# IN THE HIGH COURT OF JUDICATURE AT BOMBAY

***ORDINARY ORIGINAL CIVIL JURISDICTION***

**WRIT PETITION NO.1870 OF 2014**

Shamim Mohammad Ali Shaikh …. Petitioner
V/s.
Union of India & Anr. …. Respondents

Prof. Rohini Madhav Dandekar for the Petitioner.

Mr. G. Hariharan a/w. Mr. Mohammedali M. Chunawala, i/by Mr. Pankaj Kapoor, for Respondent No.1.

Mr. M.S. Topkar a/w. Ms. Vaishali Bhilare for Respondent No.2.

**CORAM : S.C. DHARMADHIKARI & DR. SHALINI PHANSALKAR-JOSHI, J.J.**

**DATE : 2ND MAY, 2016.**

**P.C. :**

1. The Petitioner has stated before us that she wishes to continue with Ms. Rohini Dandekar as her Advocate and on a private arrangement. Meaning thereby, Ms. Rohini Dandekar will not be treated as an Advocate appointed by the High Court Legal Services Authority.

2. It is in these circumstances that we have not taken action either against the Petitioner or Ms. Rohini Dandekar.

3. We could appreciate the embarrassment caused to another Advocate, who was brought in by the Petitioner, in order to restore the Petition only. We discharge that Advocate and we clarify that the Petitioner's Advocate would be Ms. Rohini Dandekar. If both, the Petitioner and Ms. Rohini Dandekar, remained absent on any given date, the Petition could be dismissed for want of prosecution. However, now that all parties are present with their counsel, we take up the Petition. Heard both sides.

4. This Petition, under Article 226 of the Constitution of India, is pending in this Court for a considerable duration, though it is not maintainable.

5. How this is not maintainable will be indicated by us very briefly.

6. The Petitioner claims to have availed of a loan from Respondent No.2-Bank, styled as 'Education Loan'. That was for the education of her son Raheel. Petitioner herself states in the Petition that she has deposited the Title Deed of her residential flat to secure the credit facility/loan. It is her claim that she has been repaying the loan and till the filing of the Petition, a sum of Rs.11,50,000/- has been paid. According to her, the

balance works out to Rs.9,00,000/-. The Petitioner states that, despite all this, when she suffered a personal tragedy, in that, she lost her son, for whom the education loan was obtained, Respondent No.2-Bank has resorted to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2012, *(for short, "SARFAESI Act")*. She was threatened by the Bank Officials that they would break open the lock and take possession forcibly of the mortgaged property. The Petition enlists such facts, which clearly raise a dispute.

7. Upon such facts and grounds, the relief that is prayed by the Petitioner is, to call for the records and proceedings in relation to the Notice of Demand issued by Respondent No.2-Bank and to cancel that notice.

8. It is common ground that this was a notice under Section 13(2) of the SARFAESI Act. By Section 17 of that Act, the parties, like, the Petitioner, have a right of Appeal, which shall be preferred within the time frame stipulated in sub-section (1) to the Debt Recovery Tribunal.

9. If any order passed by the Debt Recovery Tribunal is adverse to the Petitioner in any manner, there is a remedy of Appeal to the Appellate Tribunal in terms of Section 18 of the SARFAESI Act.

10. Time and again, the Hon'ble Supreme Court of India, beginning from the case of ***United Bank of India Vs. Satyawati Tondon & Ors., [2010] 8 SCC 621***, has held that a Writ Petition under Article 226 of the Constitution of India is not maintainable. This Writ Petition has been entertained by this Court and presumably moved by the plight of the Petitioner. As narrated orally and through a learned counsel, this Court was persuaded to pass an ad-interim order on 11th August 2014.

11. This order is continued till date, although thereafter nothing has been done by the Petitioner to clear the loan. Respondent No.2-Bank has filed affidavit-in-reply and narrated as to how the Petitioner was liable and continues to be liable in law. The liability of the Petitioner is not wiped out merely because she has lost her son. The Petitioner was accommodated by Respondent No.2-Bank, as narrated by it in its affidavit. The Petitioner gave no option to the Bank but to serve a notice under Section 13(2) of the SARFAESI Act. Thereafter, the Bank moved under Section 13(4), read with Section 14(1) of the SARFAESI Act by making an application to the Chief Metropolitan Magistrate. The Chief Metropolitan Magistrate passed an order on 19th December 2013 in Case No.162/SA/2013 and directed assistance to be given for taking physical possession. The Bank was compelled to move another application seeking a fresh appointment for

taking possession. However, when the Bank Officer, the Assistant Registrar attached to the concerned Metropolitan Magistrate's Court and the Police Inspector visited the site / the flat, the Bank's version is, *'none was in possession. It was locked. No one opened the door'*. That is how the Bank alleges that, having prior knowledge of the Bank moving to take possession, possibly the Petitioner left the property. An inventory at the site has been prepared.

12. The Bank says that though this residential flat is the security of the Bank, it has to recover a huge sum amounting to Rs.23,98,379/- as on 31$^{st}$ July 2014, which amount has now gone up considerably.

13. At no point of time the Petitioner has showed any interest in clearing the loan. Even today she is not making a statement that a sizable sum would be deposited with the Bank. She keeps on changing Advocate and after shifting them and, at times, blaming them as well, she seeks continuation of the ad-interim order passed nearly two years back. We cannot countenance such request and when there is a huge liability. Even otherwise, the Writ Petition is not maintainable.

14. Since the ad-interim order restores possession of the flat of the

Petitioner and it is stated that the Petitioner is in possession, we grant her eight weeks time to approach the Debt Recovery Tribunal under Section 17 of the SARFAESI Act. We continue the ad-interim order passed by this Court only for a period of eight weeks from today. If within this period she approaches the Debt Recovery Tribunal, it is entirely for the Debt Recovery Tribunal to pass such interim or final orders as are permissible in law. The Debt Recovery Tribunal is not bound to pass any interim order, much less, unconditional. The Debt Recovery Tribunal should decide the matter on its own merits and in accordance with law, uninfluenced by an ad-interim order passed by this Court.

15. All contentions of the parties are kept open.

16. Needless to clarify, that if Petitioner does not approach the Debt Recovery Tribunal within the stipulated period, the ad-interim protection granted by this Court shall come to an end and thereafter it would be open to Respondent No.2-Bank to proceed in accordance with law.

17. Writ Petition is disposed of in above terms.

**[DR. SHALINI PHANSALKAR-JOSHI, J.]    [S.C. DHARMADHIKARI, J.]**