

BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

Appeal No. 84/2022

Between

IFCI Factors Ltd.
V/s.

... Appellant/s

Patil Construction and Infrastructure Pvt. Ltd. &
Ors.

... Respondent/s

Mr Rameshwar Totala along with Mr Ashwin Poojari, Advocate for Appellant.

Mr Anoop Patil along with Uroosa Shaikh and Mr Diptendu Bose, Advocate for Respondents.

-: Order dated: 14/11/2023:-

The Appellant is in appeal impugning the order dated 19/02/2022 in Securitisation Application (S.A.) No. 124 of 2021 on the files of the Debts Recovery Tribunal, Aurangabad (D.R.T.) allowing the S.A. in favour of the Respondents.

2. The Appellant is a non-banking Government of India Company (NBFC) from which the 1st Respondent company was sanctioned a corporate loan of ₹14.70 crores on 24/07/2015 for 48 months having a moratorium of 12 months which was secured by creating a corporate mortgage over the property situated in Padegaon, Aurangabad belonging to the 2nd Respondent company. That apart, a personal guarantee was provided by the 3rd Respondent. From out of the sanctioned amount, ₹12 crores was disbursed to the 1st Respondent.

3. Repayment of the loan was persistently defaulted by the 1st Respondent and the account was classified as a non-performing asset (NPA). It is alleged that the Appellant issued a recall notice on 16/10/2019 asking the Respondent for repayment of the overdue amount of ₹2,56,26,899/-in response to which the 1st Respondent neither paid any amount nor was there any response. On 24/12/2019, the Appellant issued a demand notice under section 13 (2) of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (“SARFAESI Act”, for short) calling upon the Respondents to pay the outstanding liability of ₹3,98,95,531/-as of 13/11/2019 with further interest. There was no response from the Respondents. On 22/05/2020, the representatives of the 1st Respondent approached the Appellant and requested for restructuring and rescheduling of the loan. Thereafter, the Respondents approached the Appellant and requested a one-time settlement (OTS) vide letters dated 20/04/2021 and 07/09/2021 for repayment of the outstanding loan of ₹3.44 crores. Despite being granted several opportunities, the loan was never repaid. Steps were taken under section 13 (4) of the SARFAESI Act and symbolic possession of the secured assets was taken. The 1st Respondent sent an objection to the demand notice on 23/08/2021, and the Appellant replied to that on 09/09/2021.

4. On 16/04/2021 the Respondents filed the aforesaid S.A. before the D.R.T. seeking to restrain the Appellant from proceeding with the Sarfaesi measures for recovery of the outstanding debt. Despite choosing to challenge the Sarfaesi measures before the D.R.T., the

Respondents requested the Appellant to reschedule the repayment of the loan vide letter dated 20/04/2021.

5. The Appellant issued its sale notice on 27/10/2021 putting the property for sale by way of public auction on 29/11/2021. The Respondents filed an interim application for amendment of the S.A. and sought a stay of the auction sale. On 24/11/2021, the Counsel appearing for the Respondents sent an email to the D.R.T. producing the letter dated 16/10/2019 issued by the Appellant to the Respondents with a request to place the same before the Bench at the time of hearing the S.A. the Ld. Presiding Officer took the matter for hearing on 25/11/2021 and observed that the letter dated 16/10/2019 indicates that the demand made by the Appellant was for an amount which is less than 25% of the debt and therefore, Sarfaesi measures could not have been initiated given the embargo under section 31 (j) of the SARFAESI Act. The auction sale scheduled on 29/11/2021 was therefore cancelled and the S.A. was posted for final arguments on 17/12/2022. Thereafter vide the impugned order dated 19/02/2022, the S.A. was allowed, with a cost of ₹10,000/- imposed on the Appellant. Hence, the Appellant is aggrieved and in appeal.

6. The Appellant challenges the impugned order stating that the finding of the D.R.T. concerning the bar under section 31 (j) of the SARFAESI Act relying upon a letter sent by the Appellant to the Respondents on 16/10/2019 which does not form part of the Sarfaesi action, is erroneous. The said notice is only a piece of information to the Respondents regarding the overdue payment of ₹2,56,26,899/- as of 30/09/2019. The Sarfaesi measures were initiated by issuing a

demand notice under section 13(2) of the SARFAESI Act demanding a sum of ₹ 3,98,95,531/-. It is also pointed out by the Appellant that no objection concerning the maintainability of the Sarfaesi measures given the embargo under section 31 (j) was raised by the Respondents in the S.A. On the other hand, the Respondents have acknowledged the liability as per the demand notice in various letters and have even requested for an OTS settlement. It is pertinent to note that in the first Respondent's letter dated 22/06/2020, the principal amount due is admitted as ₹3.40 crores and in the letter dated 07/09/2021, the Respondent had requested an OTS on a principal amount of ₹3.44 crores. The Appellant, therefore, prays that the impugned order may be quashed and set aside. There is also no rhyme or reason for imposing a cost of ₹10,000/- on the Appellant while allowing the S.A.

7. The Respondents have filed a reply admitting the sanctioning of the loan, defaulted repayment, issuance of demand notice under section 13 (2) of the SARFAESI Act on 24/12/2019 demanding a sum of ₹3,98,95,531/-. It is also admitted that the representatives of Respondent No. 1 had met the bank officials and made representation requesting to refrain from taking any legal actions. It is stated that the Appellant bank had accordingly undertaken to stay off from resorting to any legal proceedings. It is further submitted that during the pandemic, the 1st Respondent company suffered heavy losses and the entire work came to a standstill. Repayment of the loan was therefore not possible and the 1st Respondent requested the Appellant to restructure and reschedule repayment of the outstanding debt vide communication dated 22/05/2020. The 1st Respondent also admits

having paid an amount of ₹10 lakhs on 08/10/2020. The managing director of the 1st Respondent Mr M B Patil contacted Covid-19 and was not in a position to attend to his official duties. The representatives of the 1st Respondent therefore informed the Appellant and sought accommodation for repayment of the outstanding debt vide email dated 20/10/2020. The Appellant had in principle agreed to grant an extension for repayment of the loan but to the surprise of the 1st Respondent, a notice under section 13 (4) of the SARFAESI Act was issued for taking symbolic possession of the secured assets on 16/08/2021. It is contended that without following the procedures and the rules of securitisation, the Appellant acted illegally. The Respondents also admit having paid a sum of ₹34,90,759/- towards the principal amount and ₹2,87,832/- towards interest as part payment towards the demand amount of ₹3,98,95,531/-the Respondents would further contend that in the notice dated 16/10/2019 ₹2,56,26,899/-was demanded towards the outstanding liability and it could never have swelled to ₹3,98,95,531/- as on 30/11/2019. It is therefore submitted that the impugned order is not erroneous and the D.R.T. has rightly observed that the sum of ₹2.56 crores is less than 20% of the total outstanding amount and allowed the S.A. and there are no reasons for upsetting that order of the D.R.T.

8. Heard the Ld. Counsel appearing for the Appellant and Respondents. Records perused.

9. The question that arises for consideration in this appeal is concerning the applicability of section 31 (j) of the SARFAESI Act. In

the impugned order, the Ld. Presiding Officer has disposed of the S.A. solely based on his finding about the embargo created under Sec. 31 (j) of the Act. Even though there were other grounds raised by the Applicants in the S.A. in their challenge to the Sarfaesi measures initiated against the secured assets, the Ld. Presiding Officer has not examined those challenges.

10. The Applicants in the S.A. have not raised a challenge to the Sarfaesi measures under Sec. 31 (j) of the Act in the S.A. Though the S.A. was subsequently amended, even the amended S.A. does not incorporate the prayer of challenge under Sec. 31 (j) of the Act. It is seen that the Ld. Counsel appearing for the Applicants had sent an email to the D.R.T. with a copy of the loan recall notice dated 16/10/2019 addressed to the Applicants by the Appellants. It was requested that the said letter be placed before the Ld. Presiding Officer at the time of the hearing. Based on that letter, it was urged that the embargo under Sec. 31(j) exists.

11. On 25/11/2021, the Ld. Presiding Officer passed an order and had observed thus:

“2. In this matter while going through the pleading it was observed that the amount claimed in 13(2) notice is less than 25% and as such is be directly covered under Sec. 31(J). The matter was kept for argument on the same.

3. The learned counsel for the applicant has drawn by attention to the letter written by the respondent company dated 16th October, 2019 wherein the total dues payable by the applicants are shown as Rs.2,56,00,000/- and the notice issued under section 13(2) dated 13th November, 2019 shows the amount claimed is Rs.3,98,00,000/-.

4. The original amount disbursed Rs.14.50 crores in the year 2016. Prima facie it appears that the 13(2) notice will be hit by section 31(J). Today the Ld. Counsel for the respondent FI submits that the amount mentioned in the letter dated 16th October, 2019 is only an overdue amount. It is hard to believe that in the notice dated 16th October, 2019

they could ask for only overdue amount when the account was already classified as NPA.

5. The learned counsel for the respondent company submits that they will have to file a detailed affidavit. It is made clear that whatever the contents of the letter they will be read as it is and not what weighed in the mind of Officer while issuing the notice.

6. In these circumstances, since it appears that the respondent company may not be entitled for any securitisation action because of Sec. 31(J). This Tribunal deems it fit to stop the auction to be conducted on 29th November, 2021 and as such the auction dated 29th November, 2021 is cancelled.”(sic)

12. Subsequently on 19/02/2022, the Ld. Presiding Officer passed the impugned order holding that even the notice issued under Sec. 13(2) refers to the letter dated 16/10/2019 recalling the entire liabilities of ₹2.56 crores and therefore, the said amount being less than 25% of the total outstanding amount would fall within the purview of Sec. 31(j) and resultantly the S.A. was allowed.

13. It is rather surprising how the Ld. Presiding Officer could grant a relief without a pleading being there in the S.A. An application under Sec. 17(1) of the SARFAESI Act is just like a suit and all contentious issues arising therein will have to be answered by the D.R.T. The D.R.T. cannot dispose of the S.A. on a preliminary finding even without there being a pleading about such contention in the S.A.

14. Even going into the merits of the findings, it is to be held that it is erroneous. Sec. 31(j) of the SARFAESI Act read thus:

“31. Provision of the Act not to apply in certain cases.-

The provisions of the Act shall not apply to-

- (j) Any case in which the amount due is less than twenty per cent of the principal amount and interest thereon.”

15. A reading of the section would suggest that an action under the SARFAESI Act could be initiated only if the liability exceeds 20% of the loan amount. The 5th proviso to Sec. 13(9) of the SARFAESI Act

which contains an explanation about the 'amount outstanding' reads thus:

“(b) “amount outstanding” shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.”

16. In the instance case, the pleading would suggest that the loan sanctioned was ₹14,70,00,000/- which first was to be repaid in instalments. And therefore, the amount outstanding would be the principal amount and interest as per the books of account of the secured creditor which would mean that the total amount due after the discharging of the liability up to 80% by the debtor would fall within the purview of Sec. 31(j). Admittedly, the Respondents have not discharged 80% of the outstanding amount. Hence, they can't take refuge under Sec. 31(j).

17. As far as the notice dated 16/10/2019 is concerned, it cannot be read as a notice contemplated under Sec. 13(2) of the SARFAESI Act. It is not issued by the authorised officer and nor does it claim to be a demand notice under the Act. Whereas the demand notice under Sec. 13(2) is issued on 24/12/2019 demanding a sum of ₹3,98,95,531 as on 30/11/2019. It is also pertinent to note that there is categorical admission on the part of the Respondents in their various letters admitting the said liability and even requesting for an OTS proposal concerning the outstanding liability at ₹3.44 crores. Never did the Respondents challenge the correctness of the amount demanded. The Ld. Counsel appearing for the Appellant has relied upon two decisions of the Kerala High Court in Writ Petition No. 26222 of 2016 and in Writ Appeal No. 1552 of 2019 in support of his argument regarding

the application of Sec.31(j) of the SARFAESI Act. I am in respectful agreement with the findings therein.

18. The upshot of the discussions made above indicates that the impugned order is erroneous and requires to be quashed and set aside. Resultantly, the appeal is allowed and the impugned judgment of the D.R.T. in S.A. No. 124 of 2021 dated 19/02/2022 is set aside. Since there is no finding by the Ld. Presiding Officer concerning the other challenges raised by the Applicants in the S.A. The S.A. No. 124 of 2021 is restored to the files of the D.R.T. with a direction to dispose of the same in accordance with the law, as expeditiously as possible.

Sd/-
Chairperson

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DRAFT MUMBAI