

BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

I.A. No. 614/2023 (WoD)

In

Appeal on Diary No. 1083/2023

Between

Bharati Surendra Khandhar

... Appellant/s

V/s.

Pegasus Assets Reconstruction Pvt. Ltd. & Ors.

... Respondent/s

Mr Bhavak Manek along with Mr V.N. Ajikumar, Advocate for Appellant.

Mr Rishabh Shah along with Mr Nishant Rana, i/b M/s. Zastriya Legal, Advocate for Respondent.

:- Order dated: 13/09/2023:-

This is an application filed by the Appellant under Section 18 (1) of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 ("SARFAESI Act", for short) seeking to waive/dispense with the payment of mandatory pre-deposit contemplated for entertaining the appeal.

2. The appeal challenges the order dated 02/05/2023 in I.A. No. 903/2023 in Securitisation Application (S.A.) No. 178 of 2023 on the files of the Debts Recovery Tribunal-II, Mumbai (D.R.T.) declining to grant any relief to the Applicants including the Appellant against the Sarfaesi measures initiated by the Respondent ARC.

3. The 1st Applicant in the S.A. is a company named M/s Libra

Fabrics Designs Pvt. Ltd. which is the principal borrower and mortgagor. Applicants Nos. 2 to 7 are the guarantors and mortgagors. Various financial facilities were availed by the Applicants in the S.A. which were defaulted leading to the initiation of Sarfaesi measures against them. It is contended that the demand notice under Section 13 (2) of the SARFAESI Act was not served. The publication of the notice is in an abridged form and therefore invalid. It is also contended that the notice does not provide the breakup of the principal amount and interest. The CERSAI registration is not provided and the mortgage is defective. The Appellant who is the 7th Applicant in the S.A. has disputed the execution of the guarantee and has also stated that there is a dispute under section 91 of the Maharashtra Co-operative Societies Act (MCS Act) between the original lender namely, Dombivali Nagrik Sahakari Bank Ltd. (DNS Bank) and her with regard to the guarantee before the Co-operative Court, Thane as ABN/CLT/100/2010. It is also stated that the nine-pointer affidavit filed by the secured creditor in the proceedings under Section 14 of the SARFAESI Act before the Chief Metropolitan Magistrate is defective. Hence the Applicants approached the D.R.T. with the S.A. to quash the Sarfaesi measures.

4. When the matter was taken up before the Ld. Presiding Officer, the Ld. Counsel appearing for the Appellants submitted that a sum of ₹1.5 crores would be paid by the Applicants within 8 weeks and that the physical possession scheduled to be taken may be deferred. The Ld. Counsel appearing for the ARC opposed the prayer and submitted that the Applicant is not in possession of the secured assets which

were let out on license to 3rd parties and that there is an outstanding liability of ₹ 14 crores which the Applicant does not intend to pay and hence opposed the granting of any interlocutory relief till the S.A. was disposed.

5. The Ld. Presiding Officer refused to protect the interest of the Applicant and rejected the interlocutory application declining to grant any relief. The Appellant is in appeal aggrieved with the order. The Appellant seeks indulgence of this Tribunal to waive the mandatory pre-deposit so that the appeal could be entertained.

6. The first Respondent is the assignee of the debt from the original creditor DNS Bank. The loan was sanctioned as per a letter dated 27.07.2014 and flat No. 402 on the 4th floor of D wing, Kohinoor Apartment, Dadar, Mumbai admeasuring 886 sq ft. is one of the properties provided as mortgage and collateral security. The Appellant and the other guarantors had also issued a letter of guarantee to the bank. The Appellant's case is that she is a senior citizen and housewife. She provided the guarantee since the original borrower Mehul J Sedani, who is conducting the concern named Libra Fabric Designs Pvt. Ltd., was the father-in-law of her son. It is submitted that the guarantee was only for the period of 12 months from the date of sanction of the loan and therefore, she had addressed the bank withdrawing her guarantee to the facilities. A copy of the letter dated 21/12/2015 is also produced. It is submitted that the facilities provided to the principal borrower company were renewed by the DNS Bank on 22/12/2015 and increased from ₹13 crores to ₹15

crores. The Appellant's consent was not sought or received for such variance of the original facilities. The Appellant caused a lawyer notice to be issued on 11/06/2018 withdrawing from guranteeship and demanding a return of the securities. Pointing out the demand notice under Sec. 13(2), the Appellant states that it mentions a guarantee executed on 17/05/2018. The Appellant has not executed such a renewal of guarantee. In the proceeding pending before the Co-operative Court, Thane, The DNS Bank did not file any written statement. A petition was filed to vacate that order of "no written statement". The Appellant relies upon that petition to indicate that there is a categorical admission by the DNS Bank to the effect that the Appellant has not executed the deed of guarantee dated 17/05/2018. Under the circumstances, it has to be concluded that the Appellant is no longer a guarantor for the facilities availed by the principal borrower, submits the Ld. Counsel appearing for the Appellant.

7. The Ld. Counsel appearing for the Appellant also takes exception to the finding in the impugned order that the property has been let on license to third parties and that the Applicants in the S.A. are no longer in possession. The Appellant states that flat no. 402 is a residential property and has not been let on license. The finding of the Ld. Presiding Officer is, therefore, apparently erroneous.

8. The Ld. Counsel appearing for the ARC submits that the demand notice under Sec. 13(2) demands a sum of ₹16,66,92,015.58. The Appellant has not pleaded any ground of financial strain and there is no prima facie case in her favour to earn a favourable order of

getting the mandatory pre-deposit reduced. The Appellant may, therefore, be directed to deposit 50% of the aforesaid amount as pre-deposit, submits the Ld. Counsel.

9. After having considered rival submissions anxiously and on perusal of records, I find that the Appellant is not only a guarantor but also a mortgagor. It may be true that the guarantee was not renewed or it may also be possible that there was a variance in the contract which enables the Appellant to resort to the defence under Sec. 133 of the Indian Contract Act. But those are points which need to be considered while disposing of the S.A. A mortgage can be extinguished only by way of redemption. Even if the guarantee goes, the mortgage continues. The definition of a 'borrower' would also include a mortgagor. Hence, prima facie, the Appellant cannot exonerate herself from the liability of being a borrower. If that be so, she is liable to comply with the mandatory provision under Sec. 18(1) of the SARFAESI Act. It is also pertinent to note that the Appellant is not staying in the mortgaged premises as it is borne out from her address mentioned in the S.A. and in the appeal. There are no grounds which enable this Tribunal to invoke the discretionary powers of the third proviso to Sec. 18(1). Hence, the Appellant is directed to deposit a sum of ₹8 crores as pre-deposit. The amount shall be deposited in four instalments of ₹2 crores each. The first instalment shall be payable within three weeks from today, and the second, third and fourth instalments shall be payable within a gap of two weeks each as scheduled hereunder.

<u>Numbers of Instalments</u>	<u>Payment on or before</u>
1 st Instalment	04.10.2023
2 nd Instalment	18.10.2023
3 rd Instalment	01.11.2023
4 th Instalment	15.11.2023

10. In default of the payment of the amount, the appeal shall be dismissed without any further reference to the Tribunal.

11. On the payment of the first instalment, the Appellant shall be entitled to a stay with regard to taking over possession of her flat No. 402 referred to above till the next date of hearing.

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

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

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

Post on 05.10.2023 for reporting compliance regarding the first instalment.

Sd/-
Chairperson