IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (LODGING) NO.3330 OF 2016

Binny Shipping Limited & Anr. ...Petitioners
Versus
Bank of India & Anr. ...Respondents

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Mr. Abhishek Khare i/b. M/s. Khare Legal Chambers for the Petitioners.
Mr. O.S. Rao for the Respondent No.1.

CORAM : A.S. OKA &
SMT. ANUJA PRABHUDESSAI, JJ.

DATED: 22nd MARCH, 2017.

P.C.:-

Heard the learned counsel appearing for the Petitioners. The order under challenge in this Petition under Article 226 of the Constitution of India is dated 28th November, 2016 by which the learned Chairperson of the Debts Recovery Appellate Tribunal (for short “DRAT”) disposed of the application made by the Petitioners under Section 18 of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Act, 2002 (for short 'the said Act') praying grant of waiver of pre-deposit amount as provided under sub section 1 of section 18 of the said Act. The DRAT noted that after giving credit for the sale proceeds of two ships, the amount due and payable by the Petitioners as on the date of issue of a notice under section 13(2) was Rs.39,61,97,336.69. The DRAT granted facility of deposit of 50% of the said amount in two equal installments. There is also a challenge to the consequential order dated 27th December, 2016 passed by the learned Chairperson of DRAT by which the Appeal filed by the Petitioners was dismissed for non compliance of the order dated 28th November, 2016.

2. With a view to appreciate the submissions made by the learned counsel for the Petitioners it will be necessary to make a brief reference to the facts of the case. On 25th October, 2006 the Wembley Branch of Bank of India in United Kingdom issued a letter to the first Petitioner granting sanction for grant of additional credit facility of (i) term loan of USD 2,888,000/- (ii) term Loan of USD 7,500,000/-and (iii) overdraft of 3,00,000/-. There is another letter dated 7th July, 2009 issued by the Bank which records that the first Petitioner has been sanctioned advance facility of USD 15,735,000/-. The details of terms and conditions on which the sanction was granted were incorporated in the said letter which provided for creation of equitable mortgage of two flats owned by the second and the third Petitioners and an office premises owned by the third Petitioner by way of security.

A condition of furnishing personal guarantees was also incorporated. It is an admitted position that the second and the third Petitioners deposited title documents in respect of the flats and office premises with Bank of India with an intention of creating equitable mortgage in favour of said Bank for securing advance granted to the first Petitioner as aforesaid.

3. We may note here that contention of the Petitioners is that though loan was granted subject to condition of execution of creation of equitable mortgage in respect of the two flats and the office (the said properties) belonging to the second and the third Petitioners after obtaining approval of the Reserve Bank of India, any such approval was not granted by the Reserve Bank of India. Admittedly, the benefit of advance sanctioned to the first Petitioner was availed by the said Petitioner.

4. A notice under sub section 2 of section 13 of the said Act was served by the first Respondent-Bank. It is stated that a further notice was issued by the first Respondent informing that the possession of the said property will be taken over as a measure under sub section 4 of section 13. Therefore, the Petitioners filed Securitisation

Application before the Debt Recovery Tribunal (DRT). In the said Securitisation Application, an interim application for interim relief was taken out by the Petitioners. By the order dated 10th November, 2016 interim application was rejected by the DRT-I. Being aggrieved by the said order, an appeal was preferred by the Petitioners before the DRAT, in which an application for waiver as aforesaid was made by the Petitioners. We have already made a reference to the first impugned order dated 28th November, 2016 passed in the Appeal. On account of non compliance with the condition of deposit of the 50% of the amount due and payable on the date of the notice under Section 13(2), by the second impugned order the Appeal was dismissed.

5. The first contention of the learned counsel for the Petitioners is that Wembley branch of Bank of India is a foreign Bank. His submission is that as the loan was advanced by a foreign Bank in United Kingdom to the first Petitioner, the provisions of the said Act are not applicable and no action could have been taken by the Bank under the provisions of the said Act. He submitted that the issue of jurisdiction goes to the root of the matter. Therefore, this was a fit case to grant waiver of pre-deposit amount under sub section 1 of section 18 of the said Act.

6. Secondly, he submitted that in fact personal guarantee could have been given by the second and the third Respondents and equitable mortgage could have been created by them only with the prior approval of the Reserve Bank of India. Lastly, he relied upon a letter of the Reserve Bank of India, Foreign Exchange Department which shows that the Reserve Bank of India declined permission for execution of the corporate guarantees and for creation of mortgage in respect of the said property. Therefore, action under sub section 4 of section 13 of the said Act was not legal.

7. He further submitted that full credit for the price of the vessels sold has not been given by the first Respondent Bank. He invited our attention to clause 1 of paragraph 8 of the sur-rejoinder where this contention has been raised. He, however, on a query made by the Court candidly accepted that the said contention was not raised before the DRAT. He also relied upon the decision of the Division Bench in the case of Jammu and Kasmir Bank Ltd. Vs. M/s. Prabhat General Agencies & Ors. in Writ Petition 4979 of 2006 dated 17th August, 2006. He submitted that on the basis of grounds canvassed by him, this is a fit case to grant complete waiver. He submitted that DRAT has not exercised the jurisdiction vested in it.

8. We have considered the submissions. On a specific query being made by the Court, the learned counsel for the Petitioners accepted that the documents of title in respect of three secured assets (the said property – two flats and one office premises) were handed over by concerned Petitioners to the Bank of India with the intention of creating equitable mortgage by way of security for the advance sanctioned to the first Petitioner. The question is whether in a Petition under Article 226 of the Constitution of India, the Petitioners can now be allowed to agitate a contention that the equitable mortgage was not valid for want of consent of the Reserve Bank of India. Another aspect is that admittedly, the advance as sanctioned was released to the first Petitioner. We may note here that the second and the third Petitioners who are claiming to be the owners of the said property who handed over documents of title, are the Directors of the first Petitioner Company. The issue of the legality of the equitable mortgage will have to be gone into in the main Securitisation Application.

9. We may make a reference to the impugned orders at this stage. On the second page of the first impugned order, the learned Chairperson of the DRAT has observed that the Bank has already given credit of the sale proceeds realised from sale of two ships. The DRAT

observed that after giving the credit of the sale proceeds, the amount due and payable by the first Petitioner was Rs.39,61,97,336.69 as on the date of issuance of notice dated 16th April, 2014 under sub section 2 of section 13 of the said Act. As stated earlier, the contention raised in the sur rejoinder filed in this Petition that credit for entire sale proceeds was not given before the DRAT. However, at the time of hearing before the DRAT, the said contention was admittedly not raised.

10. At the stage, when the prayer for waiver was considered, it was not necessary for the DRAT to have considered the larger issue regarding the applicability of the provisions of the said Act to the secured assets on the ground that advance was sanctioned and released in United Kingdom. This issue will have to be gone in the Securitisation Application.

11. There is one more aspect which must be noted. In the appeal preferred before the DRAT, ground 'M' is specifically taken, which reads thus:

> "M. <u>The Appellant further humbly submits that he is not denying his liability under the loan,</u>

however the Appellant is ready to repay and settle the proper dues only if the Respondent No.1 provides with correct and proper statement of accounts for the loan of the Appellant."

(underline is added)

We may note here that an Appeal before the DRAT was filed by all the Petitioners.

12. Thus, an admitted position which emerges is that on the basis of the sanction letter, the second and the third Petitioners with the intention of creating equitable mortgage in respect of the said property (secured assets) for securing the advance granted to the first Petitioner deposited the title deeds in respect of the secured assets with the Bank. The second and the third Petitioners are the Directors of the first Petitioner. The first Petitioner has enjoyed the facility under the sanction granted by the first Respondent Bank. As stated earlier, before the DRAT, a categorical statement was made that the Petitioners were not disputing their liability to repay the amount of advance. These are all the relevant factors for deciding the Application for waiver of pre-

deposit amount payable under sub section 1 of section 18 of the said Act. It is impossible to find fault with the discretionary order passed by the learned Chairperson of the DART when he granted relief to the extent of granting facility to deposit 50% of the amount payable under sub section 1 of section 18 in two equal installments.

13. This is not a fit case where the Petitioners should be allowed to invoke writ jurisdiction under Article 226 of the Constitution of India. Accordingly, we find no merit in the Petition and the same is rejected.

(ANUJA PRABHUDESSAI, J.) **(A.S. OKA, J.)**