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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 9848/2020**

UNION BANK OF INDIA

..... Petitioner

Through: Mr. D.K. Malhotra, Mr. Rajesh
Malhotra and Mr. Samarendra
Kumar, Advocates

versus

DMC INFRASTRUCTURE P LTD & ORS.

..... Respondents

Through: Mr. Amit Vohra, Advocate

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER

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04.12.2020

HEARD THROUGH VIDEO CONFERENCING.

CM No. 31424/2020 (Exemption)

Allowed, subject to all just exceptions.

W.P.(C) 9848/2020 & CM No. 31423/2020 (for stay)

1. The instant petition is directed against the order dated 16.11.2020, passed by the learned Debt Recovery Appellate Tribunal (DRAT), Delhi in Misc. Appeal No. 375/2019 filed by the petitioner/Bank.
2. The facts in brief leading to filing of the present petition are as under:-
 - (a) The respondents No.2 and 3 approached Corporation Bank (now merged with the petitioner/Bank) for availing of credit facilities. Respondent No.4 stood as a guarantor for repayment of the loan amount.
 - (b) Respondent No.1 was the owner of a property described as a permanent Cinema structure measuring 2115 sq. yards situated in Municipal

No.8356 at Model Basti, Bara Hindurao, Delhi (commonly known as Filmistan Cinema) and hereinafter referred to as the property. The said property was given as a security/mortgage for taking the facilities availed of by the respondents No.2 and 3.

(c) Respondent No.2 and 3 did not fulfil their obligations in making regular payment and their accounts were classified as a non-performing asset (NPA).

(d) A Demand notice under Section 13(2) of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (SARFAESI Act) was issued calling upon the borrowers i.e. respondents No.2 and 3 and the guarantor/respondent No.4 to repay the loan amount.

(e) Since the amount remained unpaid, a notice under Section 13(4) of the SARFAESI Act qua the property was issued and symbolic possession thereof was taken over by Corporation Bank, who filed an O.A. before DRT (II), Delhi for recovery of dues. The said O.A. is still pending adjudication.

(f) On receiving the Section 13(2) and 13(4) notices, respondents No.1 to 4 filed S.A. 94/2018, challenging the said notices.

(g) By an order dated 27.06.2018, the DRT directed the respondents to pay the undisputed amount i.e. Rs.28 crores, in four equal instalments. Since respondents No.1 to 4 could not pay the instalments, the Bank started taking steps for sale of the property.

(h) Respondents No.1 to 4 filed an application (I.A.1072/2019) for modification of the order dated 27.06.2018 and requested that they be permitted to pay Rs.28 crores in seven equal monthly instalments, instead of four monthly instalments, starting from 10.07.2018.

(i) Respondents No.1 to 4 contacted respondent No.5, Mr.Mukesh Garg for purchasing the property and to clear the debt. Respondent No.5 appeared before the DRT on 25.07.2018 and the DRT passed the following order:-

"Today the 3rd party Mr. Mukesh Garg appeared before this Tribunal and undertakes to pay Rs.20.30 cr. Which is the amount involved in two loan accounts. He further undertakes to pay said amount within five months. The 3rd party to file affidavit by Monday with advance copy to the respondent bank, then bank to refer the same to the higher authority. The affidavit shall be filed by tomorrow morning with copy to other side and the respondent bank will revert to the proposal by Monday i.e. 30.7.2018.

For hearing posted to 30.7.2018.

Dasti."

(j) Respondent No.5 filed an affidavit dated 26.07.2018 before the DRT. Paras 3, 4 and 5 of the said affidavit which are relevant for this case, read as under:-

*"3.That, I agree and affirm that towards the consideration for purchase of the said property, I shall deposit, with the Respondent Bank, a sum of Rs. 20.30 crores (**Rupees Twenty Crores Thirty lakhs only**), in 3 instalments of Rs. 4 crores each and a last instalment of Rs. 8.30 crores, as per the tielines mentioned in the Point 4, on the condition that the suit property i.e. All that part and parcel of the property consisting Permanent Cinema structure on the freehold plot of land measuring 2115 Sq. Yds. bearing Municipal No. 8356 situated at Model Basti, Bara Hindu Rao, Delhi 110005, is released by the Respondent Bank, free of all charges and/or any sort of encumbrances, present or future, direct or indirect, tangible or intangible, of the Respondent Bank, if any, to the Owner of the Property who has given the said property as collateral/mortgage in respect of credit facilities taken by the principal Borrower, immediately on the aforesaid payments being made and who is turn sells the same to me. That, the expression "release" as abovementioned shall mean to include the release the Original title deeds & all other documents pertaining to the suit property as well as the release of the charge, tangible or intangible, by the Respondent Bank, over*

the possession of the suit property.

4. That, I shall endeavour to the timelines of the above-said payments as follows:

a. 1st Instalment of Rs. 4 crores - on the 30th July, 2018;

b. 2nd Instalment of Rs. 4 crores - on the 30th September, 2018;

c. 3rd Instalment of Rs. 4 crores - on the 30th November, 2018;

and

d. Last instalment of Rs. 8.30 crores- on the 31st January 2019.

5. That, I shall be making the above payments on the belief and declaration given by the Respondent Bank as well as the Applicants, as a condition precedent, that Respondent Bank shall not engage into and I shall not be, directly or indirectly, made party to any dispute or litigation, present or future, between the Applicants and the Respondent bank, nor my rights on the suit property be affected in any manner whatsoever after the making of aforesaid payments by me."

(k) On 30.07.2018, the DRT granted four months time to the respondent No.5 to pay an amount of Rs.20.55 crores in instalments, out of which Rs.4 crores was to be paid by him on 30.07.2018. The second instalment of Rs.4 crores was to be paid on or before 25.08.2018, the third instalment of Rs.4 crores was to be paid on or before 20.09.2018 and the fourth instalment of Rs.4 crores was to be paid on or before 15.10.2018. The fifth instalment of Rs.4.55 crores was to be paid on or before 30.11.2018 along with 8% interest on a reducing balance basis. The order dated 30.07.2018 records that in case of default in payment of any of the instalments, the petitioner/Bank would be free to proceed against the property, as per law. The said order reads as under:-

"Heard both sides. It is submitted that so far as the dues in two loan accounts of Roshini Jewelers Pvt. Ltd. and J.B.Gold Pvt. Ltd. are concerned, they are quantified at Rs.

10,35,77,071.64 and Rs. 10,18,60,853.88 as on 30.06.2018 are concerned. That counsel for the respondent bank submits that due of two loan accounts are Rs. 20.55 crores. The 3rd party undertakes to pay the said amount of Rs. 20.55 crs within 5 months whereas the counsel for the respondent bank submits that the respondent bank agrees for three months tenure. In the interest of justice this Tribunal is granting four months time to the third party to clear the sum Rs. 20.55 crs. out of which the first installments of Rs. 4.00 crs will be paid today itself, the second installments of Rs. 4.00 crs will payable on or before 25.08.2018, 3rd installment of Rs. 4.00 crs on or before 20.9.2018, 4th installment on or before 15.10.2018 and 5th installments of Rs. 4.55 crs will be payable on or before 30.11.2018 along with Interest 8% p.a. simple on reducing balance basis from 1.7.2018. In so far as dues in respect of JMD Commercial Pvt. Ltd and Excellent Trading Company are concerned the counsel for applicant submits that they will make proposal within 15 days the respondent bank is restrained from proceeding against the subject matter property/ies. **In case of default in payment of any of the installment(s) directed above the respondent bank will be free to proceed against the property/ies as per law. With this the SA and connected OA will be disposed of on the next date of adjournment. In case the third party Sh. Mukesh Garg deposits Rs. 20.55 crs. along with interest as ordered above within time as stated above the mortgaged property i.e. 8356, Model Basti, Bara Hindurao, Delhi will be released to him.**

In so far as IA No.1170/18 & IA No. 1191/18 in SA No. 113/18 are concerned, the applicant has no objection if the tenants are allowed to remove their goods. In the circumstance the tenants are permitted to remove the unhypothecated movable goods."

(emphasis supplied)

(l) After paying the first instalment of Rs.4 crores, respondent No.5 committed a default in paying the second instalment of Rs.4 crores which was payable on or before 25.08.2018. Respondents No.1 to 4 filed I.A.1459/2018 before the DRT stating that they were in the process of

generating funds in compliance of the orders passed. They prayed for modification of the order dated 30.07.2018 by stating that the entire amount will be paid by 25.08.2018. The learned DRT dismissed the aforesaid application on 28.09.2018 and the petitioner/Bank took over physical possession of the property.

(m) Thereafter, respondent No.5 moved I.A. 1872/2018 before the DRT praying *inter alia* for return of the sum of Rs.4 crores deposited by him with the petitioner/Bank. It was argued by the respondent No.5 that the schedule of payment as agreed to by the respondents No.1 to 4 before the DRT was completely contrary to the understanding entered into between him and the said respondents. Respondent No.5 stated that he had given the schedule of payment in para No.4 of his affidavit and as recorded in the order dated 30.07.2018 and that there was a material difference in the time schedule agreed to between the respondent No.5 and the other respondents. Therefore, respondent No.5 submitted that he did not wish to proceed ahead with the purchase of the property.

(n) The said application was objected to by the petitioner/Bank contending that the amount paid by the respondent No.5 had already being adjusted by it and there was no question of refund of any money. It was stated that the petitioner/Bank did not enter into any private treaty with the respondent No.5 and the Bank was in no way concerned with the agreement entered into between the respondents No.1 to 4 and the respondent No.5.

3. Vide order dated 02.08.2019, the DRT allowed the application moved by the respondent No.5 stating that no order has been passed by DRT to forfeit the amount paid by the respondent No.5 if he failed to pay the amount. DRT held that that the petitioner/Bank could not have retained the amount deposited by the respondent No.5 and at the same time, proceed

ahead by taking possession of the property. As a result, the petitioner/Bank was directed to refund the sum of Rs.4 crores to the respondent No.5.

4. The said order has been challenged by the petitioner/Bank in S.A. 93/2018. After perusing all the orders passed by the DRT, the learned DRAT has held that the petitioner/Bank had never claimed before the DRT that the respondent No.5 was acting in collusion with the respondents No.1 to 4. Rather, the orders show that the Bank was agreeable to the proposal made by the respondent No.5 that upon payment of Rs.20.55 crores, the mortgaged property will be released in his favour. The DRAT held that the money had been paid by the respondent No.5 and not by the borrowers and the order of the DRT only indicates that in case of non-payment of the balance amount, the Bank could take steps to sell the property and no more. The aforesaid order dated 16.11.2020 passed by the learned DRAT has been challenged by the petitioner/Bank in the instant petition.

5. We have heard the arguments advanced by learned counsel for the parties, carefully examined the impugned judgment and gone through the documents placed on record.

6. It is well settled that the High Court while exercising jurisdiction under Article 227 of the Constitution of India cannot substitute the decisions arrived at by the Tribunal/court below unless and until the order challenged under Article 227 of the Constitution of India is so perverse and unjust that no Tribunal/court would arrive at such a conclusion or the judgment passed by the Tribunal/court is contrary to the law.

7. We have been taken through the various orders of the DRT and the material on record. The order dated 30.07.2018, is very clear. By the said order, respondent No.5 was permitted to deposit Rs.20.55 crores spread over four months out of which the first instalment of Rs.4 crores, was to be paid

on the date of the order, the second instalment of Rs.4 crores was to be paid on or before 25.08.2018, the third instalment of Rs.4 crores was to be paid on or before 20.09.2018 and the fourth instalment of Rs.4 crores was to be paid on or before 15.10.2018. The last instalment of Rs.4.55 crores was to be paid on or before 30.11.2018. The order states that in case of default in payment of any of the instalments, the petitioner/Bank will be free to proceed against the property, as per law. Since the amount was not paid, the petitioner/Bank initiated steps and has taken over the possession of the property.

8. We have also gone through the affidavit filed by the respondent No.5 which states that he would deposit a sum of Rs.20.35 crores and on payment of the said amount, the property would be released to him, free of encumbrances. There is nothing in the said affidavit or in the order dated 30.07.2018 passed by the DRT that indicates that it was agreed upon by the petitioner/Bank or by the respondents No.1 to 4 or the respondent No.5 that in case of any default, the amount paid by the respondent No.5 shall be forfeited by the petitioner/Bank.

9. A perusal of all the orders passed by the DRT and the affidavit only indicates that respondent No.5 had agreed to purchase the property for Rs.20.55 crores and on failure to pay the said amount, the petitioner/Bank would be entitled to take possession of the property and sell the same in accordance with law. In the absence of any stipulation of any kind, either in the order of the DRT or in the application or in the affidavit which would reflect any understanding between the parties that failure to pay the amount would entail forfeiture of the instalments paid by the respondent No.5 to the petitioner/Bank, this court is unable to come to a conclusion contrary to the findings returned by the DRT and the learned DRAT. Therefore, it cannot

be stated that the order of the DRT and the DRAT is perverse, arbitrary or unjust and deserves interference.

10. The arrangement between the parties was one for purchase of the property to which the petitioner/Bank was a party. The Bank had agreed that on receipt of Rs.20.55 crores, it would release the property in favour of the respondent No.5 and on failure to pay, it would take steps to sell the property. After paying the first instalment of Rs.4 crores, respondent No.5 did not pay the balance amount. As a result, the petitioner/Bank took steps to take over physical possession of the property. Respondent No.5 is therefore entitled to receive the money back from the petitioner/Bank.

11. In the absence of anything on record that would indicate that the amount deposited by the respondent No.5 with the petitioner/Bank would stand forfeited in case of failure to pay the balance instalments, this court cannot arrive at a conclusion that is different from the one arrived at by the learned DRT and DRAT. The petition is devoid of merits and is accordingly dismissed.

HIMA KOHLI, J

SUBRAMONIUM PRASAD, J

DECEMBER 4, 2020

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