IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2023 OF 2023

Gurpeet Singh Alagh .. Petitioner

Versus

Housing Development Finance Corporation Ltd. And Anr. .. Respondents

WITH

INTERIM APPLICATION NO.13185 OF 2023
IN
WRIT PETITION NO. 2023 OF 2023

Gurpeet Singh Alagh .. Applicant/ Petitioner

Versus

Housing Development Finance Corporation Ltd. And Anr. .. Respondents

Mr.Gurpeet Singh Alagh , *Petitioner in person*

Mr. Prathamesh Kamat a/w Mr. Chaitanya Jadhav and Mr. Madhukar Jadhav i/b S.C. Legl, *Advocates for Respondent No.1.*

CORAM : B. P. COLABAWALLA &
M.M. SATHAYE, JJ.

DATE : OCTOBER 12, 2023

P. C.

1. The above Writ Petition is filed to set aside and quash the order dated 23/09/2022 passed by the DRAT, Mumbai and to direct Respondent No.1 to refund the balance amount received by it after recovery, from the auction of the Petitioner's property according to the order dated 19/07/2021 passed in Securitisation Application No. 30 of 2020 [for short **"the said SA"**], with 24% interest p.a. from the auction date.

2. The relevant facts of this case are in a very narrow compass. The Petitioner and his former wife (Respondent No. 2 herein) had availed of a home loan of Rs. 50 lakhs from Respondent No.1 on 30/11/2006 and purchased a flat bearing No. A 1303 in RNA Royale Park, Building No. 1, A Wing, 13^{th} floor, Dahanukarwadi, Kandivali (West), Mumbai (for short "**the Secured Asset"**). Since the Petitioner and Respondent No. 2 defaulted in paying the loan taken by them, the debt owed by the Petitioner and Respondent No.2 was classified as a Non-Performing Asset (**"NPA"**) on 31/12/2008.

3. Since the debt was not paid, the 1st Respondent, on 18/02/2009, issued a notice under Section 13(2) of the *The Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002* [for short **"the SARFAESI Act"**] calling upon the debtors to pay the aforementioned housing loan together with future interest @ 18 % p.a. with effect from 01/01/2009 within a period of 60 days. This demand notice was also published in two newspapers on 28/12/2009. On 30th June 2010 the Petitioner addressed an Email to the 1st Respondent requesting it to sell the secured asset and close the loan and pay over the balance amount to the Petitioner.

4. It appears that thereafter, attempts made by the 1st Respondent to take possession of the secured asset was objected to by the Builder [who had sold the secured asset to the Petitioner and his wife] inter alia denying that there was any mortgage created pertaining to the secured asset, and also contended that the agreement allotting the said flat (the secured asset) to the Petitioner and his wife was canceled. In the light of these developments, Respondent No.1 filed Civil Suit No. 150 of 2012 before this Court seeking a declaration that the secured asset is a mortgaged property and that any document created by the Builder in relation to the secured asset with any third party was not binding on Respondent No.1. In this Suit, this Court firstly ordered that status-quo be maintained and thereafter, sometime later, transferred the said Suit to the City Civil Court. The City Civil Court ultimately dismissed the said Suit on 17/03/2017 on the ground of jurisdiction.

5. After the dismissal of the abovementioned suit, in or about August 2018, the 1st Respondent approached the Chief Metropolitan Magistrate for an order under Section 14 of the SARFAESI Act and which was allowed on 28/08/2019. A Commission was also appointed to take possession of the secured asset. Physical possession of the secured asset was thereafter handed over to the 1st Respondent on 17/02/2020.

6. After the Section 14 order was passed, the Petitioner herein preferred Securitisation Application No. 30 of 2020 [the said SA]. The said SA sought reliefs inter alia calling upon Respondent No.1 to furnish certified audited copy of the ledger statement; statement of account and balance sheet; details of account; what was the actual interest amount after the date of Petitioner's letter dated 30/06/2010; and a declaration that the 1st Respondent is not entitled to recover any interest after 30/06/2010. For the sake of convenience, the reliefs sought in the said SA are set out hereunder:

> "a. This Hon'ble Court be pleased to call upon and order and direct the Defendant No. 1 to furnish to the hon'ble Court certified audited copy of the ledger statement and statement of accounts and balance sheet in lieu of loan account No. 561975917 from the date of disbursal to the date of NPA and thereafter.
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> b. This hon'ble Court be pleased to direct the Defendant No. 1 to furnish the detail of account first to end the NPA and what is the actual interest amount due and payable after the date of Applicant's letter of 30th June 2010 which would not payable by the Applicant.
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> c. This hon'ble Court be please to declare and direct the Defendant No. 1 that they are not entitled to recover any interest from the date of the letter at Exhibit 'B' being letter dated 30th June 2010.
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> d. The hon'ble Court be pleased to order and direct the Defendant to publish all auction to furnish all details of the loan account including loan application form, guarantee, sureties, indemnities undertakings and interest statement that have been entered in lieu of this loan account as along with the statement of accounts duly certified by the chartered accounted of the bank on record as on date.
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> e. This hon'ble Court be pleased to order and direct the Defendant No. 1 further stays its heads regarding auction sale of the suit property being flat No. A, 1303, RNA, Royale Park, CHS LTD., M.G. Road, Kandivali West, Mumbai 400067 near Hindustan Naka, pursuant to the order of the SARFAESI save and except under the order and directions of this hon'ble Court.

f. This hon'ble Court be pleased to appoint the Court receiver High Court Bombay or any other office of desirable Court including the office of the commissioner of accounts High Court Bombay to hold supervise and administer the auction proceedings in lieu of the flat No. A, 1303, RNA, Royale Park, CHS LTD., M.G. Road, Kandivali West, Mumbai 400067 near Hindustan Naka, in accordance with the law.

g. This hon'ble Court be pleased to allow and permit the applicant and or his nominees to get bids or to bids in the auction proceedings to in order that the best price be allowed in the bid and get the best deal for the applicant.

h. In this respect the applicant states that any balance in excess of the arrear amount to be paid off to the Defendant No. 1 BANK, should be appropriated in equal proportion to the applicant and to the co-owner on paper being Defendant No. 2, the applicant's wife Smt. Gurpreet Kaur Sodhi alias Smt. Gurpreet Kaur Sodhi. The Applicant states that this amount is being requested to be kept in fixed deposit as there is another dispute pending between the applicant and his ex-wife in respect of adjoining flat 1304.

i. Since this account need to be settled all amount due and payable out of the share of the applicant's wife needs to be kept in the hon'ble Court as the security deposit in fixed deposit of any nationalised bank so that further orders in SC 108/2011 of City Civil Court at Dindoshi can be effectively executed by attaching this asset of the applicant's wife.

j. That this hon'ble Tribunal be pleased to direct the defendant no. 1 bank to pay to this Applicant such amount towards cost of this Application as this hon'ble Tribunal may deem fit and proper for unnecessary delay the required Sarfaesi act process and putting extra interest/burden illegally on the Applicant through he was honest and supportive."

7. On this SA, the DRT passed the order dated 19/07/2021. By this order, the DRT directed the 1st Respondent to deduct the interest charged @ 18% p.a. for the period from 01/07/2010 to 17/02/2020, as the delay in taking possession of the secured asset was due to the error on the part of Respondent No.1 to approach the wrong forum and hence the Petitioner could not be saddled with the liability of paying interest for the said delay. The 1st Respondent was therefore directed to deduct the interest as mentioned above from the total liability and then calculate their dues including the genuine expenses incurred by them and adjust the amount received from the sale of the secured asset accordingly. In case any amount remained thereafter, the same was to be refunded back to the Petitioner, were the directions. These directions were passed by the DRT because it was the specific case of the Petitioner before the DRT that the Petitioner herein, on 30/06/2010 itself, had requested the 1st Respondent to recover the loan amount by sale of the secured asset, but instead of selling the secured asset, the 1st Respondent delayed the entire procedure for 10 years and has saddled the Petitioner with additional liability by charging interest @ 18% p.a. for this entire period. Therefore, it was argued before the DRT that the said action of the 1st Respondent is required to be taken seriously, and interest from

30/06/2010 till the date of sale be curtailed. What is important to note is that it was not the case of the Petitioner that any of the measures taken by the 1st Respondent were contrary to the provisions of the SARFAESI Act or the Rules framed thereunder, and hence, the measures taken by the 1st Respondent be declared as invalid. It is on this basis, that the DRT passed the directions referred to by us earlier.

8. Being aggrieved by the order of the DRT, the 1st Respondent approached the DRAT, who passed impugned order dated 23/09/2022. We must note here that the Petitioner did not file any appeal from the order of the DRT which did not grant any other prayers to the Petitioner. Be that as it may, the DRAT, by the impugned order, allowed the Appeal filed by the 1st Respondent and set aside the order passed by the DRT. The DRAT came to the conclusion that the scope of Section 17 of the SARFAESI Act was limited and the directions passed by the DRT against the 1st Respondent could not have been passed whilst entertaining an application Section 17, especially in light of the fact that no measures under Section 13(4) of the SARFAESI Act were challenged in the said SA filed by the Petitioner herein.

9. We have carefully gone through the papers and proceedings in the above Writ Petition. We have also heard the Petitioner (appearing in person) as well as Mr. Kamat, the learned counsel appearing on behalf of the 1st Respondent. Mr. Singh, the party in person, submitted that the DRAT had gone completely wrong when it came to the conclusion that the DRT did not have jurisdiction to entertain the said SA filed by the Petitioner herein. He submitted that Section 17 of the SARFAESI Act specifically stipulates that any person aggrieved may make an application to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which measures are taken. He submitted that Section 17(7) of the SARFAESI Act states that save as otherwise provided in the SARFAESI Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the Application [under Section 17] in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short **"the RDB Act, 1993"**). He submitted that once this is the case, the DRT certainly had jurisdiction to pass the directions it did by invoking the provisions of Section 19(25) of the RDB Act, 1993 to do the complete justice between the parties. He submitted that when one reads Section 17(1) alongwith Sections 17(3)(c), 17(7), 34, 35 and 37 of the SARFAESI Act it becomes abundantly clear that the DRT alone had jurisdiction to grant the reliefs. He therefore submitted that the impugned order passed by the DRAT requires interference under Article 226 of the Constitution of India.

10. We have heard Mr. Singh at great length, especially considering that he is a party in person. We have also perused the provisions relied upon by him. Section 17 of the SARFAESI Act deals with Applications filed against measures taken to recover secured debts. For the sake of convenience, Section 17 reads as under:-

> "**17. Application against measures to recover secured debts.**—(1) Any person (including borrower) aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:
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> Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.
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> *Explanation*.—For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.
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> (1-A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction—

(*a*) the cause of action, wholly or in part, arises;

(*b*) where the secured asset is located; or

(*c*) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—

(*a*) declare the recourse to any one or more measures referred to in sub-section (4) of Section 13 taken by the secured creditor as invalid; and

(*b*) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(*c*) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of Section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of Section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of Section 13 to recover his secured debt.

(4-A) Where—

(*i*) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,—

(*a*) has expired or stood determined; or

(*b*) is contrary to Section 65-A of the Transfer of Property Act, 1882 (4 of 1882); or

(*c*) is contrary to terms of mortgage; or

(*d*) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of Section 13 of the Act; and

(*ii*) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub- clause (*a*) or sub-clause (*b*) or sub-clause (*c*) or sub-clause (*d*) of clause (*i*), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder."

(emphasis supplied)

11. Section 17(1) stipulates that any person (including a borrower), aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, or his authorised officer, may make an Application to the Debts Recovery Tribunal having jurisdiction in the matter, within 45 days from the date on which such measures are taken. Section 17(3) talks about the DRT taking certain actions and/or passing certain directions when it comes to the conclusion that any of the measures taken by the secured creditor under Section 13(4) are not in accordance with the provisions of the SARFAESI Act. Since Section 17 refers to measures taken under Section 13(4), it would be apposite to refer to this provision as well, and which reads as under:

> "(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:—
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> > (*a*) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
> >
> > (*b*) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:
> >
> > Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt: Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over

> the management of such business of the borrower which is relatable to the security for the debt;
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> (*c*) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;
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> (*d*) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

12. What Section 13(4) basically stipulates is that where the borrower fails to discharge his debt in full, the secured creditor, to realise his debt, can take any of the measures stipulated in Section 13(4). When one reads Section 17 with Section 13(4), what is clear is that an Application under Section 17 the SARFAESI Act can be filed to challenge the measures taken under Section 13(4) of the Act. It is only when a party is aggrieved by any measures taken by the secured creditor under Section 13(4), can that party approach the DRT under Section 17 of the SARFAESI Act, 2002.

13. In the facts of the present case, the measure taken by the 1st Respondent under Section 13(4) of the SARFAESI Act, 2002 was taking possession of the secured asset in the year 2020. What is interesting in this matter is that this measure [including the sale of the secured asset] was not challenged in the said SA filed by the Petitioner. In fact, the grievance of the Petitioner was quite the opposite. It was the grievance of the Petitioner that the 1st Respondent ought to have taken possession of the secured asset much earlier and sold it to recover its dues. Because the 1st Respondent has taken an inordinate amount of time to do this process, the Petitioner has been wrongly saddled with interest at 18% p.a. for this delay. It is with this case that the Petitioner approached the DRT in the said SA. It is because of this pleaded case that the DRT passed an order directing the 1st Respondent to deduct the interest from 1st July 2010 till the secured asset was sold. Having gone through the said SA, we find that the reasons given by the DRAT for interfering with the order passed by the DRT are wholly justified. In our view, the DRAT correctly held that the DRT has no jurisdiction to pass the directions that it did, especially when one considers that no measures under Section 13(4) were challenged in the said SA and which was filed under Section 17 of the SARFAESI Act. We are clearly of the view that in the facts of the present case, the DRT could not direct the 1st Respondent to deduct the interest for the period from 01/07/2010 to 17/02/2020, when no measures under Section 13(4) of the Act were challenged before it.

14. The reliance placed by Mr. Singh on the provisions of Section 17(3)(c), 17(7), 34, 35 and 37 are wholly misplaced. Section 17(3)(c) stipulates that if the DRT, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in Section 13(4) taken by the secured creditor are not in accordance with the provisions of the SARFAESI Act, and the Rules framed thereunder, it may: (*a*) declare that the recourse to any one or more measures referred to in sub-section (4) of Section 13 taken by the secured creditor as invalid; and (*b*) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an Application under Section 17(1), as the case may be; and (*c*) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of Section 13. Thus Section 17(3)(c) empowers the DRT to pass such other directions only when it comes to the conclusion that measures taken under Section 13(4) are not in accordance with the provisions of the SARFAESI Act and the Rules made thereunder. Section 17(3)(c) would not apply in a situation when the Debt Recovery Tribunal does not come to the conclusion that measures under Section 13(4) were not in accordance with the Act or the Rules made thereunder.

15. As far as Section 17(7) is concerned, it stipulates that save as otherwise provided in the SARFAESI Act, the DRT shall, as far as may be, dispose of the Application in accordance with the provisions of the RDB Act, 1993. We fail to understand how this provision would confer jurisdiction on the DRT to entertain a Securitisation Application which does not challenge any of the measures taken under Section 13(4) of the Act. This provision only stipulates that the SA filed under Section 17 shall, as far as may be possible, be disposed of in accordance with the provisions of the RDB Act, 1993. This does not mean that by taking recourse to this provision, the DRT can pass any directions which do not fall within the ambit and scope of Section 17.

16. As far as Section 34 is concerned, the same stipulates that no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the DRT or DRAT is empowered by or under this Act to determine, and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the RDB Act, 1993. This provision does not support the case of the Petitioner. We have already held that the DRT was not empowered under the SARFAESI Act to pass the directions that it did without there being any challenge to the measures taken under Section 13(4) of the Act. Section 35 also only stipulates that the provisions of the SARFAESI Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. This provision would apply only if the DRT had jurisdiction to entertain the Application filed by the Petitioner and not otherwise.

17. For all the foregoing reasons, and in light of the above discussion, we find that no case is made out to interfere with the impugned order dated 23/09/2022 passed by the DRAT, Mumbai. In these circumstances, the above Writ Petition is dismissed. However, there shall be no order as to the costs. In view of the disposal of the above Writ Petition, nothing survives in the above Interim Application and the same is disposed of accordingly.

18. We make it clear that we have not opined on the merits of the claim made by the Petitioner. He is always free to agitate his claim against the 1st Respondent in appropriate proceedings as permitted under law. If such a claim is made by the Petitioner against the 1st Respondent, the same shall be heard on its own merits and in accordance with law. From the peculiar facts of this case, it is clear that the Petitioner was prosecuting a remedy before a forum that lacked jurisdiction but bonafide and with due diligence. Hence the time spent by the Petitioner in prosecuting the said SA in the DRT / DRAT and in this Petition, shall be excluded while considering any issue of limitation, if raised by the 1st Respondent in any other proceedings that the Petitioner may choose to file.

19. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[M.M. SATHAYE, J.] **[B. P. COLABAWALLA, J.]**