by the borrower(s) who fails to repay. Lastly, it may be mentioned that the said SARFAESI Act, 2002 was enacted enabling specified SPVs to buy the NPAs from banks. However, from that it does not follow that banks inter se cannot transfer their own assets. Hence the said SARFAESI Act, 2002 has no relevance in this case.

52. Before concluding, we may state that NPAs are created on account of the breaches committed by the borrower. He violates his obligation to repay the debts. One fails to appreciate the opportunity he seeks to participate in the "Transfer of Account Receivable" from one bank to the other.

Conclusion:

53. As stated above, by the impugned judgment, the Division Bench of the Gujarat High Court upheld the order of the Company Court only on one ground, namely, assignment of debts by the banks inter se is an activity which is impermissible under the Banking Regulation Act, 1949. However, the Division Bench did not go into other issues which arose for determination before the Company Court, including applicability of the provisions of the Registration Act, 1908.

54. In the circumstances, we set aside the impugned judgment(s) on the question of assignment of debts as an activity permissible under the Banking Regulation Act, 1949. However, we remit these matters to the Division Bench of the High Court(s) for consideration of other issues raised in this batch of cases. Subject to above, the impugned judgment(s) is set aside and the civil appeals are allowed with no order as to costs.

11. In light of the aforesaid observations, it can well be said that so far as the submission qua *novatio*, the incompetence to contract or the liberty to contract are now no more *res integra* and therefore the assignees' right to step into the shoes of secured creditors claiming the funds or disbursement on the basis thereof is if otherwise not resistible on account of any breach of provision of Bombay Stamp Act, Registration Act, then in my view the same is already recognized and there cannot be any valid reason for denying them the right even for reserving and appropriating the sale proceeds. The same right cannot be whittled down in any manner only on account of the pendency of the proceedings before the Division Bench in O.J.Appeal No.156 of 2007. More over when the applicant has unequivocally submitted to file an undertaking to abide by the final outcome and observations of the Bench in O.J.Appeal No.156 of 2007, then apprehension expressed by the Official Liquidator could be taken care of.

12. In view of this, the Court is of the view that the application is required to be allowed subject to the aforesaid observations and filing of undertakings.

13. The Chartered Accountant has originally worked out ratio whereunder the applicant was to receive 96.39, receive the

portion on the sale proceeds and GIIC Ltd. 3.41, however, as the counsel has invited this Court's attention to the affidavit of GIIC at page No.324, which came to be filed on 15.04.2013. Now they have agreed to receive the amount in the ratio of 92.77 to applicant and 07.23 to GIIC. The Chartered Accountant's report as well as the Official Liquidator Reports are placed on record. The Court has perused the same. The Court's attention was specifically invited to page nos.237, 238 243 and 353. The page Nos.237 and 238 forming part of the report of the Official Liquidator dated 09.05.2013, contains the claim position and averment with regard to no claim received from workmen. The Page No.353 is forming part of the Official Liquidator Report dated 17.072013, relevant extract is set out as under;

6. It is most respectfully submitted that on perusal of the supplementary report of the Chartered Accountants, it is observed that the claims of the secured creditors have been quantified by the Chartered Accountant and the revised ratio of distribution has been worked out by them as under:

Sr. No.	Name of Secured Creditors	Outstanding Amount as on 24.12.2002	Ratio (%)
1	State Bank of India	30,75,28,911	48.7
2	State Bank of Travancore	9,04,05,224	14.32
3	Union Bank of India	12,30,63,186	19.49
4	State Bank of Saurashtra (Excluding Cash Credit)	8,89,14,485	14.08
	Total assigned to Kotak		
5	GIIC Limited	2,15,56,851	3.41
	Total	631468656	100

7. That, in view of the aforesaid facts and circumstances, the Official Liquidator most respectfully seeks following order and directions of this Court:

a) This Hon'ble Court may be pleased to permit the Official Liquidator to disburse payment to the secured creditors of the Company in Liquidation as per the

verification report submitted by M/s Khandhar Mehta & Shah, Chartered Accountants as stated in para-6 herein above or as may be found admissible after hearing all the parties looking to the facts and circumstances of the case herein above on furnishing the usual undertaking by the secured creditor in this proceeding.

b) Such other and further orders and directions as this Hon'ble Court may deem, fit and proper in the matter may also be passed.

14. The Court has already observed hereinabove that there existed no dispute qua any other, except the claim was resisted only on ground of applicant being an assignee. The Court did not dwell elaborately upon any other aspect. Suffice it to say that this application is required to be allowed, whereunder the amount of Rs.28,64,837/- and Rs.15868/- totaling Rs.28,80,705/- is required to be appropriated by applicant.

15. At this stage, Learned counsel appearing for the Official Liquidator submitted that let the applicant refund the amount of Rs.10 lacs to Official Liquidator for any exigency in future till the dissolution orders are made. It will leave the Company with the funds which could be permitted to be appropriated by the applicant as well as other secured creditors i.e. GIIC as per the ratio agreed between them, but before that total amount of Rs.28,80,705/- be permitted to be appropriated by the applicant only after furnishing the desired usual undertaking, as stated hereinabove. The same be kept on the file of the main matter.

16. The funds as per the ratio admissible to GIIC shall be transferred by way of RTGS. The application is allowed. The deposit shall be encashed for carrying out the direction.

Pankaj

(S.R.BRAHMBHATT, J.)