IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13123 OF 2016

Nazim Mohammed A Furniturewala … Petitioner
Vs.
Dena Bank & Ors. … Respondents

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Mr. Iqbal Chagala, Senior Advocate i/b. Ms. Sadaf Khan for the Petitioner.
Mr. A. R. Bamne i/b. M/s. A. R. Bamne & Co. for Respondent No.1.

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CORAM : S. C. DHARMADHIKARI & PRAKASH D. NAIK, JJ.

DATE : APRIL 28, 2017.

P.C. :

1. By this petition under Article 226 of the Constitution of India, the petitioner is challenging an order passed by the Debt Recovery Appellate Tribunal functioning under Section 18 of the SARFAESI Act, 2002 (for short, 'D.R.A.T'). By that order, copy of which is at Exhibit "A" to the petition, the learned Chairperson of D.R.A.T. has dismissed the stay application of the petitioner-appellant.

2. The petitioner has pointed out in the petition that he is not a borrower or guarantor, nor a mortgagor in respect of the credit facilities sanctioned by the 1st respondent-Bank.

3. The petitioner is the owner of the land ad-measuring 2160 sq. yards and more particularly described in paragraph 1(a) of this petition at page 3.

4. The Writ Petition proceeds to state that the 1st respondent-Bank claims to have a mortgage over the ground floor of the building and standing on this property, namely, 335, Shalimar House, Grant Road, Mumbai. The Bank claims that the ground floor is mortgaged by a partnership firm-3rd respondent through its partners Hazrabai Zakharia Aghadi and Zohrabai Zakharia Aghadi. However, the petitioner claims that at the time of creation of this mortgage, he was also a partner of this firm. The petitioner claims that he has not signed or executed any mortgage deed or created any mortgage in favour of the 1st respondent- Bank.

5. The impugned order proceeds on the footing that the petitioner is a borrower. The petitioner having not complied with the requirement of Section 18(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, “the SARFAESI Act”), and particularly the 2nd proviso thereto, then, the appeal cannot be entertained.

However, the finding of the D.R.A.T. Is premised on the fact that the petitioner is a borrower.

6. In challenging this order, Mr. Chagala, learned senior counsel appearing for the petitioner, would submit that the copy of the partnership deed at page 56 of the paper book would denote as to how the petitioner is a partner of the firm. The petitioner had expressly invited the attention of the Tribunal to this document executed way back on 17th September, 2007. It records as to how the business of partnership is to be carried on. Further, Mr. Chagala places reliance upon clause 15 of this deed of partnership to submit that no partner shall, without consent of the other partner in writing, assign, mortgage or charge her share in the assets or profits of the firm. It is submitted that the deed of mortgage, copy of which is at page 73 of the paper book, does not record that the petitioner is a partner of the firm. That deed of mortgage is of June, 2012. Once the above partnership firm is existence was to the knowledge of all concerned, as it was registered, then, the 1st respondent-Bank cannot insist on terming the petitioner as a 'borrower'/'mortgagor'.

7. Senior Counsel further submits that the Bank relies upon a document styled as "permission to mortgage, various NOC's etc for the loan to be availed by M/s HBEPL (2^{nd} respondent herein) for Rs.100 crore". The Bank relies upon this letter, copy of which is at page 72 of the paper book. However, it is apparent that all the partners have to be parties to the same. It is not, therefore, proper to rely upon only this document and read it in isolation.

8. Mr. Chagala then relies upon a letter dated 12^{th} February, 2014, addressed by the 1^{st} respondent to the borrower company and which points out that a rectification deed would be required. There are some deficiencies/faults in the mortgage of collateral security. The draft copy of the deed of rectification of mortgage needs to be executed. For overcoming these defects, a copy of the draft deed of rectification was forwarded. However, Mr. Chagala would submit that this document would not carry the case of the Bank any further. The petitioner is a partner of the firm. There has been no notice to the petitioner of this mortgage. That is an admitted fact, and recital at clause (e) of the rectification deed at page 98 would demonstrate the same. Further, the Bank's reply in

the proceedings before the Tribunal would indicate that the petitioner being a partner of the firm, though known to the Bank, it proceeds to deny the averment in that behalf. It is in these circumstances and when notice under Section 13(2) was also not addressed to the petitioner, then, this is an apparent case of the Bank proceeding highhandedly, arbitrarily, particularly when it insists on a condition of pre-deposit being complied with.

9. Mr. Chagala then relied upon an order passed by this Court dated 24th November, 2016 to submit that the Division Bench of this Court protected the petitioner simply because it was brought to its notice that the Hon'ble Supreme Court of India had passed an order. That order has been reproduced. That order indicates as to how and in what circumstances an appeal was preferred before the D.R.A.T., Delhi. The D.R.A.T. at Mumbai was not functional. Now, once the Division Bench was apprised of all this, and the mortgaged property is situate in Mumbai, then, all the more, this is not a case where the learned Chairperson's order can be sustained. Our attention has been invited to the order of the Hon'ble Supreme Court of India dated 17th August, 2016, and a further clarification of the same on 13th February, 2017.

10. The argument is that, in the light of these two orders, it is apparent that the appeal of the petitioner before the D.R.A.T. has to be heard on merits and without insisting on any deposit, much less, to the extent of 50%. Without prejudice, Mr. Chagala states that it is not possible for the petitioner to arrange and deposit the huge sum as is insisted by the Bank.

11. On the other hand, Mr. Bamne appearing on behalf of the 1st respondent-Bank would submit that this Writ Petition is a gross abuse of the process of this Court. Mr. Bamne would submit that the D.R.A.T. is right in holding that the petitioner was aware of all the transactions. In that regard, our attention is invited by him to the observations in the order of the learned Chairperson. Further, Mr. Bamne would submit that a compilation of documents handed over by him, and which documents are all referred in the affidavit filed before the Tribunal, as also in several Writ Petitions in this Court, would indicate that every time somebody or the other is put up by the borrowers to defeat the process of law. In that regard, our attention is invited to an order passed by this Court in Writ Petition (L) No.9038 of 2016 dated 23rd March, 2016 and a further

order passed on 13th October, 2016 in Writ Petition (L) No. 862 of 2016. Mr. Bamne would submit that the latter Writ Petition was filed by the firm and its partners.

12. He also would submit that there is a Writ Petition which was filed, in the first instance, in order to defeat the rights of the Bank. Even that Writ Petition, which was filed by one Abdulla Hasan Aboo Alias M. A. Abdulla, being Writ Petition (L) No. 1834 of 2015, was dismissed by this Court.

13. Finally, it is contended that no order of the Supreme Court of India in this Petition and matter would indicate that the Hon'ble Supreme Court directed the D.R.A.T. to hear the matter on merits without insisting on the condition of pre-deposit being complied with. All that the order passed by the Hon'ble Supreme Court directs is that the stay application must be decided. Once that is decided, and in accordance with law, then the view taken, which is imminently possible, should not be interfered with in this Court's extra ordinary jurisdiction under Article 226 of the Constitution of India. More so, bearing in mind the conduct of the petitioner.

14. With the assistance of both counsel, we have perused the Writ Petition and all the annexures thereto.

15. What the learned Chairperson had before him was a direction of the Hon'ble Supreme Court of India. The learned Chairperson was concerned with Misc. Appeal No. 320 of 2016. The order itself proceeds to state that the Misc. Application Nos. 473 and 474 of 2016 were filed by the petitioner-appellant in the appeal. The appeal itself was directed against the order dated 22nd March, 2016 of the DRT-III, Mumbai in Securitisation Application No. 115 of 2015. That application was filed under Section 17 of the SARFAESI Act, wherein, the D.R.T. declined to grant interim injunction during the pendency of the main proceedings. The Bank-1st respondent before us had initiated the measures under Section 13(4) of the SARFAESI Act and sought assistance of the Chief Metropolitan Magistrate so as to take possession of the secured assets. M/s. Shalimar Exhibitors-the 3rd respondent to his petition was a guarantor and had mortgaged the immovable property so as to secure the loan obtained by the 2nd respondent before us, a private limited company.

16. The petitioner claims to be a partner of the firm since 17th September, 2007. He challenged the proceedings initiated by the Bank for taking over physical possession of a portion of the commercial building known as 'Shalimar House' in Mumbai (which building is stated to be having ground floor, mezzanine floor, first and second floor with total 63 rooms and where a hotel is being run) in exercise of the powers conferred vide Section 13(4) of the SARFAESI Act because the borrower company, which was having a outstanding liability of Rs.100 crores in June 2012, failed to clear the same. The physical possession of the portion comprising of 28 rooms, including 23 guest-rooms and other rooms ad-measuring 5500 sq. ft. and 2 shops ad-measuring 36.42 sq. mtrs. and 26.53 sq. mtrs. in this building/House, constructed on the above land was sought to be taken over by the Bank since it has been mortgaged by the mortgagor firm by a registered deed of simple mortgage executed on 27th June, 2012. The petitioner contended before the D.R.T., and equally, before the D.R.A.T. that he was the owner of the land underneath the building, having inherited the same through the *will* of his deceased grandfather Zakaria Aghadi, of which *will* one Mr. Irfan Ashraf Furniturewala was the executor.

The building has been constructed by the partnership firm. A copy of the lease deed executed in respect of the land underneath, by Irfan Ashraf Furniturewala as the executor of the *will* dated 30th December, 2005 in favour of the existing two lady partners of Shalimar Exhibitors was placed on record. Then, recitals of this lease deed and other documents, including partnership deed which inducts the petitioner in the partnership, are relied upon. The Bank pointed out that the petitioner is a partner alongwith his mother and grandmother. The petitioner then claims that without his consent or knowledge, the other partners created a mortgage in respect of the property in favour of the Bank. The Bank also connived and colluded with them and without bringing this mortgage to the knowledge of the petitioner, proceeded to rely on it. The argument throughout was that the said mortgage does not bind the petitioner. If the petitioner was a consenting party to it, there was no occasion for the Bank to have insisted on execution of further documents, particularly the Deed of Rectification. However, no mortgage/rectification deed was executed either by the petitioner or by the other two partners. Thus, it is only when the petitioner came to know of the measures taken by the Bank, that he rushed to the Court.

17. It is such a case which was set up before the D.R.T. in the first instance, and the Bank filed a reply. The Bank pointed out that this is nothing but acting in collusion with the borrower and the guarantor firm's other partners to defeat the Bank's claim. It is the other partners and directors of the borrower company who are placing obstacles in the form of the petitioner and to stall the obvious legal action in the form of seeking assistance from the Chief Metropolitan Magistrate to obtain physical possession of the immovable property pursuant to a notice under Section 13(2) of the SARFAESI Act. That Act was invoked on the footing that the borrower company had borrowed huge sums. That the loan was secured by the guarantees and the deed of mortgage of immovable property by the guarantor firm, the 3rd respondent before us. It is pleaded that before the execution of the deed of mortgage, the Bank had asked the borrower to obtain necessary consent letters from the petitioner since he was the owner of the land underneath. Thereafter, on 25th June, 2012, Mr. Irfan Ashraf Furniturewala, the executor of the *will* on the basis of which the petitioner was

claiming to be the owner of the land, as well as the petitioner himself, confirmed to the Bank that M/s. Shalimar Exhibitors was the owner of the 'Shalimar House'. Hence, they were giving consent/permission to the firm for creation of the mortgage and all the documents were forwarded, including a clear assertion that there was no defect in the title of the firm. The Bank denied the claim of the petitioner that he was also a partner of M/s. Shalimar Exhibitors and that no consent was required to be obtained for the mortgage of the property in question. The sanction letter may have mentioned his name, but there was no substance in the objection of the petitioner.

18. Though the petitioner filed rejoinder to this assertion by denying the contents of the affidavit-in-reply, the D.R.T. rejected the application for interim relief made by the petitioner by a detailed order on 22nd March, 2016. The learned Chairperson of the D.R.A.T. reproduces all these observations and then, proceeds to narrate that once the D.R.A.T., Mumbai was not functional because of lack of appointment of a Chairperson, the appellant-petitioner filed a Writ Petition in this Court. That Writ Petition was

dismissed by a Division Bench of this Court on 23rd March, 2016. The petitioner, then, was called upon by this Division Bench to deposit 25% of the amount in dispute, but he expressed his unwillingness. This Court expedited the hearing of the appeal. Though the petitioner may rely upon a stray sentence, appearing in the order of the Division Bench of this Court and also of the Hon'ble Supreme Court of India, it is well settled that no order of a Court of law can be construed as defying or running contrary to a statute or a law. The petitioner cannot insist on an unconditional right of hearing of the appeal on merits. In the above facts and circumstances, and when the petitioner's conduct is entirely blame-worthy, then, we do not think that he deserves any relief in our writ jurisdiction. The Chairperson is right in insisting on the petitioner complying with the condition of pre-deposit. The argument of the petitioner was premised on the pleading that he is not a borrower. In that, the Tribunal found on a perusal of the entire record that such assertion by the petitioner has no merit. At internal page 18 (running page 41 of the paper book), the petitioner's argument was considered and in great details. Prefacing its finding on the petitioner's assertion, the Tribunal found that demand under Section 13(2) of the SARFAESI Act was raised. Apart from the principal borrower, the guarantors, namely, the partnership firm, of which the petitioner claims to be a partner, did not ever dispute this position. The petitioner has been projecting the mortgaged property to be a partnership asset and not his personal property. The learned Chairperson has clarified that the petitioner may claim right, title and interest in the land underneath, but what is subject matter of the mortgage is the portion of the building and as described by us in great details above. The petitioner has filed an appeal in his individual name while the partnership firm had challenged the proceedings before the High Court. The partnership firm took a stand that the petitioner is a partner of the firm and did not state anything about lack of his consent. However, the petitioner states that his consent was not obtained by his co-partners before creating a mortgage. It is in dealing with that argument, and based on which the assertion that the petitioner cannot be termed as a 'borrower', that the learned Chairperson of the D.R.A.T. found that the Presiding Officer of D.R.T. has rightly rejected it. That there is a family and within the family the arrangement has been made. The petitioner has referred to a letter dated 25th June, 2012. That letter, copy of which is at page 72 of the paper book, reads as under:

> "We the undersigned are the owner of the land at C.T.S. no. 1123 where the building known as 335, Shalimar house has been constructed by M/s Shalimar Exhibitors.
>
> We confirm as under:
>
> 1. M/s Shalimar Exhibitor has obtained necessary permission/approval/sanction for construction of the said building/house from all the concerned competent authorities.
> 2. The construction of the building as well as of the flat/house is in the accordance with the approved plans.
> 3. We confirm and assure you that the said land is not subject to any encumbrance, charge or liability of any kind whatsoever and that the entire property is free and marketable.
> 4. We have a clear legal and marketable title to the land and every part thereof. We have No objection to your giving a loan to the above borrower and their mortgaging the said ground floor premises with your bank by way of a registered mortgage.
>
> We hereby undertake not to affect/allow transfer/sale or the same without notice to and consent of the bank."

That is a letter addressed by Dr. Irfan Ashraf Furniturewala to the Assistant General Manager/Dena Bank, Andheri West Branch. The permission to mortgage and various No Objection Certificates for the loan availed by the 2nd respondent of Rs.100 crores is the subject matter of this letter. The signatories to this letter confirm that they are the owners of the land, namely C.T.S.

No. 1123, where the building known as 'Shalimar House' has been constructed by the partnership firm M/s. Shalimar Exhibitors. They have confirmed the above contents.

19. Below these contents, the petitioner has confirmed his acceptance in writting. Pertinently, he has never disputed execution of this letter, nor its contents, nor the signature. When the petitioner himself relies upon such a document, then, neither the D.R.T. nor the D.R.A.T. can be faulted for arriving at the conclusion that all the arguments to the contrary have to be rejected. The learned Chairperson rightly observed that this document also answers the challenge raised on behalf of the appellant-petitioner before us that despite the fact that in the loan sanction letter, his name was mentioned as a partner, still his consent was not obtained. The petitioner may then change his version and would urge that this is not a consent so as to create a mortgage by the firm, but it is only pointing out to the Bank the position with regard to the ownership and title of the petitioner. The petitioner may also say that this is a letter emanating from Mr. Irfan Ashraf Furniturewala. However, we do not think that learned

Chairperson was in error in rejecting the argument of the petitioner and which runs contrary to the express terms of this letter. Further, what we have found is that the deed of mortgage was registered and that registered deed of mortgage is dated 27th June, 2012. It is only during the course of the proceedings before the Tribunal that the above assertions have been made. Prior thereto, the notice under Section 13(2) was duly served on the firm as also the borrower. The petitioner before us is Nazim Mohammed A Furniturewala. The Bank has addressed a letter to all the partners, as also the partnership firm and the private limited company. It is very clear that though the petitioner made a faint attempt, and throughout, as is now pointed out by relying on his affidavit-in-rejoinder before D.R.T., and particularly paragraph 12 thereof, that the petitioner never gave any consent to create a mortgage or obtain any financial assistance. The petitioner then also relies upon paragraph 12 at page 163 of the paper book to contend that this letter does not bear his signature but the Bank has fabricated his signature on the said letter and strict action should be taken. The letter was addressed by Mr. Irfan Furniturewala who was not a partner of M/s. Shalimar Exhibitors and was not authorized to write such letter on behalf of the partners. Then, he says that a reading of the contents of the letter dated 25th June, 2012 proves that it is false and fabricated. The loan was allegedly sanctioned on 4th June, 2012 whereby the contents of the letter dated 25th June, 2012 states about facilities to be availed. It is in these circumstances that he urges that the alleged letter is false and fabricated and does not bear his signature.

20. Pertinently, the petitioner does not deny that the mortgage has been registered. If the registered mortgage deed has been existing and to the knowledge of the petitioner throughout, then, at least after its registration, the petitioner should have taken steps so as to sue the Bank and initiate atleast a criminal prosecution against those who have fabricated the letter and obtained his signature fraudulently. To our mind, therefore, all the arguments, as are emanating before the D.R.T., D.R.A.T. and us, are an after-thought. The whole attempt in multiple litigation, as is rightly pointed out by Mr. Bamne, is to get over the binding documents and which are enforceable in law. Once the consequences under

the SARFAESI Act were known, we have found that the parties like the petitioner, in order to resist the handing over of physical possession of an immovable property, go to any extent and at times inducted third parties in possession and brought collusive actions. This is one more attempt by the partnership firm and the borrowers desperately to avoid the inevitable. All Writ Petitions before this Court have failed.

21. We have carefully perused the orders passed by the Hon'ble Supreme Court on 17th August 2016 and 13th February, 2017. The orders read as under :

Order dated 17th August, 2016

"Delay condoned.

In course of hearing, we have been apprised that Debts Recovery Appellate Tribunal (D.R.A.T.) at New Delhi has become functional.

In view of the aforesaid, we grant liberty to the petitioner to approach the Debts Recovery Appellate Tribunal at New Delhi in appeal. Dr. Abhishek Manu Singhvi, learned senior counsel appearing for the petitioner submits that he will move the D.R.A.T. in appeal and pray for stay. If the appeal and an application for stay is filed within 10 days hence, D.R.A.T. shall deal with the application of stay and pass final order thereon within a week therefrom.

No coercive steps shall be taken for a period of three weeks. It is hereby made clear that no extension shall be granted by D.R.A.T. for any reason whatsoever because of the order passed today. Additionally, we may proceed to state that we have not expressed any opinion on the merits of the case.

The special leave petition is, accordingly, disposed of."

Order dated 13th February, 2017

"This is an application for clarification of the order dated 17th August, 2006, passed in the special leave petition.

Learned counsel appearing for both the sides have agreed that Writ Petition (C) No. 13123 of 2016, pending before the High court of Judicature at Bombay, may be heard by the said High Court and the appeal that is pending before the Debts Recovery Appellate Tribunal at New Delhi, be transferred to Mumbai. We are accepting the said submission as in the meantime, D.R.A.T. Mumbai, has become functional.

I.A. No. 3 of 2017 is, accordingly, disposed of."

After perusal of these orders, we have no doubt in our mind that a statement was recorded by the Hon'ble Supreme Court on the basis of the submission of the senior counsel appearing on behalf of the petitioner-appellant that the petitioner would approach the D.R.A.T. at Delhi in appeal. The senior counsel stated that he would move the D.R.A.T. in appeal and pray for stay. If the appeal and the application for stay is filed within 10 days, then the application shall be disposed of in a time frame. The Hon'ble Supreme Court's order cannot be construed as dispensing with the requirement or condition of pre-deposit. It is not waived. Neither the orders override express provision of law. The Supreme Court has been always clarifying and in matters such as these, that all proceedings have to be heard and decided in accordance with law. Once the petitioner was aware that he has to move an application for stay and which stay also cannot be granted unconditionally, then, on two occasions, once before this Court in Writ Petition filed by the partnership firm, and equally before us, he would have to bring in some amount. He cannot enjoy the luxury of litigation at the cost of public funds and an unconditional right of appeal. Once the petitioner's argument that he cannot be termed as 'borrower' has been rejected, then, all the more, the insistence by the learned Chairperson cannot be said to be contrary to law.

22. As a result of the above discussion, we find no merit in the Writ Petition. It is dismissed.

23. At this stage, a request is made by Mr. Chagala, on instructions, to stay the dispossession from the immovable property for a period of two months, so as to enable the petitioner to approach the higher Court. This request is opposed by Mr. Bamne.

24. In the light of the fact that the petitioner is not ready and willing to comply with a reasonable, fair and just condition imposed for prosecuting an appeal, and bearing in mind his conduct, we do not think we can accede to the request of Mr. Chagala. The request is refused.

(PRAKASH D. NAIK, J.) **(S. C. DHARMADHIKARI, J.)**