REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10322 OF 2018
(arising out of S.L.P.(C)No.12073 of 2017)

SUZUKI PARASRAMPURIA
SUITINGS PVT. LTD. ...APPELLANT(S)

VERSUS

THE OFFICIAL LIQUIDATOR OF
MAHENDRA PETROCHEMICALS LTD.
(IN LIQUIDATION) AND OTHERS ...RESPONDENT(S)

JUDGMENT

NAVIN SINHA, J.

Leave granted.

2. The appellant is an assignee of debt by the Industrial Finance Corporation of India Ltd. (hereinafter called as "IFCI") for the outstandings of M/s. Mahendra Petrochemicals Ltd. (hereinafter referred to as "M/s. MPL"). It is aggrieved by the appellate order dated 02.09.2016 in O.J. Appeal No.4 of 2016, declining to interfere with the orders of the Company Judge dated 31.07.2015 in Company Application

No.248 of 2014, and also the order dated 07.09.2015, in OJMCA No.170 of 2015 declining to recall/review the order dated 31.07.2015.

3. It is not considered necessary to set out and deal with the entirety of the facts and circumstances of the case, except to the extent necessary for the purposes of the present order, in the limited nature of the controversy arising in the present appeal.

4. Company Petition No.150 of 1996 was filed for winding up of M/s. MPL. The company was also referred for rehabilitation to the Board for Industrial and Financial Reconstruction (hereinafter referred to as "BIFR") in Reference No.385 of 2000. During pendency of the same, without permission or knowledge of the BIFR, M/s. MPL entered into an unregistered memorandum of understanding (hereinafter referred to as the 'MOU') with the sister concern of the appellant, M/s. Suzuki Parasrampuria Suitings Pvt. Ltd. for leasing out its properties to the appellant for 20 years for repayment of its debts. The MOU was also not brought to the attention of the company court till the winding-up order was passed on 19.04.2010. The IFCI, Bank of Baroda – respondent no.3 and the Punjab National Bank – respondent no.4 were secured

creditors, who had filed original applications against M/s. MPL for recovery of their debts before the Debt Recovery Tribunal under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as "SARFAESI Act"). IFCI held first charge over the assets of M/s. MPL for outstandings of Rs.160 crores and the Bank of Baroda with an outstanding of approximately Rs.4,68,00,000/- held second charge. On 28.07.2010 after the winding-up order, IFCI assigned its dues to the appellant for a sum of Rs.85 lacs only and informed the official liquidator thereafter.

5. The appellant then filed Company Application No.248 of 2014 with a prayer for substitution in place of IFCI as a secured creditor of M/s. MPL. The Company Judge rejected the application on 31.07.2015 holding that the appellant was neither a Bank or Banking company or a financial institution or securitization company or reconstruction company and therefore could not be substituted in place of IFCI as a secured creditor for the purpose of the SARFAESI Act. In the nature of the relief sought for substitution as a secured creditor under the

SARFAESI Act, the Company Judge held that the appellant could not draw any benefit for the purpose from Section 130 of the Transfer of Property Act. All other contentions were left open to be raised before the appropriate court/forum in appropriate proceedings. The appellant then filed OJMCA No.170 of 2015 invoking the inherent powers of the Company Court under Rule 9 of the Companies (Court) Rules, 1959 for recall/review of order dated 31.07.2015 contending that the appellant had never sought substitution as a secured creditor and simply desired substitution as a transferee of an actionable claim under Section 130 of the Transfer of the Property Act (hereinafter referred to as "the T.P. Act"). The recall/review application was rejected holding that an entirely new case was sought to be made out in the application. The appeal against the same has been rejected by the impugned order.

6. Shri Harin P. Raval, learned senior counsel for the appellant, assailing the impugned order dated 02.09.2016, contended that the appellant had never sought the status of a secured creditor in lieu of the IFCI. The finding to that effect is erroneous and completely misconceived. The appellant had simply desired to be adjudged a

transferee from IFCI of an actionable claim under Section 130 of the T.P. Act. The rights and claims of the appellant under the latter was the only issue, and has not been considered at all. The deed of assignment dated 28.07.2010 was subsisting and was challenged by none. The lack of any status of the appellant under the SARFAESI Act was a wholly irrelevant consideration to reject its action for transfer of an actionable claim under Section 130 of the T.P. Act. The inherent power of the Company Court under Rule 9 of the Companies (Court) Rules was wrongly declined to be exercised in the facts of the case.

7. Learned counsel for the respondents opposed the application submitting that the appellant cannot be permitted to make a *volte face* after the rejection of its only claim by the Company Judge and take shifting stands at different times according to its convenience in the same proceedings.

8. We have considered the submissions on behalf of the parties. That the unregistered MOU was without permission of the BIFR, it was not disclosed to the Company Court till the winding-up order was passed on

19.04.2010, the assignment of debt of Rs.160 crores by IFCI for Rs.85 lacs are admitted facts. The order dated 31.07.2015 passed by the Company Judge makes it very explicit that the appellant in Company Application No.248 of 2014 had specifically sought substitution in place of IFCI as a secured creditor holding first charge consequent to the deed of assignment in its favour dated 28.07.2010 from IFCI. In support of the relief sought, reliance was also placed on the pursis dated 21.11.2011 filed by IFCI in OA No.452 of 2000 before the Debt Recovery Tribunal, Ahmedabad reaffirming the assignment in favour of the appellant. The submissions made before the Company Judge leaves no doubts that as an assignee of debts from the IFCI, the appellant essentially sought substitution as a secured creditor under the SARFAESI Act and for that purpose sought to draw sustenance from the provisions of Section 130 of the Transfer of Property Act. Therefore, the Company Judge opined that Section 130 of the Transfer of the Property Act was not applicable in the facts of the case leaving it open for the parties to take all available contentions before the appropriate court/forum in appropriate proceedings. In the nature of the controversy sought to be raised by the appellant in the present appeal

we consider it proper to set out the following extracts from the order of the Company Judge:

> "23. The only question which is required to be considered in this application is as to whether the applicant can be permitted to be substituted for and in place of IFCI Limited as the secured creditor of the company in liquidation? For deciding this question, certain provisions of the SARFAESI Act are required to be considered.
> 25. Thus, in view of the aforesaid provisions contained in the SARFAESI Act, I am of the view that when the applicant company is not a bank or banking or financial institution or securitization company or reconstruction company, the applicant cannot be permitted to be substituted in place of IFCI as secured creditor for the purpose of SARFAESI Act.
> 27. The aforesaid provisions of Section 130 of the Transfer of Property Act are not applicable to the facts of the present case as the IFCI has transferred the debts of the company in liquidation in favour of the applicant by deed of assignment and therefore the case of the applicant is that it may be permitted to proceed against the company in liquidation under the SARFAESI Act as secured creditor. The applicant is not entitled to get any benefit under the SARFAESI Act and cannot be termed as secured creditor. Hence the reliance placed by the learned advocate for the applicant on the provisions of Section 130 of the Transfer of Property Act, is misconceived."

9. The relevant extract of the pleadings by the appellant in Company Application No.248 of 2014 noticed by the Company Judge in his order dated 07.09.2015 are also noticeable:

> "8. I say and submit that earlier, IFCI also filed a purshis dated 21.11.2011 before the Debts Recovery Tribunal, Ahmedabad in Original Application No.452 of 2000 reaffirming that the IFCI Ltd. Has assigned its dues in favour of the applicant. I beg to annex a copy of purshis dated 21.11.2011 filed before the Debts Recovery Tribunal, Ahmedabad in Original Application No.452 of 2000 at Annexure-III.
>
> 10. I say and submit that apropos to the Deed of Assignment, the Applicant has become the secured creditor of the Company in Liquidation and all the rights of IFCI Ltd. in relation to the financial facilities extended to the Company in Liquidation and the underlying security interests therein vests in the Applicant vis-à-vis the Company in liquidation."

10. The appellant initially took a conscious and considered stand before the Company Judge, staking a claim for being substituted as a secured creditor under the SARFAESI Act consequent to the assignment of debt to it by the IFCI. That the claim was not simply with regard to assignment of an actionable claim under Section 130 of the T.P. Act is evident from its own pleadings and the pursis filed by the IFCI before the Debt Recovery Tribunal. No material has been placed before us with regard to the orders that may have been passed by the Tribunal on such application. After the claim of the appellant of being a secured creditor was rejected by the Company Judge, and the appellant realised

the unsustainability of its claim in the law, it made a complete *volte face* from its earlier stand and surprisingly, contrary to its own pleadings, now contended that it had never sought the status of a secured creditor under the SARFAESI Act.

11. The contention of the appellant that it had never sought substitution as a secured creditor under the SARFAESI Act is additionally belied from the recitals contained in the order dated 07.09.2015. Time and again this court has held that the recitals in the order sheet with regard to what transpired before the High Court are sacrosanct. The learned Single Judge, in the review jurisdiction, has reiterated that the arguments addressed before him in Company Application No. 248 of 2014 were made specifically under the SARFAESI Act observing as follows:

> "It is also required to be noted that learned advocate for the applicant in the said application, at the time of arguments, submitted that the applicant be substituted as secured creditor and given the benefit under the SARFAESI Act and therefore, learned advocate Mr. Rao appearing for the Bank of Baroda submitted in detail, after relying upon the provisions contained in SARFAESI Act, that the applicant cannot be substituted as secured creditor and permitted to proceed under the provisions of SARFAESI Act."

12. A litigant can take different stands at different times but cannot take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. The untenability of an inconsistent stand in the same case was considered in ***Amar Singh vs. Union of India,*** (2011) 7 SCC 69, observing as follows:

> "50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to Court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions."

13. A similar view was taken in ***Joint Action Committee of Air Line Pilots' Assn. of India vs. DG of Civil Aviation,*** (2011) 5 SCC 435, observing:

> "12. The doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity..... Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily."

14. Resultantly we find no merit in the appeal. The appeal is dismissed.

.....CJI.
[RANJAN GOGOI]

.....J.
[NAVIN SINHA]

.....J.
[K.M. JOSEPH]

NEW DELHI
OCTOBER 08, 2018.