IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.15232 OF 2023

PNB Housing Finance Limited .. Petitioner

Versus

Ixora CHSL & Ors. .. Respondents

Mr.Chaitanya Chavan a/w Nishit Tanna, Abdul Rehman i/b Smit Shah, Advocates for the Petitioner.

Mr.M.J. Bhatt, Advocate for Respondent No.1.

Mr.B.V.Samant, Advocate for Respondent Nos.2 and 3.

Mr.A.I.Patel, Addl.G.P. a/w Dhruti Kapadia for State/Respondent.

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

DATE : MARCH 19, 2024

P. C.

1. Rule. With the consent of the parties, rule made returnable forthwith and heard finally.

2. The above Writ Petition is filed seeking the following reliefs:-

"(b) That the Hon'ble Court be pleased to issue Writ of Certiorari or any other appropriate writ/order quashing/setting aside impugned attachment order passed by the Respondent No.3;

(c) That the Hon'ble Court be pleased to issue Writ of Certiorari or any other appropriate writ/order restricting the Respondent No.3 from taking steps to secure physical possession and from creating third party rights over the subject property;

(d) That the Hon'ble Court be pleased to issue Writ of Mandamus or any other appropriate writ/order to direct the Respondent No.7 to issue suitable standing order/directions for Respondent No.1 for issuance of "No Objection" in favour of Petitioner vis-a-vis Auction Buyer;"

3. The Petitioner is a Non-Banking Financial Company (NBFC) and is a secured creditor of Respondent Nos.5 and 6 who are the borrowers. Respondent No.1 is a Housing Society registered under the Maharashtra Co-operative Societies Act, 1960 (for short "**the MCS Act**") where the secured asset is situated. Respondent No.2 is a Credit Co-operative Society registered under the MCS Act from whom Respondent Nos.5 and 6 have availed of finance, and now, due to the default committed in repayment, has obtained an attachment order [on the secured asset] from Respondent No.3. Respondent No.3 is the Recovery Officer empowered to exercise power of the Registrar under the MCS Act. Respondent No.4 is the Deputy Registrar and Respondent No.7 is the Commissioner of Society Registrar.

4. The facts of the present case are in a very narrow compass and which are undisputed. On 13th March, 2014 Respondent Nos.5 and 6 approached the Petitioner NBFC to avail a housing loan in order to purchase a residential flat, being Flat No.302, building No.5, Ixora Cooperative Housing Society Limited Building, Hiranandani Meadows, Gladys Alwares Road, Off.Pokhran Road No.2, Thane-400610 (for short "**the secured asset**"). Accordingly, on 21st March, 2014 the Petitioner NBFC sanctioned a housing loan of Rs.3.97 Crores in favour of Respondent Nos.5 and 6, and for which a mortgage was created on the secured asset by deposit of title deeds (equitable mortgage). On 31st March 2014, a loan agreement was also executed between the Petitioner NBFC and Respondent Nos.5 and 6. The mortgage created for the said housing loan was also registered by the Petitioner NBFC with the Central Registry of Securitization Asset Reconstruction and Security Interest of India (**CERSAI**) on 2nd April, 2014. On 16th April, 2015 Respondent Nos.5 and 6 applied for a top up facility and the same was also duly sanctioned by the Petitioner NBFC for an additional amount of Rs.81,15,000/-. For this, a top up loan agreement was also executed.

5. Since Respondent Nos.5 and 6 defaulted in making repayment of their loan, on 30th June 2016, the loan account of Respondent Nos.5 and 6 was classified as a Non Performing Asset (NPA) as per the relevant RBI guidelines. Pursuant thereto, on 16th July, 2016, the Petitioner NBFC issued a Notice under Section 13(2) of the SARFAESI Act, 2002 directing Respondent Nos.5 and 6 to repay the loan, now amounting to Rs.3,91,43,504/-, within 60 days from the receipt of the said notice. Despite the said notice, no payment was made and no reply was either filed. Accordingly, the Petitioner proceeded to take symbolic possession of the secured asset in accordance with the Section 13(4) of the SARFAESI Act, 2002 read with Rule 8(1) of the Security Interest (Enforcement) Rules, 2002.

6. Since the Petitioner was unable to obtain physical possession of the secured asset, on 16th March, 2017, the learned District Magistrate, Thane, vide its order passed under Section 14 of the SARFAESI Act, 2002, directed the Court Commissioner to handover physical possession of the secured asset to the Authorized Officer of the Petitioner. Pursuant to the order passed by the District Magistrate, Thane, the Petitioner NBFC also obtained physical possession of the secured asset. The Petitioner NBFC in fact even approved an OTS for closure of the loan account of Respondent Nos.5 and 6 provided they pay Rs.3.84 Crores within a stipulated period. The OTS also failed because the payments were not made as required under the said OTS.

7. Accordingly on 22nd August, 2023 the Petitioner issued a notice to Respondent Nos.5 and 6 that the auction of the subject property is scheduled on 14th September, 2023. This notice was not only served upon Respondent Nos.5 and 6 and pasted outside the secured asset but the same was also published in the newspaper. As per the said notice, the auction of the secured asset was conducted on 14th September, 2023 and the Petitioner received the highest bid of Rs.4.51 Crores from one Mr.Deepak Keshwani & Ors. This bidder also deposited 25% of the bid amount with the Petitioner. However this sale has not gone through because the 1st Respondent Society refused to issue their NOC on the ground that the secured asset stood attached by order dated 24th August, 2022 for recovery of the dues owed to Respondent No.2 (the Credit Society). It is in these facts that the present Petition is filed seeking the reliefs more particularly set out by us earlier.

8. We have heard the learned counsel appearing on behalf of the Petitioner NBFC, the 1st Respondent Society, as well as Respondent No.2 (the Credit Society). It is not in dispute that a mortgage was created in relation to the secured asset as far back as in March, 2014. That mortgage was even registered with CERSAI on 2nd April, 2014. The dues of the 2nd Respondent (the Credit Society) are admittedly unsecured dues. They have not been secured by any charge on the secured asset. These facts are undisputed. Once this is the case, the attachment levied on the secured asset, and that too to the detriment to the Petitioner NBFC, cannot be sustained. The Petitioner NBFC, being a mortgagee of the secured asset and which has been duly registered with CERSAI, would be entitled to sell the secured asset under the provisions of the SARFAESI Act, 2002 and appropriate the sale proceeds thereof, in priority to all other dues, as more particularly set out in Section 26E of the SARFAESI Act, 2002.

9. In view of the foregoing discussion the above Writ Petition is allowed in terms of prayer clauses (b) and (c) reproduced above. As far as prayer clause (d) is concerned, we direct that Respondent No.1 shall issue their NOC to the Petitioner NBFC for sale of the secured asset. It is made clear that in any future sale conducted by the Petitioner

NBFC, the dues of the 1st Respondent Housing Society shall be disclosed in the newspaper with a specific direction that the same will have to be cleared by the successful purchaser. As and when the secured asset is sold, the Petitioner NBFC shall be entitled to appropriate the sale proceeds thereof towards its outstanding dues, and if there is any surplus, the same shall be paid over to the 2nd Respondent (the Credit Society). In the event the property is not sold and there is any OTS arrived at between the Petitioner NBFC and Respondent Nos.5 and 6, the same shall be duly intimated to the 2nd Respondent, who shall then be entitled to take appropriate steps in accordance with law.

10. Before parting we must mention that the borrowers apparently have filed a Petition under Section 94 of the Insolvency and Bankruptcy Code, 2016 and the said Petition is still pending.

11. The learned counsel appearing on behalf of the Petitioner NBFC has stated that he will take appropriate steps to have the said Petition dismissed. We direct that the sale of the secured asset will be conducted after the dismissal of the Petition filed by the borrowers under Section 94 of the IBC, 2016.

12. Rule is made absolute in the aforesaid terms and the Writ Petition is also disposed of in terms thereof. However, there shall be no order as to costs.

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.]**