

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE**

WRIT PETITION NO. 15562 OF 2022

Mr.Vipin Aggarwal. ... Petitioner.
V/s.
Indian Overseas Bank and Others. ... Respondents.

Mr.Prathamesh Kamat with Mr.Puneet Gogad and Mr.Kushal Sawant i/b. Puneet Gogad for the Petitioner.

Mr.Karl Tamboly i/b. Vaishali Bhilare for the Respondent No.1.

Mr.Mayur Khandeparkar with Ms.Rupa Patel, Ms.Chinmayee Ghag and Mr.Nishant Rana i/b. Zastriya for Respondent Nos.4 to 6.

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**CORAM : NITIN JAMDAR AND
ABHAY AHUJA, JJ.**

DATE : 23 January 2023.

P.C. :

The Petitioner is aggrieved by the order dated 29 November 2022 passed by the Debts Recovery Appellate Tribunal at Mumbai (DRAT) directing the Appellant to pay a sum of Rs.15 crore as pre-deposit within three weeks on or before 20 December 2022, in default, the Appeal to stand dismissed without further reference to the Tribunal.

2. The Petitioner is the brother of one Mr. Ramesh Aggarwal and the co-owner of a property named Lavkush, Road No.8, 60 Hatkesh Society, Vile Parle (West), Mumbai - 400049 (hereinafter referred to as the "subject property") which property was mortgaged as security to the Indian Overseas Bank being Respondent no.1 herein for certain credit facilities granted by the Bank to the Respondent no.2 Hooghly Ship Breakers Limited, who was the borrower. Petitioner was the guarantor and mortgagor, along with his brother.

3. The outstanding balance from the borrower to the Bank, as on 28 February 2021, was Rs.43,44,11,258.38, and adding interest at the rate of 13.90 %, the balance as on 21 June 2022 totals to Rs.51,34,88,389/-.

4. As the borrower defaulted in repayment, the Bank initiated an action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and issued a sale notice dated 6 March 2021, putting the subject property on sale scheduled on 24 March 2021. The Respondent bank sold the subject property to Respondents no.4 to 6 herein on 24 March 2021 and received Rs.30,28,00,000/-The Petitioner filed an application challenging the said sale notice. However, vide order dated 25 March 2021, the Tribunal rejected ad-

interim relief, which was challenged before this Court and thereafter before the Supreme Court. However, neither this Court nor the Supreme Court has granted any relief to the Petitioner with respect to the auction sale.

5. A One Time Settlement (OTS) proposal was moved by the brother of the Petitioner -Respondent no.3 on 2 July 2021, which is after the sale of the subject property on 24 March 2021. The Bank accepted the OTS proposal and agreed to settle the debt subject to payment of Rs.13.10 crore in addition to the amount recovered pursuant to the auction sale. The OTS proposal was accepted subject to the following three conditions :

- (I) That all SARFAESI Act cases initiated by the Bank were to be withdrawn.
- (ii) Peaceful possession of the subject property was to be handed over to the auction purchaser without any demur.
- (iii) No Dues Certificate to be issued consequent to full payment of the amount agreed upon and after peaceful transfer of physical possession of the subject property to the auction purchaser.

6. On 30 July 2021, a sum of Rs.13.10 crore in terms of the OTS was deposited; however, the peaceful physical possession of the subject property has not been handed over. Even the pending cases have not been withdrawn.

7. The Petitioner filed Waiver Application on 8 July 2022 under the SARFAESI Act seeking complete waiver of the mandatory pre-deposit under the second proviso to Section 18(1) of the SARFAESI Act and in the alternative to reduce the amount to the minimum of 25% by the exercise of discretion under the third proviso to Section 18(1) of the SARFAESI Act.

8. The DRAT vide order dated 1 September 2022 directed the Petitioner to deposit Rs.15 crore in two installments towards compliance of pre-deposit under Section 18 of the SARFAESI Act. Being aggrieved by the aforesaid order, the Petitioner filed Writ Petition No.10896 of 2022 before the Bombay High Court, and a Division Bench of this Court vide order dated 14 September 2022 disposed of the Petition setting aside the impugned order dated 1 September 2022 and remanding matter to the DRAT giving liberty to the petitioner to file an additional affidavit.

9. Pursuant to the order of this Court, the Petitioner filed an additional affidavit dated 27 September 2022 in the DRAT. According to the Petitioner, there was no debt due in the books of the Respondent bank against the borrower company in view of the OTS. He, therefore, submits that the requirement of pre-deposit does not apply to the Miscellaneous Appeal filed by the Petitioner, and it can be entertained by recording satisfaction of compliance of

Section 18 accordingly. The Petitioner also stated in the alternative in the said affidavit that even if the effect of sale proceeds is not given towards satisfaction of the pre-deposit, then also, there is a sufficient amount of Rs.13.10 crore that have been deposited with the Bank, which is more than enough to satisfy the minimum threshold of requirement as envisaged under Section 18 of the SARFAESI Act as against the claim under the demand notice. The sum of Rs.13.10 crore comes to approximately 35%.

10. The DRAT heard this application on 29 November 2022 and has directed the Petitioner to pay a sum of Rs.15 crore with the Registrar of the DRAT as a pre-deposit, within three weeks on or before 20 December 2022, in default whereof, the Appeal would stand dismissed without further reference to the Tribunal. The DRAT observed that the Petitioner cannot challenge the sale, distancing himself from the OTS proposal and still take advantage of the purchase price paid by the auction purchaser and the amount paid by his brother.

11. It is against this order that this Petition has been filed seeking quashing/modification of the said order.

12. The learned counsel for the Petitioner has reiterated the contention stating that payment of Rs.13.10 crore, paid by Respondent No.3- the borrower under OTS, is an admitted position which amount has been accepted by the Respondent- Bank and,

therefore, this amount should have been deducted from the pre-deposit. It was contended that the definition of a borrower under section 2(f) of the SARFAESI Act does not make a distinction between the borrower, guarantor and mortgagor and, therefore, the amount deposited by either party should have been taken into consideration. Respondent No.1- Bank contends that the Petitioner is only interested in delaying the procedure and holding the possession of secured assets. It is contended that the Petitioner sought to stall the auction and was not successful and interim relief was rejected, and being in possession is merely moving applications to delay the procedure. It was submitted that if the sale is being challenged, there cannot be any settlement, and therefore, no benefit of the said fact can be taken by the Petitioner.

13. The Petitioner, in the application for waiver, has averred as under:

“4. In pursuance to the said OTS, Respondent No. 2 and 3 had deposited sum of Rs.13.10 crs in terms of OTS on 30/07/2021 over and above the sale proceeds of Rs.30.28 crs from auction sale. Both the amounts have already been appropriated towards the loan account. This fact is admitted by Bank vide their Affidavit in Reply to SA dated 25/04/2022 at para. no. 4. Thus, in all totality before filing present Misc. Appeal, sum of Rs.43.38 crs (Rs.30.28 crs + Rs. 13.10 crs) has already been recovered, adjusted and appropriated by the Respondent Bank in their books against the claim of Rs.37,59,77,921.09/under Demand Notice. Upon full satisfaction of the claim in the books, now there is no question of charging of further interest by Bank, thus, effectively w.e.f 30/07/2021 Bank should not charge the interest and amount get freezed on that date itself.

5. *I say that on the date of filing present Misc. Appeal on 21/06/2022 there was no “debt due” in the books of Respondent No.1 Bank against the principal borrower company in view of the OTS is being entered into for which Appellant is not party. Thus, the requirement of pre-deposit does not apply to the facts and circumstances of the present Misc. Appeal and it can be entertained by recording the satisfaction of compliance of S. 18 accordingly.*

6. *Without prejudice but in the alternative to above, I say that even if the effect of sale proceed is not given towards the satisfaction of pre-deposit as per law laid down by Hon'ble Bombay High Court, then also there is sufficient amount of Rs.13.10 crs have been deposited by the Respondent No. 2 and 3 with the Bank which is more than enough to satisfy the minimum threshold of requirement as envisaged under S. 18 of the Act. Against the claim under demand notice a sum of Rs. 13.10 crs comes to approx. 35%.*

14. Respondent Nos.4 to 6 contend that Respondent No.3, the brother of the Petitioner, entered into OTS, and one of the conditions of the OTS is handing over the possession of the property. It was contended that since the interim relief was rejected, as a consequence, the sale of mortgaged property was confirmed in favour of Respondent Nos.4 to 6, and at this stage, the Petitioner is seeking to amend the petition to challenge the sale. It is contended that the Petitioner wants the benefit of the sale of the mortgaged property and the amount of Rs.13.10 crore paid by Respondent No.3 in terms of OTS but is not honouring the other part of the OTS and, therefore, there is no error in the impugned order.

15. Under section 18(1) of the SARFAESI Act, the pre-deposit of 50% of the amount involved is stipulated for the appeal. The DRAT has the discretion to reduce the same by up to 25%. The DRAT has already exercised that discretion.

16. The case of the Petitioner is that the Petitioner, Respondent No.2 and Respondent No.3 all fall under the definition of the borrower under section 2(f) of the SARFAESI Act and therefore, the amount paid by one should be considered as deposit by the other. The OTS letter dated 2 July 2021 is on record. It states that the borrower, guarantor, and mortgagor should withdraw all the cases. The borrower/ mortgagor should transfer the physical possession of the property to the buyer. Intimation of No-dues Certificate and release of securities shall be done only after payment in full under OTS and transfer of physical possession of the secured assets now the subject property.

17. The Respondents opposing the petitioner's submissions have relied upon the decision of the Supreme Court in the case of *M/s.Siddha Neelkanth Paper Industries v. Prudent ARC Limited*¹, wherein the Hon'ble Supreme Court observed that, if the words used in the second proviso to Section 18 of the SARFAESI Act are "borrower has to deposit", it is not appreciable how the amount deposited by the auction purchaser on purchase of secured assets can be adjusted and/or appropriated towards the amount of pre-deposit,

¹ Civil Appeal No.8969/2022 decided on 5 January 2023

to be deposited by the borrower. It is the “borrower”, as defined under section 2(g) of the Act, who has to deposit the 50% of the amount of “debt due” from him. At the same time, if the borrower wants to appropriate and/or adjust the amount realized from the sale of the secured assets deposited by the auction purchaser, the borrower has to accept the auction sale. It is held that the borrower can take the benefit of the amount received by the creditor in an auction sale only if he unequivocally accepts the sale.

18. In these circumstances, the question is whether any error is committed by the DRAT in passing the impugned order. The answer is- No. The DRAT has rightly observed that the Petitioner cannot distance himself from the OTS proposal to challenge the sale by way of amendment and yet take advantage of the purchase price paid by the auction purchasers and the amount paid by Respondent No.3. Upon rejection of the application for amendment, the Petitioner has filed an appeal before the DRAT. Therefore, if the appeal succeeds, the Petitioner will be entitled to challenge the sale. There is, thus, no error in the view taken by the DRAT that the Petitioner is not entitled to get the credit of Rs.13.10 crore, which Respondent No.3 had paid. Respondent No.3 did so with the proposal towards outstanding debt after acknowledging the sale of the property and agreeing to hand over possession of the property to the auction purchasers. This was not done by Respondent No.3, nor is the full amount paid under OTS. Withdrawal of cases under the SARFAESI Act has not been made. At the most, it is for

Respondent No.3 to seek a refund or appropriation of the amount, and the Petitioner cannot seek credit of the said amount and, at the same time, challenge the same, which the Petitioner seeks to do by way of amendment.

19. There is no merit in the petition. The writ petition is rejected.

(ABHAY AHUJA, J.)

(NITIN JAMDAR, J.)