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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 4526 OF 2025

Prime Downtown Estates Pvt Ltd.)
 a private limited company incorporated)
 under the provisions of the Companies)
 Act, 1956, having its registered office at)
 Plaza Panchshil, 11th Floor, 55, Gamdevi,)
 Hughes Road, Mumbai 400007) ...Petitioner

Versus

1. Omkara Assets Reconstruction Company)
 Pvt. Ltd.,)
 a Company incorporated under)
 the provisions of the Companies Act, 2013)
 having its registered office at No.9,)
 M.P. Nagar, First Street, Kongu Nagar,)
 Extension, Tirupur 641607.)
2. Authorized Officer,)
 Omkara Assets Reconstruction Company)
 Pvt. Ltd. a company incorporated under the)
 provisions of the Companies Act, 2013)
 having its registered office at No.9,)
 M.P. Nagar, First Floor, Kongu Nagar,)
 Extension, Tirupur 641607.)
3. JC Flowers Asset Reconstruction Pvt. Ltd.)
 a company incorporated under the)
 provisions of the Companies Act, 1956 and)
 existing under the Companies Act, 2013)
 and registered as an Asset Reconstruction)
 Company pursuant to Section 3 of the)
 Securitization and Reconstruction of)
 Financial Assets and Enforcement of)
 Security Interest Act, 2002 having its)
 registered address at 12th Floor, Crompton)
 Greaves House, Dr. Annie Besant Road,)
 Worli, Mumbai 400 030 and acting in its)
 capacity as trustee of the JCF Yes Trust)
 2022-23/13 Trust)

4. Yes Bank Limited,)
a company incorporated under the)
provisions of the Companies Act, 1956 and)
a banking company within the meaning of)
Banking Regulation Act, 1949 having its)
registered office at Yes Bank Tower, IFC-2,)
15th Floor, Senapati Bapat Marg, Elphinstone)
(West), Mumbai - 400 013.)
5. E-Commerce Magnum Solutions Ltd.)
Through its Resolution Professional,)
Pankaj Ramandas Majithia,)
A public company registered under the)
Companies Act, 1956, having its office at)
One BKC, A wing, 1401, Plot No. C-66,)
G Block Bandra Kurla Complex, Bandra (E),)
Mumbai 400051)
6. Radius Infraholdings Private Limited)
a private limited company registered under)
the Companies Act, 1956, having its office)
at One BKC, A wing, 1401, Plot No. C-66,)
G Block, Bandra Kurla Complex,)
Bandra (E), Mumbai 400051)
7. Mr. Sanjay Chabaria)
Director (now suspended) of the)
E-Commerce Magnum Solutions Ltd.,)
residing at 13/14 Solitaire, Opp. Rose)
Manor School, Central Avenue, Santacruz)
(West), Mumbai 400054)
8. Mr. Vyomesh Shah)
An adult, Indian Inhabitant, residing at)
6th Floor, Akruti Co Op Hsg Society 23/F,)
Dongersi Road, Near Elizabeth Hospital,)
Walkeshwar, Malabar Hill, Mumbai 40006)
- ...Respondents

Mr. Nitin Thakkar, Senior Advocate a/w. Mr. Nishit Dhruva, Ms. Prashansa Agrawal, Mr. Darshit Rupda & Mr. Bhavesh Poojary i/b. MDP Legal, Advocates for Petitioner.

Mr. Vikram Nanakani, Senior Advocate a/w. Mr. Malhar Zatakia, Mr. Kunal Kanungo i/b. Mr. Atishay Jain, Advocates for Respondent Nos. 1 & 2.

Ms. Sushmita Gandhi a/w. Ms. Anamika Singh, Mr. Kushal Boolchandani & Ms. Kritika Garg i/b. Indus Law, Advocates for Respondent No. 3.

Mr. Ayush Rajani a/w. Ms. Khushboo Shah i/b. AKR Legal, Advocates for Respondent No. 5.

**CORAM : A.S. CHANDURKAR &
M.M. SATHAYE, JJ.**

RESERVED ON : 28TH FEBRUARY, 2025

PRONOUNCED ON : 4TH APRIL, 2025

JUDGMENT (Per M.M. Sathaye, J.)

1. Rule. Rule made returnable forthwith. Learned counsel for Respondents waive service. Taken up for final disposal by consent of the learned counsel for the parties.

2. In this Judgment, Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is referred to as 'SARFAESI Act'. The Recovery of Debts and Bankruptcy Act, 1993 is referred to as 'RDB Act'. Debts Recovery Tribunal is referred to as 'DRT' and Debts Recovery Appellate Tribunal is referred to as 'DRAT'. Securitisation Application is referred to as 'SA', Interim Application is referred to as 'IA'. Non Performing Asset is referred to as 'NPA'.

3. The Petitioner is challenging the order dated 30.01.2025 passed in I.A. No.118 of 2022 in Misc. Appeal No. 40 of 2022 passed by DRAT-Mumbai. By the said impugned order, the DRAT has directed the Petitioner at a pre-deposit stage under Section 18 of the SARFAESI Act

to deposit an amount of Rs.248,45,08,646/- in three equal installments as a condition for entertaining the appeal against the order dated 22.07.2021 passed in I.A. Nos.429 & 578 of 2021 in S.A No.46 of 2021 by DRT-II, Mumbai. The impugned order is passed under the exercise of power under 2nd proviso to Section 18(1) of the SARFAESI Act.

4. Few facts necessary for the disposal of this writ petition, are as under.

4.1 Respondent No.1 is an Asset Reconstruction Company operating through its authorised officer-Respondent No.2. The loan in question was initially given by Respondent No.4 - Yes Bank which turned NPA and which account was then assigned to Respondent No.3 which in turn assigned it to Respondent No.1.

4.2 Admittedly, the Petitioner has not executed the Loan Agreement dated 28.11.2018.

4.3 The Petitioner has executed a Deed of Mortgage registered on 30.11.2018 in favour of Respondent No.4 - Yes Bank. The said Mortgage Deed describes the Petitioner as 'Mortgagor-I' whose details are given distinctly apart from Respondent No. 5 who is described as 'Borrower or Mortgagor-II' under Scheduled-I to the said deed. The said Mortgage Deed contains the following clause.

“2 - BENEFIT OF THIS DEED

(i) xxx

(ii) The Mortgagee shall hold the Security Interest created by the Mortgagor in its favour under this Deed over the Mortgaged Properties, including the covenants and mortgages given by the Mortgagor pursuant hereto, upon trust for the benefit of the Secured Parties subject to the powers and provisions contained in

the Security Trustee Agreement, this Deed and the other Financing Documents. The Parties confirm that the Mortgagor - I shall not be responsible for repayment of the Facilities or any related interest, costs, charges etc. thereon howsoever and under any circumstances whatsoever and that Mortgagor - I will be responsible under this Deed only to the extent of providing its respective Mortgaged Properties as set out in Part-A of Schedule-II herein as a security for the Mortgage Debt.”

[Emphasis supplied]

4.4 As the loan account became NPA, the Respondent No.4 sent notice under Section 13(2) of SARFAESI Act dated 29.01.2020. It is the contention of the Petitioner that though in this notice the Petitioner’s name is stated as Noticee No.2, the reference to the word ‘you’ is only to Noticee No.1 – Respondent No.5.

4.5 The Petitioner being Mortgagor-I sent a reply dated 14.02.2020 under the provisions of Section 13(3A) of the SARFAESI Act, contending *inter alia* that under Development Agreement dated 25.10.2011 and supplemental Developmental Agreement dated 01.11.2018, the project land belonging to the Petitioner was given for development to Respondent No.5, subject to condition that the loan/finance is utilized by Respondent No.5 only for the purpose of meeting construction cost, purchase of TDR - FSI and payment of premium to concerned authorities for implementation of the development project and the loan is serviced and discharged by Respondent No.5 in timely manner without making the Petitioner liable for repayment in any manner and under any circumstances and if there is any default by the Respondent No.5 in discharging the loan whereby the Respondent No.4-Bank enforces the mortgage, then the rights of the Respondent No.5 under Development Agreement shall stand assigned to the Petitioner. It was further informed that the Petitioner was to extend

co-operation subject to the Petitioner not being liable for repayment of loan, cost, charges and interest in any manner whatsoever. It was also pointed out that Respondent No.4-Bank has agreed to special terms and conditions while sanctioning the loan, under which the bank has agreed to appoint an independent engineer who was required to submit reports quarterly and the disbursement was linked to progress of the project and it was subject to receipt of requisite approvals and Respondent No.5 was required to provide utilization statement prior and post to every disbursement. It was then pointed out that in view of special conditions the Bank was obliged not to disburse any loan till the terms and conditions, stipulated were complied with. It was also pointed out that the Petitioner not being the Borrower has not received any amount from the Bank and the amount is disbursed directly to the Respondent No.5 and no construction or development is being carried out by the Respondent No.5 on the project land. It was therefore pointed out that the Petitioner is not sure as to on what basis the Bank has disbursed the loan to the Respondent No.5 of which recovery is now claimed from the Petitioner.

4.6 The Petitioner thereafter, specifically called upon the Bank to provide copies of various documents on the basis of which disbursement was made including letter appointing an independent engineer, quarterly reports, utilization statement by Respondent No.5 etc. The Petitioner specifically denied its liability to pay any amounts as demanded under the notice. It was asserted that the Bank has no right to proceed against the Petitioner or the project land for recovery of amounts if the same has been disbursed in breach of conditions stipulated. It was ultimately pointed out that if legal proceedings are adopted despite the said reply, it will be abuse of process of law

undertaken by the Bank it will be at its risk as to costs and consequences.

4.7 Respondent No.4-Bank rejoined/replied on 28.02.2020 to the said reply admitting in paragraph No.4 that the liability to make repayment of its due is 'pinned on the Borrower' (Respondent No.5 being Borrower or Mortgagor-II).

4.8 Thereafter, possession notice was issued by the bank on 29.08.2020 and recall notice was issued on 15.01.2020. Thereafter, Sale Notices were issued. In the meantime, the Petitioner filed Securitisation Application No.46 of 2021 challenging the measures undertaken by the Bank under the provisions of SARFAESI Act. In the said Securitisation Application, the Petitioner had filed two Interlocutory Applications bearing Nos.429 of 2021 & 578 of 2021 seeking injunction against the Bank and its officer from taking further steps under Sale Notices dated 17.02.2021 and 12.05.2021. The Presiding Officer of DRT-II, Mumbai rejected both the Interlocutory Applications by order dated 22.07.2021.

4.9 The Petitioner then filed Misc. Appeal No.40 of 2022 challenging the said order dated 22.07.2021 in DRAT. The Petitioner moved Interim Application No.118 of 2022 for waiver of pre-deposit required to be made for entertaining the appeal under provisions of Section 18(1) of the SARFAESI Act. During pendency of the Securitisation Application, the sale was successful and confirmed. The Yes Bank being original creditor assigned the debt to Respondent No.3 (JC Flowers Asset Reconstruction Pvt. Ltd.) and which, in turn assigned debt to Respondent No.1(Omkara Assets Reconstruction Company Pvt. Ltd.) In these circumstances, impugned order is passed.

5. The learned Senior Advocate for the Petitioner, inviting the Court's attention to Clause 2(ii) of the Mortgage Deed dated 30.11.2018 contended that the Petitioner being only Mortgagor is not responsible for payment of any facility or related interest, costs, charges etc. and further contended that under exchange of notice reply under Section 13(3A) and rejoinder of the Bank thereto, contention of the Petitioner about sole liability of Respondent No.5 is clearly communicated to the Bank. He submitted that the Original Application filed by the Bank in DRT-I, Mumbai only seeks recovery from present Respondent Nos.5 to 8 (Defendant Nos.1 to 4 therein) and not against the Petitioner (Defendant No.5 therein). He submitted that it is obvious from paragraph Nos.5.23, 5.28 & 5.33 of the Original Application, that the Bank has disbursed loan without due diligence and Respondent Nos.5 to 8 are conveniently not raising any dispute about claim of the Bank. He submitted that while considering 'debt due' under 2nd proviso to Section 18 of the SARFAESI Act, the DRAT ought to have considered the terms of the Mortgage Deed as well as exchange of notices and replies between the Petitioner and the Bank and admissions therein. He further submitted that it cannot be the situation under law that none of the authorities apply their mind arriving at figure of 'debt due' and it is interpreted to mean only 'as claimed by the secured creditor' in all circumstances. He has relied upon the judgment of Division Bench of this Court in **Keystone Constructions Vs. State Bank of India, [2013 SCC OnLine Bom 2098]** in support of his case.

6. On the other hand Senior Advocate for Respondent No.1 contended that the 2nd proviso to Section 18(1) of the SARFAESI Act has been already interpreted by this Court in the judgment of **Keystone Constructions Vs. State Bank of India (supra)** and under the judgments

of other Courts also. He contended that the words ‘amount of debt due as claimed by the secured creditor’ means the amount demanded by the secured creditor at the relevant time or determined by the Tribunal whichever is less. He submitted that the Mortgagor is covered under the definition of Borrower under Section 2(1)(f) of the SARFAESI Act and therefore, the Petitioner is squarely covered and therefore, cannot escape the order of pre-deposit. He further submitted that the condition of pre-deposit under Section 18 of the said Act has been held as not onerous. He submitted that since the sale has taken place, the amount due as on date of filing appeal is rightly considered as threshold amount for calculation of the pre-deposit as held by the Appellate Tribunal. He has relied upon the judgments of **Sree Jeya Soundharam Textile Mills Pvt. Ltd. Vs. Canara Bank & Ors. [2019 SCC OnLine Mad 30541]** and **Narayan Chandra Ghosh Vs. UCO Bank & Ors. [(2011) 4 SCC 548]**.

REASONS AND CONCLUSIONS

7. We have carefully considered the submissions and perused the record as well as case law relied upon by the parties.

8. At the outset we note that there is no dispute about the proposition of law as laid down in the judgments of **Narayan Chandra Ghosh (supra)** and **Sree Jeya (supra)** that condition of pre-deposit for entertaining appeal under section 18 of the SARFAESI Act is not an onerous condition and ‘any person aggrieved’ contemplated under said section will include mortgagor or even third party purchaser.

9. In **Keystone Constructions Vs. State Bank of India (supra)**, while considering the provisions of Section 18(1) of the SARFAESI Act, it has

been held that a ‘mortgagor’ is included in the expression ‘borrower’ as defined by Section 2(1)(f) of the SARFAESI Act. The expression ‘debt’ under Section 2(1)(ha) of the SARFAESI Act has the same meaning as assigned to it under Section 2(g) of the RDB Act. Section 2(g) of the RDB Act includes liability claimed by the Bank under mortgage. Therefore, any amount due from ‘mortgagor’ also would fall within the ambit of the expression ‘debt due from him’ as per the 2nd proviso to Section 18(1) of the SARFAESI Act. Therefore, the Petitioner will have to face the condition under Section 18(1), especially 2nd & 3rd proviso.

10. However, we also note that in paragraph No.46 of the judgment of **Keystone Constructions Vs. State Bank of India (supra)**, Division Bench of this Court has held as under.

“46. A mortgagor, therefore, falls within the ambit of the term ‘borrower’ and the amount due from him under the mortgage falls within the ambit of the expression “amount due from him” in the second proviso to section 18(1).”

[Emphasis supplied.]

Therefore, in our considered view, the amount due from a mortgagor would mean the ‘amount due from him under the terms of the mortgage’.

11. The matter can be seen from another perspective. Section 13(3A) of the SARFAESI Act (introduced w.e.f. 11.11.2004) reads as under:

“(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate [within fifteen days] of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons **shall not confer any right upon the borrower** to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.”

[Emphasis supplied.]

12. Plain reading of this sub-section and proviso makes it clear that on receipt of notice under Section 13(2) of the SARFAESI Act, the borrower can make a representation or raise an objection and if so done, the secured creditor is under statutory obligation, first to consider such representation or objection and secondly to communicate its response to the same. The word used at both places by the legislature is ‘shall’. Therefore, if after such exercise, the secured creditor indicates a distinct quantum of liability due from the borrower or even its absence, we do not find any reason to exclude consideration of such response for the purposes of determining the amount of pre-deposit under 2nd and 3rd proviso to section 18(1) of the SARFAESI Act.

13. There is one more reason. The proviso to Section 13(3A) specifically provides that the reasons communicated for non-acceptance or likely action of the secured creditor at the stage of communication of reasons ‘shall not confer any right’ upon the Borrower to prefer an application to the DRT under Section 17. Again, words used are ‘shall not’. Borrower includes mortgagor. This in our view creates a clear bar for the Borrower (including mortgagor) to approach the DRT ‘at that stage’. This is an additional reason for us to hold that while deciding the amount of debt due as claimed at the stage of section 18(1) of the SARFAESI Act, there is no reason to exclude the consideration of objection/representation given by the Borrower (including mortgagor) and the Bank’s response thereto.

14. In the result, we hold that while arriving at the amount of pre-deposit under 2nd and 3rd proviso to section 18(1) of the SARFAESI Act, there is no reason to restrict the determination of debt due as claimed, only on the basis of notice under Section 13(2) of the SARFAESI Act and there is no reason to exclude the consideration of the Bank's response, if given, pursuant to the objection / representation given by the borrower / mortgagor to the notice issued under Section 13(2) of the SARFAESI Act. In other words, if a lesser liability of the borrower/mortgagor is indicated in the Bank's response than the liability indicated in the notice issued under Section 13(2) of the SARFAESI Act or even if absence of liability is indicated, the same is required to be taken into consideration while arriving at the pre-deposit figure under 2nd and 3rd proviso to section 18(1) of the SARFAESI Act.

About the present case

15. For the aforesaid reasons, in the facts of present case, we deem it appropriate that the Petitioner's reply dated 14.02.2020 and Bank's rejoinder thereto dated 28.02.2020 must be considered before arriving at the figure of 'debt due'. We therefore find it appropriate to exercise our extraordinary writ jurisdiction under Article 226 of the Constitution of India to interfere.

16. The petition therefore partly succeeds as under :

(A) The impugned order is quashed and set aside.

(B) We direct the DRAT, Mumbai to consider the effect of the Petitioner's reply dated 14.02.2020 and Bank's rejoinder dated 28.02.2020 alongwith documents referred therein alongwith judgments referred above while deciding I.A. No.118 of 2022

and decide the pre-deposit as may be deemed fit by the Appellate Tribunal.

(C) It will be open for the Petitioner to argue that there is no amount due from him, based on said reply and rejoinder alongwith documents referred therein. Rival contentions of the parties are kept open.

(D) Rule is made absolutely in above terms with no order as to costs.

(E) All concerned to act on duly authenticated or digitally signed copy of this order.

(M.M. SATHAYE, J.)

(A.S. CHANDURKAR, J.)