

BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

I.A. No. 169/2023 (WoD)

In

Appeal on Diary No. 388/2023

Between

Sam Family Trust & Anr.
V/s.

... Appellant/s

Catalyst Trusteeship Limited & Ors.

...Respondent/s

Mr Rafeeq Peermohideen, i/b M/s T. N. Tripathi & Co.,
Advocate for Appellants.

Mr Tushad Cooper, Senior Counsel along with Mr Sachin Chandarana, Mr Archit Shah & A Mehta, i/b M/s. M. K. Ambalal & Co. Advocate for Respondents Nos.1 to 3.

:- Order dated: 25/04/2023:-

This is an application filed under Section 18 of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 ('SARFAESI Act', for short) by the Appellants seeking a waiver of pre-deposit mandated under Section 18 (1) of the SARFAESI Act.

2. The Appellants are in appeal impugning the order of the Debts Recovery Tribunal, Pune (D.R.T.) in I.A. No. 6 of 2023 in Securitisation Application (S.A.) No. 01 of 2023 dated 10.03.2023 declining to grant any interlocutory relief with regard to the secured assets against the Respondents.

3. The S.A. was filed under Section 17 of the SARFAESI Act challenging the Sarfaesi measures adopted by the first respondent

under Section 13(1) of the SARFAESI Act. The applicants had challenged the Tahsildars's notice, the possession notice, the sale notice, and the sale.

4. Respondent No. 1 had issued a demand notice on 03.07.2020 under Section 13(2) demanding payment of a sum of ₹268,98,77,917/- and thereafter obtained an order of the District Magistrate Pune under Section 14 of the SARFAESI Act. The demand notice and the order under Section 14 were challenged by the Appellants by filing S.A. No. 207 of 2021, and the same was allowed by the D.R.T. vide order dated 28.02.2022. The Respondents challenged that order before this Tribunal by filing Appeal No. 30 of 2022. This Tribunal stayed the operation of the order in S.A. No 207 of 2021 by interlocutory order dated 11.11.2022. The appeal is still pending and the merits of the appeal are yet to be decided.

5. The Appellants aver that the stay of the order dated 28.02.022 does not tantamount to quashing or setting aside the order of the D.R.T. which allowed the S.A. Resultantly, the demand notice under Section 13(2) dated 29.06.2021 quashed by the D.R.T. does not get resurrected. Mr Rafeeq Peermohideen, the Ld. Counsel appearing for the Appellants relies upon the decision of the Hon'ble Supreme Court in *Shree Chamundi Mopeds Ltd. vs. Church of South India Trust Association* (1992) 3 SCC 1 in support of his argument drawing the distinction between 'stay of an impugned order' and 'quashing of the order'. Hence, the stay of the impugned order in S.A. 207 of 2021 does not mean that the said order has been wiped out from existence.

6. Mr Peermohideen submits that consequent to the quashing of the demand notice by the D.R.T., there is no legally enforceable demand under Section 13(2) of the SARFAESI Act. In the absence of a legally sustainable demand notice, the entire Sarfaesi measures fall to the ground. There is no valid demand for debt due or determined, and hence, the question of making a pre-deposit under Section 18(1) does not arise.

7. The subsequent action initiated by the first Respondent including taking over possession of the property and the consequent sale is therefore violative of provisions of the SARFAESI Act and Security Interest (Enforcement) Rules ('Rules', for short) contends the Ld. Counsel. It is further contended that 14 days' notice contemplated was not served. The Authorised Officer is not empowered. A valuation Report has not been obtained as required under Rule 8(5) before the property was sold. The sale notice was not published in two newspapers having wide circulation, more particularly, in vernacular language as required under Rule 8(6). The sale is therefore bad under Rule 9(1). The fact regarding the pendency of Appeals Nos 30 of 2022 and 31 of 2022 was not disclosed. The Appellants have therefore a strong prima facie case on merits. The Appellants would also contend that they are under financial strain and unable to pay the amount of pre-deposit.

8. Per contra, the first Respondent has submitted that the appeal has been filed with malafide intention. The application seeking a complete waiver of pre-deposit is not at all sustainable. No appeal shall be entertained unless the borrower has deposited

with this Tribunal 50% amount of debt due as claimed by the secured creditor or determined by the D.R.T., whichever is less. The only relief that the Appellant can seek is to get the deposit amount reduced to 25%. The first Respondent points out that the Appellant has no prima facie case. Since the issuance of the notice under sec. 13(2) of the SARFAESI Act, the Appellants have been attempting to delay and derail the legitimate recovery of the huge amount outstanding as dues. On facts, it is pointed out that due to augment its financial resources and for the acquisition of certain shares, Smaaash Entertainment Pvt. Ltd. (borrower fourth Respondent) issued in favour of ECL (Third Respondent) 14.75% secured redeemable non-convertible debentures having face value of ₹10,000/- each aggregating to ₹280 crores in two tranches during July 2017. On 17.08.2017, Debenture Trust Deed was executed between the fourth Respondent borrower and the first Respondent as Debenture Trustee. The Appellants executed security documents in favour of the Trustee and created mortgages over certain properties in order to secure the facilities granted to the borrower. There was a default in payment by the borrower and on 28.05.2019 ECL declared the account as a non-performing asset (NPA). On 28.06.2019 ECL executed an assignment deed with Edelweiss Asset Reconstruction Company Ltd. (Respondent No. 2) and assigned the debt. The borrower has challenged the said assignment in a Commercial Suit before the Bombay High Court. The first Respondent in its capacity as the Trustee filed an application before the NCLT, Mumbai on 02.05.2020. Notice under Sec. 13(2) of the SARFAESI Act was

issued on 03.07.2020 by the first Respondent to the borrower (fourth Respondent) as well as the Appellants and the Respondents Nos. 5 to 10. Thereafter, a possession notice was issued to the borrower and also to the Appellants as mortgagors/guarantors under Sec. 13(4) of the SARFAESI Act. Symbolic possession was taken thereafter. On 29.06.2021, the order was passed by the District Magistrate, Pune appointing the Tahshildar to take possession of the secured property at Lonavala. Notice was also issued by the Tahshildar. The Securitisation Applications filed by the Appellants were allowed vide judgments dated 28.02.2022. Those judgments stand challenged and are pending consideration before this Tribunal. After the matter was heard by this Tribunal and orders reserved, there was a direction to the parties to maintain the status quo. Subsequently, the order of the status quo was modified and the stay was granted by this Tribunal in view of the apparent irregularities in the order passed by the D.R.T. In view of the modification, there was no embargo in proceeding against Lonavala property. The Tahsildar issued a notice to take possession of the Lonavala property on 22.12.2022. The Appellants filed Securitisation Application No. 01 of 2023 with I.A. No. 06 of 2023 for interim relief. The interlocutory application was dismissed on 10.03.2023

9. One of the main contentions raised by the Appellants to challenge the Sarfaesi measures initiated by the first respondent is that the notice of sale was not published in a vernacular newspaper having wide circulation. In the impugned order, the Ld. Presiding Officer has dealt with this objection raised by the

Appellants. The publication was made in a Marathi newspaper named “Nav Shakthi” published in Mumbai. In view of the objection raised by the Appellants with regard to the said vernacular newspaper, the first respondent has produced a Certificate certifying that the said vernacular newspaper has a circulation in Pune and the entire State of Maharashtra. The Rule would only indicate that publication is to be made in two newspapers having wide circulation, one of which has to be in the vernacular. The first respondent complied with that direction. Whether the newspaper “Nav Shakthi” has wide circulation or not is a matter of evidence. Prima facie, the Rule has been complied with. It is also the contention of the Appellant that the auction sale was confirmed exactly for the reserve price, and that only one bid was received. Moreover, the description of the building situated on the property is not given in the auction notice. The Ld. Counsel for the Appellants relies on the decision of the Hon’ble High Court of Delhi *In Re Saraf Paper Mills Ltd. (in liquidation) through Official Liquidator 2008 SCC OnLine Del 1262* in support of his argument. The Ld. Counsel also relies on another decision of the Bombay High Court in *Asha Mehta & Ano. vs. Allahabad Bank 2011 (1) Mh. L.J 1011* to argue that the auction sale has to be conducted in a transparent manner.

10. The contention of the Appellant is that the demand notice under Section 13 (2) of the SARFAESI Act, stands quashed by an earlier order of the DRT, and therefore, the first respondent could not have proceeded against any item of the secured asset unless the impugned order is set aside by the Appellant forum. It is

pertinent to note that in view of the prima facie findings that the impugned order quashing the notice under Section 13 (2) is improper, this Tribunal had issued orders of stay suspending the operation of the judgments in S.A. Nos. 207 & 208 of 2021. This Tribunal had thus modified the earlier order directing the parties to maintain the status quo. Under the circumstances, the argument that there is no demand notice under Section 13 (2) as contended by the Appellants is not acceptable.

11. The Appellants do not have any prima facie case and the impecunious state of the Appellants is not satisfactorily established. This Tribunal is not, therefore, not inclined to exercise the discretionary jurisdiction to reduce the amount payable as pre-deposit to the minimum of 25%.

12. The Appellants are liable to pay a sum of ₹280 crores with future interest. The first Respondent has not mentioned the exact amount due from the Appellants as of the date of filing of the appeal. Hence, this Tribunal is inclined to take ₹280 crores as the amount for calculating the pre-deposit. The Appellants are directed to deposit a sum of ₹135 crores as pre-deposit within a period of 8 weeks, on or before 20.06.2023, failing which the Appeal shall stand dismissed without any further reference to this Tribunal.

13. The amount shall be deposited in the form of a Demand Draft with the Registrar of this Tribunal.

14. As and when the said amounts are deposited, they shall be invested in term deposits in the name of Registrar, DRAT,

Mumbai, with any nationalized bank, initially for 13 months, and thereafter to be renewed periodically.

15. With these observations, the I.A. is disposed of. The Respondents are at liberty to file a reply in the Appeal with an advance copy to the other side.

Post on 21.06.2023 for reporting compliance concerning the payment.

Sd/-
Chairperson

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