

BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

Appeal No. 117/2013

Between

The Greater Bombay Co-operative Bank Ltd. ... Appellant/s
V/s.
Wings Entertainment Pvt. Ltd. & Anr. ... Respondent/s
Mr Harjot Singh, i/b M/s. Raval-Shah & Co., Advocate for
Appellant.

:- Order dated: 21/06/2023:-

The Appellant is in appeal impugning the order dated 01.04.2011 in M.A. No. 5 of 2010 in S.A. No. 07 of 2007 on the files of the Debts Recovery Tribunal No. -II, Mumbai (D.R.T.).

2. The Appellant is a scheduled Cooperative Bank. The Respondent company approached the Appellant in the year 2001 for various loans in order to augment its manufacturing capacity in its factory at Dadra and Nagar Haveli. Loans were granted and property of the company was mortgaged and the plant, machinery and stock in trade hypothecated. The company defaulted payment and notice was issued under Sec. 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI" for short) on 10.12.2004 demanding a sum of ₹3,47,42,830/-. There was no response to the demand notice and hence, the hypothecated and mortgaged assets situated at Coria Lane, Juhu Tara Road, Juhu, Mumbai were attached and the

premises sealed. As of 30.11.2006, the amount outstanding was about Rs.38 lakhs. The Appellant initiated action under Sec. 13(4) of the SARFAESI Act and possession of the plant, machinery and stock available at the premises in Gala Nos. 18 to 21, Aminazar Industrial Estate, Amlı, Silvassa was taken.

3. The first Respondent company approached the D.R.T. against the Sarfaesi measures initiated by the Appellant Bank. A Commissioner was appointed from the D.R.T. to take inventory of the stock on the premises. Inventory was taken on 16.04.2007 and 17.04.2007. The first Respondent thereafter moved a complaint before the Court of the Chief Judicial Magistrate, Silvassa alleging offences under sections 406, 408, 409, 379 and 120B read with Sec. 34 of the Indian Penal Code alleging a loss of ₹1,29,39,258/-. The complaint was forwarded to the Silvassa police for investigation under Sec. 156(3) of the Code of Criminal Procedure. An F.I.R. was registered as C.R. No. 149/2007. The officers of the Appellant Bank approached the Hon'ble Sessions Court at Silvassa for anticipatory bail but the application was rejected on 21.11.2007. The challenge before the Hon'ble High Court of Bombay also proved futile. The officers thereafter approached the Hon'ble Supreme Court and vide order dated 23.01.2008, they were granted bail. The first Respondent thereafter filed a Civil Suit against the Appellant Bank claiming a sum of ₹312 crores as damages before the Silvassa Court as Special Civil Suit No. 17 of 2008. The application filed by the Appellant Bank to get the Civil Suit transferred from Silvassa to Mumbai was rejected by the Hon'ble High Court of Bombay. The

Appellant challenged the same before the Hon'ble Supreme Court and a stay of the proceedings was granted vide order dated 15.12.2008.

4. The first Respondent filed an application as M.A. No. 05 of 2010 in the S.A. claiming the amount alleged to be the value of the shortage of stock in the factory premises. The M.A. was allowed vide the impugned order. The Appellant is aggrieved and hence, in the appeal.

5. The Appellant contends that the Ld. Presiding Officer failed to appreciate the Appellant's case in establishing the falsity of the first Respondent's case. The panchnama is prepared on a single page on 08.12.2006 between 2.30 pm and 8 pm in respect of six galas where the factory is situated. A number of boxes containing the audio cassettes are shown in the panchnama based on the information given by the manager of the company. Physical verification of the boxes was never carried out. The subsequent panchnama prepared on 16 .04.2007 & 17.04.2007 took more than a day to complete despite involving numerous persons who physically counted the cassettes as 6,96,643 Nos. The earlier panchnama prepared on 08.12.2006 assessed the number of audio cassettes at 13,63,400 based on the information provided by the manager of the company by counting the number of boxes which contain the audio cassettes which was apparently incorrect. The Appellant contends that while preparing the panchnama on 08.12.2006, there was no other document on record to indicate that there were 13,63,400 audio cassettes inside the boxes. It is pertinent

to note that the alleged stolen cassettes are never recovered. The first Respondent company is expected to maintain stock register for excisable goods and other supporting documents which would have proved the actual status of the stock in the gala. Without such reliable material, it was not proper to implicate the Appellant Bank. The Executive Engineer, P.W.D. has filed a report which forms part of the charge sheet indicating that going by the measurement of the boxes in which the cassettes were stored, the gala could have accommodated only 3,900 boxes. The panchnama dated 08.12.2006 prepared on the basis of the information supplied by the manager of the company states that there were 4040 boxes which going by the report of the Executive Engineer, is physically impossible, and frustrates the allegation made against the Bank by the company and proved its falsity. The Ld. Presiding Officer is not considered these aspects in the impugned order.

6. Hence, the Appellant prays that the impugned order dated 01.04.2011 may be set aside.

7. The Respondents were served but none appeared and were consequently set ex-parte.

8. The Ld. Counsel appearing for the Appellant Mr Harjot Singh was heard and documents perused.

9. The aforesaid S.A. No. 07 of 2007 was filed by the Respondent company against the Appellant to quash the Sarfaesi proceeding initiated for recovery of the amount under the SARFAESI Act. Since the demand notice under Sec. 13(2) of the

SARFAESI Act was withdrawn by the Bank. The S.A. was disposed of on 09.04.2007 with the Respondent Bank agreeing to restore possession of the secured assets on 16.04.2007 under panchnama and by drawing inventory by the Advocate Commissioner appointed by the Tribunal.

10. The present M.A. No. 05 of 2010 is filed under Sec. 19 read with Sec. 17(2) of the SARFAESI Act. Sec. 19 contemplates payment of compensation and cost to the borrower in certain cases. In the instant case, the Ld. Presiding Officer has directed payment of a sum of ₹77,54,454/- together with interest at the rate of 9% per annum after crystallising the value of the missing cassettes while restoring possession of the property. The first Respondent was involved in the manufacture of audio cassettes and while taking possession of the factory premises by the Appellant Bank under the provisions of the SARFAESI Act, the movables stock in trade were also taken custody of. It is pertinent to note that there is no evidence to indicate the existence of the number of cassettes in the panchnama. The total number of boxes were mentioned which purportedly contained cassettes but each box was not verified regarding the number of cassettes inside. It is also pertinent to note that the panchnama was prepared in a very short time which would indicate that the actual counting of the number of cassettes was not done. Whereas when the property was restored to the Respondents the Advocate Commissioner counted each cassette in the boxes and prepared an inventory on being engaged for two complete days. The number of cassettes mentioned in the inventory dated 08.12.2006

was, therefore, only an approximation. The criminal case lodged against the officers of the Bank was charge-sheeted before the Chief Judicial Magistrate, Silvassa. The accused persons sought a discharge of the accusation under Sec. 239 Cr. PC. The prayer was rejected by the CJM. The accused preferred revision before the Sessions Judge, Silvassa and vide order dated 04.11.2019 the revision was allowed and the impugned order of the CJM was set aside and the accused officers of the Bank were discharged of the offences punishable under Secs.406, 408, 409, 379 and 120B read with Sec. 34 of IPC in Crime No. 149/2007 of Silvassa Police Station.

11. The Civil Suit filed by the Respondents is pending consideration. Under the circumstances, the finding of the Ld. Presiding Officer calculating the value of the allegedly missing cassettes and directing payment together with interest does not appear to be proper and justifiable. The officers of the Appellant Bank were exonerated of the allegations of the misappropriation and theft by the Sessions Court. The Civil Court is yet to take a decision on the claim put forth by the Respondents against the Bank. The Presiding Officer functioning under the provisions of the SARFAESI Act is not an adjudicating authority. True that the Presiding Officer is empowered under Sec. 19 of the SARFAESI Act to compensate for any loss that is caused to the borrower while restoring the property under Sec. 17(3) of the SARFAESI Act. But that does not contemplate an adjudication on merits and passing a decree with a future interest in the manner stated in the impugned

order. The Ld. Presiding Officer has exceeded his jurisdiction in allowing the M.A. The Appeal is, therefore, to be allowed as prayed for.

Resultantly, the appeal is allowed and the impugned order dated 01.04.2011 in M.A. No. 05 of 2010 is set aside and the M.A. stands dismissed.

Sd/-
Chairperson

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