IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3929 OF 2024

M/s. Sunshine Builders and Developers .. Petitioner

Versus

HDFC Bank Ltd. & Ors. .. Respondents

Senior Advocate Mr. Gaurav Joshi a/w S. Purohit a/w Rutwij Bapat a/w Shashank Fadia i/b. Priyanka Fadia for the Petitioner.

Senior Advocate Mr. Prateek Seksaria a/w Ishwar Nankani a/w Huzefa Khokawala a/w Bhakti Jain i/b. Nankani & Associates for Respondent Nos. 1 and 2.

Adv. Nimay Dave a/w Saloni Sulakhe a/w Punit Agarwal i/b. Dhaval Vussonji and Associates for Respondent No.5.

Senior Advocate Mr. Venkatesh Dhond a/w Neveille Mukerji a/w Asim Tirmizi i/b. Veritas Legal for Respondent No.6.

Mr. Mutahhar Khan for Official Liquidator.

Mr. Anil Bhagure, Assistant Official Liquidator.

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

DATE: MARCH 19, 2024

P. C.

1. Mentioned. At the request of the Petitioner taken out of turn.

2. The above Writ Petition has been filed challenging the order dated 29th February, 2024 passed by the DRAT in Interim Application No. 614 of 2022 in Appeal (Diary) No. 1208 of 2022. By the impugned order, the DRAT directed the Petitioner to deposit a sum of Rs. 125 crores as a pre-deposit under Section 18(1) of the SARFAESI Act, 2002. The said amount was to be deposited in three instalments set out hereunder:

Instalments	**Payment date**
1st Instalment of Rs. 25 Crores	21st March, 2024
2nd Instalment of Rs. 50 Crores	12th April, 2024
3rd Instalment of Rs. 50 Crores	3rd May, 2024

It is being aggrieved by this pre-deposit order that the present Petition is filed.

3. Mr. Joshi, the learned Senior Counsel appearing for the Petitioner, valiantly tried to convince us that the Petitioner is not a mortgagor at all and is certainly not a borrower. Once this is the case, the Petitioner cannot be asked to deposit any amount under Section 18(1) of the SARFAESI Act, 2002 because the Section clearly contemplates that a pre-deposit order can be passed only against the borrower and not against a third party. To buttress this argument, Mr.

Joshi relied upon the definition of the word “borrower” as set out in Section 2(1)(f) of the SARFAESI Act, 2002.

4. On the other hand, Mr. Seksaria, the learned Senior Counsel appearing for the 1st Respondent-Bank, submitted that the argument canvassed by Mr. Joshi is wholly incorrect because the documents clearly show that a mortgage of the entire property was created, with the consent and knowledge of the Petitioner. He submitted that the Development Agreement entered into by the Petitioner with the borrower showed that the Petitioner would be entitled to 50% of the free sale component, and which has now been converted into 50% of the revenue pursuant to the Supplementary Agreement dated 31st March, 2011. He therefore submitted that the entire Andheri Property was mortgaged with the 1st Respondent-Bank and it is totally incorrect on the part of the Petitioner to contend that the mortgage is invalid or not created.

5. We have heard the learned Counsel appearing for the parties at quite some length. We have also carefully perused the order passed by the DRAT. We find that the exact same argument canvassed before us by the Petitioner was also canvassed before the DRAT. The

DRAT, in paragraph 13 of the impugned order, has prima facie come to the conclusion that the Petitioners had consented to the creation of the mortgage. We, after perusing the record, do not find that the said finding of the DRAT, is in any way, perverse which would require our interference under Article 226 of the Constitution of India. In any case, the said finding is prima facie finding and was given to determine whether any pre-deposit ought to be ordered before the Appeal filed by the Petitioner is entertained. Section 2(1)(f) of the SARFAESI Act, 2002 defines the word "borrower" *inter-alia* to mean any person who has been granted financial assistance by any Bank or Financial Institution or who has given any guarantee or created any **mortgage** or pledge as security for the financial assistance granted by the said Bank or Financial Institution. From this definition, it is absolutely clear that a mortgagor, even though not being a guarantor or a principle borrower, would still be included in the definition of the word "borrower" as defined in Section 2(1)(f) of the SARFAESI Act, 2002. It is keeping this definition in mind that the DRAT came to the conclusion that the Petitioner ought to be directed to deposit the sum of Rs. 125 crores as a pre-deposit for the Appeal to be entertained. This figure was arrived at because the sale notice indicates that the debt due is approximately Rs. 259 crores.

6. We, in fact, inquired from Mr. Joshi whether his client is even in a position to deposit 25% of the amount of the debt due, or even 25% of Rs. 232 crores which was the amount for which the mortgaged property (Andheri Property) was sold. Mr. Joshi, on taking instructions, has fairly stated that the Petitioner is not in a position to deposit even the 1st instalment of Rs. 25 crores which is due on 21st March, 2024. In these circumstances, we find no reason to interfere with the impugned order passed by the DRAT.

7. The above Writ Petition is therefore dismissed. However, there shall be no order as to costs.

8. 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.]**

Laxmi