

Sadhana Bharat Rai & Anr. v. Kotak Mahindra Bank Ltd.

Sadhana Bharat Rai & Anr.

...Appellant

Kotak Mahindra Bank Ltd.

...Respondent

Case No: Appeal on Diary No. 1337/2023

Date of Judgement: 03/10/2023

Judges:

Mr Justice Ashok Menon, Chairperson

For Appellant: Mr Ismail Nasikwala, Advocate.

For Respondent: Mr Rishabh Shah along with Mr Mohit S., i/b M/s. M & S Legal Ventures, Advocate.

Download Court Copy [CLICK HERE](#)

Facts:

The case pertains to an appeal filed by Sadhana Bharat Rai & Anr. (hereinafter referred to as "Appellants") challenging the dismissal of Securitisation Application (S.A.) No. 198 of 2021 by the Debts Recovery Tribunal, Pune (DRT) vide judgment and order dated 01.07.2023. The Appellants filed an application under Section 18(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) seeking to invoke the Tribunal's indulgence to keep the mandatory pre-deposit for entertaining the appeal at the minimum of 25% of the debt due from them. The first Appellant, Mrs. Sadhana Bharat Rai, is the proprietrix of "Shrishti Petroleum," a sole proprietorship. In January 2016, she approached Essel Finance Business Loan Ltd., a non-banking financial company (NBFC), for loans against the mortgage of immovable

properties. Essel Finance sanctioned two loans vide sanction letters dated 29.01.2016: a) A loan of ₹2.50 crores against an equitable mortgage of a residential premises in Mumbai (Andheri property) b) A loan of ₹49,75,000/- against a registered mortgage of a property in Raigad (Raigad property) The first Appellant defaulted on the loan repayments, and Essel Finance initiated Commercial Arbitration Proceedings No. 533 of 2017 before the Hon'ble High Court of Judicature at Bombay. An Arbitrator was appointed, and an Arbitral Award was passed on 30.03.2018 for an amount of ₹3,21,98,131/- creating a lien over the Andheri property. On 29.11.2019, Essel Finance assigned the debt to the present Respondent, Kotak Mahindra Bank Ltd. (hereinafter referred to as "Respondent Bank"). The Respondent Bank issued a demand notice under Section 13(2) of the SARFAESI Act on 13.10.2020, demanding the amount of ₹3,21,98,131/- along with further interest at the rate of 36% per annum with effect from 31.03.2018 till realization and cost. Both the Andheri and Raigad properties were mentioned as secured assets intended to be proceeded against. The Appellants contended that the Raigad property was not included as a secured asset in the Arbitration Proceedings, and there was no Award creating a charge over the said property. The Respondent Bank obtained an order under Section 14 of the SARFAESI Act from the District Magistrate, Alibaug, to take physical possession of the Raigad property from the Appellants. The Appellants approached the DRT with the aforesaid S.A., challenging the SARFAESI measures and alleging various defects in the demand notice and the proceedings. The DRT dismissed the S.A. with costs, and the Appellants filed the present appeal, aggrieved by the DRT's order.

Arguments by the Parties:

Appellants' Arguments:

The Appellants contended that the Raigad property was not included as a secured asset in the Arbitration Proceedings, and there was no Award creating a charge over the said property. They alleged that the demand notice under Section 13(2) was defective as the break-up of the principal amount and interest was not given as required under Section 13(3). The Appellants argued that the classification of the account as

a non-performing asset (NPA) was improper and that the Respondent Bank had clubbed the two facilities with malafide intentions. They stated that no symbolic possession of the Raigad property was taken, and the said property did not form part of the Arbitral Award. The Appellants contended that Essel Finance was not a financial institution coming within the purview of Section 2(m)(iv) of the SARFAESI Act, and therefore, no SARFAESI measures could be initiated. They argued that they had a strong prima facie case, and since the loan amount due on the registered mortgage deed pertaining to the Raigad property was only ₹49,75,000/-, they should be permitted to deposit 50% of the said amount as a pre-deposit. The Appellants submitted that they had already repaid ₹65 lakhs towards the debt, wiping out the entire debt in connection with the Raigad property, and there was no need to proceed against that property. They stated that the execution of the Arbitral Award had been stayed by the Hon'ble Supreme Court in SLP No. 11586/2023 vide order dated 25.05.2023 until the next date of hearing, and therefore, the Respondent could not have proceeded with the execution of the Award under the SARFAESI Act.

Respondent Bank's Arguments:

The Respondent Bank vehemently opposed the application and contended that the Appellants were willful defaulters of the loans, and as of 24.09.2023, an amount of ₹8,83,24,487/- was due from them. The Respondent Bank pointed out that an Arbitrator is not competent to pass an Award creating a charge over mortgaged properties and could only declare a lien over the property. It contended that although the loans were granted under two facilities creating a charge over two properties, the second sanction letter clearly mentioned that the other loan on the Andheri property was interlinked with the Raigad property loan. Similarly, the first loan sanction letter also mentioned that the Raigad property was interlinked with the Andheri property loan. The Respondent Bank highlighted that the Appellants had executed a loan agreement with Essel Finance on 10.02.2016, which mentioned the total amount sanctioned as ₹29,97,05,000/- and both the Andheri and Raigad properties as securities by way of mortgage. The Respondent Bank argued that there was no anomaly in demanding the

total amount as determined in the Arbitral Award as a debt due from the Appellants in the demand notice issued under Section 13(2). Regarding the Appellants' contention of repaying ₹65 lakhs, the Respondent Bank submitted that it was entitled to appropriate the payment towards the composite loan, and even after adjusting that amount, the outstanding amount was more than ₹8 crores. The Respondent Bank argued that there was no embargo on proceeding against the debtors simultaneously under the provisions of the Arbitration Act and the SARFAESI Act, and the Hon'ble Supreme Court's stay order was only concerning the execution of the Arbitral Award with regard to the Andheri property, not the SARFAESI action.

Court's Elaborate Opinions:

The Tribunal noted that the Appellants were provided with two facilities on the same date: a loan of ₹2.50 crores on the mortgage of the Andheri property and a loan of ₹49,75,000/- on the deposit of title deeds of the Raigad property. The Tribunal observed that the title deeds of both properties were deposited with Essel Finance with the intention to create an equitable mortgage, and the Appellants had subsequently executed an agreement on 10.02.2016, wherein the intention to create a mortgage of both properties for the composite loan of ₹2,99,75,000/- was made explicit. The Tribunal stated that although a registered mortgage was executed for the Raigad property, it did not exonerate the liability created by the agreement referred to above. The Tribunal noted that the Arbitration Proceeding was initiated to determine the amount due, and in the present case, there was an arbitration clause for the determination of disputes by way of Arbitration. Referring to the second proviso to Section 18(1) of the SARFAESI Act, the Tribunal observed that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal 50% of the amount of debt due from them, as claimed by the secured creditor or determined by the Debts Recovery Tribunal, whichever is less. The Tribunal noted that the amount had already been determined by the Arbitral Award as ₹3,21,98,131/-, and the same amount was demanded from the Appellants in the demand notice under Section 13(2). Relying on the decision of the Hon'ble Supreme Court in

Sidha Neelkanth Paper Industries Pvt. Ltd. & Ano. vs. Prudent ARC Ltd & Ors., 2023 OnLine SC 12, the Tribunal held that the Appellants were liable to pay 50% of the amount demanded or determined, and there was no reason to invoke the third proviso to Section 18(1) of the SARFAESI Act to reduce the pre-deposit amount to a minimum of 25% of the debt due. The Tribunal directed the Appellants to deposit a sum of ₹1,60,00,000/- as a pre-deposit for entertaining the appeal within six weeks, i.e., on or before 14.11.2023, failing which the appeal shall stand dismissed without any further reference to the Tribunal. Upon the deposit of the amount within the stipulated time, the Tribunal granted the Appellants interim relief by deferring the action of taking over physical possession of the Raigad property until the next date of hearing. The Tribunal directed that the deposited amounts shall be invested in term deposits in the name of the Registrar, DRAT, Mumbai, with any nationalized bank, initially for 13 months, and thereafter to be renewed periodically.

Cases Cited:

Sidha Neelkanth Paper Industries Pvt. Ltd. & Ano. vs. Prudent ARC Ltd & Ors., 2023 OnLine SC 12

Sections and Laws Referred:

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

- Section 2(m)(iv) (Definition of “Financial Institution”)
- Section 13(2) (Demand Notice)
- Section 13(3) (Contents of Demand Notice)
- Section 14 (Application to District Magistrate/Chief Metropolitan Magistrate)
- Section 18(1) (Mandatory Pre-deposit for Entertaining Appeal)

Arbitration Act

In conclusion, the Debts Recovery Appellate Tribunal considered the arguments of both parties and directed the Appellants to deposit a sum

of ₹1,60,00,000/- as a pre-deposit for entertaining the appeal, rejecting their plea to reduce the amount to 25% of the debt due. The Tribunal relied on the decision of the Hon'ble Supreme Court in Sidha Neelkanth Paper Industries Pvt. Ltd. & Ano. vs. Prudent ARC Ltd & Ors. and held that the Appellants were liable to pay 50% of the amount demanded or determined. The Tribunal granted interim relief by deferring the action of taking over physical possession of the Raigad property until the next date of hearing, subject to the deposit of the pre-deposit amount within the stipulated time.