

BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

I.A. No. 16/2023 (WoD)

In

Appeal on Diary No. 1417/2022

Between

Ganpat G. Khadtare ... Appellant/s
V/s.

HDB Financial Services Ltd. &Anr. ...Respondent/s

Mr Charles D'Souza along with Mr Shavez M and Mr Shadad Khan, i/b M/s A & G Legal, Advocate for Appellant.

Mr R. L. Motwani, Advocate for Respondents.

:- Order dated: 27/01/2023:-

This is an application filed under section 18 (1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act', for short) seeking a waiver of mandatory pre-deposit of 50% of the debt due exercising the jurisdiction of this Tribunal under the 3rd proviso to section 18 (1).

2. The Appellant is in appeal aggrieved by the rejection of his Interlocutory Application No. 2718/2022 in Securitisation Application (S.A.) No. 346 of 2022 on the files of the Debts Recovery Tribunal No. II, Mumbai (D.R.T) by the Learned Presiding Officer vide order dated 23/11/2022.

3. The Appellant had filed the aforesaid S.A. aggrieved by the Sarfaesi measures initiated against him by the 1st Respondent

Financial Institution for the alleged recovery of a secured debt. The Sarfaesi measures were challenged on several grounds such as the account was not properly classified as Non-Performing Assets (NPA), and the demand notice issued under section 13 (2) was not proper. The response to the reply sent by the Appellant was not properly answered. There was no equitable mortgage by deposit of title deed as claimed. There was only a simple mortgage for a debt of ₹50 lakhs alone and not for the consolidated amount claimed by the 1st Respondent in the demand notice, the order under section 14 of the SARFAESI Act is also challenged, and further, it is stated that the Appellant was willing to settle the entire debt under an OTS scheme.

4. The 1st Respondent has challenged the application on all counts and states that it is barred by limitation. The Ld. PO prima facie found that the Securitisation Application appears to be barred by limitation for the reason that the Applicant has challenged the order under section 14 of the SARFAESI Act dated 15/01/2020 and the symbolic possession was taken on 29/06/2018. Hence, the Ld. P.O. refused to grant any ad interim relief to the Applicant. Hence, the Appellant prefers this appeal.

5. In order to entertain the appeal, the Appellant will have to first cross the hurdle of the mandatory pre-deposit contemplated under the 2nd proviso to section 18 (1) of the SARFAESI Act. For determination of the amount to be deposited, it will have to be decided as to what is the amount of debt due from the Appellant, as claimed by the secured creditors or determined by the D.R.T.

6. Heard Mr Charles D'Souza appearing for the Appellant and

Mr R. L. Motwani for the 1st Respondent. Records perused.

7. Mr Charles points out that the Appellant had borrowed money from the 1st Respondent under two facilities. The first disbursement of the loan was of ₹1.5 crores on 19/12/2013 and there was no mortgage created for that facility. There is also no evidence regarding the creation of any equitable mortgage by way of deposit of title deeds. A second facility was given to the Appellant on 11/02/2014 for ₹50 lakhs on a mortgage deed executed for the aforesaid amount. However, in the demand notice issued to the Appellant under section 13 (2) of the SARFAESI Act, the demand was for the consolidated sum. The 1st demand notice was issued on 12/09/2016 and in consequence of that symbolic possession was allegedly taken under section 13 (4). Subsequently, the earlier demand notice was recalled and the 2nd notice was issued on 29/06/2018 demanding a sum of ₹1,22,22,668/-as of 28/06/2018. In that notice, it is stated that financial assistance to the tune of ₹2 crores was granted to the Appellant by loan account No. 624536 against the creation of Security interest. It is pointed out that there is another account bearing No. 552401 which pertains to the earlier loan. Under the circumstances, it is submitted that Security interest can only be created for the 2nd financial assistance provided to the Appellant for ₹50 lakhs alone. The Appellant has also lodged a police complaint against the 1st Respondent for having forged documents pertaining to the loan. It is further pointed out that the in the application filed by the 1st Respondent before the Chief

Metropolitan Magistrate, Esplanade Mumbai, it is alleged that the original sanction letter and the loan agreement are misplaced and hence the 1st Respondent is unable to produce the same in original for the inspection of the court it is also stated that the debtor was sanctioned alone of ₹2 crores and inadvertently the details of the amount sanctioned are wrongly mentioned in the schedule of the loan agreement is ₹1 crore. There is no mention of the registration of a mortgage in the application filed under section 14 whereas, it is specifically stated that the original title deeds of the properties were deposited with the intention to create a mortgage. Had there been such a deposit, there must have been some document to evidence this fact. That apart, it is also pointed out that the mortgage deed in the case of the property mortgaged is free of any encumbrances. Had there been an earlier debt by deposit of title deeds, that should have been referred to in the registered mortgage deed.

8. Mr Charles appearing for the Appellant submits that the Appellant is a doctor by profession who has now discontinued his practice. He has no other source of income and is under financial strain. In accordance with the OTS proposal, the Appellant had produced a demand draft of for ₹90 lakhs on 31/03/2017 which indicates his bona fide attempt to clear the debt. Hence it is prayed that indulgence may be shown to reduce the pre-deposit amount to a minimum of 25%.

9. Per contra, Mr Motwani appearing for the 1st Respondent submits that the in a letter sent by the Appellant to the bank on

12.10.2016 he admits the total loan to be that of ₹2 crores against the property. He had also offered to settle the debt for ₹1.30 crores. This, according to the Ld. counsel is an admission on the part of the Appellant that the entire amount is due against the property that was mortgaged. According to the 1st Respondent, the outstanding amount as of the date of appeal is ₹28,399,089/-and therefore, the Appellant should be asked to pay 50% of that amount.

10. After having considered the rival contentions raised by the parties and on hearing the learned counsel appearing for them, I find that the Appellant has a prima facie case in the appeal, which is worthy of being entertained. It is true that there is no material placed indicating the creation of a mortgage by deposit of title deed. It is true that the intention of the mortgagor is what counts. If there was a mortgage already created by depositing title deeds, why was there a necessity for the creation of a registered simple mortgage for a sum of ₹50 lakhs is a question which needs an answer from the 1st Respondent. It is also pertinent to note that the 1st Respondent did not mention the registered mortgage deed in the application filed under section 14 of the SARFAESI ACT. The Ld. PO did not go into these aspects in the impugned order. Probably, that was left out to be decided in the S.A. as and when it came up for a final hearing. The application for interlocutory relief was declined solely on the ground that the application appears to be barred by limitation. In case, the S.A. is barred by limitation, it should have been dismissed. I am, therefore, of the opinion that

the appeal shall be entertained on deposit of the amount contemplated under proviso to section 18 (1). There is genuine doubt regarding what exactly is the secured amount of debt. The registered mortgage was created only for a sum of ₹50 lakhs. If that is to be accepted, the Appellant cannot be asked to pay pre-deposit for the entire debt inclusive of the unsecured loan. Interest that has accrued till the date of filing of the appeal will also have to be calculated but since the demand is made for the entire amount, the exact breakup of the principal and interest due as per the mortgage amount cannot be calculated with precision. On a rough estimate, it would come to about ₹75 lakhs. The Appellant is, therefore, directed to deposit a sum of ₹30 lakhs as pre-deposit in two equal instalments. The 1st instalment shall be payable within a period of 2 weeks, on or before 10.02.2023 and the 2nd instalment shall be payable within 2 weeks therefrom, on or before 24.02.2023. In default, the Appeal shall stand dismissed without any further reference to this Tribunal.

11. The amount shall be deposited in the form of a Demand Draft with the Registrar of this Tribunal.

12. As and when the said amounts are deposited, they shall be invested in term deposits in the name of Registrar, DRAT, Mumbai, with any nationalized bank, initially for 13 months, and thereafter to be renewed periodically.

13. On payment of the first instalment within the stipulated time, the Appellants shall be entitled to stay of the further Sarfaesi measures initiated by Respondent.

14. With these observations, the I.A. is disposed of. The Respondent Bank is at liberty to file a reply in the Appeal with an advance copy to the other side.

Post on 13.02.2023 for reporting compliance concerning the payment of the first instalment.

Sd/-
Chairperson

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