



C.R.P.No.1551 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:07.07.2023

CORAM:

THE HON'BLE Mrs.JUSTICE **V.BHAVANI SUBBAROYAN**

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1. M/s. Kotak Mahindra Bank Limited
rep. By the Authorised Officer,
7th floor, Plot No.7, Sector 125,
Near Dell Complex, Noida – 201 313

2. M/s Kotak Mahindra Bank Limited,
rep. By its Authorised Officer,
No.185, 2nd Floor, Annasalai,
Mount Road, Chennai – 600 006

... Petitioners

Vs.

1. T.K.Karthikeyan

2. Shanthi Karthikeyan

3. Future Capital Finance Service Limited
rep. By its State Risk Head having registered
office at FCH House,
Peninsula Corporate Park,
Ganpatrao Kadam Marg,
Lower Parle, Mumbai – 400 013

4. Authorised Officer,
Capital First Limited,
Unit No.401-407, 4th Floor,
A Wing Technopolis Knowledge Park,
Chakala Road, Opp. Holy Family School,
Andheri, Mumbai – 400 093

... Respondents

Civil Revision Petition filed under Article 227 Constitution of India to



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set aside the petition and order passed in I.A.No.4 of 2021 in O.S.No.78 of 2021 dated 12.03.2021 and to terminate the O.S.No.78 of 2021 on the file of learned Principal Judge, Tiruvallur.

For Petitioner : Mr. V.Balasubramani

For Respondents : Mr.B.Jeyash B.Dolia Sr.Counsel for
Mr.K.Pattabhi

ORDER

The present Civil Revision Petition is filed as against the order dated 12-3 2021 made in I.A No 4 of 2021 in O.S. No 78 of 2021 and to terminate the O.S. No. 78 of 2021 on the file of the Principal Judge. Thiruvallur.

2. The brief facts of the case are as follows:-

(i) The 1st and 2nd Respondents had obtained loan from M/s Capital First Limited, formerly known as Future Capital Holding Limited/ 3rd and 4th respondents for a sum of Rs.89,82,000/- (Rupees Eighty Nine Lakhs and Eighty Two Thousand only) upon terms and conditions mentioned in the agreement dated 23.12.2010.

(ii) As per the said agreement, the said loan facility was repayable by the respondents 1 and 2 in 180 equated monthly installments to the tune of Rs. 1,16,615/-(Rupees One Lakh Sixteen Thousand Six Hundred and



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Fifteen only). The respondents 1 and 2 started to commit default in repayment of amount.

(iii) Pursuant to the default in making the repayment of amount, Capital First Limited has invoked the Arbitration proceedings and an award was passed on 29.01.2015 directing the respondents 1 and 2 to pay a sum of Rs.93,35,927.62/- together with interest at the rate of 15.25% per annum from 09.10.2014. Despite the receipt of award, the respondents 1 and 2 have not paid the amount. Consequently, their loan account was classified as Non Performing Assets (NPA) by Capital First Limited on 31.01.2016. The said Capital First Limited, vide Deed of Assignment dated 08.07.2016 inter alia sold, transferred, assigned in favour of the petitioners.

(iv) Thereafter the petitioners issued notice to the respondents 1 and 2 on 06.02.2017 under Section 13 (2) of the SARFAESI ACT 2002 and called upon them to pay an amount of Rs.1,18,34,766/- (Rupees One Crore Eighteen Lakhs Thirty Four Thousand Seven Hundred and Sixty Six only) as on 06.02.2017 with interest at 15.25% per annum from 07.02.2017 until payment in full within 60 days from the date of receipt of said notice. Since the said amount was not paid within the stipulated period, the petitioners had taken symbolic possession of the property in exercise of power conferred on them under Section 13 (4) of SARFAESI ACT read with Rules 8 and 9 on 24.04.2017 and issued a Sale Notice dated 19.02.2021.



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(v) Consequent to the same, the respondents 1 and 2 filed a suit in

O.S.No.78 of 2021 before the District Court, Thiruvallur and ad-interim exparte injunction was granted against the petitioners till 31.03.2021 in I.A.No.4 of 2021 filed by them. The petitioners has filed the present petition to set aside the order of the trial court and also to strike off the plaint.

3. The learned counsel for the petitioners submits that the order passed by the Court below dated 12.03.2021 in I.A.No.4 of 2021 is bad in law and the same is liable to be quashed and set aside in view of the fact that the acts of the petitioner is covered under SARFAESI Act, 2002, which would be decided by the Recovery Tribunal or Appellate Tribunal not by the Civil Court. Also, the court below failed to appreciate the fact that the 1st and 2nd respondents are defaulting borrowers, who have succeeded in hindering and stalling the recovery process of the petitioners, just prior to the auction sale scheduled on 25.03.2021.

4. Besides the above, the learned counsel for the petitioners would rely upon the order passed by the Hon'ble Supreme Court in Harshad Goverdhan Sondagar Vs. International Assets Reconstruction Co., Ltd., and Ors., reported in 2014 (6) SCC 1, to substantiate that no civil court shall have jurisdiction to entertain any case, where action has been taken under



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SARFAESI Act, thereby pleaded to set aside the order passed by the court below in I.A.No.4 of 2021 in O.S.No.78 of 2021.

5. Per contra, the learned senior counsel appearing for the respondents submitted that the respondents 1 and 2 have neither participated in the arbitration proceedings nor engaged any counsel and hence the entire proceedings are void. Further, the suit is of civil in nature and according to Section 9 of Civil Procedure Code, there is no bar under Section 34 of SARFAESI Act and the Civil Court has jurisdiction to try any case of civil nature.

6. Also, the learned senior counsel for the respondents relied on the Judgment of the Hon'ble Supreme Court reported in **AIR 1969 SC 78 [Dulabahi Vs. State of Madhya Pradesh]** and submitted that if the provisions of a particular act have not been complied with or the statutory tribunal has not acted in conformity with the judicial procedure then, bar against the civil court cannot sustain. Further, relied on the Judgment of the Hon'ble Division Bench reported in **2004 (2) CTC 759 [V.Tulasi Vs.Indian Overseas Bank]** to state "that the jurisdiction of the civil court can be invoked only when the action of a secured creditor is alleged to be fraudulent or his claim is so absurd or untenable."



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7. That apart, the learned senior counsel for the respondents submitted that the transaction in this case is a mortgage transaction and the mortgage right being a right in rem cannot be probed through arbitration, as per **Booz Allen and Hamilton Inc., V. SBI Home Finance and others, reported in 2011 (5) SCC 532** and according to **Sukanya Holdings Vs. Jayesh H Pandya reported in (2003 5 SCC 531) page 31**, Mortgage transactions cannot split in arbitration proceedings.

8. Lastly, the learned senior counsel for the respondents contends that as per Central Government, Notification S.O.2641 dated 05.08.2016 in order to invoke Sections 13 to 19 of the SARFAESI Act, the principal debt amount should be One Crore and above but in this case, the amount pertains to Rs.89 Lakhs only and as per Section 26D of SARFAESI Act, the privilege of invoking provisions of the Act especially Sections 13 to 19 is given only to those who register the transaction in a central registry / CERSAI, however, as per CERSAI report, the transaction is not registered in the central registry and hence the invocation of the SARFAESI Act by the petitioners against the respondents is not valid as per law.

9. Heard learned counsel on either side and perused the documents



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placed on record.

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10. On perusing the documents and upon hearing the arguments of learned Counsels of either parties, the following two issues arises for consideration before this Court:

(i) Whether the order in I.A. No. 4 of 2021 in OS. No. 78 of 2021, dated 12-3-2021 passed by the Principal District Judge, Thiruvallur is liable to be set aside or not .

(ii) Whether to terminate O.S. No. 78 of 2021 on the ground of Bar of Jurisdiction of Civil Court to entertain suits in SARFAESI proceedings.

11. It is seen from the records available that the 1st and 2nd respondents have availed loan from the 3rd respondent and thereafter, the 3rd respondent, by way of Deed of Assignment dated 08.07.2016, interalia, transferred / assigned in favour of the petitioners, the said fact is not disputed by either parties. However, this Court is not inclined to go in to the aspects of whether the arbitration award is sustainable or not, which is not the purview of the present civil revision petition. Further, the proceedings initiated by the petitioners herein under the SARFAESI Act, does not have any binding on the arbitral award and there is no necessity to deal with the same and hence the arguments putforth by the respondents counsel is



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rejected on that score.

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12. As far as Issue No.(i), viz., whether the order passed in I.A. No. 4 of 2021 in O.S.No.78 of 2021, dated 12-03-2021 passed by the learned Principal District Judge, Thiruvallur is liable to be set aside or not, is concerned, it is to be noted that according to the respondents 1 and 2 / plaintiffs, they have entered into loan agreement with the FUTURE CAPITAL, which is an Non-Banking Financial Company (NBFC), the NBFC had assigned the loan to the petitioners which is illegal and not binding on them. However, as per clause 11(b) of the Home Equity Loan Agreement dated 07.02.2011, the lender has right to transfer or assign the mortgage over the property in favour of any bank. As per Notification of Reserve Bank of India in RBI/2005-06/54 DBOD.NO.BP. BC. 16 / 21.04.048/ 2005-06 dated 13 July 2005, RBI had clearly, permitted assignment of debt with or without security in the course of banking activity and, therefore, such an assignment was legally permissible and, therefore, enforceable. Hence it is clear that the assignment was a permitted banking activity in law. That apart, the respondents/plaintiffs contention is that as per RBI notification, an Non banking financial Corporation can initiate SARFAESI Proceedings only if the Principal amount is above Rs.1 Crore, but in the present case, the loan has been assigned to a bank, which is a "secured creditor" within the



meaning of section 2(zd) of the SARFAESI Act, which is entitled to initiate SARFAESI proceedings against a debtor.

13. In this connection, it is necessary to rely upon the Judgment of the Hon'ble Division Bench of Bombay High Court in ***Poorti Rent a Car and Logistics Pvt. Ltd. & ors. vs. Kotak Mahindra Bank Ltd. & ors*** [2022 LiveLaw (Bom) 95], wherein it is held that a Bank, being a "secured creditor" within the meaning of section 2(zd) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), is entitled to initiate proceedings against a debtor under Section 13 thereof, notwithstanding the fact that the assignor of debt portfolio was not a "financial institution" at the material time.

" ...13. A debt is a sum of money that is owed or due. Once a loan agreement is entered by and between a borrower (customer) and a lender (bank/financial institution) and mortgage is created, an outstanding in the account of the borrower is a debt due and payable by the borrower to the lender. Such debt is an asset in the hands of the lender. As the owner of the debt, the lender can always transfer its asset unless a law or the loan agreement prohibits the same. Such transfer in no manner affects any right or interest of the borrower. Here, the respondent no.2 assigned its rights under a contract and its own asset, namely, the debt, to the respondent no.1. It is not the case of the petitioners that in so assigning, their rights as borrowers flowing from the loan agreement has in any manner been affected or even the asset affected. It has also not been shown by the petitioners that the rights that the respondent no.2 assigned to the respondent no.1 were incapable of assignment, either under any law or under an agreement between the petitioners and the respondent no.2.



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Law is well-settled that a claim to a simple debt is assignable even if the debtor has refused to pay, and that the practice of assigning or 'selling' debts to debt collecting agencies and credit factors could hardly be carried on if the law were otherwise.

14. Be that as it may, bearing the above principles as well as all other statutory provisions in mind, it needs examination as to whether assignment of the debt by the respondent no.2 to the respondent no.1 could preclude the former from taking recourse to Chapter III of the SARFAESI Act....

*22. We do not find the challenge of the petitioners to be of any substance at all. If indeed the provisions of the SARFAESI Act can be applied even in respect of loan agreements entered into before such enactment was brought into force, we see nothing in any law to hold that the provisions thereof can never be resorted to by a bank like the respondent no.1 in circumstances such as the present. Upon noticing default being committed, the account of the petitioners was classified as a non-performing asset by the respondent no.1. The rights of the respondent no.2 enforceable against the petitioners for default in payment of debt having passed on to it, the respondent no.1 did have the authority or sanction in law to resort to the provisions of the SARFAESI Act. Applying the parameters as laid down in paragraph 18 of the decision in M. D. Frozen Foods Exports Pvt. Ltd. (supra), since accepted in Indiabulls Housing Finance Limited (supra), **we find that all such parameters in the present case are fulfilled with the result that initiation of action under Chapter III of the SARFAESI Act by the respondent no.1, being a "secured creditor" within the meaning of section 2(zd) thereof for the purpose of enforcing the security interest that was created earlier, is legally permissible. That the respondent no. 1 is the successor-in-interest of the respondent no.2, which was not a "financial institution" at the material time would make no difference insofar as consequence in law is concerned.***

14. However, coming to the core- issue of jurisdiction, Section 34 of the SARFAESI Act bars the jurisdiction of the Civil Court. The Civil Court cannot entertain any suit or proceeding in respect of a matter which the



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DRT or the DRAT is empowered under the SARFAESI Act to determine and no injunction can be granted in respect of any action taken in pursuance of any power conferred by the Securitisation Act, it is pertinent to extract Section 34 of SARFAESI Act.

"34. Civil court not to have jurisdiction.—No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal 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 Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)."

15. On perusal of the prayer made in O.S.No.78 of 2021, it is seen that the respondents 1 and 2 / debtors had coined the prayer clubbing two issues i.e. Arbitration Proceedings as well as the SARFAESI proceedings together in one suit. As far as the 1st prayer to pass a decree declaring the award passed by the Arbitrator dated 29-1-2015 as null and void is also the prayer which is coined to avoid appeal provision under Section 34 of Arbitration and Conciliation Act. However, as far as the prayer in the injunction petition which is relevant to SARFAESI Act, in the opinion of this Court seems to be barred under Section 34 of SARFAESI Act 2002. There is a small distinction between Section 18 of Recovery of Debts due to banks and financial institution act and the scope of 34 of SARFAESI Act, wherein the Hon'ble Supreme Court in case reported in **2014 (1 SCC 479)**

Jagadeesh Singh vs. Heeralal & Others] held that the civil court's



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jurisdiction is ousted. A perusal of the decision would show ousting of jurisdiction of civil court under SARFAESI Act. The Hon'ble Supreme Court while considering the scope of Section 34 of SARFAESI Act ousting the civil court jurisdiction, held that suit filed therein is not maintainable. The relevant paragraph No. 24 is extracted hereunder :

".. . . . 24. Statutory interest is being created in favour of the secured creditor on the secured assets and when the secured creditor proposes to proceed against the secured assets, sub-section (4) of Section 13 envisages various measures to secure the borrower's debt. One of the measures provided by the statute is to take possession of secured assets of the borrowers, including the right to transfer by way of lease, assignment or realising the secured assets. Any person aggrieved by any of the measures referred to in sub-section (4) of Section 13 has got a statutory right of appeal to the DRT under Section 17. The opening portion of Section 34 clearly states that no civil court shall have the jurisdiction to entertain any suit or proceeding in respect of any matter which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression in respect of any matter referred to in Section 34 would take in the measures provided under sub-section (4) of Section 13 of the Securitisation Act. Consequently, if any aggrieved person has got any grievance against any measures taken by the borrower under sub-section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. The civil court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well."

16. It is clear from the above judgment of the Hon'ble Supreme Court

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that the scope of Section 34 is not one and the similar in its application.

While Section 34 of SARFAESI Act contemplates ousting of civil jurisdiction to entertain any suit or proceedings in respect of any matter which DRT or the Appellate Tribunal is empowered to determine under the SARFAESI Act, whereas, Section 18 of Recovery of Debt Due to bank and Financial Institution Act contemplates the bar of jurisdiction only in relation to matters specified under Section 17 of the Act therein. Therefore, the decision above referred would render assistance as far as the prayer couched by the plaintiffs / debtors in O.S.No.78 of 2021 with regard to challenge made by them in prayer C of the plaint.

17. Further, the learned senior counsel appearing for the respondents, to substantiate his contention, has relied on case of **Bank of Rajasthan vs VCK Shares and Stocking Broking service limited in Civil Appeal No. 8972 and 8973 of 2014**, wherein at paragraph Nos.12, 14, 15, 16, 18, 53 and 54, it is held as follows:-

“12. The Division Bench of the High Court opined that as per the view of this Court in [Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corporation](#),¹ a suit filed by a borrower against the bank was not barred before the Civil Court, although a suit filed by the bank against the borrower was barred. This judgment was found to be the authority on the point as it came subsequent to the other decisions of the Supreme Court on this issue.

14. In a later decision in [Indian Bank v. ABS Marine Products \(P\) Ltd.](#) ³ a Division Bench of this Court took the view that the jurisdiction of the Civil Courts was not barred in regard to any suit filed by the borrower against a bank for any relief.



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Jurisdiction was barred only in regard to applications by a bank or a financial institution for recovery of its debts. It was held that although a counterclaim and set-off may be made under sub-Sections (6) and (11) of Section 19 of the RDB Act, no jurisdiction was conferred on the DRT to try independent suits or proceedings initiated by the borrowers. It was thus held that the borrower had the option to file a separate suit before (2000) 7 SCC 357. The Civil Court and the counterclaim before the DRT was not the only remedy. Referring to the earlier judgment in Abhijit Tea Co. Pvt. Ltd. & Others (supra), the Bench in the Indian Bank (supra) observed that an independent suit can be deemed to be a counterclaim and can be transferred to DRT only if the following conditions are satisfied:

“a. The subject matter of the bank’s suit, and the suit of the defendant against the bank, should be inextricably connected in the sense that decision in one would affect the decision in the other.

b. Both parties (the plaintiff in the suit against the bank and the bank) should agree for the independent suit being considered as a counter-claim in the bank’s application before the Tribunal, so that both can be heard and disposed of by the Tribunal.”

15. Another Co-ordinate Bench of this Court in [State Bank of India vs. Ranjan Chemicals Ltd. and Another](#)⁴ held that there was no need to restrict the power of the Civil Court to order joint trial by introducing a condition that a joint trial could be ordered only with the consent of both parties. It was observed on the basis of Abhijit Tea Co.’s case that a claim in an independent suit could be considered as a claim for set-off and counterclaim within the meaning of Section 19 of the RDB Act.

16. Thus, in the reference order, it was mentioned that subsequent to the Ranjan Chemicals Ltd. case (supra), another Division Bench in Nahar Industrial Enterprises Ltd. case (supra) held that the decision in Ranjan Chemicals Ltd. (supra) could not have departed from the decision in Indian Bank case (supra), both being Coordinate Benches. It was thus concluded that there existed a difference of opinion between several benches of this Court on this issue and it was considered appropriate to refer the following questions to a larger Bench.



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“(a). Whether an independent suit filed by a borrower against a Bank or Financial Institution, which has applied for recovery of its loan against the plaintiff under the RDB Act, is liable to be transferred and tried along with the application under the RDB Act by the DRT ?

(b). If the answer is in the affirmative, can such transfer be ordered by a court only with the consent of the plaintiff?

(c). Is the jurisdiction of a Civil Court to try a suit filed by a borrower against a Bank or Financial Institution ousted by virtue of the scheme of the RDB Act in relation to the proceedings for recovery of debt by a Bank or Financial Institution?”

18. The Supreme Court of India in Indian Bank case (supra), Ranjan Chemicals Ltd. case (supra) and Nahar Industrial Enterprises Ltd. case (supra) has had no cleavage of opinion regarding the first question referred to a larger bench as they held that an independent suit by a borrower can be transferred and tried along with the original application by the bank under the RDB Act. The difference of opinion arose only with respect to consent of the parties. These decisions have set no bar in law regarding the transfer of independent suit filed by the borrower against the bank to be decided as a counterclaim/set-off by the DRT in an original application filed by the bank.

53. We certainly would not like that the process envisaged under the RDB Act be impeded in any manner by filing of a separate suit if a defendant chooses to do so. A claim petition before the DRT has to proceed in a particular manner and would so proceed. There can be no question of stay of those proceedings by way of a civil proceeding instituted by a defendant before the Civil Court. The suit would take its own course while a petition before the DRT would take its own course. We appreciate that this may be in the nature of parallel proceedings but then it is the defendant's own option. We see no problem with the same as long as the objective of having expeditious disposal of the claim before the DRT under the RDB Act is not impeded by filing a civil suit. Thus, it is not open to a defendant, who may have taken recourse to the Civil Court, to seek a stay on the decision of the DRT awaiting the verdict of his suit before the Civil Court as it is a matter of his choice.

54. We thus make it abundantly clear that in case of such



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an option exercised by the defendant who filed an independent suit, whatever be the nature of reliefs, the claim petition under the RDB Act would continue to proceed expeditiously in terms of the procedure established therein to come to a conclusion whether a debt is due to a bank and/or financial institution and whether a recovery certificate ought to be issued in that behalf.”

18. On the reading of the above Judgment, it is categorically clear that the bar under Section 34 is absolute and civil jurisdiction is ousted to entertain any suit or proceedings in respect of any matter, which the DRT or appellate tribunal is empowered under the SARFAESI Act. Having invoke the SARFAESI provision and the sale notice issued dated 19-2-2021 under the SARFAESI Act, the debtor/plaintiffs before the Principal District Judge, Thiruvallur has couched the prayer engrossing the SARFAESI Jurisdiction into the Civil Court as far as prayer B & C in the plaint, which the civil court has no jurisdiction to try as there is absolute bar under Section 34 of SARFAESI Act.

In the above said facts and circumstances of the case, this Court has no hesitation to set aside the order dated 12-3-2021 made in I.A. No. 4 of 2021 in O.S. No. 78 of 2021. However, with regard to the second limb of the prayer made in the present civil revision petition to terminate O.S. No.78 of 2021 is allowed partly by rendering the prayer B & C, as terminated owing to lack of jurisdiction to the civil court on the ground that



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there is absolute bar under Section 34 of SARFAESI Act to entertain any issue, which Debt Recovery Tribunal or Appellate Tribunal is empowered to determine.

With the above direction the Civil Revision Petition is partly allowed.

Consequently, connected miscellaneous petitions are closed. No costs.

07.07.2023

Index:Yes/No

Internet:Yes/No

Speaking / Nonspeaking order

ssd

To

1. Future Capital Finance Service Limited
rep. By its State Risk Head having registered
office at FCH House, Peninsula Corporate Park,
Ganpatrao Kadam Marg,
Lower Parle, Mumbai – 400 013

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2. Authorised Officer,
Capital First Limited,
Unit No.401-407, 4th Floor,
A Wing Technopolis Knowledge Park,
Chakala Road, Opp. Holy Family School,
Andheri, Mumbai – 400 093

V.BHAVANI SUBBAROYAN J.

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