

M/s. Oriana Diamonds & Ors. v. Dhani Loan & Services Ltd., & Ors

M/s. Oriana Diamonds & Ors.

...Appellant

Dhani Loan & Services Ltd., & Ors

...Respondent

Case No: Appeal on Diary No. 1056/2023

Date of Judgement: 28/06/2023

Judges:

Mr. Justice Ashok Menon, Chairperson

For Appellant: Mr. Dhrumit Chauhan, Advocate.

For Respondent: Mr. T.N. Tripathi along with Ms. Somya, i/b M/s. T.N. Tripathi & Co., Advocate.

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Facts:

The matter relates to an appeal filed by M/s. Oriana Diamonds & Ors. (Appellants) challenging the order dated 23.06.2023 passed by the Debts Recovery Tribunal-II, Ahmedabad (DRT) in Securitization Application (S.A.) No. 329/2022. The DRT had declined to grant interlocutory relief concerning the secured assets, namely Shop Nos. 13 and 18, while granting relief for the rest of the assets. The Appellants are aggrieved by the DRT's order and have filed the present appeal before the Debts Recovery Appellate Tribunal (DRAT). To entertain the appeal, the Appellants must comply with the mandatory pre-deposit requirement under Section 18(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security

Interest Act, 2002 (SARFAESI Act). The demand notice was issued on 23.06.2021 under Section 13(2) of the SARFAESI Act, demanding a sum of ₹1,62,09,068/- as of 27.05.2021 for two financial facilities. A second demand notice was issued on 22.06.2021 for the remaining facilities granted to the Appellants, demanding a sum of ₹1,30,31,975.37/- as of 28.05.2021. The total amount claimed due from the Appellants is ₹2,92,41,043.37/-, and subsequent interest has also accrued since the notices were issued in 2021. The Appellants have challenged the SARFAESI measures on various grounds, including the adequacy of the demand notice under Section 13(2), the breakup of the amount as required under Section 13(3), and the due service of notice on the borrowers. Subsequently, the property was put up for auction, and the Appellants sought an amendment to the S.A. to incorporate their challenge to the auction proceedings. The Respondent Bank took steps for physical possession of the property and obtained an order under Section 14 of the SARFAESI Act from the Additional Chief Judicial Magistrate-Surat on 03.04.2023. The propriety of the said order is also challenged by the Appellants. The Appellants contend that the Learned Magistrate authorized stenographers for taking physical possession of the property, which, according to the Appellants' counsel, may not be in conformity with Section 14, which indicates that only an officer subordinate to the Magistrate can be designated for taking over possession. The Appellants' counsel submits that they have a strong prima facie case challenging the SARFAESI measures on various grounds and that they are suffering from financial strain, as substantiated by the income tax returns of Appellants Nos. 2 and 3, indicating meager income for the assessment year starting from 2020-2021 and no payment of income tax due to insufficient income. The Appellants' counsel further submits that the subject Shop Rooms Nos. 13 & 18 belong to Appellant No. 3, and therefore, his income would be particularly relevant for disposing of the application under Section 18(1) of the SARFAESI Act.

Arguments by All Parties:

Appellants' Arguments:

The Appellants have a strong prima facie case challenging the SARFAESI

measures on various grounds, including the adequacy of the demand notice under Section 13(2), the breakup of the amount as required under Section 13(3), and the due service of notice on the borrowers. The Appellants are suffering from financial strain, as substantiated by the income tax returns of Appellants Nos. 2 and 3, indicating meager income for the assessment year starting from 2020-2021 and no payment of income tax due to insufficient income. The subject Shop Rooms Nos. 13 & 18 belong to Appellant No. 3, and therefore, his income would be particularly relevant for disposing of the application under Section 18(1) of the SARFAESI Act. The counsel for the Appellants submits that they are depositing a demand draft of ₹35 lakhs today, and the balance amount of ₹1.15 crores shall be payable in three equal installments within a gap of three weeks each.

Respondents' Arguments:

The counsel for the Respondent Bank vehemently opposed the application, stating that the Appellants do not require any indulgence for getting the amount of pre-deposit reduced. The amount due from the Appellants is approximately ₹4.66 crores, and all the contentions raised challenging the SARFAESI measures are totally untenable and unsustainable. The Appellants have not been successful in proving their financial strain because the balance sheets and income pertaining to the 1st Appellant firm have not been produced, and the income tax returns of the rest of the Appellants have also not been produced. As per the partnership deed, the 4th Appellant has major shares (90%) in the profit of the firm, and his financial status would definitely be relevant for determining the pre-deposit. Even going by the income tax returns filed, it seems that Appellants Nos. 2 and 3 have sufficient properties worth crores of rupees, and the fact that they do not have any income by itself would not indicate their financial status. They have properties that are not among the secured assets and could easily be liquidated for the purpose of payment of the debt or the pre-deposit. The counsel for the Respondent Bank argues that the amount should not be reduced to the minimum of 25% as sought by the Appellants.

Court's Elaborate Opinions:

The contentions regarding the inadequacy of the notice under Section 13(2), the infirmity in the auction taken under Section 14, and the authority of the Authorized Officer who issued the notice under Section 13(2) will have to be ultimately decided by the DRT. The court finds that there is an outstanding balance of approximately ₹4 crores due from the Appellants. It is pointed out by the Respondent that the property has already been sold, the Sale Certificate has been issued and registered, and possession has already been handed over to the auction purchaser. However, this fact of handing over possession to the auction purchaser is challenged by the Appellants, who submit that possession is still with the borrowers. This fact will have to be decided by the Learned Presiding Officer considering the S.A. The court finds that the Appellants have an arguable case, even though it has not been established beyond doubt. The court is convinced to some extent regarding the financial strain undergone by the Appellants, as the argument of the Respondent's counsel that the Appellants have substantial assets will not suffice because what is required for considering the ability to deposit the money for entertaining the appeal is the availability of income. However, the Appellants are not entitled to get the amount reduced to a minimum of 25%. Considering the huge balance due to be paid by the Appellants and the fact that the actual income of the firm, which is the original borrower, has not been established, the court directs the Appellants to deposit a sum of ₹1.5 crores as pre-deposit. The court directs the Appellants to deposit a demand draft of ₹35 lakhs today, and the balance amount of ₹1.15 crores shall be payable in three equal installments within a gap of three weeks each. Failure to pay the installments within the stipulated time shall result in the dismissal of the appeal without any further reference to the court. In view of the deposit of ₹35 lakhs, the parties are directed to maintain the status quo as of today. The auction purchaser, who has not appeared despite being served with notice, is directed not to create any third-party interest.

Cases Cited:

No specific cases have been cited in the order.

Sections and Laws Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act)

- Section 13(2) (Demand Notice)
- Section 13(3) (Breakup of the amount in the Demand Notice)
- Section 14 (Enforcement of Security Interest)
- Section 18(1) (Pre-deposit requirement for entertaining an appeal)

Security Interest (Enforcement) Rules

- Rule 2(a) (Authorized Officer)