

Pegasus Assets Reconstruction P.Ltd vs M/S Haryana Concast Limited & Anr on 29 December, 2015

Equivalent citations: AIR 2016 SUPREME COURT 494, 2016 (4) SCC 47, 2016 ACD 384 (SC), 2016 (2) ADR 250, 2016 (2) AJR 329, (2016) 5 MAD LW 274, (2016) 2 WLC(SC)CVL 320, (2016) 1 KER LJ 324, (2016) 131 REVDEC 578, (2016) 159 ALLINDCAS 43 (SC), (2016) 1 CLR 544 (SC), (2016) 1 MAD LJ 569, (2017) 1 MAH LJ 1, (2017) 1 MPLJ 25, (2017) 1 PUN LR 114, (2016) 1 SCALE 1, (2016) 115 ALL LR 464, (2016) 1 BANKCAS 389, (2016) 1 ALL WC 854, 2016 (1) NIJ 746 SN, 2016 (3) KCCR SN 296 (SC)

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3646 OF 2011

Pegasus Assets Reconstruction P. Ltd.

....Appellant

Versus

M/s. Haryana Concast Limited & Anr.

...Respondents

With

Civil Appeal No. 14736 of 2015
(Arising out of SLP(C) No. 7074 of 2010)

Civil Appeal Nos.14737-14738 of 2015
(Arising out of SLP(C) Nos. 117-118 of 2011) and

Civil Appeal Nos. 9293-94 of 2014

J U D G M E N T

SHIVA KIRTI SINGH, J.

A common issue of law: Whether a Company Court, directly or through an Official Liquidator, can wield any control in respect of sale of a secured asset by a secured creditor in exercise of powers available to such creditor under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity 'the SARFAESI Act'), arises in all these matters which have been heard together and shall be governed by this common judgment.

In order to understand the central issue involved in each of the matters, it may be useful to notice that Civil Appeal No. 3646 of 2011 preferred by Pegasus Assets Reconstruction Private Limited (for brevity, 'Pegasus'), which has been heard as the lead matter, arises out of a Division Bench judgment of Punjab and Haryana High Court dated 15.12.2009 whereby the Division Bench upheld the judgment of Company Court and approved of certain fetters placed upon M/s. Pegasus Assets Reconstruction Pvt. Ltd., while allowing it to exercise its powers as a secured creditor under the SARFAESI Act and proceed with the sale of the secured assets. Since the judgment of Division Bench disallowed the appeal of Haryana State Infrastructure and Industrial Development Corporation (for brevity 'HSI IDC') against the order of Company Judge allowing Pegasus to stay outside the winding up proceeding of the respondent Haryana Concast Limited, HSI IDC is also before this Court through SLP (C) No. 7074 of 2010.

The secured asset in the form of approximately 36 acres of land of Haryana Concast Ltd. was subjected to auction by Pegasus in association and collaboration with the Official Liquidator as per order of the company judge and was ultimately sold for Rs.32 crores in favour of M/s. Venus Realcon Pvt. Ltd. One Vinod Rajaliwala challenged the orders of the company judge confirming sale in favour of M/s. Venus Realcon Pvt. Ltd. by preferring a company appeal and also through a public interest litigation (a writ petition). Both were dismissed by the Division Bench. Those orders have been challenged by Mr. Vinod Rajaliwala through Special Leave Petition (C) Nos.117-118 of 2011. The three matters indicated above thus relate to secured assets of the same company under Liquidation, M/s. Haryana Concast Limited.

The fourth matter, C.A. No. 9293-94 of 2014 preferred by Megnostar Telecommunications Private Limited (for brevity, 'Megnostar') arises out of a Division Bench Judgment of Delhi High Court dated 17.9.2012. By this order the Delhi High Court has differed with the views taken by the Punjab and Haryana High Court in the judgment assailed by Pegasus in Civil Appeal No.3646 of 2011. According to Delhi High Court, the company judge or the official liquidator cannot have any say in the sale of secured assets by the secured creditors under the SARFAESI Act. The Companies Act cannot be used to put any fetters on the sale by secured creditors because a secured creditor under Section 13 of the SARFAESI Act has been granted a right to enforce the security interest "without the intervention of the court or tribunal" in accordance with the provisions of the SARFAESI Act. It goes without saying that if the view taken by the Punjab and Haryana High Court in the matter of Pegasus is approved and the Civil Appeal No. 3646 of 2011 is dismissed, then the Delhi High Court's view will stand disapproved and Civil Appeal No. 9293-94 of 2014 will have to be allowed. In order to decide the issue indicated above, it is not necessary to go into factual details relating to either the case of Pegasus or to that of Megnostar. Only the broad features necessary for appreciation of rival submissions in respect of these matters have been taken note of.

M/s. Haryana Concast Ltd., respondent no.1 suffered a winding up order of the Company Judge of Punjab & Haryana High Court in 1999. The only secured creditor, the Bank of India obtained a recovery certificate against respondent no.1 from the Debt Recovery Tribunal, Chandigarh in 2002 for a sum of Rs.5.84 crores approx. with pendente lite and future interest @ 18% p.a. from the date of filing of the suit till realization. Although the High Court allowed the Official Liquidator to sell the assets of the company in May 2004 and the bank also submitted its claim before the Official Liquidator in July 2004 for Rs.10.58 crores approx. as dues upto 30th June 2004, the sale could not be effected for one reason or the other. Being a guarantor, the HSIIDC settled the liabilities of three banks by paying Rs.10.39 crores approx. and as a result acquired a charge only over the moveable assets, that is, raw materials of the company. Accordingly it was substituted/ subrogated in place of the three banks. As a registered securitization company, Pegasus entered into an assignment agreement with the sole secured creditor, Bank of India on 27.8.2008 and soon informed the Official Liquidator that it intends to remain outside the winding up process, to enforce its security as per the provisions of SARFAESI Act, subject to the rights of the erstwhile workmen of the company, respondent no.1 as per Section 529A of the Companies Act. Pegasus pursued its aforesaid stand by filing an application before the Company Judge for recalling an order dated March 20, 2008 wherein it had directed the Official Liquidator to undertake a fresh sale of the assets of the company. In this petition dated 22.09.2008, Pegasus also sought directions to the Official Liquidator to hand over the secured assets of the company in its favour. The Company Judge allowed Pegasus to proceed under the SARFAESI Act for enforcing its security by an order passed on March 20, 2009 but in view of orders passed earlier in the winding up proceedings the Company Judge laid down certain terms and conditions for permitting Pegasus to stay outside the winding up proceedings and bring about sale of secured assets under Section 13 of the SARFAESI Act read with Rules 8 and 9 of Security Interest Enforcement Rules, 2002 (hereinafter referred to as 'the Rules'). These conditions forming part of paragraph 19 of the judgment of the learned Company Judge are extracted hereinbelow because these have been objected to by Pegasus as fetters which the Company Judge could not have obtained and therefore Pegasus preferred Company Appeal No.28 of 2009 which has been dismissed by the order under appeal dated 15.12.2009. Para 19 is as follows :

“19. If any attempt to harmonize the provisions of the SARFAESI Act and the Companies Act could be made, in the context of orders for sale having already been made by the Company Court and the participation of the assignor of the applicant at several steps for the conduct of sale through the Company Court, it will be inexpedient unyoke the proceeding that were put through the O.L. While upholding the claim that the procedure laid down under the SARFAESI Act would enable the provisions of the Security Enforcement Rules to be applied for conduct and confirmation of the sale, the dispensation in this case would be

(a) to permit the applicant to stay outside the winding up proceedings and take action to bring to sale the secured assets under Section 13 of the SARFAESI Act read with Rules 8 and 9 of Security Interest Enforcement Rules, 2002.

(b) The applicant-Reconstruction Company shall keep all the steps taken under the SARFAESI Act and the relevant rules transparent and submit all the proposals for

sale to the O.L. and the details of valuation obtained for the conduct of the sale for the purpose of determining the used price.

(c) Sale shall be advertised with a specific clause that the winding up proceedings are pending before the Company Court, with details of case number and the Court of adjudication.

(d) The expenses already incurred for the conduct of the sale by O.L. shall be deducted from out of the sale proceeds before any appropriation or disbursement and deposited with O.L.

(e) The Reconstruction Company shall place before the Company Court the details of its claim and all expenses incurred before the Company Court before making any appropriation to himself and disbursed.

(f) The surplus proceeds over what is lawfully due to it shall be deposited to the credit of the Company (in liquidation) before the O.L.” The stand of the appellant, Pegasus is that the Division Bench erred in law in not appreciating that rights and liabilities of the appellant as an asset reconstruction company had to be governed by and within the four corners of the SARFAESI Act and not by or under the Companies Act. On a pointed query that it had accepted the order including the terms and conditions and finalized the sale of the secured asset in collaboration with the Official Liquidator, learned counsel for Pegasus fairly accepted that Pegasus was not against the sale of secured asset already concluded but the appeal is being pursued for getting the legal issue settled as a precedent for future, otherwise as an assets reconstruction company the appellant shall be facing similar fetters in case the secured assets happen to be of a company under winding up.

Learned counsels representing the company respondent no.1 which is represented by the Official Liquidator and learned counsel for respondent no.2 HSIIDC have advanced submissions to the contrary. According to them a winding up proceeding has to be supervised by the Official Liquidator as per orders of the Company Judge and the provisions of the Companies Act. The counsel for the company, respondent no.1 asserted that once the assets have come into the hands of the Official Liquidator, these have to be protected and governed by provisions of the Companies Act which are meant not only to serve the interest of secured creditor like Pegasus but also to take care of interest of the workmen and by ascertaining their dues which have highest priority and require protection as per Section 529A of the Companies Act as well as interest of the unsecured creditors. The stand of respondent no.2 is that once the bank had opted to participate in the winding up proceedings before the Company Judge, Pegasus should not have been permitted to take a contrary stand as it could have only stepped into the shoes of the bank. HSIIDC had also preferred a cross appeal bearing No. 23 of 2009 before the Division Bench against order of the Company Judge dated March 20, 2009. Before the Division Bench, it claimed a right to be associated with Pegasus in the process of sale of the secured assets of the company, from beginning to end. However, it is clear as a crystal that HSIIDC is neither a secured creditor of the company under winding up nor it has stepped into shoes

of any secured creditor.

C.A.Nos.9293-9294 of 2014 Megnostar is the company, now under liquidation, which mortgaged its property bearing Plot No.1297 admeasuring 502.33 Sq. Yds. situated at MIE, Bahadurgarh, Haryana along with structures, present and future, with respondent-bank through Memo of Deposit of Title Deeds dated 29.04.2008 for securing loans obtained from the bank. In December 2008 respondent-bank issued a notice under Section 13(2) of the SARFAESI Act upon Megnostar on account of persistent defaults in making timely payment of amounts due to the bank. On 05.02.2009 Megnostar requested for release of the secured assets to enable it to sell the same for making part payment of dues of the bank. A Company Petition No.359 of 2009 was filed by an unsecured creditor M/s. Magicon Impex Pvt. Ltd. for winding up of Megnostar but the bank was not made aware of this proceeding till visit of some officials from the office of the Official Liquidator on 28.08.2011. The bank obtained directions from the District Magistrate concerned under Section 14(1) of the SARFAESI Act, took over possession of the secured asset on 16.06.2010 and a notice to that effect was published in various newspapers on 18.06.2010. O.A. No.38 of 2009 filed by the bank against Megnostar was allowed by DRT-II, Delhi on 13.07.2010 holding the company liable to pay to the bank Rs.12.95 crores approx. with pendente lite and future interest @ 15.5.% p.a. with quarterly interests from date of filing of O.A. till date of realization. To realize its dues, the respondent-bank published auction- cum-sale notice of the secured assets on 23.07.2011 in exercise of its rights under Section 13(4) of the SARFAESI Act. In the public auction held on 24.08.2011 respondent, M/s. Mohan Tractors (P) Ltd. offered the highest bid of Rs.80 lacs. As a successful auction purchaser, it was handed over the possession and title deed of the mortgaged property. On 28.08.2011 this property at Bahadurgarh was visited by 4-5 persons claiming to be from the office of the Official Liquidator. They had come to take possession of the property on the basis of an order dated 03.08.2011 in Company Petition No.359 of 2009 whereby the Company Judge had appointed the Official Liquidator as a provisional liquidator with direction to take charge of all assets of the company Megnostar. The personnel from the office of the Official Liquidator were apprised of developments and sale under the SARFAESI Act but with the aid of police personnel they took forcible possession of the mortgaged property on August 30, 2011. In September 2011 the bank filed C.A.No.1948 of 2011 in C.P. No.359 of 2009 for a direction upon the Official Liquidator to unseal the property and hand over its possession to M/s. Mohan Tractors. To similar effect was C.A.No.1947 of 2011 filed by M/s. Mohan Tractors. The Company Judge appointed a valuer who submitted a Valuation Report on 14.01.2012. As per the report the land was valued at Rs.77.44 lacs approx. and the construction existing on the land was valued at Rs.40.65 lacs, the total value thus amounted to Rs.1.18 crores approx. The learned Company Judge dismissed C.A. Nos.1947 and 1948 of 2011 by order dated 26.4.2012. Against that, the bank respondent no.2 preferred Company Appeal No.58 of 2012 before the Division Bench of High Court of Delhi. A separate appeal bearing no.62 of 2012 was filed by M/s. Mohan Tractors. Those appeals were allowed by the Division Bench as per order under appeal dated 17.09.2012.

The case of Mr. Vinod Rajaliwala requires separate consideration but only after an adjudication on the main issue indicated earlier and after deciding which of the two views is in accordance with law, of Delhi High Court in the case of Megnostar or of Punjab & Haryana High Court in the case of Pegasus. As the case of Pegasus has been argued as a lead matter, we propose to first consider the

views of Punjab & Haryana High Court. After noticing the Statement of Objects & Reasons for enactment of the SARFAESI Act as discussed by the Company Judge, the Division Bench took note of detailed arguments advanced on behalf of Pegasus which is to the following effect. Section 5 of the SARFAESI Act provides for acquisition of rights or interest in financial assets of any bank or financial institution by any securitization company or reconstruction company, inter alia, by entering into an agreement and this Section begins with a non obstante clause. Section 9 enumerates various measures which can be adopted by a securitization company or reconstruction company, including the sale or lease of a part or whole of the business of the borrower and this Section also begins with a non obstante clause. Chapter III consists of 7 sections providing for enforcement of security interest created in favour of any secured creditor. Section 13, which also begins with a non obstante clause of a limited nature for overcoming the hurdles of Section 69 or Section 69A of the Transfer of Property Act, 1882, creates a right in the secured creditor to enforce any security interest in its favour without the intervention of a court or tribunal, in accordance with the provisions of this Act. The detailed scheme for enforcement of the secured assets under various sub-sections and provisos in Section 13 were pointed out along with Section 35 and 37 in support of a submission that the provisions are not only a complete code for enforcement of secured asset by a secured creditor but in case of conflict with any other statute, the provisions of the SARFAESI Act would prevail. Some other statutes enumerated in Section 37 can play a supplemental role along with any other law for the time being in force including the Companies Act but obviously only till they are consistent with provisions of the SARFAESI Act. The relevant case laws were also cited and considered. The rival contention and case laws were noted for framing the main question of law in the following words : -

“Whether the Company Court enjoys jurisdiction to issue supervisory direction to a securitization company/ secured creditor in connection with a company in liquidation or under winding up in the face of Section 13 of the SARFAESI Act or securitization company opting to stand outside the winding up is absolutely free to utilise the sale proceeds of assets of the company in liquidation?” The Division Bench of Punjab & Haryana High Court considered the case of *Mardia Chemicals v. Union of India* (2004) 4 SCC 311; *Rajasthan State Financial Corporation v. Official Liquidator* AIR 2006 SC 755 = (2005) 8 SCC 190; *Bakemans Industries v. New Cawnpore* (2008) 144 Company Cases 71 (SC); *Ram Kripal Singh v. State of Uttar Pradesh* (2007) 11 SCC 22; and *Central Bank of India v. State of Kerala* (2009) 4 SCC 94 for coming to a conclusion in paragraph 34 that the Company Court enjoys the jurisdiction to issue directions to a securitization company or a secured creditor who has opted to stay outside the winding up and invoke its power under Section 13 of the SARFAESI Act.

We are unable to subscribe to the aforesaid views. On the other hand, after going through the judgment of Delhi High Court in the case of *Megnostar* we are persuaded to approve its views because of various reasons some of which we shall enumerate and explain hereinafter. The relevant case laws discussed in the two conflicting judgments are virtually the same but the error committed by the Division Bench in the case of *Pegasus* lies mainly in coming to a conclusion that there is no

inconsistency between the Companies Act and the SARFAESI Act if the Company Judge issues supervisory directions to achieve the object of Section 529A which finds a clear mention in one of the provisos of Section 13(9) of the SARFAESI Act. This view is unacceptable for the reasons detailed by Delhi High Court in the case of Megnostar. Those reasons commend themselves to us also. We are particularly in agreement with the view in paragraph 26 of the judgment which is as follows :

“26. 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.” However, there are certain areas covered by the Delhi High Court which need further elucidation and clarification. For that it will be relevant and necessary to first go through the ambit, scope and peculiarities of Statutes like the State Financial Corporations Act, 1951 (for brevity the ‘SFC Act’) and The Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for brevity the ‘RDB Act’) in contrast with the SARFAESI Act and some case laws which, in our view, are of special significance for better understanding of the issues.

All the aforesaid Acts are Central legislations enacted for specific purposes. The SFC Act enables the State Governments to establish a Financial Corporation for a State on the lines of Central Industrial Finance Corporation set up under Act XV of 1948 to provide medium and long term credit to industrial undertakings, somewhat outside the normal lending activities of Commercial Banks. This Act, inter-alia, vests special privileges in the State Financial Corporations in the matter of enforcement of its claims against borrowers, through sections such as 29, 30, 31 and

32. Coercive steps including sale of secured property is, vide Section 31 required to be taken by moving appropriate application before the concerned District Judge as per procedure prescribed under Section 32. Section 46B does bestow overriding status on this Act over the then existing law but not over the Companies Act of 1956 which is a later law. Hence, in several judgments it has rightly been held that if the defaulter is a company under winding up, a State Financial Corporation can at best be a secured creditor who may opt to remain out of winding up but nonetheless it will be subject to orders passed in accordance with law under the Companies Act.

The RDB Act is of 1993, i.e. later to the Companies Act. Its avowed object is to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto. This Act creates a special machinery for speedy recovery of dues of banks and financial institutions which, by an amendment of 2004 now include a registered securitization company or reconstruction company envisaged under the SARFAESI Act. Section 18 bars the jurisdiction of ordinary courts or authority in respect of matters falling within the jurisdiction of Tribunal as specified in Section 17. An

Appellate Tribunal is provided under Section 20. The power of the tribunal extends to determining the debt due as well as its realization. Section 34 confers over-riding effect upon this Act over any other law in force.

In contrast, the SARFAESI Act was enacted in 2002 to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. Inter-alia, one of the main objects of this Act is to clothe the banks and financial institutions in India with power to take possession of securities and sell them. All its significant provisions have been noted in detail in *Mardia Chemicals* in which vires of this Act was examined and upheld. A reading of Sections 9 and 13 of the SARFAESI Act leaves no manner of doubt that for enforcement of its security interest, a secured creditor has been not only vested with powers to do so without the intervention of the court or tribunal but detailed procedure has also been prescribed to take care of various eventualities such as when the borrower company is under liquidation for which proviso to sub-section (9) of Section 13 contains clear mandate keeping in view the provisions of Section 529 and 529A of the Companies Act, 1956. Since significant amendments were introduced in Section 529 while inserting Section 529A through Amendment Act 35 of 1985, effective from 24.5.1985 and with the aid of a non obstante clause in sub-section (1) of Section 529A workmen's dues were given preference over other dues and made to stand *pari passu* with dues of the secured creditors, in case of apparent conflict, this Court through various judgments has upheld the proceedings under the RDB Act as it happens to be a later Act with overriding effect over other laws. The interest of the workmen in respect of dues payable to them as per Section 529 and 529A of the Companies Act has been protected by permitting, wherever necessary, association of the Official Liquidator with the proceedings before the Debts Recovery Tribunal under the RDB Act. In our considered judgment, the same view is required to be taken in context of SARFAESI Act also, for the additional reason that Section 13 requires notice to the borrower at various stages which in the case of a company under winding up being a borrower would mean requirement of notice to the Official Liquidator. The Security Interest (Enforcement) Rules, 2002 (for brevity, 'the Rules') framed under the provisions of SARFAESI Act also require notice upon the borrower or his agent at different stages. For sale of immovable secured assets, as per Rule 8, the authorized officer can take possession by delivering a Possession Notice to the borrower and by affixing Possession Notice on the outer door or at some conspicuous place of the property. Before the sale also, the authorized officer is required to serve to the borrower a notice of 30 days. Thus the Rules also ensure that the Official Liquidator is in knowledge of the proceedings under the SARFAESI Act in case the borrower happens to be a company under winding up. As a borrower, the Official Liquidator has ample opportunity to get the details of the workers dues as ascertained under the Companies Act, placed before the authorized officer and seek proper distribution of the amount realised from the sale of secured assets in accordance with various provisos under sub-section (9) of Section 13 of the SARFAESI Act.

The above discussion supports the view taken by Delhi High Court that no order is required by the Company Judge for association of the Official Liquidator in order to protect the interest of workers and to realize their dues. Sufficient provisions have been made for this purpose under the SARFAESI Act and the Rules framed thereunder.

In the event, in the capacity of a borrower the Official Liquidator is not satisfied with the decisions or steps taken by the secured creditor or the authorized officer, at appropriate stage it has sufficient opportunity to avail right of appeal under Section 17 of the SARFAESI Act before the Debts Recovery Tribunal. There is a right of further appeal under Section 18 before the Appellate Tribunal. On the other hand, if the view taken by Punjab & Haryana High Court in Pegasus is accepted, there shall be a conflict of rights and interest of the secured creditor who have the right and liberty to realize their secured interest in accordance with the provisions of the SARFAESI Act on one hand, and the statutory rights and liability of the Official Liquidator acting under the orders of the Company Judge as per provisions of the Companies Act, on the other. The appellate fora shall also differ, leading to a situation of uncertainty and conflict between the two Acts. In such a scenario, we respectfully agree with the Delhi view and disapprove that of the Punjab & Haryana High Court. Coming to the case laws, on behalf of Megnostar, Delhi view was assailed by placing reliance upon Rajasthan State Financial Corporation. In this case decided by three Judges, this Court examined the grievance of Rajasthan State Financial Corporation in the context of conflict between the SFC Act and the Companies Act. After taking note of various earlier judgments of this Court in the case of Allahabad Bank v. Canara Bank (2000) 4 SCC 406; International Coach Builders Ltd. v. Karnataka State Financial Corporation (2003) 10 SCC 482; Industrial Credit and Investment Corporation of India Ltd. v. Srinivas Agencies (1996) 4 SCC 165; and A.P. State Financial Corporation v. Official Liquidator (2000) 7 SCC 291, it was held in para 16 that a financial corporation has the right to proceed under Section 29 of the SFC Act against a debtor, if it is a company, only so long as there is no order of winding up. When the debtor is a company in winding up, the provisions of Sections 529 and 529A of the Companies Act would affect the rights of financial corporations because of a “*pari passu*” charge in favour of the workmen. In respect of such dues of the workmen the Official Liquidator has to be accepted as their representative. In the context of RDB Act, reliance was placed upon another judgment of this Court by three Judges in the case of Bank of Maharashtra v. Pandurang Keshav Gorwardkar (2013) 7 SCC 754 wherein this Court held that the Debts Recovery Tribunal is not empowered to adjudicate/ determine dues of workmen of debtor-company. Once the company is in winding up workmen’s dues can be determined only by the liquidator under supervision of Company Court and by no other authority. In para 53, while considering Rajasthan State Financial Corporation decided by three Judges’ Bench it was noticed that once a winding up proceeding has commenced, the distribution of the proceeds of the sale of the assets at the instance of the banks or financial institutions coming under the RDB Act or SFC Act can only be with the association of the Official Liquidator and under the supervision of the Company Court. The reason for such a view was recognized to lie in Section 529A of the Companies Act which governs the distribution of assets as provided therein. But it was also noted that since there was a conflict as to who would be competent to sell the assets, it was held that for this purpose the DRT would be competent because the RDB Act of 1993 being a later and special law shall prevail over the Companies Act which is a general law.

Reliance was also placed upon this Court’s judgment in Employees Provident Fund Commissioner v. Official Liquidator (2011) 10 SCC 727. This case had arisen in the context of dues payable by an employer under Section 11 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and the question was whether in granting priority, such dues would be subject to Section 529A of the Companies Act. The answer was in the affirmative, i.e., the Companies Act would, in this matter

hold its field as there is no situation of conflict.

On behalf of respondent Bank, Kotak Mahindra as well as Respondent No. 2, auction purchaser, the judgment in the case of Rajasthan State Financial Corporation (supra) was distinguished by placing reliance upon factual and legal situation prevailing in that case as noted in Paragraph 2 of the judgment. It was pointed out that Section 32 (10) of the SFC Act contains ample clarification that if liquidation proceedings have commenced in respect of the borrower before an application is made under sub-section (1) of Section 31, the financial corporation will not get any preference over the other creditors unless it is conferred on it by any other law. In that case no proceeding had been initiated under the SFC Act and all developments had taken place in the liquidation proceeding. Rajasthan State Financial Corporation was therefore unable to take any advantage of provisions under SFC Act. At the end of paragraph 2, this Court rightly held that “a mere right to take advantage of any enactment without any act done towards availing of that right cannot be deemed a right accrued.” Since we have held earlier in favour of views of Delhi High Court, it is not necessary to burden this judgment with the case laws which support that view and have been noted by the High Court. We are in agreement with the submissions advanced on behalf of respondent Kotak Mahindra Bank as well as respondent No.2 that there is no lacuna or ambiguity in the SARFAESI Act to warrant reading something more into it. For the purpose it has been enacted, it is a complete code and the earlier judgments rendered in the context of SFC Act or RDB Act vis-à-vis the Companies Act, cannot be held applicable on all force to the SARFAESI Act. There is nothing lacking in the Act so as to borrow anything from the Companies Act till the stage the secured assets are sold by the secured creditors in accordance with the provisions in the SARFAESI Act and the Rules. At the post sale stage, the rights of the persons or parties having any stake in the sale proceeds are also taken care of by sub-section (9) of Section 13 and its five provisos (not numbered). It is significant that as per sub-section (9) a sort of consensus is required amongst the secured creditors, if they are more than one, for the exercise of rights available under sub-section (4). If borrower is a company in liquidation, the sale proceeds have to be distributed in accordance with the provisions of Section 529A of the Companies Act even where the company is being wound up after coming into force of the SARFAESI Act, if the secured creditor of such company opts to stand out of the winding up proceedings, it is entitled to retain the sale proceeds of its secured assets after depositing the workmen’s dues with the liquidator in accordance with the provisions of Section 529A of the Company Act. The third proviso is also meant to work out the provisions of Section 529A of the Companies Act, in case the workmen’s dues cannot be ascertained, by relying upon communication of estimate of such dues by the liquidator to the secured creditor, who has to deposit the amount of such estimated dues with the liquidator and then it can retain the sale proceeds of the secured assets. The other two provisos also are in aid of the liquidator to discharge his duties and obligations arising under Section 529A of the Companies Act. Thus, it is evident that the required provisions of the Companies Act have been incorporated in the SARFAESI Act for harmonizing this Act with the Companies Act in respect of dues of workmen and their protection under Section 529A of the Companies Act. In view of such exercise already done by the legislature, there is no plausible reason as to take recourse to any provisions of the Companies Act and permit interference in the proceedings under the SARFAESI Act either by the Company Judge or the liquidator. As noted earlier, the Official Liquidator as a representative of the borrower company under winding up has to be associated, not for supplying any omission in the SARFAESI Act but because of express

provisions therein as well as in the Rules. Hence the exercise of harmonizing that this Court had to undertake in the context of SFC Act or the RDB Act is no longer warranted in respect of SARFAESI Act vis-à-vis the Companies Act.

The aforesaid view commends itself to us also because of clear intention of the Parliament expressed in Section 13 of the SARFAESI Act that a secured creditor has the right to enforce its security interest without the intervention of the court or tribunal. At the same time, this Act takes care that in case of grievance, the borrower, which in the case of a company under liquidation would mean the liquidator, will have the right of seeking redressal under Sections 17 and 18 of the SARFAESI Act. On account of the above discussions, the Division Bench judgment of the Punjab and Haryana High Court under challenge by Pegasus fails to meet our approval and is therefore, set aside only for the purpose of clarifying the law. Since the sale already made has not been assailed by Pegasus, therefore that issue will abide by the views that we shall indicate hereinafter in respect of SLP(C) Nos. 117-118 of 2011 preferred by Mr. Vinod Rajaliwala.

We grant leave in SLP(C) No.7074 of 2010 preferred by HSIIDC but only to dismiss this case as we have found the grievance of Pegasus to be justified; it was entitled not only to stay outside the winding up proceeding in view of provisions of SARFAESI Act which is a special and later Act but was also entitled to exercise its rights without any fetters that were erroneously placed upon it by the company Judge and were approved also by the Division Bench. Hence, the grievance of the HSIIDC that Pegasus should not have been permitted to stay outside the winding up proceeding is found meritless. Consequently its appeal has to be dismissed.

As we have approved the judgment of the Division Bench of Delhi High Court in the case of Megnostar, the appeals preferred against the judgment in Civil Appeal Nos. 9293-94 of 2014 are hereby dismissed. In the facts of the case there shall be no order as to costs.

With respect to the case of Vinod Rajaliwala, it has been indicated earlier that approximately 36 acres of land of Haryana Concast Limited was put to auction and sale by Pegasus in association with official liquidator and was ultimately sold for Rs.32 crores in favour of M/s. Venus Realcon Private Limited. Vinod Rajaliwala challenged the orders of the company Judge confirming the sale by preferring a company appeal and also through a public interest litigation (a writ petition). Both were dismissed by the Division Bench of Punjab and Haryana High Court by orders passed on 23.9.2010. These orders in company appeal No. 10/2010 and PIL being CWP No.8422 of 2010 are under challenge at the instance of Mr. Rajaliwala through special leave petition (C) Nos. 117-118 of 2011. Since the larger issue arising out of the conflicting judgments of Punjab and Haryana High Court and Delhi High Court has already been addressed by us, the case of Mr. Rajaliwala requires adjudication, mostly on facts as to whether the sale confirmed by the Company Judge and approved by the Division Bench in favour of M/s. Venus Realcon requires any interference. It is not at all necessary to go into the facts which preceded the sale in favour of M/s Venus Realcon for Rs.32 crores which till date stands confirmed. It is against confirmation of sale that Mr. Rajaliwala has preferred appeal as well as a PIL on the ground that the consideration money does not reflect the correct value of the secured assets, i.e., the land sold to M/s. Venus Realcon. In order to substantiate this claim, Mr. Rajaliwala was granted an opportunity by the Division Bench to find out a higher bid.

One M/s. ACHASTES Promoters Private Limited through an application in Company Appeal No. 10/2010 claimed to offer a bid of Rs.33 crores but later withdrew the same. Thereafter, another buyer made an offer of Rs.37 crores but tendered a meagre amount of Rs.1 crore only before the Division Bench. On these facts the Division Bench dismissed company appeal on 23.9.2010. As a consequence, the PIL was also dismissed on the same date. In this Court, the petitioner claimed that the property was worth hundred of crores but ultimately petitioner persuaded another entity M/s. Himalayan Infra Projects Private Limited to offer a higher bid. This company was allowed to intervene and be impleaded, and it deposited 10 crores in January, 2011 and Rs. 40 crores in April, 2011. That money is lying in deposit in this Court.

The argument on behalf of Mr. Rajaliwala and the intervener Himalayan Infra Projects Private Limited is that this Court should take a practical view and allow the offer of Rs.50 crores in comparison to Rs.32 crores deposited by the auction purchaser. In reply, on behalf of Venus Realcon- respondent No. 3, it was pointed out that Mr. Rajaliwala is himself a property dealer and a PIL at his instance, in this matter, does not deserve any consideration for lack of good faith, in view of Judgment in the case of Arun Kumar Agrawal vs. Union of India, 2014 (2) SCC 609. It was pointed out from materials on record that the valuation of property has been changing from 2002 when it was estimated to be Rs.10.13 crores. In January 2010 its market value was around Rs.24-25 crores and the distress value was Rs.18-20 crores approximately as per two different valuation reports. The valuation of Rs.75 crores approximately in 2008 was unrealistic, solely on the basis of oral communication from the Collector said to be based upon valuation for commercial plot and not for an industrial plot. It is pointed out that one bid in 2005 by M/s. Radha Raman Builders and Developers Private Limited for Rs.29 crores approximately for a larger plot than the actual land, could not materialize. The first offer by M/s. Venus Realcon on 9.4.2010 was Rs.26 crores which on negotiation was raised to Rs.26.50 crores. Subsequently on allegations made by Mr. Rajaliwala the Company Judge on 13.5.2010 held an open bid in Court, wherein M/s. Venus Realcon raised its bid to Rs.32 crores. The Court then ordered for fresh advertisement pursuant to which no bidder, including Mr. Rajaliwala offered more than Rs.32 crores. Hence the Company Court confirmed the sale in favour of M/s. Venus Realcon for Rs.32 crores but it was made subject to Special Leave Petitions filed by Pegasus and HSIIDC.

On considering the submissions of parties, we find that the sale confirmed in favour of M/s. Venus Realcon for Rs.32 crores does not require any interference particularly at the instance of Petitioner-Vinod Rajaliwala. There was no illegality or irregularity established against the conduct of auction and once it is found that the offer of Rs.32 crores was a fair offer in a competitive bid conducted fairly and the offer has been accepted and the sale confirmed, it would not be proper for this court to undermine the value of such auction sale conducted not only by the secured creditor but also by the Official Liquidator who was permitted to be associated with the whole process of finding out of valuation as well as the conduct of sale. M/s. Venus Realcon has rightly placed reliance upon the judgments of this court in the case of Valji Khimji & Co. vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. 2008(9) SCC 299 and Vedica Procon Private Limited vs. Balleshwar Greens P. Ltd., 2015(8) SCALE 713. In Valji Khimji, the law was enunciated in Paragraph 28 in the following words:

“If it is held that every confirmed sale can be set aside the result would be that no auction-sale will ever be complete because always somebody can come after the auction or its confirmation offering a higher amount. It could have been a different matter if the auction had been held without adequate publicity in well-known newspapers having wide circulation, but where the auction-sale was done after wide publicity, then setting aside the sale after its confirmation will create huge problems. When an auction- sale is advertised in well-known newspapers having wide circulation, all eligible persons can come and bid for the same, and they are themselves to be blamed if they do not come forward to bid at the time of the auction. They cannot ordinarily later on be allowed after the bidding (or confirmation) is over to offer a higher price. Of course, the situation may be different if an auction-sale is finalized, say for Rs.1 crore, and subsequently somebody turns up offering Rs.10 crores. In this situation it is possible to infer that there was some fraud because if somebody subsequently offers Rs.10 crores, then an inference can be drawn that an attempt had been made to acquire that property/asset at a grossly inadequate price. This situation itself may indicate fraud or some collusion. However, if the price offered after the auction is over which is only a little over the auction price, that cannot by itself suggest that any fraud has been done.” In Vedica Procon’s case (supra) the aforesaid view was noticed and after considering many judgments in Paragraph 39, the Court approved the view taken in Navalkha and Sons vs. Sri Ramanya Das & Ors., 1969 (3) SCC 537 that there is a discretion in the Company Court either to accept or reject the highest bid before an order of confirmation of sale is made. However, once the Company Court is satisfied that the price is adequate, the subsequent higher offer cannot be a ground for refusing confirmation. The price of immoveable property keeps on varying depending upon the market conditions and availability of a buyer. Such fluctuations may attract fresh higher offers but normally such offers cannot be made the basis for reopening the confirmed sale which was otherwise valid. In the present case, we are satisfied that the sale made in favour of M/s. Venus Realcon does not require any interference. There is no good reason why the full price paid by Venus Realcon should be ordered to be refunded with interest etc. and possession which was delivered to Venus Realcon at the time of sale should be disturbed after passage of so much time. In such circumstances, while granting leave in SLP(C) Nos.117-118, the consequent Civil Appeals are hereby dismissed but without any order as to costs. The money deposited in this case by the intervener M/s. Himalayan Infra Projects Private Limited should be refunded to it forthwith along with interest accrued thereupon.

The views expressed and the orders passed hereinabove may once again be recapitulated as follows :- (1) Civil Appeal No. 3646 of 2011 is allowed only for declaration of law without interfering with the sale of the secured assets which has not been challenged by Pegasus. (2) Civil Appeal No.-----/2015 (Arising out of SLP(C) No. 7074 of 2010) is dismissed. (3) Civil Appeal Nos. -----/2015 (Arising out of SLP(C) Nos. 117-118 of 2011) are dismissed. The amount of Rs.50 crores deposited by the intervener M/s. Himalayan Infra Projects Private Limited

shall be refunded to it forthwith alongwith interest accrued thereupon. (4) Civil Appeal Nos.

9293-94 of 2014 are dismissed. The judgment and order of the Delhi High Court is affirmed by holding that powers under the Companies Act cannot be wielded by the Company Judge to interfere with proceedings by a secured creditor to realize its secured interests as per provisions of the SARFAESI Act.

There shall be no order as to costs.

.....J. [VIKRAMAJIT SEN]J. [SHIVA KIRTI SINGH] New Delhi.

December 29, 2015.
