

BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

Appeal No. 66/2023

Between

Kiran P. Chhajed

... Appellant/s

V/s.

Indian SME Asset Reconstruction Company &

Ors.

...Respondent/s

Mr Pradeep Samant, Advocate for Appellant.

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

The appeal is directed against the judgment and order dated 26.07.2021 in Original Application (O.A.) No. 507/2016 on the files of the Debts Recovery Tribunal-I, Mumbai (D.R.T.).

2. The O.A. was filed for recovery of a sum of ₹56,21,208.24 from Defendants Nos. 1 to 3 the original borrower and guarantors. The Respondent ARC had simultaneously proceeded against the secured asset Flat No. 4 in A Wing, Ground Floor, Pawan Palace, R.N.P. Park, Village- Khari, Bhayander (East), Dist. Thane under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARAFESI Act', for short). The ARC put up the property for public sale and the Appellant allegedly purchased the property and was issued a sale certificate by the authorised officer of the ARC on 17.10.2011. Thereafter, the Appellant sought possession of the auctioned property which the ARC was not able to comply with. The Appellant issued a letter on 17.05.2012 to the ARC seeking a refund of the sale consideration because of its inability to deliver

possession of the auctioned property. The Respondent sent a letter on 01.06.2012 expressing their inability to hand over physical possession of the property. The deposited amount, was, however, not refunded. After the auction sale concluded, the first Respondent filed the aforesaid O.A. for recovery of the outstanding dues with a charge over the auctioned flat. The borrower and guarantors remained ex-parte. Although the Appellant got himself impleaded in the O.A., he did not subsequently appear in the O.A. as the result of which he was set ex-parte and the D.R.T. committed an error decreeing the O.A. as against all the defendants including the Appellant who was actually, not a borrower but an auction purchaser of the property under the provisions of the SARFAESI Act.

3. A charge decree was ordered and a Recovery Certificate was also issued by the D.R.T. Recovery proceedings were initiated by the first Respondent with regard to recovery of the amount from out of the secured asset, which is the flat purchased by the Appellant in the auction sale. Realising that there was an erroneous decree against the Appellant, the first Respondent filed Misc. Application No. 31 of 2022 before the D.R.T., and vide order dated 15.06.2022 the decree against the Appellant was recalled and the Recovery Certificate was amended. However, the charge against the property which was purchased by the Appellant was not recalled and therefore, the Appellant continues to be in trouble.

4. The Appellant had filed this appeal with the prayer to quash and set aside the impugned judgment and order dated 26.07.2021 and has

also sought relief with regard to refund of the amount which he had paid to the first Respondent towards the sale consideration.

5. There is no embargo against the ARC proceeding against the secured asset simultaneously under the provisions of the Recovery of Debts and Bankruptcy Act, 1993 ('RDB Act', for short) and also against the SARFAESI Act, for short). But there cannot be a decree against the mortgaged property once it has been sold under the provisions of the SARFAESI Act. In the instance case, the property was already sold to the Appellant by the authorised officer of the ARC and had received the full sale consideration. Thereafter, the first Respondent could not have got a charge decree against the secured asset since it was no longer available to be proceeded against. In spite of the facts that the Appellant has been exonerated from the liability to pay the decretal amount by being removed from the party array in the O.A., the charge decree remains in place which would definitely affect the Appellant. Hence, the Ld. Counsel for the Appellant submits that in the interest of justice, the impugned judgment and order need to be interfered with, and the Recovery Certificate as regards the charge over the secured asset recalled. The first Respondent is only entitled to a personal decree to realise the amount from defendants Nos. 1 to 3 with regard to property other than the flat referred to above.

6. The prayer regarding the refund of money which is sought by the Appellant cannot be entertained in the O.A. because he is no longer a party to the O.A. and hence, in the appeal also such an order for refund of money by the first Respondent cannot be

entertained. The relief available to the Appellant to get back the auction money for breach on the part of the first Respondent by failing to deliver physical possession of the property to the Appellant is to be addressed in a different proceeding. Since the property was sold under the provisions of the SARFAESI Act, the Appellant is an aggrieved person under Sec. 17 of the SARFAESI Act and is at liberty to move the D.R.T. under Sec. 17 for a refund of the money which has been paid by him in the public auction.

The appeal is allowed in part directing the Recovery Certificate to be modified by excluding the flat purchased by the Appellant. The Certificate shall be confined to a personal decree against the defendants with a charge over any other property that is available for the first Respondent to proceed against. The time spent by the Appellant in prosecuting this appeal shall be considered for exemption of Sec. 14 of the Limitation Act as and when appropriate action is taken before the appropriate Forum.

Sd/-
Chairperson

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