IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2004 OF 2017

...

K.a. Malle Life Sciences Pvt. Ltd. ....Petitioner
V/S
State Bank Of Mysore And 2 Ors ....Respondents

...

Dr Birendra Saraf a/w Advait Sethna a/w R.R.Thakkar i/b Udaipuri And Company for the Petitioner.
Ms Pooja Patil Khandeparkar a/w Rashmi Chavan a/w Durga Soni i/b Vivek S Sawant for Respondent No.2.

...

CORAM : A.A. SAYED &
V.L.ACHLIYA, JJ.
DATED : 5 JULY 2018

P.C.:

The Petitioner has filed this Petition impugning the judgment and order dated 7 March 2017 passed by the DRT-I, Mumbai whereby the Securitization Application No.5 of 2014 filed by the Petitioner is dismissed on the grounds of `maintainability' and `limitation'. The said SA No.5 of 2014 was filed by the Petitioner impugning communication dated 6 April 2013 of the Respondent-Bank forfeiting the amount of Rs.3.25 crores being the 25% of the purchase price deposited by the Petitioner for purchase of secured asset of the borrower company viz.Swastik Drugs Limited at an auction conducted by the Respondent-Bank. The Petitioner also prayed for refund of the aforesaid amount with interest in the SA.

2. So far as the issue of maintainability is concerned the DRT in the impugned order held that the SA would not be maintainable before DRT relying upon the judgment of the Division Bench of this Court in the case of **Umang Sugar Pvt. Ltd. V/s. State of Maharashtra & Ors.** 2014(3) All MR 27, wherein it was held that the remedy of challenging the action of the secured creditor in forfeiting the amount of deposit under Rule 9(5) of the SARFAESI Act would be by way of a Writ Petition and an Application under section 17 would not be maintainable. The judgment of the Division Bench is now no more good law in view of the recent judgment of the Apex Court in **Agarwal Tracom Pvt.Ltd. V/s. Punjab National Bank & Ors.**, (2018) 1 SCC 626. In the said case the Apex Court has held that the remedy of the Auction Purchaser for challenging the action of the Bank in forfeiting the deposit under Rule 9(5) of the SARFAESI Act would be maintainable before the DRT by filing an Application under section 17 of the SARFAESI Act and in view of the alternate remedy the High Court ought not to entertain a Writ Petition & DRT would be the proper forum.

3. In these circumstances, the finding of the DRT in the impugned order that the SA would not be maintainable cannot be sustained.

4. So far as issue of `limitation' is concerned, it is noticed that by communication dated 6 April 2013 the Respondent-Bank had informed the Petitioner that the amount of Rs.3.25 crores was being forfeited and the Petitioner had filed Misc. Application No.282 of 2013 in May 2013 challenging the aforesaid communication dated 6 April 2013 in SA No.16 of 2011. The said SA No.16 of 2013 was filed by the borrower-company viz.Swastik Drugs Ltd. challenging the action of the Respondent-Bank of auction sale of its properties. The Petitioner also filed Misc. Application No.279 of 2013 in SA No.16 of 2011 for intervention. It is in this SA No.16 of 2011 that the DRT had passed an order dated 27-03-2012 permitting the Respondent-Bank to conduct the auction of the mortgaged properties and directing the Respondent-Bank to take prior permission from DRT before confirming the sale. Further, it is in this SA No.16 of 2011 that DRT had passed an order dated 16-08-2012 permitting the Respondent-Bank to accept the balance 75% of the bid amount & further ordering that the Petitioner-Auction Purchaser shall not transfer the property until the disposal of SA No.16 of 2011 and that the sale shall be subject to outcome of SA No.16 of 2011. In the circumstances, the act of the Petitioner in filing MA No.279 of 2013 for impleadment and MA No. 282 of 2013 for challenging the communication dated 6 April 2013 in the first instance

cannot be faulted and it can in no circumstances be said that the Petitioner was not bonafidely pursuing his remedy before the DRT by filing MA No.282 of 2013 in SA No.16 of 2011.

5. It is not in dispute before the Court that MA No.282 of 2013 impugning the communication dated 6 April 2013 was filed by the Petitioner within 45 days of the communication dated 6 April 2013 of the Respondent-Bank, whereby the Petitioner was informed that the amount of Rs.3.25 crores paid by the Petitioner to the Respondent -Bank was being forfeited. The DRT passed a common order dated 10-07-2013 in MA Nos.279 and 282 of 2013 holding that the Petitioner cannot be added as a party in SA. The DRT further held that for challenging the Respondent-Bank's communication of 6 April 2013, the Petitioner would have to initiate an independent proceedings before the appropriate forum. The Petitioner thereafter preferred an Appeal before the DRAT impugning the said order dated 10 September 2013 passed by the DRT, which came to be dismissed on 9 January 2014. The Petitioner then preferred Writ Petition No.872 of 2014 before this Court challenging the orders dated 9 January 2014 of the DRAT and 10 September 2013 of the DRT. In the meanwhile, on 20 January 2014, the Petitioner had also filed SA No.5 of 2014 before the DRT challenging the Respondent-Bank's communication dated 6 April 2013, (in

which the impugned order has been passed on 7 March 2017 by the DRT). On 16 April 2016, the Division Bench of this Court disposed of WP No.872 of 2014 by passing the following order:

> " In the light of the pending proceedings before the Debts Recovery Tribunal, leave is granted to the Petitioner to withdraw the Writ Petition. The Writ Petition is disposed of as withdrawn. In the light of withdrawal of the Writ Petition, Notice of Motion No.370 of 2015 and Notice of Motion (I) No.213 of 2016 do not survive and stand disposed of as such." *(emphasis supplied)*

6. In view of the above, it can be safely said that the Petitioner was bonafidely prosecuting his proceedings emanating from MA No.279 of 2011 filed by the Petitioner (which was admittedly filed within 45 days of the impugned communication dated 6 April 2013) till filing of the Petitioner's own SA No.5 of 2014, wherein the impugned order dated 17 March 2017 has been passed by the DRT. In the circumstances, we are inclined to accept the contention of the learned Counsel for the Petitioner that the Petitioner was prosecuting the proceedings with due diligence and in good faith and the case of the Petitioner would be covered under section 14 of the Limitation Act, 1963. We find that the DRT has not considered the aforesaid aspects while dismissing the SA No.5 of 2014 on the ground of limitation also. We note that the DRT while passing the order impugned has not gone into merits of the case and has dismissed the SA No.5 of 2014

filed by the Petitioner on the ground of `maintainability' and `limitation' as indicated earlier. It is also required to be noted that the Petitioner has approached this Court directly by filing Writ Petition and has not challenged the impugned order before the DRAT.

7. In light of the aforesaid discussion, we find that the findings with regard to `maintainability' as well as `limitation' in the impugned order of DRT cannot be sustained.

8. In the result, we pass the following order:

(i) The impugned order dated 7 March 2017 of DRT is set aside.

(ii) The matter is remitted back to DRT which shall hear the SA No.5 of 2014 afresh on merits.

(iii) Inasmuch as the Securitisation Application is of the year 2014, DRT to dispose of the SA No.5 of 2014 expeditiously.

9. The Petition is disposed of in the aforesaid terms.

Uday
Prabhakar
Kambli

Digitally signed by Uday Prabhakar Kambli
Date: 2018.07.10 13:39:35 +0530

(V.L.ACHLIYA,J.) **(A.A.SAYED, J.)**