

(2016) 11 BOM CK 0006

In the Bombay High Court

Case No : Writ Petition No. 1315 of 2014

Eskays Construction Pvt. Ltd.

APPELLANT

Vs

Soma Papers & Industries Ltd.

RESPONDENT

Date of Decision : 30-11-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 17, Section 18
Security Interest (Enforcement) Rules, 2002 -

Citation : (2017) AIR(Bombay) 10 : (2017) 1 BC 461 : (2017) 1 DCR 502 :
(2017) 1 DRTC 551 : (2017) 1 KerLJ 14

Hon'ble Judges : S.C. Dharmadhikari and B.P. Colabawalla, JJ.

Bench : Division Bench

Advocate : Mr. Jamshed Ansari, Advocate, for the Respondent No. 3; Mr. O.A. Das, Advocate, for the Respondent No. 2; Ms. Jyotsna Vyas i/b Mr. O.P. Pandya, Advocates, for the Respondent No. 1; Mr. Prasad K. Dhakephalkar Sr. Counsel a/ w Mr. Sanjay Jain, Ms Rashida F.

Final Decision : Dismissed

Judgement

Mr. B. P. Colabawalla, J - Rule. Respondents waive service. By consent of parties, rule made returnable forthwith and heard finally.

2. This Writ Petition has been filed under Article 226 of the Constitution of India seeking a Writ of Certiorari or any other appropriate writ, order or direction, seeking to quash the orders dated 1 April, 2009 and 7 January, 2014 passed by the Debt Recovery Appellate Tribunal, Mumbai ("DRAT") in Appeal No.79 of 2008. By the order dated 1 April, 2009 the DRAT granted a complete waiver of deposit under section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, the "SARFAESI Act"). By the order dated 7 January, 2014 the DRAT entertained the appeal filed by the borrower (Respondent No.1 herein) on merits and thereafter set aside the order and judgment dated 26 March, 2008 passed by the Presiding Officer, Debt

Recovery Tribunal-I, Mumbai ("DRT") in Securitization Application No. 17 of 2007.

3. The brief facts giving rise to the present controversy are as under:-

(a) The Petitioner is a company incorporated under the provisions of the Companies Act, 1956. It is an auction purchaser of a property being all that piece and parcel of land situate, lying and being at Villages: Dashak and Panchak, Nashik, together with structures standing thereon bearing Survey No.8, Hissa No.1, Survey No.8, Hissa No.2A, Survey No.8, Hissa No.2B and Survey No.8, Hissa No.3, admeasuring in aggregate 28,200 square meters (the "immoveable property") from Respondent Nos.2 to 5. In addition to this immoveable property, the Petitioners, in the very same auction also purchased the moveable properties mortgaged by the 1st Respondent with Respondent Nos.2 to 5 (Banks). Cumulatively, the immoveable and moveable properties are hereinafter referred to as the "subject properties". The subject properties were purchased by the Petitioners from Respondent Nos.2 to 5 under the provisions of the SARFAESI Act. Respondent No.1 is also a company incorporated under the provisions of the Companies Act, 1956 and is the borrower of Respondent Nos.2 to 5 who are banks within the meaning of the SARFAESI Act. As Respondent No.1 had defaulted in servicing its dues to Respondent Nos.2 to 5, the subject properties belonging to Respondent No.1, and which were mortgaged/charged to Respondent Nos.2 to 5, were sold by them in exercise of their powers under the provisions of the SARFAESI Act. This is how the Petitioners claim to have purchased the subject properties.

(b) The immoveable property originally belonged to one Citric India Ltd. who thereafter sold and transferred the same along with the structures thereon to Shree Vindhya Paper Mills Ltd. Thereafter, Respondent No.1 was incorporated on 19 November, 1991 and pursuant to a Scheme of Arrangement entered into between Respondent No.1 and the said Shree Vindhya Paper Mills Ltd., the immoveable property was transferred in favour of Respondent No.1. This Scheme of Arrangement was approved by this Court by its order dated 22 October, 1992.

(c) Thereafter, Respondent No.1 had availed of various financial facilities from Respondent Nos.2 to 5 for which Respondent No.1 had mortgaged / charged the subject properties in favour of the said Respondents. Since, Respondent No.1 defaulted in payment of its liabilities, Respondent No.2 acting for itself as well as on behalf of Respondent Nos.3 to 5 issued a notice dated 21 November, 2005 under Section 13(2) of the SARFAESI Act, inter alia calling upon Respondent No.1 to pay an amount of Rs.3.55 Crores along with interest thereon, failing which further action would be taken under the provisions of the SARFAESI Act.

(d) In reply to the aforesaid notice, Respondent No.1, by its letter dated 13 December, 2005 inter alia contended that action under the provisions of the SARFAESI Act could not proceed, in view of the fact that Respondent No.1 had made a reference to the Board for Industrial and Financial Reconstruction ("BIFR") under the provisions of the Sick Industrial Companies (Special

Provisions) Act, 1985 (for short, the "SICA, 1985"). Despite the aforesaid, Respondent No.1 by its letters dated 30 January, 2006 and 16 February, 2006 submitted a proposal for a One Time Settlement ("OTS"). Whilst this OTS was pending, on 27 February, 2006 Respondent No.2 took possession of the subject properties by exercising powers under Section 13(4) of the SARFAESI Act.

(e) Thereafter, various attempts were made to settle the matter. It appears that the OTS made by Respondent No.1 was sanctioned and Respondent No.1 had agreed to sell the subject properties to one M/s Shubham Developers, for an amount of Rs.7.47 Crores. It also appears that Respondent No.1 had agreed to sell the subject properties to Respondent No.6 for an amount of Rs.6.76 Crores. However, these transactions did not fructify.

(f) As the dues of the Respondent Banks were not paid as per the OTS sanctioned, Respondent No.2 revoked the said OTS on 29 December, 2006 and also gave a notice of sale of the said property. In furtherance thereof, Respondent No.2 also obtained a valuation report dated 18 April, 2007 from the Government approved valuer in respect of the subject properties. As per the said report, the immoveable property (along with the structures thereon) was valued at Rs.9,11,88,000/- and the moveable properties (i.e. plant and machinery etc.) was valued at Rs.1,50,78,000/-, making an aggregate valuation of Rs.10,62,66,000/- for the subject properties (on the basis of Free Market Valuation). The Distress Sale Value of the immoveable property (along with the structures thereon) was put at Rs.5,93,00,000/- and the Distress Sale Value of the moveable properties (i.e. plant and machinery etc.) was Rs.1,13,09,000/-, aggregating to a distress sale valuation of Rs.7,06,09,000/- of the subject properties.

(g) After this valuation was received, Respondent No.2, by its letter dated 26 April, 2007, informed Respondent No.1 that it was proceeding ahead with the sale of the subject properties and fixed the reserve price of Rs.8.00 Crores. Accordingly, Respondent No.2 issued a public notice on 20 April, 2007 for sale of the subject properties under the provisions of the SARFAESI Act. What is important to note is that, by this public notice the sale was being conducted, not only of the immovable property belonging to Respondent No.1 but also its movable properties, both of which were mortgaged / charged with Respondent Nos.2 to 5. Thereafter, Respondent No.1 by its letter dated 30 April, 2007 requested for a copy of the valuation report. However, Respondent No.1 did not raise any objection either to the contents of the public notice nor to the fact that a combined sale of the subject properties (i.e. of the immovable and movable properties) was being conducted. It is also not in dispute that Respondent No.2 supplied copies of the valuation report to Respondent No.1 as required by them.

(h) In the auction that was conducted by Respondent Nos.2 to 5 for sale of the subject properties, the Petitioners participated and submitted a bid of Rs.8.74 Crores and also paid the Earnest Money Deposit ("EMD") of Rs.80 Lacs. There were about 8 to 10 other bidders, who also participated in the said auction.

However, the Petitioner was the highest bidder. Accordingly, Respondent No.2 by its letter dated 29 May, 2007, informed the Petitioner that it was the highest bidder and directed it to pay an amount of Rs.1,38,75,000/- (balance of 25% of the bid amount, after deducting the EMD amount) within two days and the balance consideration of Rs.6,56,25,000/- within a period of 15 days therefrom. These amounts were duly paid by the Petitioners within the stipulated time, and therefore, Respondent No.2 issued a Sale Certificate in favour of the Petitioners. The requisite stamp duty of Rs.43,75,000/- was also paid on the Sale Certificate. This Sale Certificate has also been duly registered under the provisions of the Indian Registration Act, 1908 on 8 April, 2009. A copy of this Sale Certificate can be found at Exh "I" to the Petition.

(i) In the interregnum, Respondent No.1 sought to challenge the auction by filing Securitisation Application No.17 of 2007 and also applied for interim relief. Since, no interim relief was granted by the DRT, the sale was completed in favour of the Petitioner, as more particularly set out earlier. Since the Petitioners were the successful bidder in the auction conducted by Respondent Nos.2 to 5, and since the Securitisation Application No.17 of 2007 was pending before the DRT, the Petitioners applied for being impleaded as a party to the said Securitization Application. This application of the Petitioners was ultimately allowed by the DRAT on 20 August, 2007, pursuant to which the Petitioners were joined to the Securitization Application. After their joinder, the Petitioners and Respondent No.2 filed their respective affidavits in reply to the Securitization Application.

(j) After hearing the parties, the DRT, by its detailed order dated 26 March, 2008 dismissed the Securitization Application No.17 of 2007. Being aggrieved by the order passed by the DRT, Respondent No.1 filed an appeal before the DRAT under Section 18 of the SARFAESI Act (Appeal No.79 of 2008). We must mention here that Section 18 of the SARFAESI Act contemplates that before any 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. A discretion has also been given to the DRAT to reduce this amount to not less than 25%, for reasons to be recorded in writing by the DRAT. In other words, the minimum requirement of deposit is 25% of the amount as claimed as due from the borrower by the secured creditors or as determined by the DRT, whichever is less. This is a mandatory provision and cannot be waived. Despite this, Respondent No.1 contended before the DRAT that since the sale of the subject properties has already taken place and the amounts lying with Respondent No.2 were far in excess of the amounts that were required to be deposited by Respondent No.1 under Section 18 of the SARFAESI Act, Respondent No.1 is not required to deposit any amount before the DRAT to entertain its appeal. Respondent No.1 persuaded the DRAT to accept this contention and grant complete waiver of pre-deposit as per its order dated 1 April, 2009. This order (dated 1 April, 2009) is also impugned in this Petition along with the final order passed by the DRAT dated 7 January, 2014.

(k) Be that as it may, after the Petitioner and Respondent No.2 filed their respective affidavits before the DRAT, the DRAT heard the Petitioners as well as the Respondents herein and passed the impugned order dated 7 January, 2014. By the impugned order the DRAT set aside the judgment and order passed by the DRT in Securitization Application No. 17 of 2007 (filed by Respondent No.1). Consequently, the said S.A. was allowed and the DRAT declared that the sale notice issued by the authorised officer of Respondent No.2 herein as well as the sale of subject properties to the Petitioner was in violation of rule 6(2) and rule 8(6) of the SARFAESI Rules. It was however clarified that Respondent No.2 herein could proceed to re-sell the subject properties after strictly complying with the provisions of Rules 6, 8 and 9 of the SARFAESI Rules. Being aggrieved by these two orders (dated 1 April, 2009 and 7 January, 2014) passed by the DRAT, the Petitioner is before us in our writ jurisdiction under Article 226 of the Constitution of India. We must note over here that, even Respondent No.2 herein (Bank of India) has filed its independent Writ Petition No. 5139 of 2014 challenging the very same orders passed by the DRAT.

(l) For the sake of completeness, we must also mention that it is the case of the Petitioner that it has applied for the development of the immoveable property to the Nashik Municipal Corporation. The development permissions have been granted by the said Corporation to the Petitioner on 23 March, 2011. It is also averred that after commencing development of a project known as Mittal Riviera on the immoveable property, it has received substantial bookings and the Petitioners have accepted huge amounts from the prospective purchasers. As far as the moveables are concerned, the Petitioners have averred that they have been sold long before the order dated 7 January, 2014 was passed by the DRAT.

4. In this factual background, Mr. Dhakephalkar learned Senior Counsel appearing on behalf of the Petitioner, submitted that both the orders passed by the DRAT, namely, 1 April 2009 and 7 January, 2014 are ex-facie illegal and ought to be set aside. As far as the order dated 1 April, 2009 is concerned, Mr. Dhakephalkar submitted that this was an order that was passed on an application for waiver of deposit. He submitted that Section 18 of the SARFAESI Act clearly stipulates that no appeal filed by a borrower can be entertained by the DRAT unless the borrower deposits with the DRAT 50% of the amount of debt due from him, as claimed by the secured creditors or as determined by the DRT, whichever is less. He submitted that Section 18 further stipulates that the DRAT may, for reasons to be recorded in writing, reduce this amount to not less than 25%. Mr. Dhakephalkar submitted that these provisions are mandatory and have to be complied with by the borrower before its appeal could be entertained by the DRAT. In other words, it was the contention of Mr. Dhakephalkar that if the conditions of deposit are not met and/or complied with by the borrower, then there is a jurisdictional bar from entertaining the appeal filed by the borrower. Looking to the language of Section 18, Mr. Dhakephalkar submitted that the DRAT had no power to waive the entire amount of deposit that was required to be made under Section 18. In this regard he laid great stress on the third proviso

of Section 18(1) which stipulates that the DRAT may for the reasons recorded in writing, reduce the amount to not less than 25%. In other words, Mr. Dhakephalkar submitted that though the mandatory provision was that the borrower was required to deposit 50% of the debt before its appeal could be entertained, the DRAT had the discretion to reduce it to the amount of 25%. It had no discretion to reduce it any further. Looking to the unambiguous statutory provisions as contained in Section 18 of the SARFAESI Act, Mr. Dhakephalkar submitted that the order dated 1 April, 2009 passed by the DRAT (page 200 of the paper book), and which granted a full waiver of deposit, was ex-facie contrary to the statutory provisions and was liable to be set aside. Consequently, he submitted that if this order is set aside, then necessarily the order dated 7 January, 2014, also has to go. This is for the simple reason that the appeal filed by the 1st Respondent herein before the DRAT could not have been entertained on merits, before a deposit as contemplated under Section 18 of the SARFAESI Act was complied with by the 1st Respondent herein.

5. Even on the merits of the matter, Mr. Dhakephalkar submitted that the order dated 7 January, 2014 passed by the DRAT was unsustainable. He submitted that the DRAT had basically set aside the sale in favour of the Petitioner on two grounds, namely, (i) that the description of the subject properties was vague and not properly described in the sale notice, vitiating the sale; and (ii) that there was non-compliance of Rules 6(2) and 8(6) of the SARFAESI Rules which were mandatory in nature and had to be complied with by the Respondent Banks before they could effect the sale of the subject properties under the provisions of the SARFAESI Act. Mr. Dhakephalkar submitted that on both counts, the order of the DRAT dated 7 January, 2014 was vulnerable to challenge.

6. On the first ground that the description of the subject properties was vague and not properly described in the sale notice, Mr. Dhakephalkar brought to our attention the sale notice at page 116 of the paper book. The description of the subject properties in the sale notice reads as under:

Lot No. Description of Property

1 All Land, Buildings along with Plants and Machinery, thereon located at G.D. Somani Marg, Jail Road, Panchak Village, Nasik Road, Dist. Nasik, Pin ? 400 101, within registration Subdistrict/District Nasik, Maharashtra. Area of Land : 28200 Sq.Mtr.

7. Placing reliance on this, Mr. Dhakephalkar submitted that a proper description was given of the subject properties in the sale notice including the area that was to be sold and the finding of the DRAT on this aspect is clearly erroneous and requires interference. He submitted that a great deal of arguments were advanced before the DRAT on the issue of demarcation of the immovable property purchased by the Petitioners from Respondent Nos.2 to 5. In this regard, he submitted that no party had ever disputed that the Petitioner had purchased the immovable property admeasuring 28,200 Sq. Meters. and in fact

this is the area which is in possession of the Petitioners. He submitted that the same is also confirmed as per the plan sanctioned by the Nashik Land Revenue Authorities. He submitted that the contention of the borrower (Respondent No.1) that there was no demarcation of the immovable property which was sold to the Petitioners, was ex-facie false and without any merit. Mr. Dhakephalkar submitted that it is impossible to accept such a contention as it would then amount to the 1st Respondent ? borrower creating a mortgage of the immovable property without having it demarcated or measured. That was not even the case of the 1st Respondent. He submitted that even otherwise, the Valuation Report obtained by Respondent Nos.2 to 5 and which was admittedly forwarded to Respondent No.1, gives an appropriate description of the subject properties including its demarcation. Never have the 1st Respondent, at any time before filing the Securitization Application contended that the description of the subject properties was either vague or not properly described. Even the possession notice dated 27 February, 2006 (page 89 of the paper book) issued under Rule 8(1) of the SARFAESI Rules describes the subject properties in almost identical terms as was done in the sale notice. He submitted that, it is not in dispute that this possession notice was duly served on the 1st Respondent ? borrower. Despite being served with this notice, the 1st Respondent ? borrower never once contended that the description of the subject properties was vague and/or incorrect or that the immovable property described therein admeasuring 28,200 square meters was not demarcated. He submitted that, therefore, it was too late in the day for the 1st Respondent ? borrower to contend that the description of the subject properties was vague and not properly described, which would vitiate the sale.

8. In any event, Mr. Dhakephalkar submitted that an appropriate description of the properties in the sale notice is for the benefit of the prospective purchasers so that they are put to notice as to what exactly they intend purchasing. The borrower can hardly be heard to make a grievance that the sale of the subject properties is vitiated on the ground that it was not properly described and/or was vague. The borrower, who admittedly had large amounts due and payable to the Respondent banks, can hardly be heard to make this grievance, was the submission of Mr. Dhakephalkar. He, therefore, submitted that even on the merits of the matter, namely, on the issue of the description of the subject properties in the sale notice being vague (and on which ground the DRAT set aside the sale), is wholly unsustainable.

9. As far as the second contention is concerned, namely, that Rules 6(2) and 8(6) of the SARFAESI Rules were not complied with, Mr. Dhakephalkar submitted that the DRAT had completely misdirected itself in coming to this conclusion. He submitted that it is an admitted fact that to settle the dues of the Respondent Nos.2 to 5 (banks), the 1st Respondent proposed an OTS under which the 1st Respondent was to sell the subject properties and pay the dues of the banks. There were two attempts made for this purpose. Firstly, Respondent No.1 agreed to sell the subject properties to one M/s Shubham Developers for an amount of

Rs.7.47 Crores. It also agreed to sell the subject properties to Respondent No.6 for an amount of Rs.6.76 Crores. However, both these transactions did not fructify. Mr. Dhakephalkar submitted that the purpose of Rules 6(2) and 8(6) of the SARFAESI Rules are to ensure that time is given to the borrower to pay the dues of the banks / financial institutions before the borrower's properties are sold. In effect, time is given to redeem the mortgage / charge created in favour of the banks. It is not in doubt that these rules are mandatory. However, these rules, though mandatory, are for the benefit of the borrower and if by conduct, the borrower has waived its rights, then the sale cannot be vitiated on the ground that no notice was given as contemplated under the said rules, was the submission. In the facts of the present case, Mr. Dhakephalkar submitted that clearly the 1st Respondent ? borrower had waived its right to receive any notice under Rules 6(2) or 8(6), in view of the fact that they themselves, to pay off the dues of the Respondent banks, had agreed for sale of the subject properties, firstly to one M/s Shubham Developers for an amount of Rs.7.47 Crores and thereafter to Respondent No.6 for an amount of Rs.6.76 Crores. Looking at this conduct of the 1st Respondent ? borrower, Mr. Dhakephalkar submitted that the borrower clearly did not intend or want to exercise its right of redemption. This being the case, consequently, 1st Respondent ? borrower had waived its rights to receive any notice as contemplated under Rules 6(2) and 8(6) of the SARFAESI Rules, was the submission of Mr. Dhakephalkar. He, therefore, submitted that the DRAT has completely misdirected itself in setting aside the sale of the Petitioner on the ground that there was violation of Rules 6(2) and 8(6) of the SARFAESI Rules.

10. On the other hand, Ms Jyotsna Vyas, learned counsel appearing on behalf of the 1st Respondent ? borrower, submitted that both the orders passed by the DRAT (namely 1 April, 2009 and 7 January, 2014) were fully justified in law and required no interference by us in our extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India. As far as the first order dated 1 April, 2009 is concerned, Ms Vyas submitted that this was an order passed on the application for waiver of deposit. She submitted that it is true that Section 18 of the SARFAESI Act stipulates that no appeal filed by the borrower can be entertained by the DRAT, unless the borrower deposits with the DRAT, 50% of the amount of debt due from him, as claimed by the secured creditors or as determined by the DRT, whichever is less. However, this does not mean that even in a case where the properties of the borrower are sold and the entire dues of the banks are recovered from that sale, the borrower still has to deposit 50% as contemplated under section 18. She submitted that in the facts of the present case, the subject properties were sold by Respondent Nos.2 to 5 for a sum of Rs.8.74 Crores which was far higher than the dues of the Respondent banks. This being the position, the DRAT, was fully justified in ordering full waiver of deposit under Section 18 of the SARFAESI Act.

11. As far as the merits of the matter are concerned, Ms Vyas submitted that the DRAT has correctly held that the subject properties were not properly described

in the sale notice, thereby vitiating the sale. She submitted that looking to the description of the properties as mentioned in the sale notice, it is evident that the movable properties were sold along with the immovable property. However, there was no proper description of the moveable properties that were being sold. It was merely stated that the immovable property along with the plant and machinery was being sold. Despite the fact that the valuation obtained gave separate values for the immovable as well as movable properties, the same were sold together in a combined sale for a price of Rs.8.74 Crores to the Petitioners by Respondent Nos.2 to 5. There was no justification for selling both the immovable as well as the movable properties when in fact selling only the immovable property would have been good enough to pay the entire dues of the Respondent banks. She, therefore, submitted that on this ground, namely, that the sale is vitiated on the ground that the description of the subject properties was vague and was not properly described in the sale notice, the impugned order cannot be faulted and ought to be upheld.

12. As far as non-compliance of Rules 6(2) and 8(6) of the SARFAESI Rules are concerned, Ms Vyas submitted that admittedly no notice as contemplated under the said rules was served upon the 1st Respondent ? borrower. Ms Vyas submitted that it is now settled law that a notice of 30 days for sale of the movable and immovable secured assets of the borrower has to be served upon the borrower before any such sale is effected. In the facts of the present case, Ms Vyas submitted that admittedly no such notice is served and consequently the sale conducted in favour of the Petitioner was bad in law and correctly set aside by the DRAT. Ms Vyas submitted that in any event, the argument of Mr. Dhakephalkar that the 1st Respondent ? borrower had waived its right to receive the notices as contemplated under Rules 6(2) and 8(6) of the SARFAESI Rules is without any merit. The 1st Respondent ? borrower has never waived any of its rights, as sought to be contended by Mr. Dhakephalkar, was the submission. For all the aforesaid reasons, Ms Vyas submitted that this Petition has no merit and ought to be dismissed with costs.

13. We have heard the learned counsel for the parties at length and perused the papers and proceedings in the Writ Petition along with the annexures thereto. Before we deal with the rival contentions, it would be necessary to set out the purpose and object for which the SARFAESI Act was brought into force. The statements of object and reasons of the SARFAESI Act indicate that the financial sector, being one of the key drivers in India's efforts to achieve success in rapidly developing its economy, did not have a level playing field as compared to other participants in the financial markets of the world. There was no legal provision for facilitating securitisation of financial assets of banks and financial institutions, and unlike international banks, the banks and financial institutions in India did not have the power to take possession of securities and sell them. The Legislature felt that our existing legal framework had not kept pace with the changing commercial practices and financial sector reforms, which resulted in delays in recovery of defaulting loans. This in turn had the effect of mounting

levels of nonperforming assets of banks and financial institutions. In order to bring the Indian Banking Sector on par with International Standards, the Government set up two Narasimhan Committees and the Andhyarujina Committee for the purposes of examining banking sector reforms. These Committees inter alia suggested enactment of a new legislation for securitization and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the Court. Accepting these recommendations, the SARFAESI Act was brought into force w.e.f. 21-06-2002. There have been several amendments to the SARFAESI Act, the latest being an amendment of 2016 that received the assent of the President on 12 August, 2016 and was published in the Official Gazette dated 16 August, 2016. It is called the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016. The preamble of this amending Act indicates that the same was intended to further amend the SARFAESI Act, the RDDB Act, the Indian Stamp Act, 1899 and the Depository Act, 1996 and for matters connected therewith or incidental thereto.

14. Having noted the purpose and object of the Act, we shall now deal with the rival contentions. The first argument canvassed by Mr. Dhakephalkar was that the order dated 1 April, 2009 passed by the DRAT by which a full waiver of deposit was granted to the 1st Respondent ? borrower, is ex-facie illegal as it is contrary to the statutory provisions of the SARFAESI Act. To understand this argument it would be appropriate to set out Section 18 of the SARFAESI Act which reads as under:-

"18. Appeal to Appellate Tribunal.?(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal under Section 17, may prefer an appeal along with such fee, as may be prescribed to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal: Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:

Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of debt referred to in the second proviso.

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder."

(emphasis supplied)

15. Section 18(1) clearly stipulates, any person aggrieved by any order made by the DRT under Section 17, may prefer an appeal to the DRAT within 30 days from the date of receipt of the order of the DRT. The 2nd proviso to Section 18(1) stipulates that no appeal shall be entertained by the DRAT unless the borrower has deposited with it 50% of the amount of debt due from him, as claimed by the secured creditors or as determined by the DRT, whichever is less. The 3rd proviso to Section 18(1) gives a discretion to the DRAT to reduce the aforesaid amount to not less than 25%, provided the DRAT gives reasons for the same which are to be recorded in writing. What becomes clear from the aforesaid provisions is that there is a jurisdictional bar from entertaining an appeal filed by the borrower from an order passed under Section 17, unless the borrower deposits 50% of the amount of debt due from him, as claimed by the secured creditors or as determined by the DRT, whichever is less. There is also a discretion granted to the DRAT to reduce this amount to 25% provided it finds adequate reasons for doing so and gives reasons, that are recorded in writing. If this deposit is not made, then the DRAT has no jurisdiction to entertain the appeal of the borrower. The crucial words "debt due from him" have to be interpreted consistent with the object and purpose sought to be achieved by the SARFAESI Act. Unless the debt due is secured, the borrower cannot be allowed the luxury of litigation. If that is permitted, the secured creditors would be engaged in a continuous and futile litigation. On a plain reading of the section it is clear that the DRAT has no power or jurisdiction to reduce the deposit amount to less than 25%. This is ex-facie clear from the plain and unambiguous language of Section 18 of the SARFAESI Act.

16. In the view that we have taken, we are supported by a decision of the Supreme Court in the case of *Narayan Chandra Ghosh v. UCO Bank* (2011) 4 SCC 548 wherein the Supreme Court has clearly held that the provisions of Section 18, and more particularly the second and the third proviso thereto are mandatory in nature and the DRAT has no power to grant full waiver of deposit. The relevant paragraphs of the aforesaid decision reads thus:

"7. Section 18(1) of the Act confers a statutory right on a person aggrieved by any order made by the Debts Recovery Tribunal under Section 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the right conferred under Section 18(1) is subject to the condition laid down in the second proviso thereto. The second proviso postulates that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. However, under the third proviso to the sub-section, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty-five per cent of the debt, referred to in the second proviso. Thus, there is an absolute bar to the entertainment of an appeal under Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre-deposit of fifty per cent of the debt due from him or

determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity.

8. It is well-settled that when a statute confers a right of appeal, while granting the right, the legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be said to be onerous. Thus, we hold that the requirement of pre-deposit under sub-section (1) of Section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the statute. We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the 1 (2011) 4 SCC 548 Act being a condition precedent for preferring an appeal under the said section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement.

9. The argument of the learned counsel for the appellant that as the amount of debt due had not been determined by the Debts Recovery Tribunal, the appeal could be entertained by the Appellate Tribunal without insisting on pre-deposit, is equally fallacious. Under the second proviso to sub-section (1) of Section 18 of the Act the amount of fifty per cent, which is required to be deposited by the borrower, is computed either with reference to the debt due from him as claimed by the secured creditors or as determined by the Debts Recovery Tribunal, whichever is less. Obviously, where the amount of debt is yet to be determined by the Debts Recovery Tribunal, the borrower, while preferring an appeal, would be liable to deposit fifty per cent of the debt due from him as claimed by the secured creditors. Therefore, the condition of pre-deposit being mandatory, a complete waiver of deposit by the appellant with the Appellate Tribunal, was beyond the provisions of the Act, as is evident from the second and third provisos to the said section. At best, the Appellate Tribunal could have, after recording the reasons, reduced the amount of deposit of fifty per cent to an amount not less than twenty-five per cent of the debt referred to in the second proviso. We are convinced that the order of the Appellate Tribunal, entertaining the appellant's appeal without insisting on pre-deposit was clearly unsustainable and, therefore, the decision of the High Court in setting aside the same cannot be flawed."

(emphasis supplied)

17. In view of this authoritative pronouncement of the Supreme Court, we find considerable force in the arguments of Mr. Dhakephalkar that the DRAT has completely misdirected itself in granting full waiver of deposit to the 1st Respondent ? borrower before entertaining its appeal under Section 18 of the

SARFAESI Act.

18. Faced with this situation, Ms Vyas submitted that the DRAT has granted full waiver of deposit in peculiar facts and circumstances of the present case. She submitted that considering the fact that the Respondent Banks had already sold the subject properties (secured assets) for a consideration that fully secured their claim, there was no requirement for the 1st Respondent ? borrower to deposit any amount as contemplated under Section 18 of the SARFAESI Act. We are unable to accept this submission. In our view it would be ludicrous to suggest that the money realised by the Respondent banks from sale of their secured assets could be used by the borrower to fulfil the condition of pre-deposit under Section 18. We must hasten to add that it would be a different matter if the sale is accepted and confirmed by the borrower. In the facts of the present case, the 1st Respondent ? borrower wants to use the sale proceeds received from sale of the subject properties to be adjusted/ given credit for in the application for waiver of deposit and at the very same time challenges the sale of very same subject properties. This is to our mind, would be defeating the very purpose for which Section 18 was enacted, which is to curb unnecessary and frivolous litigation. We, therefore, have no hesitation in rejecting this argument. We must mention here that an identical argument was canvassed before another Division Bench of this Court in the case of R.G. Dalpatrai and Co. v. Bank of Baroda Writ Petition (L) No.2361 of 2014 decided on 9th October, 2014 and the same was emphatically repelled. Paragraph 5 of the said decision reads thus:

"5. In our view, it will not be possible for us to interfere with the impugned order passed by the DRAT while exercising our writ jurisdiction under Article 226 of the Constitution of India. It is a well settled position in law that the amount which is received by the Bank in the sale of the immovable property cannot be adjusted in the application for waiver of pre-deposit, unless the sale is accepted and confirmed by the borrower. In the present case, Petitioner has challenged the said sale after taking out separate application. We are, therefore, not inclined to entertain this Petition. Petition is dismissed in limine."

(emphasis supplied)

19. Not only is the aforesaid ratio binding on us, but we are in full agreement with the same. In this view of the matter, we have no hesitation in rejecting this argument of Ms Vyas. Consequently, we are of the view that the order dated 1 April, 2009 is unsustainable and has to be set aside in view of the fact that it runs contrary to the statutory provisions of Section 18 of the SARFAESI Act. This being the case, the DRAT could not have entertained the appeal of the 1st Respondent ? borrower on merits, and therefore, even the order dated 7 January, 2014, has to go. Under normal circumstances, the course to be adopted by us, would have been to remand the Application for waiver of deposit back to the DRAT directing it to fix an amount of pre-deposit as it deemed fit and only thereafter hear the appeal on merits, provided the 1st Respondent ? borrower complied with the directions of deposit. However, in the facts and circumstances

of the present case, we do not feel the need to do so as we find that even on the merits of the matter, the order of the DRAT dated 7 January, 2014 cannot be sustained for the reasons more particularly set out hereafter.

20. On the first issue on which the DRAT set aside the sale in favour of the Petitioner was that the description of the subject properties was vague and not properly described, thereby vitiating the sale. On going through the record produced before us, we are unable to agree with the DRAT. The description of the subject properties has been set out by us earlier in this judgment. The description of the subject properties in the sale notice (page 116 of the paper book) clearly describes the property including of land, buildings along with plants and machinery located at G.D.Somani Marg, Jail Road, Panchak Village, Nasik Road, Dist. Nasik, Pin 422 101 within registration Sub-district/ District Nasik, Maharashtra. The area is also mentioned as 28,200 square meters. We do not think that reading the sale notice, there is any vagueness in description of the subject properties. What is pertinent to also note that even in the possession notice, as contemplated under Rule 8(1) of the SARFAESI Rules, the description of the subject properties has been given in almost identical terms. It is not the case of the 1st Respondent ? borrower that it has not received this possession notice. In fact the question of taking over possession of the subject properties has never been put in issue by the 1st Respondent ? borrower and what has been challenged is the only the sale. Despite receipt of this possession notice, the 1st Respondent ? borrower never once contended that the description of the subject properties was vague and/or not properly described. We find that this argument has been made only to somehow defeat the recovery of the legitimate dues of Respondent Nos.2 to 5 and ought to have been rejected by the DRAT.

21. Even otherwise, we fail to see how the borrower can make a grievance about this aspect. The description of the property in the sale notice is for the benefit of the prospective purchasers, so that they have a clear idea as to what they are bidding for. In absence of the borrower demonstrating any prejudice caused to it by virtue of a vague and/or incorrect description of the property, such an argument cannot be countenanced at the instance of the borrower. In the facts of the present case, the 1st Respondent ? borrower has not even canvassed before us that it has suffered any prejudice by virtue of the fact that the subject properties were vaguely described in the sale notice. Additionally, as mentioned earlier, the subject properties were valued by a Government Valuer. Even in those valuations, the subject properties have been described in more or less the same terms as in the sale notice. These valuations were duly forwarded by Respondent Nos.2 to 5 to the 1st Respondent ? borrower, who raised no objection with reference to the same. Hence, looking to the totality of facts of the case, we do not think that the DRAT ought to have interfered with the sale conducted by Respondent Nos.2 to 5 in favour of the Petitioner on this ground.

22. As far as the second ground on which the DRAT interfered with the sale in favour of the Petitioner was that, there was non-compliance of Rules 6(2) and

8(6) of the SARFEASI Rules. It is true that the said rules [Rules 6(2) and 8(6)] are mandatory and ordinarily have to be complied with by the secured creditor before it proceeds to sell its secured assets. Rule 6(2) comes into play when the secured creditor seeks to sell movable property and Rule 8(6) comes into play when the borrower is selling immovable property. Both these rules postulate that the Authorised Officer shall serve on the borrower a notice of 30 days for sale of the movable and/or immovable secured assets, as the case may be. The purpose for enacting these two rules is to ensure that one last opportunity is given to the borrower to pay the dues of the secured creditor before the secured assets are sold. In other words, a right of redemption is given to the borrower. However, despite the fact that these rules are mandatory and are for the benefit of the borrower, it does not mean that the same cannot be waived. It is a settled position in law and even if a provision is mandatory, it can always be waived by a party / parties for whose benefit such a provision has been made. Rules 6(2) and 8(6) clearly being for the benefit of the borrower, he could lawfully waive the rights granted to him under the said Rules. These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not, depends on the facts of each case and no hard and fast rule can be laid down in this regard. This proposition is too well settled. However, if one needs to refer to any decision in support of the said proposition, a reference to a decision of the Supreme Court in the case of General Manager, Sri Siddeshwara Cooperative Bank Ltd. v. Iqbal & Ors, (2013) 10 SCC 83 would be apposite. This decision was given in the context of Rule 9 of the SARFAESI Rules. Paragraph 19 of this decision is very instructive in this regard and reads thus:

"19. There is no doubt that Rule 9(1) is mandatory but this provision is definitely for the benefit of the borrower. Similarly, Rule 9(3) and Rule 9(4) are for the benefit of the secured creditor (or in any case for the benefit of the borrower). It is settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made. The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for that matter for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their right. These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not depends on the facts of each case and no hard-and-fast rule can be laid down in this regard."

23. In the facts of the present case, we find considerable force in the argument of Mr. Dhakephalkar that the 1st Respondent ? borrower had waived its right to receive a notice as contemplated under Rules 6(2) and 8(6) of the SARFAESI Rules. The facts of this case clearly show that the 1st Respondent ? borrower itself, to pay the dues of Respondent Nos.2 to 5, had agreed to sell the subject properties. In fact, the 1st Respondent ? borrower proposed that the subject properties would be sold to M/s Shubham Developers for Rs.7.47 crores and thereafter to Respondent No.6 for Rs.6.76 Crores. When these transactions did

not fructify, Respondent Nos.2 to 5 revoked the OTS sanctioned in favour of the 1st Respondent ? borrower and thereafter proceeded to sell the subject properties under the provisions of the SARFAESI Act. This being the factual position, it is clear that the 1st Respondent ? borrower had given up its right of redemption [as contemplated under Rules 6(2) and 8(6)] by itself offering to sell the subject properties to pay the dues of Respondent Nos.2 to 5. In these facts, we do not think that the DRAT was correct in holding that the sale is vitiated for non-compliance of Rules 6(2) and 8(6) of the SARFAESI Rules. The facts clearly demonstrate that the 1st Respondent ? borrower had clearly waived its right to receive the 30 day notice as contemplated under Rule 6(2) [for movable property] and Rule 8(6) [for immovable property] of the SARFAESI Rules. We, therefore, find that even on merits, the DRAT ought not to have entertained and allowed the appeal filed by the 1st Respondent ? borrower.

24. In these circumstances, rule is made absolute and the Writ Petition is granted in terms of prayer clause (a). The orders dated 1 April, 2009 and 7 January, 2014 passed by the DRAT in Appeal No. 79 of 2008 are hereby quashed and set aside. However, in the facts and circumstances of the case, there shall be no order as to costs.