

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CA-CWP-16-2017 (O&M) in

CWP-26545-2014

Date of decision:- 10.07.2017

M/s Cosmas Research Lab Ltd.

...Appellant

Versus

State Bank of India and others

...Respondents

CORAM: HON'BLE MR. JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present:- Mr. Anand Chhibbar, Senior Advocate,
with Mr. Nitin Thatai, Advocate,
and Mr. Gaurav Mankotia, Advocate,
for the appellant.

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S.J. VAZIFDAR, C.J. (ORAL)

The appellant has challenged the action of respondent No. 1 - State Bank of India under Sections 13(2) and 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short the 'SARFAESI Act') on the ground that respondent No. 1 had no jurisdiction to invoke the provisions of Section 13.

2. This contention is raised on the basis of Section 13(9) of the SARFAESI Act which reads as under:-

"13 Enforcement of Security Interest -

(9) Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall

be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than (sixty per cent) in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of section 529-A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the

workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any."

3. Mr. Chhibbar, learned senior counsel appearing on behalf of the appellant, states that respondent No. 1 advanced finances only to the extent of about 31% the balance having been advanced by respondent No. 3 - Punjab National Bank. The issue as to whether there is a bar to a bank invoking the provisions of Section 13 of the SARFAESI Act, if the extent of its share in the total loan accounts is less than 60% in value, has been decided by an order and judgement of a Division Bench of this Court dated 26.09.2014 in CWP-19666-2014 titled as *M/s MSD Industrial Enterprises Ltd. Vs Debts Recovery Appellate Tribunal and others*. The Division Bench held as under:-

"The sole argument raised by learned counsel for the petitioner is that the respondent-Corporation has only 12.78% shares in the total loan accounts, therefore, in terms of Section 13(9) of the SARFAESI Act, a creditor who has less than 'three-fourth' (now 'sixty per cent') of the shares of the secured creditors cannot be permitted to take recourse of the provisions of the Act.

We find such contention to be wholly untenable. Firstly, it is the pleaded case of the petitioner itself that the loan account of other two creditors stand settled. The respondent No.2 is now the sole secured creditor, thus it is a creditor to the extent of 100%, though at

one stage, it had only 12.78% shares.

Still further, a Division Bench of Delhi High Court in *Chemstar Organics India Limited v. Bank of Baroda and others*, 2012 (132) DRJ 815 examined the provisions of Section 13(9) of the SARFAESI Act. It has been held that it is a beneficial provision for the secured creditor and not for the debtor. Therefore, the borrower cannot take benefit of such lack of consent. The Court held to the following effect:-

"24. We have set out the salient facts in view of the multiplicity of proceedings which had been initiated. To our mind, the crucial question is the very object of introduction of the SARFAESI Act and as to how Section 13(9) of the said Act has to be read in that context. The purpose of enactment of SARFAESI Act was to enable the banks and financial institutions to realize long term assets, manage problems of liquidity, asset liability mis-match and improve recovery by exercising powers to take possession of the securities and realize proceeds through sale. This was to assist in reduction of nonperforming assets by adopting measures for recovery or reconstruction. Chapter III deals with enforcement of security interest and Section 13 forms a part of this Chapter. Any security interest in favour of secured creditors has, thus, been made enforceable without intervention of court or tribunal in accordance with the provisions of SARFAESI Act. If Section 13(9) is read in that context, it is obvious that this is a beneficial provision for the secured creditors and not the debtor. The

reason for the same is that there may be more than one secured creditor or joint financiers and one secured creditor should not be able to appropriate the proceeds of the secured assets or take a decision in that behalf without concurrence of the other secured creditors. The benchmark provided herein is of three-fourth value of the secured creditors. Thus, if this benchmark is met, a secured creditor exercises all rights conferred on him in pursuance to Section 13(4) of the said Act. This protects the interests of the other secured creditors as also gives weightage to their opinion. The only infirmity qua the action of BOB relied upon by the petitioner-company in the present case is the absence of consent beforehand from other secured creditor viz. GIIC so as to meet the benchmark of three-fourth in value of the secured creditors. It is, however, not in dispute that consent was accorded by GIIC. The provisions of Section 13(9) of the SARFAESI Act are not meant to be an instrument of defence by a borrower to avoid payment where ultimately three-fourth of the value of the secured creditors are at idem on the action proposed or taken. We have to also keep in mind that with regard to the initial notice of BOB qua the residential property of the promoters of the petitioner-company, GIIC had no interest. Qua the other assets, there was a pari passu charge of GIIC and BOB as is admitted by GIIC. It is obvious that the petitioner-company is using the absence of earlier consent of GIIC as a ruse to deny payment of liability to both the creditors."

The said view was approved by a Division Bench of this Court in CWP No.13920 of 2014 titled M/s Veetee Fine Foods Ltds. v.Punjab National Bank and others, decided on 18.09.2014.

Learned counsel for the petitioner referred to two judgments of Delhi High Court in W.P. (C) No.9557 of 2007 titled Asset Reconstruction Co. India P. Ltd. v. Shamken Spinners Ltd. & others, decided on 22.11.2010 and W.P.(C) No.8644 of 2009 titled Oman International Bank S.A.O.G. v. Appellate Authority for Industrial and Financial Reconstruction, decided on 05.05.2010. However, both the judgments pertain to the sale of assets by the secured creditor in terms of the provisions of SICA Act. The provisions of SARFAESI Act have been interpreted by Division Bench of Delhi High Court in Chemstar Organics India Ltd.'s case (supra) which has been followed by Division Bench judgment of this Court in M/s Veetee Fine Foods Ltd's case (supra).

In view thereof, we do not find any merit in the argument raised.

Consequently, the present writ petition is dismissed."

4. We cannot ignore this judgement on the ground that these are mere passing observations. The Division Bench has followed the judgement of a Division Bench of the Delhi High Court. It has also followed the judgement of a Division Bench of this Court. It is not open to us to take a contrary view.

5. The appeal is, therefore, dismissed.

6. It is, however, clarified that all other issues of fact as well as the financial implications are kept open including in proceedings under Section 17 of the SARFAESI Act, if resorted to.

(S.J. VAZIFDAR)
CHIEF JUSTICE

(HARINDER SINGH SIDHU)
JUDGE

10.07.2017

Amodh

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No