IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 797 OF 2024

Sony Mony Developers Pvt Ltd & Ors ...Petitioners

Versus

Asset Care & Reconstruction Enterprises & Anr ...Respondents

Mr. Mayur Khandeparkar, *a/w Ayush Kothari, Munaf Virjee & Akash Agarwal, i/b AMR Law & Raj Dani, Advocates for the Petitioners.*

Mr. Nitin Thakkar, Senior Advocate, *a/w T.N. Tripathi, i/b T.N. Tripathi & Co., Advocates for Respondent No.1.*

Mr. Cyrus Ardeshir, *Advocate for Respondent No.2.*

CORAM : B. P. COLABAWALLA &
SOMASEKHAR SUNDARESAN, JJ.

DATE : JANUARY 29, 2024

PC :

1. The above Writ Petition is filed challenging the order dated 17th January 2024 passed by the DRAT in Interim Application No. 33 of 2024 in Appeal No. (D) 81 of 2024. This Interim Application was filed seeking a waiver of deposit as contemplated under the 2nd proviso to Section 18(1) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "**SARFAESI Act, 2002**"). The learned DRAT, after hearing the parties,

directed the Petitioners herein (the Appellants before the DRAT) to deposit a total sum of Rs.35 Crores as a condition precedent for entertaining their Appeal. The DRAT, in the impugned order, recorded that the Appellants undertake to deposit a sum of Rs.10.25 Crores on or before 19th January 2024 by 2:30 pm., and if the said deposit was made within the stipulated time, dispossession of the Appellants (the Petitioners herein) from the secured asset shall stand deferred till the next date. The DRAT further directed that the balance amount of Rs.24.75 Crores would be paid in two installments in the following manner :

Numbers of Instalments	Payment on or before
1st Instalment Rs.10,00,00,000/-	02.02.2024
2nd Instalment Rs.14,75,00,000/-	16.02.2024

The DRAT ordered that in default, the Appeal shall stand dismissed, without any further reference to the Court.

2. Mr. Khandeparkar, the Learned Counsel appearing on behalf of the Petitioners, assailed the aforesaid order of the DRAT on two basic grounds. The first ground was that the amount payable to the 1st Respondent-ARC, was not the amount of Rs. 84 Crores as recorded in

the impugned order, but approximately a sum of Rs.49 Crores. He submitted that this figure has been arrived at on the basis of what is mentioned in the 13(2) notice issued by the 1st Respondent-ARC on 24th April 2019. He submitted that if one takes this figure into account, then the maximum amount that would be required to be deposited by the Petitioners would be a sum of Rs.25 Crores, and if the same is reduced to 25%, the same would come to approximately Rs.12.5 Crores. Mr.Khandeparkar, in support of this submission, relied upon the provisions of the 2nd proviso to Section 18(1) of the SARFAESI Act as well as a decision of the Hon'ble Supreme Court in the case of **Sidha Neelkanth Paper Industries Private Limited and Another vs. Prudent ARC Limited and Others (2023) SCC OnLine SC 12**. Mr. Khandeparkar submitted that this judgment, and more particularly paragraph 34 thereof, makes it clear that whatever amount is mentioned in the Section 13(2) notice would be the "debt due", in case steps taken under Sections 13(2) / 13(4) against the secured assets are under challenge before DRT. He submitted that once this is the law laid down by the Hon'ble Supreme Court, the DRAT was completely incorrect in directing the Petitioners to deposit a sum of Rs.35 Crores which would be more than 50% of the amount mentioned in the securitization notice.

3. The second argument/ground canvassed by Mr. Khandeparkar was that in any case, the impugned order is passed on 17th January 2024 and the Petitioners were directed to deposit a sum of Rs.10.25 Crores on or before 19th January 2024 which period in any event is way to short, especially considering the amount involved. For all these reasons, Mr. Khandeparkar submitted that the impugned order ought to be set aside and the matter be remanded back to the DRAT for a fresh consideration of the Waiver Application (Interim Application No. 33 of 2024) filed by the Petitioners herein.

4. We have heard Mr. Khandeparkar at some length. We are unable to agree with the submissions canvassed by him. Firstly, we must note that in the facts of the present case when the Waiver Application was being argued, a reply was filed by the first Respondent-ARC in which its specifically took up the contention that the amount due from the Petitioners, as on 16th January 2024, was a sum of Rs.84,81,20,881/-. This in fact has been recorded even in the impugned order. We find that this amount was not disputed as the figure to be taken for determining the amount of pre-deposit as contemplated under Section 18 of the SARFAESI Act. In fact, since possession was to be taken on 19th January 2024, the Petitioners themselves undertook to the

DRAT that they would deposit a sum of Rs.10.25 Crores or on before 19th January 2024 so that they would not be dispossessed from the secured assets. Once this is the case, we find that it is now too late in the day for the Petitioners to contend that the amount on which the pre-deposit ought to have been calculated should have been Rs.49 Crores and not Rs.84 Crores as mentioned in the impugned order.

5. This apart, we find that even in law the aforesaid argument is unsustainable. As rightly submitted by Mr. Thakkar, the Learned Senior Counsel appearing on behalf of the 1st Respondent-ARC, the 2nd proviso to Section 18(1), and which is really germane for our purposes, *inter alia* stipulates that no Appeal shall be entertained unless the borrower has deposited with the DRT 50% of the amount of "debt due" from him as claimed by the secured creditors, or determined by the DRT, whichever is less. He submitted that the 3rd proviso gives power to the DRAT to reduce the deposit amount from 50% to 25% provided reasons for the same are recorded in writing by the DRAT. As stipulated in the 3rd proviso, the DRAT has no power to reduce the amount of deposit less than 25% of the debt referred to in the 2nd proviso. We are in agreement with the submission of Mr. Thakkar that the word ‘debt’ has been defined under the SARFAESI Act under Section 2(h)(a) and which

stipulates that it shall have the same meaning that is assigned to it in clause (g) of Section 2 of the Recovery of Debts and Bankruptcy Act, 1993 (for short "**RDB Act**"). The word 'debt' is defined in Section 2(g) of the RDB Act to mean any liability (inclusive of interest) which is claimed as due from any person by a Bank or a financial institution during the course of any business activity undertaken by the said Bank or financial institution under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under the decree or order of any Civil Court or any arbitration award or otherwise or under a mortgage subsisting on, and legally recoverable on the date of the application.

6. We are of the considered view that on an *ex facie* reading of the said definition it is clear that the word 'debt' has been given an extremely wide meaning and means any liability inclusive of interest which is claimed as due from any person by a Bank or a financial institution. On a plain reading of the 2nd proviso to Section 18(1) of the SARFAESI Act, r/w the definition of the word 'debt' as defined in Section 2(g) of the RDB Act, it is clear that before an Appeal can be entertained by the DRAT, the borrower has to deposit 50% of the amount of "debt due" from him as claimed by the secured creditor or as

determined by the DRT whichever is less. If there is no determination of the debt by the DRT (as in the present case), then the borrower would have to deposit 50% of the amount of "debt due" from him as claimed by the secured creditor. The provision on a plain reading does not in any way exclude taking into consideration future interest that is accrued on the debt owed by the borrower to the secured creditor. In fact, the definition to the word ‘debt’ means any liability (inclusive of interest) which is claimed as due from any person by a Bank or a financial institution. Therefore, if the claim made by the secured creditor in the Section 13(2) notice includes future interest (as in the present case), the same would certainly be included in the amount of "debt due" from the borrower to the secured creditor as contemplated under the 2nd proviso to Section 18(1) of the SARFAESI Act. We, therefore, find no justification in the statute to hold that it is only the figure that is mentioned in the 13(2) notice that is to be taken into consideration, and not the future interest accrued on the said sum, whilst determining the deposit amount under the 2nd proviso to Section 18(1) of the SARFAESI Act. The amount of deposit would have to be determined on the basis of the amount of the "debt due" by the borrower to the secured creditor on the date when the Appeal is filed in the DRAT. This would not only include the amount mentioned in the Section 13(2) notice but also interest accrued thereon till the date of filing of the Appeal under Section 18 of the SARFAESI Act. We find that this issue is no longer *res integra* and is covered by a decision of a Division Bench of this Court to which one of us was a party (B.P. Colabawalla, J.) in the case of **MRB Roadconst.. Pvt. Ltd. vs. Rupee Co-Op. Bank** (2016 (3) Mh.L.J. 589). The relevant portion of this decision reads thus:

> "18. On a plain reading of the 2nd proviso to section 18(1) of the SARFAESI Act read with the definition under the word "debt" as defined in section 2(g) of the RDDB Act, it is clear that before an appeal can be entertained by the DRAT, the borrower has to deposit 50% of the amount of debt due from him as claimed by the secured creditors or as determined by the DRT whichever is less. If there is no determination of the debt by the DRT under the provisions of the RDDB Act, then the borrower would have to deposit 50% of the amount of debt due from him as claimed by the secured creditors. The provision on a plain reading does not in any way exclude taking into consideration the future interest that is accrued on the debt owed by the borrower to the secured creditor. In fact, the definition of the word "debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution. Therefore, if the claim made by the secured creditor in the section 13(2) notice includes future interest, the same would certainly be included in the "amount of the debt due" from the borrower to the secured creditor as contemplated under the 2nd proviso to section 18(1) of the SARFAESI Act. There is therefore no justification to hold that it is only the figure that is mentioned in the section 13(2) notice that is to be taken into consideration and not the future interest accrued on the said sum, whilst determining the deposit amount under the 2nd proviso to section 18 of the SARFAESI Act. The amount of deposit would have to be determined on the basis of the amount of debt

due by the borrower to the secured creditor on the date when the appeal is filed in DRAT. This would not only include the amount mentioned in the section 13(2) notice but also interest accrued thereon till the date of filing of the appeal under section 18 of the SARFAESI Act. To our mind, this is the only interpretation that is possible of the 2nd proviso to section 18 of the SARFAESI Act. If we were to accept the contention of the petitioner that the amount to be deposited by the borrower [under the 2nd proviso to section 18(1)] would be only on the basis of the sum/figure as mentioned in the section 13(2) notice and not the interest accrued thereon after the date of the said notice, the same would be violating the plain language of the statute. To interpret the 2nd proviso to section 18(1) in this fashion, to our mind, would clearly violate the plain and unambiguous language of the said section.

19. We must mention here that after the issuance of the notice under section 13(2) and before the appeal is filed in the DRAT under section 18 of the SARFAESI Act, if the borrower has made any part payment of the debt due to the secured creditors, then credit for the same would have to be given to the borrower and for the purposes of deposit under the 2nd proviso to section 18(1), the reduced amount (after giving credit) would have to be taken into consideration for determining the amount required to be deposited by the borrower. This is simply because on the date of filing of the appeal, the debt due to the secured creditor would be reduced after giving credit for the amount already paid."

7. This now only leaves us to deal with the decision of the Hon'ble Supreme Court in the case of **Sidha Neelkanth Papers Industries Private Limited (supra)**. Mr. Khandeparkar laid tremendous stress on paragraph 34 of the said decision to contend that only the amount mentioned in the 13(2) notice is the amount that is to be taken

into consideration for the purposes of calculating the pre-deposit. For the sake of the convenience paragraph 34 of the decision of the Hon'ble Supreme Court in **Sidha Neelkanth Papers Industries Private Limited (supra)** is reproduced hereunder:

> "34. As per Section 18 of the SARFAESI Act, any person aggrieved, by any order made by the DRT under section 17, may prefer an appeal within thirty days to an appellate Tribunal (DRAT) from the date of receipt of the order of DRT. 2nd proviso to section 18 provides that no appeal shall be entertained unless the "**borrower**" has deposited with the Appellate Tribunal fifty percent of the amount of "debt due" from him, as claimed by the secured creditors or determined by the DRT, whichever is less and only and only then, an appeal under Section 18 of the SARFAESI Act is permissible against the order passed by the DRT under Section 17 of the SARFAESI Act. Under Section 17, the scope of enquiry is limited to the steps taken under Section 13(4) against the secured assets. Therefore, whatever amount is mentioned in the notice under Section 13(2) of the SARFAESI Act, in case steps taken under Section 13(2)/13(4) against the secured assets are under challenge before the DRT will be the 'debt due' within the meaning of proviso to Section 18 of the SARFAESI Act. In case of challenge to the sale of the secured assets, the amount mentioned in the sale certificate will have to be considered while determining the amount of pre-deposit under Section 18 of the SARFAESI Act. However, in a case where both are under challenge, namely, steps taken under Section 13(4) against the secured assets and also the auction sale of the secured assets, in that case, the "debt due" shall mean any liability (inclusive of interest) which is claimed as due from any person, whichever is higher."

8. We are afraid that Mr. Khandeparkar reads the aforesaid paragraph totally out of context. When one reads this decision in its entirety, it leaves no manner of doubt that the amount that has to be deposited by the borrower would be the amount together with interest on the date of the filing of the Appeal. If we were to interpret the decision of the Hon'ble Supreme Court in the way Mr. Khandeparkar wants us to, it would run counter to the express language of Section 18 of the SARFAESI Act. We, therefore, find that the reliance placed by Mr. Khandeparkar on the decision of the Hon'ble Supreme Court in **Sidha Neelkanth Papers Industries Private Limited** (**supra**) is wholly misplaced. The aforesaid judgment, when read as a whole does not mandate that where only the 13(2) notice and/or 13(4) measure is challenged without challenging the sale notice, only the amount mentioned in the 13(2) notice would be the figure which would be taken into consideration for determining the pre-deposit. In any event, in the facts of the present case, even otherwise, we find that in the Securitization Application filed by the Petitioners herein, they had in fact challenged the sale notice published by the 1st Respondent-ARC. Merely because by the time the Securitization Application came to be decided the sale did not fructify makes little difference. Once this is the case, we find that there is no merit in the aforesaid argument of Mr.

Khandeparkar.

9. As far as his argument regarding the shortage of time to deposit the amount is concerned, we find that this argument cannot lie in the mouth of the Petitioners at all. As mentioned earlier, possession of the secured asset was to be taken on 19th January 2024. Since the Petitioners did not want to be dispossessed from the secured asset, they undertook to the Court that they would deposit Rs.10.25 Crores on or before 19th January 2024 by 2:30 pm. It is because of this undertaking, and to ensure that the Petitioners are not dispossessed on that given date, that time of two days was granted to the Petitioners to deposit the amount of Rs.10.25 Crores. This is more so when we take into account that the impugned order of the DRT was passed on 5th July 2023 and the period to challenge the said order expired on 5th August 2023 (under Section 18(1) of the SARFAESI Act). The Advocate Commissioner already appointed under an order under Section 14 of the SARFAESI Act issued a notice dated 29th December 2023 to the Petitioners for taking physical possession of the secured asset on 19th January 2024. It is only thereafter that the Petitioners woke up from their slumber and filed the Appeal on 14th January 2024 and moved the DRAT on their Waiver Application which was heard on 17th January 2024. We,

therefore, find that there was absolutely nothing wrong when the DRAT granted two days to deposit the amount of Rs.10.25 Crores or on before 19th January 2024 in order to ensure that they are not dispossessed from the secured asset.

10. Lastly, despite this whole discussion, we put it to Mr. Khandeparkar whether his client is in a position to deposit a sum of Rs.25 Crores (being approximately 50% of Rs. 49 Crores). He, on taking instructions from his clients, fairly stated that he is not in a position to deposit the said amount.

11. In view of the forgoing discussion, we find no merit in the above Writ Petition. It is accordingly dismissed. However, there shall be no order as to costs.

12. We have been informed that the Petitioners are desirous of making an One Time Settlement ("**OTS**") proposal to the 1st Respondent-ARC. We may clarify that this order shall not in any way prejudice the OTS proposal the Petitioners wish to make to the 1st Respondent-ARC. If any such OTS is made, the 1st Respondent-ARC is free to consider the same uninfluenced by this order.

13. 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.

[SOMASEKHAR SUNDARESAN, J.] **[B. P. COLABAWALLA, J.]**