BEFORE THE DEBTS RECOVERY APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

Appeal No.194/2015

Between

M/s Arham Exim Pvt. Ltd. & Ors. … Appellant/s

V/s.

Bank of Baroda …Respondent/s

Mr Rajesh Nagory, i/b Ms Sanjana Ghogare, Advocate for Appellant.
Mr Anant B. Shinde, Advocate for Respondent Bank.

-: Order dated: 21/12/2023:-

The important question that arises for consideration in this appeal is regarding the maintainability of the appeal which impugns the dismissal of the Securitisation Application (S.A.) No. 30 of 2012 by the Debts Recovery Tribunal-III, Mumbai (D.R.T.) vide judgment dated 15.06.2015.

2. The Appellants had filed the S.A. challenging the Sarfaesi measures initiated by the Respondent Bank of Baroda on various counts under Sec. 17 of the Securitisation and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 ('SARFAESI Act', for short).

3. Various items of the properties were proceeded against as secured assets for recovery of the debt due. On 19.01.2019, the Appellants filed an application at Exhibit-01 in the S.A. submitting that they do not have any objection to the bank taking physical

possession of flats Nos. 7 and 8, shop Nos. 20 to 22 and office premises Nos. 317 to 319 which could be sold by the bank under the provisions of the SARFAESI Act to recover the debt. The only relief that the Applicants in the S.A. sought from the Tribunal was that since six couple and their children resided in flat Nos. 29, 39 & 41 admeasuring 400 sq. ft each and interconnected, an injunction may be granted restraining the bank from taking physical possession of the said three flats immediately, as the applicants required some breathing time. It was also submitted that the applicants were not in a position to deposit any amount as a condition to stall taking over possession of those flats.

4. The Respondent's counsel submitted that there was an outstanding debt of ₹14 crores due from the applicants and that the value of the entire properties would come to only ₹7.5 crores and in case physical possession of all the flats were not taken, the bank could be put to hardship.

5. The Ld. Presiding Officer vide order dated 19.12.2012 observed that selling of the properties surrendered voluntarily would take at least two months. Hence, there is justification for restraining the bank from proceeding against three residential flats for a period of 2 ½ months. The application was thus, allowed in part.

6. Thereafter, the applicants had filed an application objecting to the fixing of the reserve price of the properties which were to be sold after the surrender. The Respondent bank had already published the sale notice in the newspapers. In the order dated 19.01.2012, the applicants were permitted to bring purchasers so as to facilitate the bank to sell the property by way of public auction at the best possible

price.

7. The Ld. Presiding Officer observed that Exhibit-01 application was allowed on 19.01.2012 on the condition that the applicants would retain three flats and agreed to the sale of the remaining properties. Given the consent order, the contention raised by the applicants concerning the sale was found to be without merits and dismissed. It was directed by the Ld. Presiding Officer that the S.A. would be disposed of on merits after hearing of the parties.

8. The Appellants would contend that vide the impugned order dated 15.06.2015, the S.A. was dismissed on the premise that given clear admission by the applicants, a stay in respect of flat Nos. 29, 39 and 41 was granted only for 2 ½ months. This indicates that the applicants have to hand over physical possession of those flats as well, after the stipulated period mentioned in the interlocutory order dated 19.01.2012. That order has not been challenged. The challenge to the possession notice raised in the S.A. would, therefore, not survive. Hence, the S.A. was dismissed. The Appellants are aggrieved and hence, in appeal.

9. The primary contention taken by the Respondent is that the appeal is not maintainable given the embargo under Sec. 20(2) of the Recovery of the Debts and Bankruptcy Act, 1993('RDB Act', for short). Sub-Sec. (2) of Sec. 20 states that no appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties. It will, therefore, have to be examined whether there was a consent order made by the D.R.T.

10. The Appellants had voluntarily agreed to surrender the secured assets and permitted the bank to proceed with the sale provided they

were given breathing time about the surrender of three flats Nos. 29, 39 & 41 and based on that submission, the Ld. Presiding Officer had granted 2 ½ months to the Appellants because the sale would take not less than two months to get completed. Given the surrendering of the properties and agreeing to sell them under the provisions of the SARFAESI Act, it has to be assumed that the Appellants have waived their challenges to the Sarfaesi measures raised in the S.A. under Sec. 17(1). After having waived their challenges, the Appellants cannot be heard to insist on the disposal of the S.A. on merits.

11. The Ld. Counsel for the Respondent has relied on the decision of the Hon'ble Supreme Court in *State of Maharashtra vs. Ramdas Srinivas Nayak & Ano. (1982) 2 SCC 463* wherein it is held thus:

> "Statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in the court have been wrongly recorded in a judgment, it is incumbent upon the parties, why the matter is still fresh in the minds of the judges, to call the attention of the very judges who have made the record to the fact that the statement made with the regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course, a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of law and had laid to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment."

From this, it is clear that the Presiding Officer's order is conclusive regarding what transpired before him and neither the lawyer nor the litigant can claim to contradict it, except before the very same Presiding Officer himself, but nowhere else. The Appellants did not

contradict the submissions made in the order of the D.R.T. dated 19.01.2012 or on 25.04.2012 regarding the surrender of the properties subject to retaining three flats to get a 'breathing time'. After having earned the indulgence shown by the D.R.T. granting two and half months to surrender the three flats while surrendering the rest of the properties and agreeing to proceed with the sale, the Appellants cannot in the stage of the appeal resile from their submissions made before the Tribunal.

The appeal has no merits and is only to be dismissed.

Sd/-
Chairperson

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