

BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

I.A. No. 715/2023(WoD)

In

Appeal on Diary No. 1872/2023

Between

Tuffware Industries & Ors.

... Appellant/s

V/s.

Union Bank of India & Anr.

...Respondent/s

Mr Dinesh Purandare along with Mr Gurang Kinkhabwala & Mr Puneet Gogad, i/b Ms Mumtaz Khan, Advocate for Appellants.

Mr Rajesh Nagory along with Mr Ayush Kothari, i/b Mrs. Uma Fadia, Advocate for Respondent No.1.

Mr Umesh Shetty along with Mr Bhavin Gada, i/b Ms Pratibha Mehta, Advocate for Respondent No. 2.

:- Order dated: 13/11/2023:-

The Appellants impugned the interlocutory order dated 13/09/2023 in Interlocutory Application (I.A.) No. 1240 of 2023 in Securitisation Application (S.A.) No. 256 of 2022 on the files of the Debts Recovery Tribunal-III, Mumbai dismissing the I.A. and declining to grant any interlocutory relief of protection to the Appellants with regard to the Sarfaesi measures taken by the Respondent bank against the secured assets of the Appellants under the provisions of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest, 2002 (“SARFAESI Act”, for short).

2. The present I.A. No. 715/2023 is an application filed under Sec. 18 (1) of the SARFAESI Act for waiver of mandatory pre-deposit contemplated under the 2nd proviso for the purpose of entertaining the appeal.

3. The facts and brief are thus:

The 1st Appellant M/s Tuffware Industries is a partnership firm of which Appellants Nos. 2 to 5 are the partners. The firm is engaged in the manufacturing and export of stainless steel and ancillary products. The Appellants were allegedly banking with the 1st Respondent Bank since 1995. There were regular in repayment of the debts availed by them and ever no dispute till 2008. Following the global recession of 2008, the business of the Appellants got severely affected and in consequence, the repayment of the debt got delayed. It was noticed that the Respondent Bank was charging more interest in violation of the RBI guidelines. The total credit facility enjoyed by the firm was only about ₹8,25,00,000/- in 2010. However, due to the enhanced rate of interest as well as capitalisation, the debt doubled in a span of 4 years to ₹16,35,00,000/-. The account was classified as a non-performing asset (NPA) and on 28/10/2016, the Respondent bank issued a demand notice under section 13 (2) of the SARFAESI Act demanding payment of the outstanding dues of ₹18,26,62,583.27. The Appellants would state that the impugned demand notice is illegal and suffers from various infirmities. It is contended that the demand notice was issued only to the 1st Appellant firm. The rest of the Appellants were not issued specific demand notices. Marking of copies to the rest of the Appellants would not be sufficient. The Respondent Bank also failed to provide the option of redemption contemplated under section 13(8) of the SARFAESI Act. The breakup of the interest applied and the penal interest charged is not detailed in the demand notice in contravention of section 13 (3) of the SARFAESI Act. The

Respondent bank had allegedly taken symbolic possession of the secured assets. The attempts made by the Appellants to settle the debt by way of negotiations failed. The Respondent bank initiated proceedings to sell the property by way of an E-auction notice dated 01/09/2022.

4. The Appellants filed the S.A. challenging the auction notice dated 01/09/2022. Interim relief was also sought to stay the auction by filing I. A. No. 2373 of 2022. The Appellants had raised the contention that the notice was not served on Appellants Nos. 4 and 5. However, vide order dated 26.10.2022, the D.R.T. dismissed I.A. No. 2373/2022. The Appellants approached this Tribunal with Misc. Appeal (Diary) No. 1288 of 2022 and the same is pending consideration.

5. In the absence of any interlocutory order favouring the Appellants, the 1st Respondent sold the secured asset bearing plot No. 22 along with the factory building on Survey No. 93, Hissa Nos. 12 & 15, Survey No. 94, Hissa Nos. 1 to 4 & 6 Waliv Road, Vasai Road East, Palghar 401208 to the 2nd Respondent auction purchaser namely M/s AIRPAC Filters & Systems Pvt. Ltd. for a consideration of ₹8,52,79,000/- and the sale certificate has allegedly been issued on 03/11/2023. The bank had filed a petition under Sec. 14 of the SARFAESI Act before the District Magistrate, Palghar and had obtained an order of taking physical possession of the secured assets.

6. It is contended that a third-party creditor of the Appellant invoked provisions of section 95 of the Insolvency and Bankruptcy Code (IBC) against Appellants Nos. 2 to 5 before the National

Company Law Tribunal, Mumbai. As an effect of filing the application an interim moratorium under section 96 of the IBC comes into effect from 10/11/2022.

7. In consequence of the filing of the IBC proceedings the Appellants approached the District Magistrate and got an order of stay on 06/12/2022. The 2nd Respondent approached the Hon'ble Bombay High Court with Writ Petition No. 1422 of 2023. The writ petition was allowed and the order of stay granted by the District Magistrate was quashed by the Hon'ble High Court vide order dated 29/03/2023, and the parties were directed to approach the D.R.T. for reliefs. The Appellants unsuccessfully challenged the order of the High Court before the Supreme Court in SLP No. 7132/2023 which was dismissed on 13/04/2023.

8. The Appellants filed I.A. No. 882/2023 for amendment of the S.A. seeking to implead the auction purchaser as a party and raising challenges to the auction sale and issuance of sale certificate, which was allowed and amendment carried out. The S.A. was further amended as per order on I.A. No. 1368 of 2023 consequent to the orders of the Bombay High Court and the Supreme Court.

9. I.A. No. 1240/2023 was filed by the Appellants seeking to declare that in view of the operation of section 96 of the IBC, no further action can be initiated against the secured assets or against the loan account whatsoever in nature including taking physical possession of the property and handing it over to the auction purchase, as long as the moratorium is in force. It was contended that the order passed by the District Magistrate on 11/01/2019 is in

respect of the “debt” of the Appellants towards the Respondent bank and hence squarely falls under the ambit of section 96 (1) (b) (i) IBC. It is contended that the proposed Sarfaesi measures of taking physical possession of the secured assets under section 14 of the SARFAESI Act also flow from a procedure to recover the debt and therefore the fact that the property has been sold does not change the nature of the recovery process.

10. After considering the rival contentions, the Ld. Presiding Officer was of the view that the IBC proceedings under Sec. 95 was filed by a creditor named M/s Petch Metals Limited on 10/11/2022, while the sale certificate was issued to the 2nd Respondent on 03/11/2020 and it does not require registration for completion of the sale. It is also stated that the amount paid by the auction purchase was adjusted towards the loan account and there remains no debt as the amount was sufficient to satisfy the outstanding debt. Under the circumstances, the provisions of section 96 of the IBC are not applicable. The application was thus dismissed.

11. The Appellants are aggrieved and hence, in appeal. Determination of the payment of the mandatory pre-deposit under the second proviso to Sec. 18 (1) comes up for consideration prior to the entertainment of the appeal. The application for waiver of deposit filed by the Appellants was taken up for hearing.

12. Heard the Ld. Counsel appearing for the Appellants Mr Dinesh Purandare, Mr Rajesh Nagory the Ld. Counsel for Respondent No. 1 and Mr Umesh Shetty, the Ld. Senior Counsel for Respondent No.2. Records perused.

13. Mr Purandare submits that while considering the application under Sec. 18(1) of the SARFAESI Act, even a prima facie determination of the D.R.T. in an interlocutory proceeding under Sec. 17 of the SARFAESI Act would constitute the amount of debt due from the debtor as determined by the D.R.T. for the purpose of the 2nd proviso to Sec. 18(1). In the instance case, the D.R.T. has in the impugned order observed that the entire debt has been satisfied consequent to the sale and therefore, there is no debt due and payable. Hence, the moratorium under Sec. 96 of the IBC would not apply. In support of his contention, Mr Purandare relied upon the decision of the Hon'ble Bombay High Court in *Keystone Constructions vs. State Bank of India MANU/MH/1699/2013* wherein it is held thus:

“17. It is settled law that against an interlocutory order under Sec. 17 of the SARFAESI Act, an appeal lies under Sec. 18 of that Act. There is nothing that restrains the DRT from coming to a prima facie conclusion of the debt due. Absent an express provision or an intention to the contrary it must, in fact, be assumed to have such a power for it could otherwise lead to injustice. Take for instance case where the DRT finds the quantum of the claim made by the bank to be ex-facie unsustainable. While granting an interlocutory injunction, the DRT could impose a condition requiring the appellant/debtor to deposit what it considers, albeit prima facie, to be the debt due. If the debtor files appeal against order, it is that amount must be considered while determining the amount of pre-deposit under the second proviso to section 18(1).

18. The word “determined” in the second proviso of Sec. 18 does not necessarily mean a final determination. If the DRT, in proceedings filed by the creditor under the DRT Act determines the borrowers/debtor's liability finally, that would be the amount to be taken into consideration for the purpose of the second proviso. If, on the other hand, there is no such final determination and the DRT comes to a prima facie determination of the amount due, that would be the amount determined by the DRT for the purpose of the second proviso to Sec. 18.”

14. The Ld. Counsel Mr Purandare also relies on the decision of the Hon'ble Supreme Court in *ITC Limited vs. Blue Coast Hotels Limited &*

Ors. (2018) 15 SCC 99 in support of his argument that in cases where the creditor did not have actual possession of the secured asset but only a constructive or symbolic possession, the transfer of the secured asset by the creditor cannot be construed to be a complete transfer as contemplated under Sec. 8 of the Transfer of the Property Act. And therefore, the entire interest in the property could not pass to the auction purchaser and the creditor remained as such. The Ld. Counsel would want to impress upon this Tribunal that despite the sale taking place prior to the filing of the application under the IBC, no interest in the property had passed on to the auction purchaser. The moratorium would, therefore, come into effect.

15. The District Magistrate is under statutory obligation to immediately pass an order under Sec. 14 of the SARFAESI Act on compliance of all formalities by the secured creditor referred to in the proviso to Sec. 14(1) of the Act. The act of the District Magistrate is a ministerial act and it cannot brook delay. It has been so held in *NKGSB Co-operative Bank Ltd. vs. Subir Chakravarty (2022) 10 SCC 286*, which has been followed by a later decision by the Hon'ble Supreme Court in *Balkrishna Rama Tarle (Dead through LRs) & Ano. vs. Phoenix ARC Pvt. Ltd. & Ors. (2023) 1 SCC 662*.

16. In the instance case, the auction purchaser had paid the entire amount of sale consideration soon after the sale and prior to the filing of the IBC proceedings. The order of the District Magistrate was also prior in point of time. On confirmation of the sale consequent to the receipt of the entire sale consideration, it cannot be said to be an incomplete sale. The moratorium comes into effect only subsequently,

and would, therefore, not affect the sale. (see *Indian Overseas Bank vs RCM Infrastructure Ltd & Ano.* (2022) 8 SCC 516).

17. The argument of Mr Purandare that there is a prima facie determination of the debt due by the D.R.T. while dismissing the interlocutory application is not acceptable. It is only with regard to the application of the moratorium that the D.R.T. had observed that there is no debt due consequent to the adjustment of the consideration received in the auction sale. The Hon'ble Supreme Court has in the latest decision of *M/s Sidha Neelkanth Paper Industries Pvt. Ltd. & Ano. vs. Prudent ARC Ltd & Ors* 2023 SCC OnLine SC 12 held that the sale consideration received on auction sale cannot be adjusted towards the debt due as long as debtor challenges the sale. And when the Sarfaesi measures including the sale are challenged, debt due would be the entire amount inclusive of the interest.

18. The Respondent Bank would contend that the amount due from the Appellants as on debt inclusive of the interest is ₹57,18,88,147.04 and therefore, the Appellants are liable to pay 50% of that amount as pre-deposit. The appeal challenging the dismissal of the earlier interlocutory application by the Appellants is also pending consideration. In that Misc. Appeal (Diary) No. 1288 of 2022, an application for waiver of deposit is filed by the Appellants admitting that an amount of ₹24.42 crores is due and payable by them.

19. The Appellants have produced Income Tax Returns to indicate that they are under financial strain. There is no business taking place.

20. The threshold amount for determination of pre-deposit would be ₹57,18,88,147.04. Considering the entire facts and circumstances

of this case, I direct the Appellants to deposit a sum of ₹20 crores as pre-deposit. The Appellants have already deposited ₹1.5 crores towards pre-deposit. The balance of ₹18.5 crores shall be deposited in three instalments within a gap of three weeks each as detailed herein.

<u>Numbers of Instalments</u>	<u>Payment on or before</u>
1 st Instalment ₹6,00,00,000/-	04.12.2023
2 nd Instalment ₹6,00,00,000/-	26.12.2023
3 rd Instalment ₹6,50,00,000/-	16.01.2024

21. Default in payment of any of the instalments entails in dismissal of the appeal without any further reference to this Tribunal.

22. In view of the deposit of ₹1.5 crores upfront, the Appellants shall be entitled to an injunction with regard to dispossession of the property till the next date of hearing.

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

24. 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.

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

Post on 05.12.2023 for reporting compliance regarding the first instalment.

Sd/-
Chairperson