IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO.3186 OF 2019

Sheikh Noor Mohammad ..Petitioner
Versus
The Mogaveera Co-operative Bank
Limited & Anr. ..Respondents

Mr. Shanay Shah i/by T. N. Tripathi & Co., Advocate for the Petitioner.
Mr. S. A. Oak, Advocate for the Respondents.

CORAM : PRADEEP NANDRAJOG, C.J. &
SMT. BHARATI DANGRE, J.
DATE : 11th NOVEMBER, 2019

P.C.

1] Heard learned counsel for the parties finally at the preliminary hearing of the Petition.

2] Learned counsel for the Respondent – Bank appears on an advance copy of the Writ Petition being served upon Bank.

3] For a loan advanced by the Respondent – Bank to Ahmer Shaikh his father the Writ Petitioner mortgaged Flat No.201, 2nd Floor, Building No.B-2, Al-Quds Co-operative Housing Society Ltd. and thus the father and son would both be borrowers in view of clause (f) of Sub Section (1) of Section 2 of the SARFAESI Act, 2002. There being default in repayment of the loan, Respondent issued a notice under Sub Section (2) of Section 13 of SARFAESI Act on 5th October 2016 demanding the then outstanding sum of ₹ 44,14,043/-. The

Petitioner claims that neither he nor his son received the said notice. It is the case of the Petitioner that neither he nor his son received any order passed under Section 13(4) of the SARFAESI Act and they learnt about notice issued by the Bank under Sub Section (2) of Section 13 of SARFAESI Act when the Bank obtained an order under Section 14 of the SARFAESI Act.

4] DRT not functioning on account of a mysterious fire damaging the building, the Petitioner and his son filed Writ Petition in this Court registered as Writ Petition Stamp Nos.15484 of 2018 in which on 6th June 2018 an order was passed recording that the Petitioner and his son would deposit ₹ 5 lakhs with the Bank by 7th June 2018 and further sum of ₹ 5 lakhs within two weeks thereafter. The Writ Petition was disposed of on 21st June 2018 noting that said sums had been deposited with the Bank. The Petitioner and his son were relegated to the remedy before the DRT.

5] The Petitioner and his son filed an application under Section 17 of the SARFAESI, Act. They prayed for the attachment of the property to be declared void and by way of an interim measure prayed that the order issued by the Metropolitan Magistrate under Section 14 of the SARFAESI Act be stayed and the physical possession of the flat be not taken over. DRT passed an order on 24th July 2018. Noting the stand of the Bank that after adjusting ₹ 10 lakhs, outstanding as of the date when the Tribunal passed the order was ₹ 46,48,338, the Tribunal directed that upon the Petitioner and his son deposited ₹ 10 lakhs by 15.08.2018 followed by ₹ 15 lakhs by 15.09.2018 and ₹ 10 lakhs by 15.10.2018 remaining amount claimed by the Bank shall be stayed and the Bank would not proceed with the attachment. Meaning thereby, with respect to the original demand by the Bank in sum of ₹ 44,14,043/- after adjusting ₹ 10 lakhs which was already paid under directions issued by the Court learned DRT requires the father and the son to pay further sum of ₹ 35 lakhs.

6] The conditional order of stay dated 24th July 2018 was challenged by the Petitioner before the learned Debts Recovery Appellate Tribunal which passed an order on 11th October 2018 noting that the claim of the Petitioner was of being a senior citizen aged 68 years and having no income. That he was dependant on his sister from whom he had borrowed ₹ 10 lakhs to be deposited with the Bank. The Appellate Tribunal noted that even with respect to the demand in sum of ₹ 14,14,043/-, deducting ₹ 10 lakhs deposited, remaining amount would be ₹ 34,14,043/-. 50% thereof would be ₹ 17,07,021/-. Called upon to exercise its powers under the 3rd Proviso to Sub Section (1) of Section 18 of the SARFAESI Act, the Tribunal did not reduce the pre-deposit condition to 25% and dealt with 50% of the amount due required by the 2nd Proviso to be deposited as a condition for the Tribunal to entertain the Appeal granted partial relief by directing ₹ 17,07,021/- to be deposited in two installments of ₹ 8,53,510/- each. The first by 16.10.2018 and the second by 16.11.2018. The Petitioner deposited ₹ 8,53,510/- by 18.10.2018 but could not deposit the second installment and revisited this Court and under Writ Petition (L) No.3862 of 2018 in which the order of pre-deposit was questioned on the reasoning that the Appellate Tribunal did not exercise its jurisdiction as per law and reason on account of financial hardship was not considered to be considered while exercising the power under 3rd Proviso to Sub Section (1) of Section 18 of the SARFAESI Act. The said Writ petition was disposed of on 14th November 2018 requiring the Appellate Tribunal to consider exercising its power under 3rd Proviso of Sub Section (1) of Section 18 of the SARFAESI Act in view of the law declaring by this Court in the decision reported as 2012 (Supp.1) Bom. C.R. 863 *Sterlite Technologies Ltd. Vs. Union of India & Ors*.

7] At the remanded stage the Tribunal has passed the impugned order dated 1st November 2019. Unfortunately for the Petitioner, his counsel was ill advised to argue that Co-operative Banks would not be entitled to the benefit of SARFAESI Act on account of a decision passed by a Bench of the Gujarat High Court, for the reason this Court has already taken a view that Co-operative Banks are entitled to avail remedies under SARFAESI Act. The contention of the Petitioner that he was in financial hardship and thus the condition of pre-deposit for entertaining the Appeal be reduce 25% has been dealt with by the Tribunal very interestingly. As noted above, the Petitioner had deposited ₹ 8,53,510/- as the first installment as directed by the learned DRT. The Petitioner placed documents before learned DRAT to show that on his sister's pledging jewelry with Muthoot Fincorp they advanced a loan of ₹ 6.9 lakhs to Petitioner's sister and this loan amount was used by the Petitioner to deposit ₹ 8,53,510/- with the Bank. The learned DRAT wondered as to wherefrom the Petitioner got remaining sum of ₹ 1,63,510/-, and therefore inferred that probably the Petitioner admits he was hiding facts from the Appellate Tribunal.

8] Challenge in the Petition is to the order dated 1st November 2019.

9] Suffice it to state the Appellate Tribunal was not to act as an Accountant or Chartered Account while dealing with the claim of the Petitioner that on account of financial hardship he was unable to deposit 50% of the amount due. Indeed the reasoning by the DRAT is perverse in returning the finding that the Petitioner has not been able to show financial hardship.

10] Keeping in view the fact that the Petitioner as deposited ₹ 18,57,510/- and the demand raised was ₹ 44,14,043 noting that about 43% of the amount demanded has been deposited in the Bank we bring the curtains down by disposing of the Writ Petition setting aside the impugned order dated 1st November 2019 and allow M. A. No.638 of 2018 filed by the Petitioner reducing the pre-deposit to the amount already deposited requiring learned DRAT to decide Appeal No.58 of 2018 on merits.

Balaji G. Panchal

Digitally signed by Balaji G. Panchal
Date: 2019.11.13 17:29:47 +0530

SMT. BHARATI DANGRE, J **CHIEF JUSTICE**