

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

**Present: Mr Justice Ashok Menon, Chairperson**

**I.A. No.630/2023(WoD)**

**In**

**Appeal on Diary No. 1337/2023**

**Between**

Sadhana Bharat Rai & Anr.

... Appellant/s

V/s.

Kotak Mahindra Bank Ltd.

... Respondent/s

Mr Ismail Nasikwala, Advocate for Appellants.

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

**:- Order dated: 03/10/2023:-**

The Appellants are husband and wife who have filed this appeal challenging the dismissal of the Securitisation Application (S.A.) No. 198 of 2021 of the files of the Debts Recovery Tribunal, Pune (D.R.T.) vide judgment and order dated 01.07.2023. The application is filed under Sec. 18(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act', for short) seeking to invoke the indulgence of this Tribunal to keep the mandatory pre-deposit for entertaining the appeal at the minimum of 25% of the debt due from the Appellants.

2. The first Appellant Mrs Sadhana Bharat Rai is the proprietrix of "Shrishti Petroleum", a sole proprietorship belonging to her. In January 2016 she approached M/s Essel Finance Business Loan Ltd., a non-banking financial company (Essel Finance) for a loan against the mortgage of immovable properties. Loans were sanctioned vide

two sanction letters dated 29.01.2016. The first sanction letter granted a loan of ₹2.50 crores against an equitable mortgage of residential premises namely Flat No. 3002, 30th Floor, B Wing, Metropolis, J. P. Road, Andheri (West), Mumbai (Andheri property) and the second loan of ₹49,75,000/- was sanctioned against a registered mortgage of Gut No. 44 (part) of village Chinchghar, Raigad given on lease to Hindustan Petroleum Corporation Ltd. (Raigad property).

3. The first Appellant defaulted on payment of loans. Essel Finance initiated Commercial Arbitration Proceedings No. 533 of 2017 before the Hon'ble High Court of Judicature at Bombay and accordingly, an Arbitrator was appointed and an Arbitral Award passed on 30.03.2018 for an amount of ₹3,21,98,131/- creating a lien over the Andheri property.

4. Essel Finance assigned the debt on 29.11.2019 to the present Respondent Kotak Mahindra Bank Ltd. On 13.10.2020. And the assignee bank issued a demand notice under Sec. 13(2) of the SARFAESI Act demanding the amount of ₹3,21,98,131/- together with further interest at the rate of 36% per annum with the effect from 31.03.2018 till realisation and cost. Both Andheri and Raigad properties have been mentioned as secured assets intended to be proceeded against.

5. The Appellants would contend that the Raigad property has not been included as a secured asset in the Arbitration Proceedings and there is also no Award creating a charge over the said property. Nevertheless, the Respondent obtained an order under Sec. 14 of the SARFAESI Act from the District Magistrate, Alibaug to take physical

possession of the property from the Appellants. A notice was received from the Tahsildar to execute the order. The Appellants approached the D.R.T. with the aforesaid S.A. challenging the Sarfaesi measures. The demand notice under Sec. 13(2) is alleged to be defective for the reason that the break-up of the principal amount and interest is not given as required under Sec. 13(3). It is also contended that the classification of the account as a non-performing asset (NPA) was improper. It is also alleged that the Respondent bank has clubbed the two facilities with malafide intentions. No symbolic possession of the Raigad property was taken. The said property does not form part of the Arbitral Award. In the Arbitration Petition and the Award, the Respondent has not mentioned anything about the Raigad property and intended to proceed against only the Andheri property for the entire amount due. The Raigad property being in the possession of the tenant, physical possession cannot be taken. It is also contended that Essel Finance is not a financial institution coming within the purview of Sec. 2 (m) (iv) of the SARFAESI Act and therefore, no Sarfaesi measures could be initiated.

6. The Ld. Presiding Officer brushed aside all the challenges raised by the Applicants in the S.A. and dismissed the S.A. with costs. The Appellants are aggrieved and hence, in appeal.

7. In order to entertain the appeal, the Appellants will have to deposit the amount contemplated under Sec. 18(1) of the SARFAESI Act. On the basis of the above pleadings, the Appellants would contend that they have a strong prima facie case and that since the loan amount due on the registered mortgage deed pertaining to the

Raigad property is only ₹49,75,000/- they may be permitted to deposit 50% of the said amount as pre-deposit.

8. The Respondent Bank has vehemently opposed the application and contends that the Appellants are willful defaulters of the loans and as of 24.09.2023 an amount of ₹8,83,24,487/- is due from them. It is pointed out that an Arbitrator is not competent to pass an Award creating a charge over mortgaged properties and hence, could only have declared a lien over the property. It is further contended that though the loans were granted under two facilities creating a charge over two items of the properties, the second sanction letter clearly mentioned that the other loan on property of Flat No. 3002, 30th Floor, B Wing, Metropolis, J. P Road, Andheri (West) is interlinked with this loan. Similarly, the first loan sanction letter also mentions that the property in Gut No. 44(p) of village Chinchghar is interlinked with this loan.

9. That apart, the Respondent would point out that the Appellants had executed a loan agreement with Essel Finance on 10.02.2016 which mentions the total amount sanctioned as ₹29,97,05,000/- and also mentions both the Andheri property and the Raigad property as securities by way of mortgage.

10. Hence, it is contended for the Respondent that there is 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 Sec. 13(2).

11. The Ld. Counsel appearing for the Appellants Mr Ismail Nasikwala submits that the Appellants have already repaid ₹65 lakhs

towards the debt which would wipe out the entire debt in connection with the Raigad property and therefore, there is no need to proceed against that property. It is also stated that the execution of the Arbitral Award has been stayed by the Hon'ble Supreme Court in SLP No. 11586/2023 vide order dated 25.05.2023 till the next date of hearing. Hence, the Respondent could not have proceeded with the execution of the Award under the SARFAESI Act.

12. The Ld. Counsel appearing for the Respondent Mr Rishabh Shah submits that there is no embargo in proceeding against the debtors simultaneously under the provisions of the Arbitration Act as also under the provisions of the SARFAESI Act. What has been stayed by the Hon'ble Supreme Court is only the execution of the Arbitral Award with regard to the Andheri property. There is no stay of the Sarfaesi action.

13. The Ld. Counsel for the Respondent would also contend that even if the Appellants have paid ₹65 lakhs towards the debt, it is for the Respondent to appropriate it towards the composite loan. And even after adjusting that amount, the amount outstanding is more than ₹8 crores. The Appellants should, therefore, be directed to deposit 50% of the amount claimed in the demand notice.

14. From the records it is borne out that the Appellants were provided with two facilities on the same date. One was a loan for ₹2.50 crores on the basis of the mortgage of the Andheri property and a second loan was granted for ₹49,75,000/- on deposit of title deeds of the Raigad property. The title deeds of both these properties were deposited with Essel Finance with the intention to create an equitable

mortgage. The Appellants have 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/- is made explicit. It is true that subsequently a registered mortgage with regard to the Raigad property was also executed. But that would not in any way exonerate the liability created by way of the agreement referred to above.

15. An Arbitration Proceeding is initiated for the determination of the amount due. In the instant case, there was an arbitration clause provided for the determination of dispute by way of Arbitration. Under the second proviso to Sec. 18(1) of the SARFAESI Act, no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal 50% of the amount of debt due from him, as claimed by the secured creditor or determined by the Debts Recovery Tribunal, whichever is less. The amount has already been determined by the Arbitral Award as ₹3,21,98,131/-. In the demand notice under Sec. 13(2) that amount is demanded from the Appellants. In view of the latest 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 Appellants are liable to pay 50% amount that is demanded or determined. There is no reason to invoke the third proviso to Sec. 18(1) of the SARFAESI Act to reduce the pre-deposit amount to a minimum of 25% of the debt due.

16. Hence, the Appellants are directed to deposit a sum of ₹1,60,00,000/- as pre-deposit for entertaining the appeal. The said amount shall be deposited within a period of 6 weeks i.e. on or before

14.11.2023, failing which the appeal shall stand dismissed without any further reference to this Tribunal.

17. On the deposit of the amount within the stipulated time, the Appellants shall be entitled to get the action of taking over physical possession of the Raigad property deferred till the next date of hearing.

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

19. 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.

12. 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 15.11.2023 for reporting compliance regarding payment.

Sd/-  
Chairperson

mks-3