hvn

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORGINAL CIVIL JURISDICTION

WRIT PETITION NO.1759 OF 2015
WITH
NOTICE OF MOTION (L) NO.557 OF 2015

Vallabbhai P. Surani and Ors. ..Petitioners.

V/s.

State Bank of India and Ors. ..Respondents.

Mr.S.U.Kamdar, Senior Advocate, Mr. Rajeev Kamale and Umesh Shetty i/b. Thodur Law Associates for the petitioners.
Mr.P.K. Samdhani, Senior Advocate with Mr. Rohit Gupta i/b. Vivek S. Sawant for the respondent No.1 – State Bank of India.
Mr.D.D.Madon, Senior Advocate i/b. Shashank N.Fadia for the respondent No.3.
Mr. Amit Jajoo with Ms.Sushmita Gandhi and Ms. Anaisha i/b. PKA Associates for the respondent No.7.

CORAM: A.S.OKA AND
V.L.ACHLIYA, JJ.
DATED : 14TH/15TH SEPTEMBER, 2015

P.C. :-

1. Heard the learned senior counsel appearing for the petitioners and the learned senior counsel representing the respondent nos. 1 and 3 as well as the learned counsel for the respondent no. 7 .

2. The petitioners in this petition under Article 226 of the Constitution of India claim to be the guarantors in respect of the

financial facilities granted to M/s. J.B.Diamonds Limited which is a company under liquidation.

3. An application was made under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the said Act of 2002') by the first respondent Bank before the learned Chief Metropolitan Magistrate, Esplanade, Mumbai in respect of the secured assets which are the subject matter of the writ petition. An order was passed on 2nd February, 2015 by the learned Chief Metropolitan Magistrate allowing the application.

4. Aggrieved by the order of the learned Chief Metropolitan Magistrate, Mumbai, the petitioners filed an application under the provisions of section 17 of the said Act of 2002 being Securitization Application No.34/15 and an application for interim relief was taken out in the said Securitization Application No.34/15 restraining the first respondent and other respondents from taking any action under the said Act of 2002 against the guarantors and the borrower and for an order restraining them taking of symbolic possession of the secured assets under the said Act of 2002. The interim application was rejected on 12th March, 2015 and by the same order, the Securitization Application No.34/15 was also disposed of.

5. On 11th March, 2015 some of the present Petitioners filed writ petitions before this Court for challenging the order dated 2nd February 2015 passed by the learned Chief Metropolitan Magistrate. The writ petitions were dismissed by judgment and order dated 8th April, 2015 by a Division Bench of this Court. The order of the Division Bench has been confirmed by the Supreme Court in petition for Special Leave to Appeal No.11758 of 2015 and other connected matters.

6. Subsequently, another Securitization Application under Section 17 of the Act of 2002 being Securitization Application No. 52/2015 was filed by the present petitioners for challenging the proceedings initiated under the said Act of 2002 and also the same order dated 2nd February 2015 under Section 14. In the said Securitization Application No.52/15, an interim application was filed seeking stay of operation of the order dated 2nd February, 2015 passed by the learned Chief Metropolitan Magistrate. A prayer was also made for restraining the first respondent bank from taking physical possession of the secured assets in execution of the possession warrant issued by the learned Chief Metropolitan Magistrate. By judgment and order dated 15th April, 2015 the learned Presiding of the DRAT rejected the interim application. On 29th May, 2015 the present petitioners made one more

application in the Securitization Application No.52/15 for grant of stay. The said application was also rejected on 29th May, 2015 by the learned Presiding Officer of DRAT-II, Mumbai. On 8th June, 2015 a review application was filed by the present petitioners seeking review of the judgment and order dated 15th April, 2015 passed by the learned Presiding Officer, DRAT-II. By order dated 18th June, 2015, which is impugned in the present petition under Article 226 of the Constitution of India, the review application filed by the petitioner was dismissed by the learned Presiding Officer, DRAT-II.

7. It would be necessary to make a reference to the prayers in this petition under Article 226 of the Constitution of India. The first prayer is for quashing and setting aside the order dated 15th April, 2015 passed by the learned Presiding Officer, DRAT-II on the application for interim relief in Securitization Application No.52/15. The second prayer is for challenging the order dated 18th June, 2015 passed on the review application. The next challenge is to the order dated 2nd February, 2015 passed by the learned Chief Metropolitan Magistrate, Mumbai on an application made by the first respondent under section 14 of the said Act of 2002. Another substantive relief is for directing rehearing of the review application. The next prayer is for directions to refer the inter-se disputes and differences between respondent Nos.1, 3 and 7 to arbitration and to stay the

proceedings of the Securitization Application No.52/15 until the award is made by the Arbitrator. The last prayer for substantive relief is for directions to the DRAT to consider in the appeal filed by respondent No.3 being Appeal No.156/15 all the issues in its entirety arising out of the present securitization application, including the review application, by giving opportunity to the petitioners to plead their case.

8. The learned Senior Counsel appearing for the petitioners has taken us through the aforesaid orders. He pointed out that the first respondent SBI is the lead Bank of a Consortium. He pointed out that after the order dated 12th March, 2015 was passed on the first securitisation application filed by the petitioners, on 8th April 2015, the assignees of some of the Banks forming the part of the consortium had withdrawn their consent which led to filing of second Securitisation Application No.52/15. He pointed out that writ petitions filed by some of the Petitioners were dismissed vide order dated 8th April, 2015. He invited our attention to the provisions of the said Act and the scheme of Section 13. He invited our attention to sub-section (9) of Section 13 which is applicable to the case. He pointed out that the sub-section provides that in case of joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any of the rights conferred on him on the basis of sub-section (4) of section 13 unless the exercise

of the such rights is agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding as on record date and such action shall be binding on the secured creditors. He pointed out that in the present case, the requirement of sub-section (9) of section 13 is no longer satisfied and, therefore, no further steps can be taken by the first respondent in accordance with sub-section (4) of section 13. He invited our attention to a decision of the Calcutta High Court in the case of **Jyotish Prokas Chattoraji and another V/s. Bagla Kanta Choudari and others**[1]. He further placed reliance on a decision of the Division Bench of the Madhya Pradesh High Court in the case of **Dhar Textile Mills Ltd. V/s. Canara Bank and Ors.**[2] He relied upon the decision of the Apex Court in the case of **Smruti Paharia V/s. Sanjay Paharia**[3] wherein the Apex Court held that consent by the parties under section 13B of the Hindu Marriage Act, 1955 should be in existence till the date of passing of the decree of divorce. He urged that unless such consent is subsisting till the date of passing of the decree of divorce, the decree for divorce cannot be passed. He invited our attention to the findings recorded by the learned Presiding officer, DRAT-II while passing the impugned order on the review application. He urged that the review application is maintainable but the learned Presiding Officer has

1 A.I.R. 1922 Cal. 274

2 [2010]159 Compcase 620(MP)

3 (2009) 13 Supreme Court Cases 338

declined to consider the same on merits in view of the fact that an appeal preferred against the order dated 15th April, 2015 was pending before the DRAT. He urged that the review application was therefore not decided on merits. He submitted that the Securitisation Application No.52/15 was maintainable as it was based on subsequent event which occurred on 8th April, 2015.

9. The learned senior counsel appearing for the first respondent State Bank of India invited our attention to the conduct of the petitioners as reflected from the act of filing of successive proceedings. He has stated that considering the conduct of the petitioners, no interference can be made in writ jurisdiction under Article 226 of the Constitution of India. By way of reply, learned senior counsel for the petitioners submits that as the review petition was maintainable, the same ought to have been decided on merits. He urged that though the remedy was available to prefer an appeal before the DRAT, the petitioners were justified in filing the review petition.

11. We have given careful consideration to the submissions. A notice under sub section 2 of section 13 of the said Act was issued no 4th December, 2010. The first order was made by the learned Chief Metropolitan Magistrate on 15th March, 2012 under section 14 of the said Act for the purpose of taking physical

possession of the secured assets which are subject matter of the present petition. After hearing the petitioners, the second order under section 14 was passed by the learned Chief Metropolitan Magistrate on 2nd February, 2015.

12. The first proceeding which was filed by the petitioners for challenging the order dated 2nd February, 2015 was by way of Securitization Application No.34/15 under Section 17 of the said Act before the learned Presiding Officer of DRT-II, Mumbai. An application for interim relief was made therein seeking a direction against the first respondent not to take coercive actions against the guarantors/ borrowers. A direction sought was not to take either symbolic or actual possession of secured assets under the provisions of the said Act. By an order dated 12th March, 2015, not only the application for interim relief but also the main application under section 17 was rejected. In Paragraph 3 of the said order, it is noted that an objection was raised by the petitioners that the first respondent Bank had no right to initiate action under the said Act in view of the fact that the provisions of sub section (9) of section 13 of the said Act . The contention was that the exercise of such rights by the first respondent bank has not been agreed upon by the secured creditors representing not less than 60% in value of the amount outstanding as on the record date. In paragraphs 6 and 7 of the said order, the case made out by the third

respondent (the assignee of some of the Banks forming a part of the Consortium which allegedly has allegedly withdrawn consent on 8th April 2015) before DRT was also dealt with. It was pointed out that during the pendency of Original Application No.87/11 filed in DRT II Mumbai, the debts of certain Banks were assigned in favour of third respondent by a registered deed of assignment. Paragraph 6 of the said order records the submission of third respondent that during the pendency of the Original Application, the guarantors and the borrower company (J.B. Diamond Ltd.) approached third respondent for settlement of the debt in respect of the amount advanced the assignors of the third respondent and the settlement terms have been accepted . What is material is paragraph 8 of the said order which reads thus :

> "8. The mandate of law is that the consent of the secured creditors representing not less than 60% in value of the amount outstanding as on record date shall be biding on all the secured creditors. Hence, **the alleged assignees have entered into the shoes of assignors and are treated as secured creditors and the consent letters as referred to above are binding upon the assignees and the said consent letters have authorized the respondent no. 1 bank to initiate the alleged action on which action has already been initiated by the respondent no.1**

> **bank before the assignment. Hence, the respondent no.1 bank is legally and validly entitled to proceed with the actions initiated under SARFAESI Act.**"

(emphasis added)

13. Thus, a specific finding was recorded by the learned Presiding Officer of DRT II that the first respondent was legally and validly entitled to proceed with the actions under the said Act 0f 2002. The learned Presiding Officer of the DRT observed that the assignees have stepped into the shoes of assignors and are treated as the secured creditors. It was held that the consent letters issued by the assignors are binding upon the assignees and the said consent letters have authorized first respondent Bank to initiate the alleged action under the said Act of 2002. Though the challenge by the petitioners to the order dated 2nd February, 2015 under section 14 of the said Act was rejected by DRT II by the order dated 12th March, 2015 by rejecting the interim application and by disposing of the Securitization Application No. 34/15, the petitioners did not challenge the said order. Three of the petitioners in this writ petition filed writ petitions in this court on 11th March, 2015 for challenging the order passed under section 14 by the learned Chief Metropolitan Magistrate, Mumbai on 2nd February 2015. By a detailed judgment and order dated 8th April, 2015, a Division Bench dismissed the writ petition and even declined to

continue ad-interim relief granted earlier. The said order of the Division Bench has been confirmed by the Apex Court by order dated 24th April, 2015.

14. The petitioners thereafter again challenged the same order dated 2nd February, 2015 passed by the learned Chief Metropolitan Magistrate by filing Securitization Application No. 52/15 before DRT II. We may note here that the petitioners accepted the correctness of the order passed by the DRT II, on 12th March, 2015 on their earlier Securitization Application. It is pertinent to note that notwithstanding the observations made in paragraph 8 of the order dated 12th March, 2015, third respondent allegedly claimed that it has withdrawn the consent on 8th April 2015. Even assuming that the alleged withdrawal of the consent by the third respondent provided a cause of action to the petitioners, they could have always agitated the same by filing an Appeal against the order dated 12th March, 2015. As stated earlier, instead of filing an Appeal, the order dated 2nd February 2015 under Section 14 was again challenged by three of the petitioners by filing a writ petition in this Court, which was rejected by a detailed judgment and order which was confirmed by the Apex Court.

15. An application for interim relief in Securitization

Application No.52/15 filed by the petitioners was rejected by the learned Presiding Officer of DRT II by order dated 29th May, 2015. In the said detailed judgment and order, the objection of the petitioners based on sub section (9) of section 13 of the said Act of 2002 was considered by the learned Presiding Officer of DRT-II. The conduct of the petitioners of accepting the order on the Securitization Application No.34/15 and of filing writ petition was considered by the Presiding Officer of DRT II while rejecting the application for interim relief by a detailed judgment and order dated 15th April, 2015. Though the remedy of preferring an appeal against the said order before the DRAT was available to the petitioners, on 29th May, 2015, the petitioners again approached DRT II for grant of interim protection in Securitization Application No. 52/15. By an order dated 29th May, 2015, the said application was rejected. It is pertinent to note that the appeal preferred by the third respondent against the judgment and order dated 15th April, 2015 is pending before the DRT. Instead of preferring an appeal against the order dated 15th April, 2015, on 2nd June, 2015 petitioners filed a review application seeking review of the order dated 15th April, 2015. By an order dated 18th June, 2015, which is impugned in this petition, Review Application was rejected by the learned Presiding Officer of DRT II by a detailed judgment and Order which is impugned herein by holding that there was no error apparent on the face of record.

16. Apart from the conduct of the petitioners of filing proceedings one after the another in the aforesaid manner, we must note here that in the present petition, the petitioners are challenging the order dated 2nd February, 2015 passed under section 14 of the said Act of the Chief Metropolitan Magistrate in this petition which was already challenged by the petitioners by filing Securitization Application No. 24/15. Three petitioners challenged the said order by filing writ petitions. The same order is again the subject matter of challenge in subsequent Securitlization Application No. 52/15 filed by the petitioners. Instead of challenging the order dated 15th April, 2015 in Securitization Application No. 52/15 by preferring an appeal, the petitioners have chosen to challenge the said order by filing the present petition.

17. By making an interim application in Securitization Application No. 52/15, the petitioners sought discretionary and equitable relief from the DRT. The said relief was denied not only on merits but also on the basis of conduct which is specifically noted in paragraph 8 of the order dated 15th April 2015. The said conduct is of selecting forum and filing different proceedings for challenging the same order. A review was sought of the order dated 15th April 2015 made on the application for interim relief in which discretionary and equitable order was sought by the petitioners.

For the reasons recorded, the DRT has declined to exercise the powers of review by holding that there was no error apparent on the face of the record.

18. In the interim application filed in Securitization Application No. 52/15, a discretionary relief of temporary injunction was sought. Considering the conduct of the petitioners, the learned Presiding Officer of DRT II was fully justified in declining to grant equitable relief to the petitioners. Therefore, there is no reason to find fault with the order dated 15th April, 2015 on merits. Consequently, we cannot find fault with the order passed on Review Application which is also the subject matter of challenge in this petition.

19. The Petitioners have invoked extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India. Such extra ordinary jurisdiction is always discretionary which is not available to every litigant as a matter of right. Apart from of the fact that we find that the orders passed by the DRT on the application for interim relief and review application are legal and proper, after considering the conduct of the petitioners, this petition deserves to be thrown out only on the basis of their conduct.

20. We accordingly reject the petition.

21. At this stage, learned senior counsel for the petitioners prays for continuation of ad interim relief. Considering the findings which we have recorded on the conduct of the petitioners, the said prayer cannot be acceded to. Moreover, in the writ petition filed by some of the petitioners, this Court not only declined to interfere but also declined to continue ad interim relief after dismissal of the writ petition. Even the said order has been confirmed by the Apex Court. Hence, prayer for continuation of interim relief is rejected.

22. In view of the disposal of the petition, Notice of motion does not survive, the same is also disposed of.

(V.L.ACHLIYA, J.) **(A.S.OKA. J.)**

C E R T I F I C A T E

Certified that this Judgment / Order uploaded is a true and correct copy of original signed Judgment / Order.