

## SIMULTANEOUS APPLICATION OF SARFAESI AND THE ARBITRATION ACT

In the matter of ***Indiabulls Housing Finance Limited v. Deccan Chronicle Holdings Limited & Ors., 2018(2)Bom.C.R. 739***, the apex court addressed the issues of whether the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI**") can be invoked by the amalgamated company when the original lender does not fall within the purview of SARFAESI but the amalgamated company does and whether invocation of arbitration proceedings under a loan agreement bars the initiation of proceedings under SARFAESI for recovery of amounts advanced as loan. It was held that the amalgamated company being an assignee of a debt through amalgamation could invoke the provisions of SARFAESI and both arbitration and proceedings under SARFAESI can be invoked simultaneously with one remedy not barring the other.

**Facts:** Two loans of Rs. 50 Crores each were advanced by M/s. Indiabulls Financial Services Limited ("**IBFSL**") to M/s. Deccan Chronicle Holdings Limited and its Directors being the contesting respondents ("**Respondents**") vide loan agreement dated 8th December, 2011 and loan agreement 5th January, 2012 respectively. The said loans were secured by creating equitable mortgage over the properties of the Respondents.

In 2012, it was proposed to merge IBFSL with its sister concern, Indiabulls Housing Finance Limited (the "**Appellant**"). The High Court sanctioned the scheme of merger between the Appellant and IBFSL vide its order dated 12th December, 2012. With the sanction of the merger, the assets and liabilities of IBFSL stood vested in the Appellant and IBFSL was dissolved without winding up on its merger with the Appellant.

Meanwhile, the Respondent borrowers committed default in repaying the loans advanced to them and even before the merger, IBFSL issued a loan recall notice to the Respondents and classified the loan accounts of the Respondents as Non Performing Assets. IBFSL had also filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (the "**Arbitration Act**") for securing the amounts payable by the Respondents. Thereafter, the Appellant having stepped into the shoes of IBFSL, issued notice under

the provisions of SARFAESI in respect of debts owed to IBFSL and for taking symbolic possession of the mortgaged properties.

**Proceedings before the High Court:** The Respondents challenged the invocation of provisions under SARFAESI before the Debts Recovery Tribunal, Chandigarh (which was later withdrawn) and also filed a Writ Petition challenging the declaration of the Respondents' accounts as NPA and passing of orders by the Chief Metropolitan Magistrate under Section 14 of SARFAESI.

The Appellant then issued notice by which the Respondents were informed of the auction of their properties at Banjara Hills, Hyderabad. The Appellant's acts of initiating the auction was challenged by the Respondents by filing another writ petition before the Andhra Pradesh High Court.

By order dated 4th February, 2014, the Andhra Pradesh High Court allowed the Writ Petition challenging the proceedings initiated under SARFAESI and set aside the invocation of the provisions of SARFAESI. It was held that initiation of proceedings under SARFAESI is impermissible in law once the arbitration is invoked under the Arbitration Act. The High Court noted that the contesting Respondents had borrowed from IBFSL, not the Appellant. It was

stated that the loan transaction could not be brought within the purview of SARFAESI post merger, without the consent of the Respondents.

**Appeal to the Supreme Court:** A challenge was accordingly preferred by the Appellant before the Supreme Court questioning the correctness and legality of the judgement and order dated 4th February, 2014 passed by the Andhra Pradesh High Court.

**Issues for consideration:** The Supreme Court considered the following two issues while deciding the Appeal:

1. Whether the Appellant can invoke the provisions of SARFAESI when the loan was advanced by IBFSL?
2. Whether the provisions of SARFAESI could be invoked once the proceedings under the Arbitration Act were initiated?

**Judgment:** On the first issue, the Court highlighted that IBFSL had the right to assign its assets to any person without requiring the borrower's consent and accordingly, the Appellant is an assignee of a debt through amalgamation of the original lender with the Appellant. On the submission of the Respondents that the Respondent No. 1 could not be treated as a "borrower" under Section 2(1)(f) read with Sections 2(1)(c) and 2(1)(m) of SARFAESI and that the rule of literal interpretation deserves to be deployed and the Court ought not to add words to a statute or read words into it so as to produce a "*casus omissus*", the court held that the present matter was not a case of the Court creating any legislation or supplying any *casus omissus*.

The Court discussed the objective behind enacting SARFAESI which is to give impetus to industrial development in the country by providing speedy procedure of recovery. On analysing the facts and the legal regime, the Court concluded that the Respondent No. 1 Company is a borrower within the meaning of Section 2(1)(f) of SARFAESI, the Appellant

is a secured creditor within the meaning of Section 2(1)(zd) of SARFAESI and the arrangement between the two parties is classified as security arrangement and the loan agreements created security interest under SARFAESI. Accordingly, the Appellant can invoke the provisions of SARFAESI when the loan was advanced by IBFSL.

On the issue of simultaneous application of the provisions of the Arbitration Act and SARFAESI, the apex Court held that the High Court erred in holding that the invocation of proceedings under the Arbitration Act would foreclose the right to invoke the provisions of SARFAESI. The Court held that SARFAESI is a special enactment which provides speedy remedy to the banks and financial institutions without recourse to the court of law. On the other hand, Arbitration Act is a statute of general nature. The Court observed that "Merely because steps are taken under this general law would not mean that remedy under the special statute is foreclosed. If at all, legal position is just the reverse."

The Court relied on the decisions in **Transcore v. Union of India & Anr.**, (2008) 1 SCC 125 and **M.D. Frozen Foods Exports Pvt. Ltd. & Ors. v. Hero Fincorp Ltd.**, (2017) S.C.C. Online S.C. 1211 and stated that the same would apply in all force. In *Transcore v. Union of India & Anr.* (supra), the Court rejected the applicability of the doctrine of election and held that the financial institution is not precluded from taking steps under SARFAESI simply because it has availed the remedy under the Recovery of Debts due to Banks and Financial Institutions Act, 1993. In *M.D. Frozen Foods Exports Pvt. Ltd. & Ors. v. Hero Fincorp Ltd.* (supra), the court held that SARFAESI proceedings and arbitration proceedings can go hand in hand and one remedy does not bar the other.

After analysing the facts and the legal regime, the apex Court held that the provisions of SARFAESI and the Arbitration Act are complementary to each other and set aside the judgment of the Andhra Pradesh High Court and allowed the appeal.

**Conclusion:** The court discussed the object of the SARFAESI and recognised that the very rationale for the said Act to be brought into force was to provide an expeditious procedure where there was a security interest. The Court stated that SARFAESI is retroactive in nature as no substantive rights are affected. The Court further discussed the meaning and effect of amalgamation and stated that on sanction of amalgamation, all loans, recoveries, security, interest, financial documents, etc. of IBFSL got transferred to and stood vested in the Appellant including the loans given by IBFSL to the Respondent borrowers. The Court stated that on the sanctioning of the scheme, the Respondent borrowers became the borrowers of

the Appellant as if the financial assistance was granted by the Appellant to the Respondents.

In view of the aforesaid, the apex court held that proceedings under SARFAESI can be initiated by the amalgamated company who is an assignee of debt even if the original lender did not fall within the purview of SARFAESI. Further, SARFAESI proceedings and arbitration proceedings can be invoked simultaneously and one does not foreclose the other.

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