

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**COMPANY APPLICATION NO. 241 of 2011****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE VIPUL M. PANCHOLI**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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PRAMODBHAI KANJIBHAI PATEL....Applicant(s)

Versus

OFFICIAL LIQUIDATOR OF M/S MINAL OIL & AGRO INDUSTRIES PVT &
1....Respondent(s)

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Appearance:

MR CHINMAY M GANDHI, ADVOCATE for the Applicant(s) No. 1

MR MB GANDHI, ADVOCATE for the Applicant(s) No. 1

MS AMEE YAJNIK, ADVOCATE for the Respondent(s) No. 1

MR.NANDISH CHUDGAR, ADVOCATE for NANAVATI ASSOCIATES,
ADVOCATE for the Respondent(s) No. 2

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CORAM: **HONOURABLE MR.JUSTICE VIPUL M. PANCHOLI****Date :30/10/2015****CAV JUDGMENT**

1. Applicant has taken out this judges summons,

wherein, the applicant has prayed as under:

"a) That this Hon'ble Court be pleased to hold and declare that the Kalupur Commercial Co-operative Bank has resorted to provisions of Securitization Act illegally and the notice dated 12.02.2011 be declared as illegal and void and the opponent No.2 Bank be restrained from taking any further steps on the basis of the said notice.

b) That this Hon'ble Court be pleased to hold and declare that the opponent No.2 Bank has no right to resort to the private properties, which were given by way of additional securities as per the document or mortgage, by way of deposit of title deeds and this Hon'ble Court be further pleased to hold and declare that the opponent No.2 Bank having lost the primary security of hypothecation and pledged goods and machineries and having not executed the decree dated 30.06.2003 obtained by the opponent No.2 Bank in the Lawad Suit No.1886 of 2002, the opponent No.2 Bank has lost all the rights, the decree against the applicant is not executable and therefore, under the decree or under the Securitization Act no steps can be taken against the applicant.

c) This Hon'ble Court be pleased to direct the opponent No.2 Bank to lodge the claim against the Official Liquidator to refund the decretal dues from the auction money realized by way of sale of hypothecated and pledged goods."

2. Heard learned advocate Mr.M.B.Gandhi with learned advocate Mr.Chinmay Gandhi for the applicant, learned advocate Ms.Amee Yajnik for respondent No.1-Official Liquidator and learned advocate Mr.Nandish Chudgar for Nanavati Associates for respondent No.2.

3. Learned advocate Mr.Gandhi submitted that M/s. Minal Oil & Agro Industries Private Limited (now in liquidation) had taken a loan of Rs.250 Lacs from the respondent No.2-Bank. At that time, the deed of hypothecation as well as of pledge was jointly executed, in which, the goods and stocks were hypothecated and machinery of salt plant were pledged and possession of the same was given to respondent No.2. Respondent No.2 wanted further security, therefore applicant created mortgage by way of deposit of title deeds and all the original sale deeds of land situated at village Nandasan, Taluka:Kadi, District:Mehsana bearing Survey Nos.167/1, 170, 171, 340/1, 340/2, 340/3, 169/1, 167/2, 168/2, 168/1 and 169/2 of different measurements were mortgaged by way of deposit of title deeds. Similarly, another property being office premises situated at 8th Floor of the Popular House, Ashram Road, Ahmedabad, was also mortgaged to the respondent No.2. Learned advocate Mr.Gandhi submitted that all the aforesaid properties are the private properties of the applicant.

4. At this stage, learned advocate Mr.Gandhi would

contend that the respondent No.2, to which, hypothecation and pledge was created, did not exercise the right under the law. Learned advocate pointed out that the respondent No.2 filed Lavad Suit before the Board of Nominees against the applicant and others and Board of Nominees passed an award in favour of the respondent No.2. Thus, the respondent No.2 had a decree in its hands, but respondent No.2 has not exercised the rights under the law and taken over the possession of the hypothecated goods. Similarly, salt plant machineries for an amount of Rs.284 lacs which was pledged with the respondent No.2 and possession was actually handed over as per the document and therefore the Official Liquidator was not having authority to take the possession of the machineries from the respondent No.2. In spite of that, the possession of the said machineries was taken by the Official Liquidator and the respondent No.2 did not take any steps. The Official Liquidator sold such goods, stocks and machineries, in spite of that, respondent No.2 did not take any steps. In 2007, letter was written by respondent No.2 to the Official Liquidator and called upon the Official Liquidator to

pay off the dues from the amount realized from the sale of hypothecated and pledged goods. Thereafter, no steps were taken by respondent No.2. Thus, learned advocate Mr.Gandhi would submit that the respondent No.2 has waived the right on the hypothecated and pledged goods and once primary security is lost, the respondent No.2 cannot fall upon other securities of the third party as a guarantor because when additional security is given, it is the duty of the respondent No.2 to see that the primary security is maintained, retained and kept intact for the recovery of the dues. He further submitted that if that security is sold and from the amount realized, if the debt is not fully paid off, then in that case, the Bank can fall upon the additional security as per agreement. However, in the present case, respondent No.2 has lost the primary security and therefore, now they have no right to claim anything from the applicant.

5. Learned advocate Mr.Gandhi thereafter submitted that the respondent No.2 remained silent and did not take steps for getting its dues either by exercising the right to get the possession of the hypothecated goods and to retain the possession of the pledged

goods or even thereafter, no claim is lodged by the respondent No.2 with the Official Liquidator for the amount being realized therefrom. Thus, the respondent No.2 has remained silent for eight years. In the meantime, the applicant has filed another application being Company Application No.260 of 2010, where, the applicant has sought a declaration that the primary security is lost and therefore respondent No.2 is not entitled to recover any dues from the applicant. Thus, after filing of the said application by the applicant, the respondent No.2 has thereafter issued notice under Section 13(2) of Securitization and Reconstruction on Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act' for short) on 12.02.2011. By way of the said notice, the respondent No.2 has proposed that under Section 13(4) of the SARFAESI Act, the respondent No.2 wants to take over the possession of the private properties of the applicant for the realization of the dues of respondent No.2. He contended that this is nothing but an afterthought.

6. Learned advocate Mr.Gandhi thereafter contended that the applicant has given the reply to the notice

issued by the respondent No.2. However, he submitted that present application is filed on the ground that the respondent No.2 will certainly initiate action under Section 13(4) of the SARFAESI Act. He therefore submitted that reliefs prayed for in this application be granted and notice issued by the respondent No.2 under the SARFAESI Act be quashed and set aside.

7. On the other hand, learned advocate Mr.Chudgar appearing for the respondent No.2 has taken the preliminary objection with regard to the maintainability of the present application before the Company Court. Learned advocate Mr.Chudgar has requested this Court to decide the said preliminary objection and refused to argue on merits of the case. He contended that the applicant has challenged the notice issued by the respondent No.2 under the provisions of SARFAESI Act and this application has been filed by the applicant with a view to delay the recovery process / action initiated by the respondent No.2 to recover the dues of the applicant. He further contended that this Court has no jurisdiction to entertain and adjudicate any dispute which is outside the scope of the Companies Act of 1956. Notice is

issued under Section 13(2) of the SARFAESI Act, which is purely a matter between the Bank and the guarantor in the present case, which cannot be adjudicated by the Company Court. Learned advocate thereafter referred provision contained in Section 34 and 17 of the SARFAESI Act and submitted that Civil Court has no jurisdiction to entertain any suit or proceedings in respect of any matter which Debts Recovery Tribunal or Appellate Tribunal is empowered to determine.

8. Learned advocate Mr.Chudgar thereafter placed reliance upon decision rendered by the Hon'ble Supreme Court in the case of Mardia Chemicals v. Union of India, reported in 2004 (4) SCC 311 and submitted that remedy would be available to the borrower/guarantor as contemplated under Section 17 of the SARFAESI Act.

9. Learned advocate Mr.Chudgar thereafter contended that the respondent No.2-Bank is laying its hands on private properties of the applicant, which are not the properties of the company in liquidation. Thus, when it is a case of the applicant himself that proceedings are initiated by respondent No.2 with regard to the private property of the applicant, which is not the

property of the company in liquidation, the present application before the Company Court is not maintainable and it is misconceived. He therefore submitted that present application be dismissed only on this ground.

10. Learned advocate Ms.Amee Yajnik appearing for the Official Liquidator has also supported the submissions canvassed on behalf of respondent No.2.

11. I have considered the submissions canvassed on on behalf of learned advocates for the parties. I have also gone through the material produced on record and other relevant materials referred and relied upon by the learned advocates.

12. From the record, it has emerged that the company in liquidation had taken a loan of Rs.250 lacs from respondent No.2. At that time, deed of hypothecation as well as of pledge was executed. However, the respondent No.2 wanted further security and therefore the applicant had created mortgage by way of deposit of title deeds and different parcels of lands situated from Village:Nandasan, Taluka:Kadi, District:Mehsana were mortgaged by way of deposit of title deed. It is

the case of the applicant himself that the said properties are private properties of the applicant and he stood as guarantor. The respondent No.2 has issued the notice under Section 13(2) of SARFAESI Act, which is challenged by the applicant in the present proceedings. Thus, the respondent No.2 has taken preliminary objection, which is required to be considered first in the present application.

13. Section 13(2) of the SARFAESI Act provides as under:

13(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under subsection (4).

14. Section 13(4) of the SARFAESI Act provides as under:

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

15. Section 17 of the SARFAESI Act provides as under:

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 authorised officer under this Chapter, may make an application alongwith 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 measure 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 this sub-section.

16. Section 34 of the SARFAESI Act provides as under:

34. Civil Court not to have jurisdiction

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).

17. From the aforesaid provisions of SARFAESI Act, it is clear that the respondent No.2 has initiated action under the SARFAESI Act by issuing notice under Section 13(2) of the said Act, if the possession is taken under Section 13(4) of the SARFAESI Act, the applicant can approach before the Debts Recovery Tribunal by filing proceedings under Section 17 of the said Act. Section 34 of the Act provides that Civil Court is not having jurisdiction to entertain any proceedings if

the dispute is with regard to any matter which the Debts Recovery Tribunal or Appellate Tribunal is empowered to determine.

18. It is the case of the applicant that he has mortgaged his private properties with the respondent No.2. Said properties are not the properties of the company in liquidation as per the case of the applicant. I have dealt with the said aspect in Company Application No.164 of 2010 and held that the properties in question are the private properties of the applicant. Therefore, the Company Court is not having jurisdiction to entertain the dispute between the Bank and the guarantor in the facts of the present case. Thus, this Court is of the opinion that present application is not maintainable and is misconceived. The same is filed against the issuance of notice, for which, the reply is already filed by the applicant and therefore also, at the notice stage, the present application is not maintainable.

19. In view of the aforesaid facts and circumstances of the case, this Court has not gone into the submissions canvassed on behalf of learned advocate

for the applicant on merits. Learned advocate Mr.Chudgar has also not submitted on merits of the case.

20. Thus, this application is not considered on merits. Therefore, it is open for the applicant to agitate his grievances by filing appropriate proceedings before appropriate forum. As and when such proceedings are filed, it is open for the concerned Court/Forum/Tribunal to decide the same in accordance with law without being influenced by dismissal of this application. It is once again clarified that this Court has not gone into the merits of the case.

21. Thus, this application is accordingly dismissed.

(VIPUL M. PANCHOLI, J.)

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