IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10047 OF 2018

1 Nirmala Balasaheb Bhintade
W/o Balasaheb Bhintade
C-506, 5th Floor, Zenith
Co-op. Society Ltd.,
Bhavani Nagar, Marol,
Andheri (West),
Mumbai 400059

2 Balasaheb Bhintade
C-506, 5th Floor,
Zenith Co-op. Society Ltd.,
Bhavani Nagar, Marol,
Andheri West,
Mumbai 400059 … Petitioners

Versus

1 SBI Global Factors Ltd.
The Metropolitan Building,
Bandra Kurla Complex,
6th Floor, Bandra (East),
Mumbai-400059.

2 Rambo Fashion Ltd.
107/133/3A Rahul Mittal
Industrial Estate Sakinaka,
Andheri (East),
Mumbai 400059

3 Abhishek Sidharth More
Advocate
20/72 BIT Chawl,
R.B.Chandorkar Marg,
Agripada
Mumbai 400011

4 The Sr. Inspector of Police
Powai Police Station,
Mumbai ... Respondents

...

Mr. Navneet Krishnan i/by Nava Legal Asso. for the Petitioner.

Mr. Rohit Gupta with Ms. Anamika with Ms Bhagyashree Lembhe i/by H.S.A. for the Respondent No.1.

CORAM : K. K. TATED &
SANDEEP K. SHINDE JJ.
DATE : 21 SEPTEMBER, 2018.

ORDER : [Per Shri Sandeep K. Shinde, J.]

Petitioner No.2 is director of Respondent No.2-Company; whereas Petitioner No.1 is wife of Petitioner No.2. Respondent No.1 is Secured Creditor and Respondent No.2 is borrower. Both the Petitioners are guarantors to loan advanced by the Respondent No.1 to Respondent No.2.

2 Respondent No.2 (hereinafter called as 'Secured Creditor') issued a demand notice under Section 13(2) of the Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as '**SARFAESI Act**') on 9.11.2016 calling upon the borrowers and guarantors to pay Rs.19,47,76,126/- as the loan account has been classified as Non Performing Asset [NPA]. It was followed by an action taken under Section 14 of the SARFAESI Act, whereby the learned Additional Chief Metropolitan Magistrate passed an order on 21.3.2018 and appointed Commissioner to take physical possession of the secured assets on 6.7.2018.

3 Petitioners being aggrieved by the order passed under Section 14 of the SARFAESI Act filed Securitisation Application before the DRT-II, Mumbai, wherein Interim Application No.919 of 2018 was preferred and sought stay to the execution of the order passed under Section 14 of the SARFAESI Act. The learned DRT declined to stay the execution vide order dated 6.7.2018. This order was challenged before the DRAT vide M.A.No.460 of 2018 in Appeal No.41 of 2018. Said application met with same fate. The Appellate Tribunal while disposing of the application granted liberty to Secured

Creditors to proceed to take possession of the secured assets, however, made it clear that such a possession and action is subject to outcome of the Appeal No.41 of 2018 pending before it.

4 Aggrieved by the order passed by the DRT and DRAT, Petitioners have preferred this Writ Petition and prayed interim relief to restrain Secured Creditors from taking physical possession of the secured asset.

5 Before adverting to the arguments advanced by the learned counsel for the Petitioner, it may be stated that Secured Creditors herein have filed a suit in July, 2010 being Suit No.1981 of 2010 in this Court, against the borrowers-company, its guarantors, directors and the present Petitioners for a decree to recover the amount of Rs.6,23,15,721/- with interest @ 18%. Another prayer in the suit is, of declaratory in nature, seeking declaration that loan/financial facility extended, granted and sanctioned to M/s. Rambo Fashion Ltd. (Borrower) is secured by valid and subsisting mortgage of the immovable properties of the Defendant Nos.1, 2 and 4. Defendant No.4 in the suit is the Petitioner No.1 in this Petition

and the Defendant No.2 in the suit is the Petitioner No.2 herein.

6 Defendant Nos.1 to 4 in the said suit filed their written statement on 8.4.2015 and denied any loan facility as such has been extended, granted and released to M/s. Rambo Fashion Ltd. (Respondent No.2) Equally suit claim is resisted on the ground that the guarantors/defendants who are the petitioners before this Court have, not mortgaged the subject properties as a security to the Creditors. They have denied execution of any mortgage deed either in form of deposit of title deeds or otherwise. In the said suit, issues are framed and issue no.6 therein relates to valid and subsisting mortgage of immovable properties of the Defendant No.1,2 and 4. Issue reads thus:

> "6 Whether the Plaintiffs prove that trade finance itself was duly secured by valid and subsisting mortgage on the immovable properties of the Defendant Nos.1,2 and 4 ?

7 Undisputedly, in the suit proceedings, the learned Single Judge of this Court vide orders dated 22.11.2010 and 6.12.2010 restrained the Defendant Nos.1,2 and 4, i.e., M/s.

Rambo Fashion Ltd. and the Petitioner Nos.1 and 2 herein from disposing; alienating; parting with possession or from creating third party rights in the suit properties (Secured Assets) which is also the subject matter of proceedings under SARFAESI Act. These orders dated 22.11.2010 and 6.12.2010 are thus binding on the Petitioners herein.

8 Mr. Gupta appearing for the Respondent No.1 has brought to our notice two registered Leave and Licence Agreements executed on 3.6.2018 by the Petitioners in respect of Flat No.18/C 506, Zenith Co-operative Housing Society (Secured Asset) whereby Mr. Agarwal Pranjal and Mr. Hardik Prithani have been inducted as licensees. Yet another Leave and Licence agreement has been executed by the Petitioner No.2 in respect of Flat NO.18-C, 505 (Secured Asset) whereby Mr. Vaibhav Pimpalgaonkar and Mr. Yogesh Kewlani and two others have been inducted as licensees in Flat No.18/C 505.

9 Petitioner No.2 by inducting the licensees in flat No.18-C, 505 and 506 breached the restraint orders dated

22.11.2010 and 6.12.2010 passed by this Court.

10 This Court when confronted the Petitioner with leave and licence agreements, which on the face of it were executed in breach of the orders passed by this Court, he could tender any explanation and in fact, admitted execution of these agreements.

11 This Petition is filed under Article 226 of the Constitution of India inter-alia challenging the order passed by the DRAT dated 10.8.2018 whereby interim relief was refused and permitted the Secured Creditors to take possession of the secured asset;

12 On the backdrop of the aforesaid facts, undisputedly Petitioners have not approached this Court with clean hands. This Court in Writ Jurisdiction cannot overlook conduct of the parties and it is expected of them to approach the Court with clean hands. It may be stated that the Petitioner No.2 has inducted licensees in the Secured Assets in June, 2018 but these facts were not brought to the notice of the

Court but were placed on record by the Secured Creditors. Thus, we conclude that the Petitioners have suppressed the material facts and have not approached this Court with clean hands. In fact, Petitioners have breached the orders of this Court dated 22.11.2010 and 6.12.2010. Petitioners are, therefore, not entitled to any discretionary relief. On this ground alone, we refuse to entertain the Petition and relegate the parties to the DRAT where Appeal No.41 of 2018 filed by the Petitioners is pending.

13 It may be stated that Petitioners who are the defendants in the Suit No.2963 of 2010 resisted the suit claim also on the ground that they had not executed any mortgage either by deposit of title deeds or otherwise in favour of the Secured Creditors.

14 We have gone through the pleadings in the suit. Secured Creditors in paragraph 16 of the suit pleaded that M/s. Rambo Fashion Ltd. (borrower), forwarded documents in respect of properties, i.e., Flat Nos.506 and 505 belonging to

Defendant Nos.2 and 4 (Petitioners herein) with '<u>intention to create mortgage</u>'. Likewise, in paragraph 5 Secured Creditors (Plaintiffs therein) pleaded that for the purpose of securing repayment of the aforesaid trade finance facility, Defendant Nos.2 and 3 had issued joint and several Letters of Guarantee on 10.1.2007. *(emphasis supplied)*

15 Prima-facie, it appears, Plaintiffs have not pleaded in the plaint factum of mortgage deed being executed by the Petitioners herein to secure the loan/facility extended and sanctioned to M/s. Rambo Fashion Ltd.

16 Thus, after going through the pleadings in the plaint and in view of the fact that the issue has been framed by this Court in Suit No.2963 of 2010 relating to subsistence of mortgage of the secured assets, we are of the opinion that issue to be gone into is; "*whether Secured Creditors have created security interest in the subject flats within the meaning of Section 2(z)(f) read with Section 26-D of the SARFAESI Act*".

17 We make it clear that this Court has not addressed this issue at all. We declined to entertain the Petition only on the ground that the Petitioners have not approached this Court with clean hands and flouted restraint orders passed by this Court in suit proceedings.

Be that as it may, since Appellate Tribunal has declined interim relief and granted liberty to Respondents to take possession of Secured Assets, subject to outcome of Appeal, in the interest of justice, we deem it appropriate to relegate the parties to DRAT. We, however, make it clear that this Court has not addressed objection of Secured Creditor qua maintainability of Appeal in view of provisions of Section 18 of the SARFAESI. The DRAT shall decide the said objection.

18 Resultantly, the Petition is dismissed and disposed of accordingly.

19 All contentions of both Petitioners and Respondents are kept open.

(SANDEEP K. SHINDE, J.) ***(K. K. TATED, J.)***