

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 30.04.2014

W.P.(C) 3060/2012 & CM 6792/2012

IFCI LIMITED

..... Petitioner

versus

OM SHIVAY REAL ESTATE PRIVATE LIMITED AND ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Dinkar Singh.

For the Respondents : Mr Amarjit Singh Bedi, Md. Asfar Heyat Warsi and Ms Aparajita Sharma for Respondent No.1.
Mr Rajinder Wali for Respondent No.2.
Mr S.R.Sharma for Respondent No.3.
Mr Sarul Jail and Ms Anjali Thukral for Respondent No.4.
Mr P.R.Singh for Respondent No.5.
Mr Samar S. Kachwaha and Mr Raghavendra M. Bajaj for Alcatel Lucent India Ltd.(Intervenors)

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

J U D G M E N T

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition is directed against the order dated 15.03.2012 passed by the Debts Recovery Appellate Tribunal, Delhi in Miscellaneous Appeal No.19/2009 arising out of SA No.36/2007(DRT-I, Delhi). In the said

SA No.36/2007 an order was passed on 03.12.2008 by the Presiding Officer of the Debts Recovery Tribunal-I (DRT-I), Delhi whereby an application filed on behalf of the petitioner (IFCI Ltd) under Section 5 of the Limitation Act, 1963 for condoning the delay in filing the said SA under Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the said Act') had been allowed. The respondent No.1 before us had filed the said appeal being Miscellaneous Appeal No.19/2009. In that appeal before the said Appellate Tribunal, two issues had been framed. We are only concerned with the second issue and that is:-

“Whether the DRT had rightly exercised its discretion in condoning the delay in filing the SA?”

2. This question was answered in the negative by the Appellate Tribunal. Being aggrieved by that decision the petitioner is before us by way of the present writ petition.

3. Before we examine the issue at hand it would be necessary to set out some facts. The petitioner claims to be a secured creditor in respect of the hypothecated goods of the Silicon Division and the Equipment and Semiconductor Division of the factory belonging to the respondent No.5 at 12/1,

Mathura Road, Village Aurangpur, District Faridabad, Haryana. Indian Bank (respondent No.3) and Punjab National Bank (respondent No.2) claimed to be part of the consortium with which the land & building and plant & machinery of the respondent No.5 (Usha India Ltd.) was mortgaged and hypothecated. Possession of the said factory premises had been taken over by the said consortium of Indian Bank and Punjab National Bank as far back as on 15.09.2006. The consortium had issued demand notices under Section 13(2) of the said Act to the respondent No.5 (Usha India Ltd.). Those demand notices went unanswered and, therefore, the said consortium took further action under Section 13(4) of the said Act by issuing auction notices on 07.12.2006 and 13.01.2007 with regard to sale of the secured assets. On 23.01.2002 the auction was held and the said assets were sold to the respondent No.1. Thereafter two sale certificates, one in respect of land & building and the other in respect of movables, were issued on 05.02.2007 in favour of the respondent No.1. On 19.07.2007 the petitioner herein filed the said SA No.36/2007 under Section 17 of the said Act before the DRT challenging the sale notices and the consequent sale of the secured assets to the respondent No.1 and also claimed itself to be a secured creditor in respect of the movable assets in the above mentioned two units.

4. Section 17 of the said Act, to the extent it is relevant, is set out hereinbelow:-

“17. Right to appeal. – (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorized officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation. – For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) section 17.

XXXXX XXXXX XXXXX XXXXX”
(underlining added)

5. It is pertinent to note from the above extract that the starting point of the limitation for the filing of an appeal under Section 17 is the date on which measures under Section 13(4) are taken by a secured creditor or his authorized officer. In the present case it is evident that the measures under

Section 13(4) of the said Act were clearly taken on (a) 11.09.2006, when possession was taken; (b) on 07.12.2006 when the first auction notice was published; (c) on 13.01.2007 when the second notice with regard to the auction was published; and (d) also on 23.01.2007, when the auction was conducted. Thus, normally, the starting point of limitation would have been 11.09.2006 because that is the first point of time when the measures under Section 13(4) were taken. However, since the petitioner is seeking to set aside the sale transaction, we can assume that the first point of time when the measure under Section 13(4) was taken would be 07.12.2006 and the subsequent dates referred to above. But, according to the learned counsel for the petitioner, the petitioner was unaware of these events and it became aware of the said auction only on 09.06.2007 when it received a reply from Indian Bank with regard to the sale of the assets. Thus, according to the learned counsel for the petitioner, if 09.06.2007 is taken as the starting point of the limitation because, according to him, it is on that date that the petitioner became fully aware that the assets had been sold by the consortium of banks, then, the period of 45 days would expire on 25.07.2007. Since, SA No.36/2007 had been filed on 19.07.2007, it was contended that it was within the period of 45 days prescribed under Section 17(1) of the said Act.

6. The learned counsel appearing on behalf of the respondent No.1 as well as the learned counsel for the respondent Nos.2 and 3 submitted that the Appellate Tribunal had correctly rejected this submission of the learned counsel for the petitioner inasmuch as the petitioner was very well aware of the sale of the assets much prior to 09.06.2007. They drew our attention to the letter dated 06.03.2007 which had been written by the respondent No.5 (Usha India Ltd.) to the petitioner. The said letter reads as under:-

**“USHA
(INDIA) LTD**

USHA (INDIA) LTD.

12/1 Mathura Road Faridabad-121003 India

Phone :0129277641 to 277646

Fax: 91-0129-277679, GRAMS: RECTIFIER

Email: inteluil@del2.vsnl.net.in

HOME PAGE: <http://www.usha.com>

Ref.No:- UIL/RPS/Legal/03/08

Date: 06.03.2007

M/S Industrial Finance corporation of India,
Bank Of baroda Building,
16, Parliament Street,
New Delhi- 110001

Subject: Illegal auction of Usha (India) Limited, Premises
at 12/1, Mathura Road, Faridabad.

Sir,

1. This is to inform you that one M/s Murthal Tank & Vessels Pvt. Ltd. has forcibly taken illegal possession of the premises of Usha (India) Ltd situated at 12/1, Delhi Mathura Road Faridabad (Haryana)- 121003 along with the entire plant, machinery, furniture, fixtures, materials, etc claiming to have obtained sale certificate from the Indian Bank.

2. It is important to mention that Usha (India) Ltd has challenged the Sale Notice of the Indian Bank and the matter is pending before the Debt Recovery Tribunal-I, New Delhi and is coming up on 15.03.2007.
3. The Bank officials have not taken possession of the assets pledged with them as required under the law nor did the bank inform of the sale even as the matter was pending in the court. Thus there is no segregation and verification of the assets pledged with Indian Bank. Mr Virmani an official of the Indian Bank was contacted by the officials of Usha (India) who informed him of the forcible entry and occupation of the entire premises by Murthal Tank & Vessels Pvt. Ltd and misappropriation of the assets of UIL. However Mr Virmani paid no heed.
4. Infact M/s Murthal Tank & Vessels Pvt. Ltd without informing the Directors and officials of Usha India Limited, and with active support of the local police forcibly took possession of the factory premises and are also moving the plant, machinery, goods etc. lying in the premises.
5. This happened in the evening of 22.02.2007 without the knowledge of the directors and officials of Usha (India) Limited who had all left their office for home which clearly reflects the malafide of the M/s Murthal Tank & Vessels Pvt. Ltd and also of the Bank officials who did not take possession of the assets alleged to be pledged to them before issuing the alleged sale certificate.
6. It is apprehended that such forcible possession of the entire premises along with all the plant, machinery, fixtures, materials etc. is leading to theft and misappropriation.
7. Several financial institutions have charge over the assets both movable and immovable and those

assets are being misappropriated. Infact in the ensuing melee machinery worth 100 crores which is pledged with IFCI and the Samsung equipment/machinery pledged with EXIM bank being removed and the armed henchmen of M/s Murthal Tank & Vessels Pvt. Ltd in the premises are obstructing the protection of the plant machinery and other goods. We have no knowledge of what is happening in the premises, as we are not being allowed to move around in our premises.

8. Despite request M/s Murthal Tank & Vessels Pvt. Ltd has neither shown any relevant judicial order nor have given copy of the Sale Certificate or any document under which they claim to have taken possession.
9. Workers are also being denied their statutory dues such as the ESI, PF etc.

In view of the above we would request you to kindly take appropriate action as per law to safe guard the interest of Usha (India) Limited.

Thanking you,

Yours faithfully,
For Usha (India) Limited

Sd/-
Director”

7. The learned counsel for the said respondents then drew our attention to another letter dated 16.05.2007 from the respondent No.5 (Usha India Ltd.) to the petitioner. The said letter dated 16.05.2007 is as under:-

“USHA

16.5.2007

(INDIA) LTD.

12/1, Mathura Road, Faridabad

Phone: 0129-2256527

Fax 91-0129-2277679 Grams

Industrial Finance Corporation of India
IFCI Tower 61, Nehru Place,
New Delhi-110 019

Sub: Auction of Factory premises consisting of Land
86 Building Plant 86 Machinery situated at 12/1,
Mathura Road, Faridabad.

Dear Sir,

This has ref to our earlier communication dated 6.3.07 on
the subject mentioned above we wish to state as under:

1. That Indian Bank has auctioned the Land 86 Building 86 Plant 86 Machinery 12/1 Mathura Road Faridabad premises without verifying the facts from the management.
2. After recovering their dues, Indian Bank is holding a surplus sum of Rs.8 11 Crore on behalf of the company which they have realized by auctioning the company property situated at 12/1 Mathura Road, Faridabad. Kindly take up the matter with Indian Bank. World Trade Centre Babar Road, New Delhi, for recovery of the amount payable to you.
3. That the property situated at 12/1 Mathura Road Faridabad has been completely handed over to auction buyer M/s. Murthal Tank & Vessels P. Ltd. by Indian Bank whereas a large part of Plant and Machinery is pledged/Hypothecated to your Institution.
4. That other properties of the company situated at Gauriganj Bhintal etc. are lying unattended. We would request you to kindly depute your representative in take charge of all payment. The company which are pledged/hypothecated to you.

Since there is no one on the rolls of the company hence no one is looking after the property i.e. Land 85 Building 85 Plant 85 Machinery situated at Gauriganj 8v Bhimtal. We apprehend that some goonda elements may take over and dispose of the Plant 85 Machinery. We the present Directors will not be liable for assets of the company.

Kindly treat the matter on urgent basis as well have reason to believe that these properties might be misappropriated.

We will appreciate prompt action on your part.

Thanking you,
Yours truly
For Usha (India) Ltd.
Sd/-
Amit Kumar
Director.”

8. While the petitioner admits the receipt of the letter dated 16.05.2007 on 21.05.2007, it denies receipt of the letter dated 06.03.2007. It is the contention of the learned counsel for the petitioner that the letter dated 06.03.2007 could not have been received by the petitioner as it had been sent to the address at Bank of Baroda Building, 16, Parliament Street, New Delhi, which, the petitioner had left way back in 1994-95. Be that as it may, the fact that the petitioner received the letter dated 16.05.2007 is admitted. After receipt of the said letter dated 16.05.2007 the petitioner sent a letter on 01.06.2007 addressed to Indian Bank. The said letter reads as under:-

“NO. IFCI/LEGAL/2007

1. Shri V. Srinivasan,
Public Information Officer &
General Manager (MCC)
Indian Bank, Head Office,
Customer Service Cell
66, Rajaji Salai,
Chennai-600001
2. Branch Manager,
Indian Bank, World Trade Centre,
Babar Road, New Delhi.

Dear Sir,

Re: Usha (India) Ltd. Auction of factory premises
situated at 12/1, Mathura Road, Faridabad.

1. We have come to know that Indian Bank has auctioned the factory premises consisting of Land 85 Building and plant and machinery situated at 12/1, Mathura Road, Faridabad and has handed over the same to the auction buyer M/s. Murthal Tank 85 Vessels Pvt. Ltd. against a huge consideration.
2. In this regard, we are surprised to note that Indian Bank has sold the assets of the company without obtaining any consent from IFCI though IFCI has first charge on the assets of the company. The above mentioned company has been in default with IFCI since long and our present outstanding dues recoverable from it is around Rs.345 crore.

3. You are, therefore, requested to send us the full details of the auction proceeding as regard to the sale of assets of the company for examination of the same at our end. Please treat this matter as most urgent.

Yours faithfully,

V.S.V. Roa
Dy. General Manager”

9. It is in response to this letter dated 01.06.2007 that the petitioner received the letter dated 09.06.2007 from Indian Bank. The letter dated 09.06.2007 is as under:-

“INDIAN BANK
ASSETS RECOVERY MANAGEMENT BRANCH
World Trade Centre, Upper Ground Floor Babar
Road, New Delhi
Ph (011) 23412168, 23412166
Email:armbdelhi@indianbank.co.in

AARMB/ND/USHA/78/2007-08

9TH June, 2007

The Dy. General Manager
IFCI
Delhi Regional Office
IFCI Tower 61, Nehru Place,
New Delhi-110 019

Dear Sir,

Sub: A/c Usha India Ltd. Auction of factory premises

situated at 12/1, Delhi Mathura Road, Faridabad.

Ref: Your letter No. FCI/ LEGAL/ 2007-25186 dated 1.6.2007.

Anent the above we wish to inform you that the Factory land building * Machinery at Khasrta No. 1545-1550 in Village Aurangpur, Distt. Faridabad, Haryana (12/1 Mathura Road, Faridabad) of Usha India Ltd. has been sold by consortium banks (Indian Bank 86 Punjab National Bank) under SARFAESI Act, as the above consortium had first charge/ mortgage over the said secured assets. This is for your kind information.

Yours faithfully,
Asstt. General Manager,”

10. We may point out that in the impugned order the Appellate Tribunal had taken 06.03.2007 as the starting point of limitation inasmuch as according to it the letter dated 06.03.2007 had been received by the petitioner. There may be substance in that finding because in the letter dated 16.05.2007, which was admittedly received by the petitioner, there is a reference to the earlier letter of 06.03.2007 and there is no contemporaneous correspondence on the part of the petitioner to negate that statement. However, since the learned counsel for the petitioner has vehemently argued that the letter dated 06.03.2007 could not have been received by the petitioner inasmuch as the ‘Bank of Baroda Building’ address had been given up by the petitioner way back in 1994-95, we shall assume that the

letter dated 06.03.2007 was not received by the petitioner. Even if such an assumption is made, it would still not make any difference to this case. This is so because in our view the petitioner had admitted receipt of letter dated 16.05.2007 on 21.05.2007. By virtue of that letter, the contents of which we have reproduced above, it is evident that the petitioner was informed in clear terms that Indian Bank had auctioned the land & building and plant & machinery at 12/1, Mathura Road, Village Aurangpur, District Faridabad, Haryana. It had also informed the petitioner that a surplus sum was lying with Indian Bank after they had recovered their dues. In the said letter the petitioner was also informed that the property situated at 12/1, Mathura Road, Village Aurangpur, District Faridabad, Haryana had been completely handed over to the auction purchaser – Murthal Tanks & Vessels Pvt. Ltd. (now known as Om Shivay Real Estate Pvt. Ltd., respondent No.1 herein) by Indian Bank. The petitioner was also informed that this had been done although a large part of the plant & machinery was allegedly pledged/hypothecated with the petitioner.

11. In other words, the petitioner was fully informed what measures were taken under Section 13(4) of the said Act on the part of the consortium banks which included Indian Bank. The contention of the learned counsel for the

petitioner that starting point of limitation should be 09.06.2007 when Indian Bank confirmed that such an auction was held cannot be accepted. Knowledge of the auction was already available with the petitioner on 21.05.2007 when it admittedly received the letter dated 16.05.2007 from respondent No.5 (Usha India Ltd.). Therefore, the starting point of limitation would be 21.05.2007. The petitioner had 45 days from 21.05.2007 to file the appeal under Section 17. Those 45 days expired on 06.07.2007. The appeal (SA No.36/2007) under Section 17 was filed later, on 19.07.2007, after expiration of the 45 days period. Consequently, even if the date of 06.03.2007 is not taken as the starting point of the limitation the petitioner's said SA would yet be barred by limitation inasmuch as the starting point would certainly be 21.05.2007.

12. Finally, we would like to deal with the decision cited by the learned counsel for the petitioner in **Rukhmabai v. Lala Laxminarayan and Ors.:** **AIR 1960 SC 335**. In that case the Supreme Court considered as to what was the meaning of the expression "right to sue". We are afraid that the said decision would have no application to the facts of the present case inasmuch as that decision was concerned with Article 120 of the Limitation Act, 1908 wherein the expression "right to sue accrues" was used. In Section 17 of the

said Act no such expression finds place. The starting point of limitation has been specifically indicated to be the date on which the measures under Section 13(4) had been taken. Therefore, the said decision does not come to the aid of the petitioner at all.

13. Consequently, the writ petition has no merit and is liable to be dismissed. The dismissal of this writ petition will, however, be without prejudice to the rights and contentions of the petitioner, respondent No.4 and Alcatel Lucent India Ltd. who are parties in SA No.1/2007. We also make it clear that the surplus of the auction proceeds lying with Indian Bank along with the interest accrued thereon till date shall be deposited with DRT-I within four weeks in SA No.1/2007 for appropriate orders to be passed by the said Tribunal. The said amount shall be kept by DRT-I in a Fixed Deposit for 181 days in the first instance till further orders that may be passed by DRT-I. The writ petition stands dismissed as above.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

APRIL 30, 2014

mk