

**BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI**

Present: Mr Justice Ashok Menon, Chairperson

Appeal No. 128/2016

Between

Nirmal Lifestyle Limited ... Appellant/s
V/s.

Asset Reconstruction Company (India) Ltd & ... Respondent/s
Anr.

Mr Rajesh Nagory, along with Mr Rishab Jain, i/b M/s/ MDP
Partners, Advocate for Appellant.

Mr Gaurang Kinkhabwala along with Mr Siddharth Ranande and P.
Jain, i/b M/s. Trilegal, Advocate for Respondent No. 1.

Mr Shriraj K., i/b M/s. Saraf & Partners, Advocate for Respondent
No.2.

-: Order dated: 17/03/2023:-

The Appellant is in appeal impugning the order dated 28/01/2016
in Securitisation Application (S.A.) No. 1 of 2014 on the files of the
Debts Recovery Tribunal-I, Mumbai (D.R.T.).

2. The Appellant company is engaged in the business of
construction and development of real estate. It is neither a borrower
nor a guarantor. The 2nd Respondent company allegedly availed
various credit facilities and financial assistance from a consortium
of banks. The 1st Respondent is an asset reconstruction company
which acquired the debts due to the banks by way of assignment.
The 2nd Respondent which was formerly known as Tulip Hospitality
Services Ltd. is the owner of 'Tulip Star Hotel' which was originally
known as Centaur Hotel and was owned by the Union of India.

Under the disinvestment policy of the Government of India, the aforesaid hotel was put up for sale and purchased by the 2nd Respondent. The name of the second Respondent was subsequently changed to V Hotels Ltd. The Appellant company was approached by the 2nd Respondent for developing the ground and 1st floor of the above-mentioned hotel property having an extent of 2,00,000 ft² as a shopping mall and 50,000 ft² built-up area in the basement to be developed as a supermarket. The parties entered into heads of agreement on 29/03/2003 which was followed by a supplementary head of agreement on 31/03/2003 and a memorandum of understanding on 11/06/2003, all of which culminated into an agreement dated 21/06/2003 and a supplementary agreement dated 17/10/2003. As per the agreements ₹30 crores was to be paid by the Appellant to the 2nd Respondent subject to certain obligations as specified in the agreement to be complied with by the second Respondent. The Appellant was entitled to a 1,25,000 ft² built-up area in the proposed shopping mall and supermarket and it was obligatory on the part of the 2nd Respondent to obtain the necessary no objection certificate from the consortium of banks and financial institutions. A sum of ₹30,60,00,000/- was paid by the Appellant to the 2nd Respondent. However, the 2nd Respondent failed to comply with its obligation to obtain the NOC from the banks and the necessary building approvals from the Bombay Municipal Corporation. The Appellant was therefore constrained to initiate arbitration proceedings against the 2nd Respondent for specific performance of the contract. The Ld. Arbitrator passed an award directing the 2nd Respondent to refund a sum of ₹19,60,00,000/-

together with interest to the Appellant and the specific performance was declined. The award was impugned before the Hon'ble High Court of Bombay and the award was set aside vide order dated 27/11/2013. Consequent to the default committed by the 2nd Respondent in repaying the debt due to the 1st Respondent, Sarfaesi measures are initiated and the entire hotel property belonging to the 2nd Respondent is intended to be put for sale. Such an act would prejudicially affect the Appellant's rights with respect to the 2,50,000 ft² built-up area pertaining to which the agreement was executed between the Appellant and the 2nd Respondent. The Appellant came across a public notice dated 07/12/2013 published in the Times of India newspaper. It is understood that consequent to the demand notice dated 10/07/2013 issued under section 13(2) of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 ('SARFAESI Act', for short). It is understood that the 1st Respondent has taken symbolic possession of the property on 14/10/2013. S.A. No. 359/2013 was filed by the 1st Respondent under section 14 of the SARFAESI Act before the Chief Metropolitan Magistrate for taking physical possession of the property. The 2nd Respondent also filed a Securitisation Application No. 395/2013 before the DRT-II, Mumbai seeking a restraining order against the 1st Respondent and the same is still pending. In view of the protection granted by the Hon'ble High Court of Bombay in favour of the Appellant its right with regard to 2,50,000 ft² of the built-up area needs to be protected. Hence the Appellant filed the S.A. mentioned above challenging the Sarfaesi measures with regard to the extent of the

building which is the subject matter of the agreement between the Appellant and the 2nd Respondent.

3. The first Respondent contested the application by contending that the Applicant company had entered into the alleged development agreement with the second Respondent knowing fully well about the debt incurred by the second Respondent from the consortium of banks. The agreement itself had provided for obtaining NOC from the Banks and Financial Institutions which was never obtained. The Appellant had, therefore, proceeded to enter into an agreement with the second Respondent at its own risk with the knowledge that the entire property was mortgaged and a secured asset. It is also contended that the Appellant is hand in glove with the second Respondent in thwarting the Sarfaesi measures initiated by the first Respondent.

4. The Ld. Presiding Officer came to the conclusion that the Appellant is not an “aggrieved person” as contemplated under the provisions of Sec. 17(1) of the SARFAESI Act. It was observed that except for the grievances regarding the non-performance of the agreement entered into between the Appellant and the second Respondent, the Appellant has not raised any illegality/irregularity by the first Respondent in initiating the Sarfaesi measures. The S.A. was, accordingly dismissed.

5. The Appellant is aggrieved by the dismissal of the S.A. and hence in Appeal.

6. Heard Mr Rajesh Nagory the Ld. Counsel appearing for the Appellant, Mr G. Kinkhabwala the Ld. Counsel appearing for the first Respondent and Mr Sriraj K., the Ld. Counsel appearing for

the second Respondent. Records perused.

7. The thrust of the arguments raised by Mr Nagory appearing for the Appellant is that the Appellant is undoubtedly an “aggrieved person” as contemplated under Sec. 17(1) of the SARFAESI Act and is, therefore, entitled to reliefs prayed for in its application. The Ld. Counsel relies on the decision of the Hon’ble Supreme Court in *Bar Council of Maharashtra vs. M.V. Dabholkar and Ors. (1975) 2 SCC 702* to substantiate his argument that the Appellant is aggrieved. Reliance is also placed on the decision of *Murdga Mudaliar (Deceased) & Ors. vs Subba Reddiar 1950 SCC OnLine Mad 136* to argue that the agreement in writing required to be registered but unregistered may be used as evidence of the agreement in a suit for damages for its breach. The decision of the Madras High Court in *Saraswamma vs. Paddayya & 3 Ors. 1922 SCC OnLine Mad 203* is relied upon to argue that an unregistered deed of partition is admissible in evidence to prove the division of status.

8. As observed by the Ld. Presiding Officer, the Appellant has not succeeded in establishing any flaws in the Sarfaesi measures initiated by the first Respondent. It may be an aggrieved person because the agreement which it had entered into with the second Respondent may not be capable of being implemented. But it is also to be considered that the first Respondent is not a party to that agreement between the Appellant and the second Respondent and is, therefore, not bound by it. The Appellant had entered into an agreement knowing full well that the property was mortgaged to a consortium of banks and financial institutions. There was a stipulation for getting a no-objection certificate from the banks

which were never obtained. An agreement for the development of the property, as such, does not create any proprietary right over the property. There is also no charge created unless there is a decree obtained by the Appellant with a charge over the property. The right of the Appellant lies elsewhere. merely for the reason that the Appellant has parted with money to the mortgagor for the development of the mortgaged property, it cannot prevent the secured creditor from proceeding against the secured asset for the realisation of the mortgage debt. The remedy of the Appellant against the second Respondent lies elsewhere. I find no infirmity whatsoever in the impugned order calling for any interference. The appeal has no merits and is, therefore, dismissed, though without costs.

mks-1

Sd/-
Chairperson