IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6737 OF 2016

WITH
CIVIL APPLICATION NO. 1453 OF 2016

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| **M/s. Erica Healthcare Pvt. Ltd. and Ors.** | } | **Petitioners** |
| **versus** | | |
| **NKGSB Co-operative Bank Ltd. and Ors.** | } | **Respondents** |

Mr. M. K. Dubey with Mr. Vivek V. Phadke for the petitioners.

Mr. Jay Choksi with Mr. Jay Mehta i/b. M/s. Law Frrame for respondent no. 1.

**CORAM :- S. C. DHARMADHIKARI &**
**B. P. COLABAWALLA, JJ.**

**DATED :- JUNE 17, 2016**

**P.C.** :-

1) This petition is filed because the learned Chairperson of the Debt Recovery Appellate Tribunal, Mumbai has not been appointed by the Central Government.

2) The petitioners had obtained a loan from respondent no. 1 bank. It was classified as non performing asset on 31st July, 2013 and demand notices dated 23rd October, 2013 and 2nd May, 2014 were issued after invoking the Securitisation and Reconstruction of Financial Assets and Enforcement of Security

Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act"). Since the loan was secured by equitable mortgage of two immovable properties and there was a default committed that upon issuance of such notices, measures were taken to obtain physical possession of these two immovable properties/ mortgaged securities. The proceedings under section 14(1) of the SARFAESI Act were initiated and at that stage, a securitisation application bearing number 140 of 2016 was filed before DRT-III, Mumbai.

3) An interim application was made therein seeking stay of all the measures. The prayer for interim relief was dismissed on 15th April, 2016. It is reported that the second application also has been made claiming identical reliefs, but that also has not been entertained.

4) It is in these circumstances and submitting that there is a further right of appeal under section 18 of the SARFAESI Act and to enable filing of the same this writ petition be entertained. Pending the application that will be made in the proposed appeal, the physical possession of the flat, which is mortgaged and located at Goregaon-Mulund Link Road, Goregaon (East), Mumbai 400 065 be protected, particularly when one of the directors of the borrowers and guarantors is a cancer patient.

5) This request is opposed by pointing out that the loan is to the tune of Rs.8 crores and the steps have been taken nearly two years back. Nothing has been paid from that time and whenever the orders enabling taking of physical possession are passed, the bank has never been able to take any benefit thereof.

6) After hearing both sides, aware as we are of sub-section (1) of section 18 of the SARFAESI Act with its two provisos, allowing the petitioners to avail of right of appeal unconditionally is not permissible. In the given facts and circumstances and when the outstanding sum is stated to be Rs.8 crores, the debt due is admitted, then, all the more the luxury of the writ petition in this court is impermissible. Hence, to balance the rights and equities, we pass the following order:-

(i) On the petitioners depositing a sum of Rs.1.5 crores with the respondent bank within a period of four weeks from today, the DRAT shall entertain the appeal of the petitioners and decide it in accordance with law.

(ii) Failure to abide by this condition would result in automatic dismissal of the appeal under section 18 of the SARFAESI Act and that remedy cannot be availed by the petitioners.

(iii) For a period of four weeks, the bank shall not take physical possession of the premises, which are subject matter of this petition, if not already taken.

(iv) This order and direction is based on the footing that the petitioners are in physical possession of the premises and none other has been inducted in possession thereof nor will they transfer the same in any manner pending compliance with our direction and if our direction is complied with, pending disposal of the appeal.

(v) We clarify that when we are issuing such a direction, we have not in any manner expressed any final opinion on the rival contentions as far as the merits of the controversy are concerned.

7) With the aforesaid directions, the writ petition is disposed of. In the light of the disposal of the writ petition, the civil application does not survive and stands disposed of as such. No costs.

**(B.P.COLABAWALLA, J.)** **(S.C.DHARMADHIKARI, J.)**