

November, 2021
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MDP Highlights

MDP Legal Updates

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MDP & PARTNERS SUCCESSFULLY REPRESENTED AXIS FINANCE LIMITED IN AN APPEAL FILED AGAINST M/S ORBIT VENTURE DEVELOPERS & ITS PARTNERS BEFORE THE DIVISION BENCH OF HON'BLE BOMBAY HIGH COURT.

Axis Finance Limited (AFL) had lent a sum of Rs 130 crores to one M/s. Orbit Venture Developer (OVD), a partnership firm. The security created by OVD in favour of AFL was two-fold:

- a. Mortgage of 12 unsold flats;
- b. Receivables in respect of 54 identified flats, amounting to Rs. 107 crores which was to be received from the sale of the flats in the said project.

AFL filed a Commercial Suit and Interlocutory Application for the appointment of the Receiver and injunction in respect of the said 12 flats as well as on the receivables. The matter was carried in Appeal before the Division Bench of Justice Mr. S.J. Kathawalla and Justice Mr. Abhay Ahuja when an Order came to be passed on 10 November 2021 directing the Court Receiver to seal the 34 Flats, doors of which were found locked at the time of Commissioner's visit at the site and also directed the Court Receiver to appoint a Chartered Accountant to reconcile the balance receivables due and payable by the flat purchasers of the sold units and submit a report.

Axis Finance Limited was represented by Senior Counsel Mr. Venkatesh Dhond a/w Mr. Rashmin Khandekar, Mr. Nishit Dhruva (Managing Partner), Mr. Prakash Shinde (Partner), Ms. Khushbu Chhajed (Partner), Ms. Niyati Merchant (Senior Associate) and Mr. Yash Dhruva (Associate) of MDP & Partners.

MDP PARTNERS SUCCESSFULLY REPRESENTED HUBTOWN WHEREIN VARIOUS MISCELLANEOUS APPLICATIONS WERE FILED CHALLENGING THE COMPANY PETITION WHICH WERE ADMITTED AND THE COMPANY PETITIONS WERE DISMISSED BY THE NCLT.

The petitioner as a shareholder in SHA filed a Section 7 Application in the NCLT claiming to be the financial creditor. The said claim was filed on the basis that there was a guaranteed buy back of the shares. The said Application was opposed by corporate debtor primarily on the following grounds:

- a. There was a dispute with regards to the valuation of the said buy back. As the shareholders agreement provided that if there is a dispute between the shareholders, the matter should be referred to arbitration and in fact is pending before the Arbitrator.
- b. The said buy back cannot be enforced by any shareholder without the consent of the other shareholders.
- c. The petitioner had purchased the said shares from a foreign fund, who could not have invested in the Indian real estate sector by way of “debt” i.e. fixed return and could have only invested as a shareholder.

Based on the said defences by the corporate debtor, the claim of the financial creditor was dismissed.

Apart from the aforesaid defenses, it was also contended that the claim was barred by limitation as the purported claim of buy back had exceeded the period of 3 years. Moreover, there was no creditor/debtor relationship between the petitioner and the CD had not received any monies from the petitioner.

MDP & PARTNERS REPRESENTED CANARA BANK IN A COMMERCIAL SUMMARY SUIT FILED BY SKS POWER GENERATION (CHHT) LTD (“SKS POWER”) FOR ORDER AND DECREE THAT THE BANK TO PAY SKS POWER A SUM OF RS. 1,21,65,00,000/-.

That Bank Guarantees worth Rs.1,21,65,00,000/- was issued in favour of SKS Power Ltd. on behalf of Cethar Ltd for completion of various contracts entered between SKS Power and Cethar. The BG's were extended from time to time, however, in 2017, Cethar went under CIRP and subsequently under liquidation. SKS Power immediately invoked the BGs on the entire amount i.e. after passing of the admission order of the Ld. NCLT, Chennai Bench.

Since Canara Bank refused to pay, SKS Power filed this summary suit and took out the summons for judgement against Canara Bank. It was at this point that Nagarajan (liquidator for Cethar) entered with his interim application of impleadment (right to sue) claiming that Cethar is at least a proper party, if not a necessary party. However, the said Application came to be rejected. The main contention of the Bank was that if they are ordered to pay SKS Power under the bank guarantees, then it would be difficult to recover the amount since Cethar Ltd. is in liquidation. Hence, it is a ground of irretrievable prejudice. It was further argued that a reference was pending against the SKS Power before the Board of Industrial and Financial Reconstruction and thus, even if they succeed, they won't be able to realize its claim.

However, the Hon'ble Court of Justice G.S.Patel vide its judgment and order dated 11th August, 2021 (Reportable) was pleased to order and decree the Summary Suit, thereby directing the Bank to pay a sum of Rs.1,21,65,00,000/- to SKS Power alongwith interest and further observed that in order to procure relief in the form of injunction in such cases, it must be proved that it will lead to injustice on the Bank and its customers, which will be grave, catastrophic and monumental. Hence, a mere apprehension that the other party will not be able to pay, is not a good enough defence. Exceptional circumstances making it impossible for the guarantor to reimburse himself, if he eventually succeeds, will have to be conclusively established.

The said judgment of 11th August, 2021 has been challenged in Appeal before the Division Bench of Justice S.J.Kathawalla and Justice Milind Jadhav.

Canara Bank was represented by Counsel Mr.Prateek Sakseria, Mr.Nishit Dhruva (Managing Partner), Mr. Prakash Shinde (Partner) and Ms. Niyati Merchant (Senior Associate)

MDP & PARTNERS SUCCESSFULLY REPRESENTED AXIS FINANCE LIMITED IN COMMERCIAL SUIT FILED AGAINST M/S SOHAM ESTATES & ITS PARTNERS BEFORE THE HON'BLE BOMBAY HIGH COURT.

Axis Finance Limited (AFL) had lent a sum of Rs 25 crores to one M/s. Soham Estates (**Soham**), a partnership firm. AFL and Soham had executed a Facility Agreement which inter alia sets out the security created for securing the loan amount. Various defaults were committed by Soham in repaying the loan amount.

AFL filed a Commercial Suit and Interim Application inter alia for attachment before judgment and seeking temporary injunction in respect of all the securities which are secured with AFL. The matter was heard by Justice Mr. G.S. Patel when an Order came to be passed.

The Hon'ble High Court was pleased to grant ad-interim order restraining the Defendants from creating third party rights in respect of all the securities which are secured with AFL.

Axis Finance Limited was represented by Counsel Mr. Karl Tamboly a/w, Mr. Nishit Dhruva (Managing Partner), Mr. Prakash Shinde (Partner), Ms. Khushbu Chhajed (Partner), Ms. Niyati Merchant (Senior Associate) and Mr. Yash Dhruva (Associate) of MDP & Partners.

SUPREME COURT HELD THAT MERE MENTIONING AND USING THE WORD 'FRAUD'/'FRAUDULENT' IS NOT SUFFICIENT TO SATISFY THE TEST OF 'FRAUD'.

Facts of the Case

Defendant No.3 availed the loan facility vide Rupee Loan Agreement dated 26.07.2011 from Defendant No.2 and to the extent of Rs.500 crores Appellant stood as guarantor. A mortgage was created by the appellant herein in favour respondent No.2 (financial creditor) over its factory land at Evalur, Tamil Nadu to secure the repayment, discharge and redemption by Defendant No.3.

Defendant No.3 – corporate debtor could not pay the loan amount, therefore the proceedings under the Insolvency Bankruptcy Code, 2016 (IBC) was initiated against the Defendant No.3, resolution plan came to be approved by the Committee of Creditors and approved by the National Company Law Tribunal. As per the case on behalf of the plaintiff – appellant herein on payment of aforesaid amount and transfer of aforesaid shares No Due Certificate was issued in favour of the corporate debtor – original defendant No.3 on 25.06.2018 and the corporate debtor came to be discharged. Assignment agreement was executed between defendant No.2 – respondent No.2 herein and respondent No.1 herein on 30.06.2018 assigning the debts. Respondent No.1 herein initiated the proceedings against the plaintiff – appellant herein, who stood as guarantor, under Section 13(2) by issuing a notice dated 27.12.2018, Responded by the plaintiff – appellant herein vide reply dated 20.02.2019

Thereafter a possession notice dated 19.06.2019 Possession notice was published in the newspaper on 22.06.2019. Suit was filed in Madras HC with an application seeking leave to file the suit with the prayers to set aside the Assignment Agreement on the grounds of fraud. As observed hereinabove, the suit was filed on 22.06.2019. Immediately thereafter appellant herein – plaintiff also filed an application before the Debt Recovery Tribunal (DRT), Chennai under Section 17(1)

of SARFAESI Act on 17.07.2019 against the possession notice dated 19.06.2019 High Court dismissed application on the ground of jurisdiction observing that the suit is for land and property situated outside the jurisdiction of the court and therefore the suit is not maintainable. It was also observed and held that the civil court's jurisdiction is barred in view of Section 34 of the SARFAESI Act and only DRT had competence to decide the matter.

Held :

Mere mentioning and using the word 'fraud'/'fraudulent' is not sufficient to satisfy the test of 'fraud' A pleading/using the word 'fraud'/'fraudulent' without any material particulars would not tantamount to pleading of 'fraud. Even as per Order VI Rule 4 in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, particulars shall be stated in the pleading

In any case, whether there shall be legally enforceable debt so far as the plaintiff – appellant herein is concerned even after the approved resolution plan against the corporate debtor still there shall be the liability of the plaintiff and/or the assignee can be said to be secured creditor and/or whether any amount is due and payable by the plaintiff, are all questions which are required to be dealt with and considered by the DRT in the proceedings initiated under the SARFAESI Act.

SUPREME COURT HELD THAT SECTION 5 OF THE LIMITATION ACT SHALL NOT BE APPLICABLE TO THE APPEAL AGAINST THE ORDER OF RECOVERY OFFICER

Facts of the case:

Debts Recovery Tribunal condoning the delay of 31 days in preferring the appeal under Section 30 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993,

Debts Recovery Appellate Tribunal (hereinafter referred to as “DRAT”) by which the learned DRAT quashed and set aside the order passed by the Debts Recovery Tribunal;

High Court of Delhi in Writ Petition has quashed and set aside the order passed by the Debts Recovery Appellate Tribunal.

Feeling aggrieved and dissatisfied with the Order of the High Court of Delhi, Civil Appeal was filed before the Hon’ble Supreme Court.

The Supreme Court has held:

The short question, which is posed for consideration before this Court is whether Section 5 of the Limitation Act shall be applicable to the appeal against the order of Recovery Officer under Section 30 of the Act, 1993?

High Court has set aside the order passed by the DRAT relying upon the decision of this Court in the case of A.R. Venugopal Alias R. Venugopal Vs. Jotheeswaran and Ors., (2016) 16 SCC 588.

it is required to be noted that the decision of this Court in the case of A.R. Venugopal Alias R. Venugopal (supra), which has been relied upon by the High Court while passing the impugned judgment and order has been expressly overruled by this Court in the decision in the case of International Asset Reconstruction Company of India Limited (2017) 16 SCC 137.

Thus, as per the law laid down by this Court in the aforesaid case and even otherwise considering Section 30 of the Act, 1993, Section 5 of the Limitation Act shall not be applicable to the appeal against the order of Recovery Officer as provided under Section 30 of the Act, 1993. Therefore, the High Court had committed a grave error in quashing and setting aside the order passed by the DRAT and in restoring the order passed by the Debts Recovery Tribunal condoning the delay in preferring the appeal under Section 30 by applying Section 5 of the Limitation Act.

Order passed by the High Court and the order passed by the Debts Recovery Tribunal condoning the delay in preferring the appeal under Section 30 of the Act, 1993, preferred against the order passed by the Recovery Officer are unsustainable and deserve to be quashed and set aside and are accordingly quashed and set aside.

MDP & PARTNERS CONDUCTED THE LEGAL DUE DILIGENCE FOR A PROPERTY SITUATED IN FARUKHNAGAR (GURUGRAM) AND KHALIKPUR (JHAJJAR) IN HARYANA:

Malav Virani (Partner), Sunay Kargatia (Associate Partner) and Abhishek Chandwani (Associate) acted for a private sector bank and conducted the title due diligence in respect of land parcels admeasuring approximately 107 acres or thereabouts situated at Farukhnagar (Gurugram) and Khalikpur (Jhajjar) in Haryana and belonging to a warehousing and logistics company.

**MDP & PARTNERS ACTED AS LEGAL ADVISORS OF THE
LOAN DOCUMENTATION FOR THE FACILITY
AGGREGATING TO INR 30,00,00,000.**

Malav Virani (Partner), Sunay Kargatia (Associate Partner) and Dhruvi Shah (Senior Associate) of MDP & Partners, Advocates and Solicitors, acted as the legal advisors for a non-banking financial institution and negotiated the terms, drafted the loan documentation and ancillary documentation in respect of facilities aggregating to INR 30,00,00,000/- availed by a construction company.

MDP PARTNERS ACTED AS THE LEGAL ADVISORS IN RESPECT OF LOAN DOCUMENTATION FOR THE FACILITY AGGREGATING TO INR 34,00,00,000.

Malav Virani (Partner), Sunay Kargatia (Associate Partner) and Dhruvi Shah (Senior Associate) of MDP & Partners, Advocates and Solicitors, acted as the legal advisors for a non-banking financial institution and negotiated the terms, drafted the loan documentation and ancillary documentation in respect of facilities aggregating to INR 34,00,00,000 availed by logistics company.

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