Sidha Neelkanth Paper Industries Pvt. ... vs Prudent Arc Limited on 5 January, 2023

Author: M.R. Shah

Bench: B.V. Nagarathna, M.R. Shah

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 8969 OF 2022

M/s Sidha Neelkanth Paper Industries
Private Limited & Another …Appellants

Versus

Prudent ARC Limited & Others …Respondents

WITH

CIVIL APPEAL NO. 8970 OF 2022
CIVIL APPEAL NO. 8972 OF 2022
CIVIL APPEAL NO. 8973 OF 2022
CIVIL APPEAL NO. 8974 OF 2022

JUDGMENT

M.R. SHAH, J.

1. As common questions of law and fact arise in this group of appeals, namely, interpretation of Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act'), all these appeals are decided and disposed of together by this common judgment and order.

2. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 22.12.2020 passed by the High Court of Delhi at New Delhi in Writ Petition (Civil) No. 6060/2020, both, the borrower as well as the secured creditor have preferred Civil Appeal Nos. 8969 and 8970 of 2022.

3. Civil Appeal Nos. 8972, 8973 and 8974 of 2022 have been preferred against the common impugned judgment and order dated 12.04.2022 passed by the High Court of Madhya Pradesh, Bench at Indore in respective Writ Petition Nos. 5494/2021, 5470/2021 and 5478/2021, by which the High Court has dismissed the said writ petitions preferred by the original writ petitioners –

auction purchasers and has confirmed the orders passed by the Debt Recovery Appellate Tribunal, Allahabad (for short, 'DRAT'), by which the DRAT while entertaining the appeals under Section 18 of the SARFAESI Act held that the borrower is not liable to deposit 50% of the amount of debt as the secured property has been sold and the amount is realised as the same was paid by the auction purchasers and is to be appropriated towards the amount liable to be deposited as pre-deposit under Section 18 of the SARFAESI Act. Factual aspects in Civil Appeal Nos.8969 & 8970 of 2022:

> 4. That the appellant in Civil Appeal No. 8969/2022 – Sidha Neelkanth Paper Industries Private Limited (hereinafter referred to as the 'principal borrower') approached the Andhra Bank for sanction of credit facility and in the year 2008, it had approached Standard Chartered Bank for taking over the debt taken by it. In the year 2010, the Andhra Bank sanctioned open cash credit limit for a sum of Rs. 15.5 crores in favour of the principal borrower. Immovable properties were mortgaged by the guarantors and by the borrower to secure the said cash credit facility. After taking over the existing cash credit facility, a further ad-hoc open cash credit to the tune of Rs. 3 crores, due to the Standard Chartered Bank, was cleared by the Andhra Bank.
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> 4.1 Since, the principal borrower failed to make the repayment to the Andhra Bank, its account was declared as a Non Performing Asset (NPA). A notice dated 10.05.2013 was issued by the Andhra Bank under Section 13(2) of the SARFAESI Act, calling upon the borrower to pay the outstanding amount of Rs. 16,61,91,174.67 (Rupees sixteen crores sixty one lakhs ninety one thousand one hundred seventy four and paise sixty seven only), payable as on 27.04.2013. Objections thereto were raised by the principal borrower under Section 13(3A) of the SARFAESI Act. Since the amount demanded was not paid under Section 13(2) of the SARFAESI Act, measures under Section 13(4) of the SARFAESI Act were initiated by the Bank and possession of one of the mortgaged properties, being property bearing No. 170, Deepali, Pitampura, Delhi-110034 was taken. An Appeal was filed being SA No. 264/2013 by respondent Nos. 2 & 3 herein challenging the measures taken by the Andhra Bank under Section 13(4) of the SARFAESI Act.

4.2 On 25.07.2013, a conditional interim stay was granted by the Debt Recovery Tribunal-III (for short, 'DRT') and the applicants in SA No. 264/2013 were directed to deposit a sum of Rs. 2 crores within a period of 30 days. The said applicants were also directed to bring a better buyer in respect of the properties in question within a period of 60 days along with 10% of the proposed sale consideration. Since the borrower failed to comply with the order of the DRT, the mortgaged properties were put to auction. Attempts made by the owners of the property to challenge the proposed auction failed inasmuch as the application moved before the DRT and the appeal preferred before the DRAT were both dismissed. The writ petition filed by the owners before the High Court also came to be dismissed as withdrawn on 17.02.2016. That thereafter, the property in question was put to auction after getting the property valued and obtaining a valuation report of the property in question, namely, property bearing No. 170, Deepali, Pitampura, Delhi- 110034. In the meantime, the Andhra Bank assigned all its debts and underlying securities to Prudent ARC Limited, the appellant in Civil Appeal No. 8970/2022. The borrower filed Writ Petition (Civil) No. 12791/2018

before the High Court challenging the assignment of debts by Andhra Bank, which came to be dismissed by the High Court on 28.11.2018. An intra-court appeal also came to be dismissed. 4.3 That thereafter, the borrower filed an interlocutory application before the DRT to prevent the auction scheduled on 05.12.2018. However, the DRT allowed the creditor/assignee to proceed with the auction. The auction was conducted on 05.12.2018 and one M/s Tejswi Impex Pvt. Ltd. (auction purchaser) was the successful highest bidder for an amount of Rs. 12.5 crores. The entire amount was deposited and a sale certificate came to be issued in favour of the auction purchaser on 19.12.2018.

4.4 The borrower filed an appeal before the DRAT being Appeal No. 616/2018 challenging the order dated 05.12.2018 passed by the DRT dismissing the application filed by the borrower praying that the Bank/assignee be restrained from proceeding with the auction. The DRAT vide order dated 20.12.2018 directed the borrower to comply with the requirements of making a pre-deposit under Section 18 of the SARFAESI Act. The said order was in the nature of an interim order. The order dated 20.12.2018 passed by the DRAT was challenged before the High Court by way of Writ Petition No. 14066/2018. 4.5 The High Court directed the DRAT to hear the appeal on merits by observing that on realising the amount of Rs. 12.5 crores against the debt of Rs. 16.61 crores, it can be said that more than 50% of the debt due is secured/recovered and therefore the requirement of making a pre-deposit under the second proviso to Section 18 of the SARFAESI Act can be said to have been met. That thereafter, the DRAT disposed of the appeal vide order dated 1.8.2019 with a direction to the DRT to dispose of the main Securitization Application within a period of three months. Subsequently, vide order dated 05.10.2019, the DRT dismissed SA No. 264/2013 filed by respondent Nos. 2 & 3 herein. Against the said order, the borrower and the owner of the mortgaged property filed Regular Appeal No. 467/2019. The borrower sought waiver of the statutory pre-deposit under Section 18 of the SARFAESI Act, relying on the earlier order dated 26.12.2018 passed in Writ Petition No. 14066/2018 and contending, inter alia, that as Rs. 12.5 crores had already been recovered/realised by selling the mortgaged property and the same had been deposited by the auction purchaser, which can be said to be more than 50% of the debt of Rs. 16.61 crores and therefore the borrower is not required to pay any further amount towards the pre- deposit as envisaged under Section 18 of the SARFAESI Act. The DRAT allowed the waiver of the statutory pre-deposit by observing that the amount already realised by selling the mortgaged property/secured property is required to be adjusted towards the pre-deposit and/or the same can be said to be a deposit of 50% of the amount as pre-deposit, as envisaged under Section 18 of the SARFAESI Act.

4.6 Feeling aggrieved and dissatisfied with the order passed by the DRAT allowing waiver of the statutory pre-deposit on the aforesaid ground, the secured creditor/assignee filed the subject writ petition before the High Court being Writ Petition No. 6060/2020. By the impugned judgment and order, the High Court has partly allowed the said writ petition preferred by the secured creditor/assignee by directing that the borrower is required to deposit 50% of the remaining 4.1 crores being debt due (after deducting/adjusting Rs. 12.5 crores realised/recovered by selling the mortgaged property). The High Court has also observed that it shall be open to DRAT to reduce the said pre- deposit amount to 25%, after recording reasons in writing for the said reduction. The aforesaid order is passed by the High Court, after observing and concluding as under:

"(a) Pre-deposit contemplated under the second proviso of Section 18 of the SARFAESI Act, 2002 is mandatory in nature and cannot be waived by the learned DRAT.

(b) While computing the "amount of debt due", the amount of debt claimed by he secured creditor in its notice issued under Section 13(2) of the Act, shall be relevant and any future interest need not be taken into consideration for purposes of determining, "the amount of debt due as claimed by the secured credit", in cases where the DRT has not determined the liability of a borrower.

(c) The interest component shall be ignored only for the purposes of Section 18 of the Act. This judgment shall not affect the rights of the secured creditors to claim interest from the borrower, for recovery of amounts due under the RDDB Act.

(d) Any amount that has been repaid by the borrower and/or recovered by a secured creditor after filing of the petition under Section 17, shall stand to the benefit of the borrower while computing the "amount of debt due" under the second proviso to Section 18 of the SARFAESI Act, 2002." 4.7 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court, both, the secured creditor/assignee – Prudent ARC Limited and the original borrower – Sidha Neelkanth Paper Industries Pvt. Ltd. have preferred the present appeals.

Factual Aspects in Civil Appeal Nos.8972, 8973 & 8974 of 2022:

5. That the respective respondents in the present appeals took financial assistance by way of a Home Loan to the tune of Rupees one crore fifty lakhs from Bank of Baroda – the financial creditor. In order to secure the loan, the borrowers had mortgaged their property situated at Survey No. 542/2/2/1, Patwari Halka No. 18, Junior Dewas, District Dewas. Upon committing the default in returning the loan amount, the Bank issued a demand notice dated 3.8.2019 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act') for a debt of Rs. 1,40,81,936/-. A possession notice was issued on 10.10.2019. The borrowers approached the DRT by filing SA No. 652/2019. The bank withdrew the said notice and issued a fresh notice dated 13.1.2020 under Section 13(2) of the SARFAESI Act for the outstanding amount of Rs. 1,40,81,936/- from the borrowers. That thereafter the bank published the possession notice in daily newspapers on 24.03.2020. Subsequently, the bank issued a sale notice under Section 8(6) of the Security Interest Enforcement Rules, 2002 and put the mortgaged property to auction on 17.08.2020.

5.1 The borrowers again approached the DRT by way of SA No. 240/2020 on 14.08.2020. The bank conducted the auction proceedings on 17.08.2020 in which the appellants herein – original writ petitioners before the High Court, as one of the bidders, was declared as a successful highest bidder, having bid of Rs. 1,55,10,000/-. That thereafter the auction purchaser deposited the entire bid amount. The sale in favour of the auction purchaser came to be finalised and the sale certificate was registered on 23.11.2020 in favour of the auction purchaser and he was put in possession of the

secured asset. 5.2 Vide order dated 13.11.2020, the DRT dismissed SA No. 240/2020. Being aggrieved by the order dated 13.11.2020 passed by the DRT, the borrower approached the DRAT by way of Appeal No.344/2020 along with an application seeking waiver of the pre-deposit of the amount under Section 18 of the SARFAESI Act. By order dated 9.2.2021, the DRAT held that as the bank had already recovered the debt by selling the mortgaged property and there was no remaining amount of debt due, the requirement of pre-deposit was satisfied and the borrower/appellants were not required to tender any amount towards discharging the condition of pre-deposit for entertaining the appeal under Section 18 of the SARFAESI Act .

5.3 Being aggrieved by the said order, the auction purchaser as well as the Bank filed the subject writ petitions before the High Court. By the impugned common judgment and order, the High Court dismissed the said writ petitions by observing that the borrower is not liable to deposit 50% of the amount of the debt as initially claimed by the secured creditor in view of the recovery of the amount by way of an auction sale. Thus, according to the High Court, the amount realised on deposit of the sale consideration by the auction purchaser is required to be appropriated and/or adjusted towards the amount of pre-deposit required to be deposited by the borrower under Section 18 of the SARFAESI Act. 5.4 Feeling aggrieved and dissatisfied with the common impugned judgment and order passed by the High Court, the auction purchasers have preferred the present civil appeals.

Rival submissions in CA Nos.8969 & 8970/2022

6. Learned counsel appearing on behalf of the principal borrower has vehemently submitted that the High Court has materially erred in directing the principal borrower to deposit 50% of the remaining sum of Rs. 4.1 crores as pre-deposit under Section 18 of the SARFAESI Act. 6.1 It is further submitted that in the present case the secured property was sold in a public auction for a sum of Rs. 12.5 crores against the original amount of debt of Rs. 16.61 crores. That therefore the amount recovered was more than 50% of the original amount of debt of Rs. 16.61 crores and therefore no further order could have been passed directing the principal borrower to deposit any amount towards pre- deposit as required under Section 18 of the SARFAESI Act. It is contended that the amount realised by the financial institution by selling the secured property is required to be adjusted/appropriated while considering the “debt due”.

6.2 It is further contended that while passing the impugned order, the High Court has misinterpreted the definition of “debt” defined under Section 2(g) of the Recovery of Debts and Bankruptcy Act, 1993 (hereinafter referred to as the ‘Act 1993’). That the “debt due” required to be calculated to determine the pre-deposit amount shall have to be calculated deducting the money received by the bank/financial institution during the pendency of the proceedings before the DRT. 6.3 It is next submitted that while passing the impugned judgment and order, the High Court has erred in not applying the literal rule of interpretation for construing the second proviso to Section 18 of the SARFAESI Act for ascertaining true and correct meaning on the expression of “debt due”.

7. Learned counsel appearing on behalf of the financial institution and the auction purchaser have vehemently submitted that the High Court has materially erred in directing the borrower to deposit 50% of the remaining Rs. 4.1 crores only as pre-deposit. It is contended that the said order is under

challenge by the financial institution in the present case and it is the case on behalf of the financial institution that the High Court ought to have directed the borrower to deposit 50% of the original amount of debt of Rs. 16.61 crores.

7.1 It is submitted that the High Court has very seriously erred in directing that the amount realised from auction sale of the secured property shall have to be appropriated for the pre-deposit amount which is to be determined on the balance of the "debt due", without considering the interest component.

7.2 It is further submitted that as per proviso to Section 18 of the SARFAESI Act, the amount of pre-deposit is to be calculated in respect of the amount of "debt due" and the "debt" in SARFAESI Act is defined in Section 2(ha). It is submitted that as per section 2(ha) "debt" shall have the same meaning as assigned to it in section 2(g) of the Act of 1993. It is submitted that on perusal of Section 2(g) of the Act of 1993, "debt due" would include liability + interest. It is submitted that in the present case the High Court in the impugned judgment and order has observed and held that while considering the pre-deposit under Section 18 of the SARFAESI Act, interest component is to be ignored. It is submitted that the same is contrary to Section 2(ha) of the SARFAESI Act. 7.3 It is further submitted that as the borrower has challenged the notice under Section 13(2) of the SARFAESI Act and has also challenged the auction sale, adjustment of the amount recovered from sale of the secured assets against the pre-deposit under Section 18 of the SARFAESI Act, could not be permitted. Reliance is placed on the decision of the Bombay High Court in the case of Eskays Construction Pvt. Ltd. v. Soma Papers & Industries Limited & Others, 2016 SCC OnLine Bom. 9827, against which a special leave petition was filed and dismissed. It is submitted that even the proviso to Section 18 of the SARFAESI Act does not provide for any such adjustment. It is averred that therefore in the present case, the High Court has erred in allowing adjustment of the amount recovered from sale of secured assets, the amount which has been deposited by the auction purchaser and not borrower while considering pre-deposit under Section 18 of the SARFAESI Act.

Rival submissions in Civil Appeal Nos.8972 to 8974 of 2022

8. Shri Vinay Navare, learned Senior Advocate appearing on behalf of the auction purchaser, in addition, has vehemently submitted that the requirement of deposit under Section 18 of the SARFAESI Act is not for the purpose of securing payment of the creditor. That the objective is to require the borrower to prove his bona fides and to discourage frivolous litigation from being initiated by the borrower. It is submitted that therefore, this Court in the case of Axis Bank v. SBS Organics Private Limited, (2016) 12 SCC 18 has held that the amount of pre-deposit is refundable to the borrower after disposal of appeal. 8.1 It is next submitted that the language of Section 18 of the SARFAESI Act is very clear and unambiguous. It says that the "borrower shall deposit", which means such amount is required to be brought in by the borrower and the amount standing with creditor through auction sale cannot be for the benefit of the borrower. That the borrower can take benefit of the amount received by the creditor in an auction sale only if he unequivocally accepts the sale. It is submitted that if the borrower wants to question the sale, then he cannot claim the amount of deposit for his benefit. The borrower cannot be allowed blow hot and cold.

8.2 Reliance is placed on the decision of this Court in the matter of M/s Shilpa Shares and Securities v. National Cooperative Bank Ltd., (S.L.P (Civil) No. 14717/2022, decided on 21.11.2022) wherein it has been held that the amount deposited pursuant to the order of this Court cannot be adjusted in pre-deposit. That in the said case, the borrower applied for OTS and the matter reached this Court and to show the bona fides of the borrower, while considering its prayer for OTS, this Court directed to deposit certain amount. That thereafter the special leave petition came to be dismissed and in an appeal challenging the proceedings under the SARFAESI Act, the borrower wanted to adjust and/or appropriate the amount deposited pursuant to the order passed by this Court and that Court negatived the same by observing that the amount deposited pursuant to the order of this Court cannot be adjusted in pre-deposit.

8.3 Making above submissions, it is prayed that the impugned judgment and order passed by the High Court be set aside and the borrower be directed to deposit 50% of the "debt due" without adjusting and/or appropriating the amount realised by selling the secured assets.

9. Learned counsel appearing on behalf of the original borrowers have supported the impugned judgment and order passed by the High Court of Madhya Pradesh and have submitted that the High Court has not committed any error in dismissing the writ petitions and confirming the orders passed by the DRAT by which the DRAT after adjusting/appropriating the amount realised by sale of the secured property held that the borrowers are not required to deposit any further amount towards pre-deposit as the amount realised is more than 50% of the "debt due".

Consideration:

10. We have heard learned counsel appearing on behalf of the secured creditor/assignee, the respective auction purchasers and respective borrowers.

11. The short question which is posed for the consideration of this Court is, "whether, while calculating the amount to be deposited as pre- deposit under Section 18 of the SARFAESI Act, 50% of which amount the borrower is required to deposit as pre-deposit and whether while calculating the amount of "debt due", the amount deposited by the auction purchaser on purchase of the secured assets is required to be adjusted and/or appropriated towards the amount of pre-deposit to be deposited by the borrower under Section 18 of the SARFAESI Act?" Another question would be, "whether the "debt due" under Section 18 of the SARFAESI Act would include the liability + interest?"

12. While considering the aforesaid issues/questions, Section 18, & 2(ha) of the SARFAESI Act and section 2(g) of the Recovery of Debts and Bankruptcy Act, 1993, which would have a direct bearing are required to be referred to. The said provisions read 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.

2(ha) "debt" shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and includes—

(i) unpaid portion of the purchase price of any tangible asset given on hire or financial lease or conditional sale or under any other contract;

(ii) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable any borrower to acquire the intangible asset or obtain licence of such asset;

Section 2(g) of the Recovery of Debts and Bankruptcy Act, 1993 - "debt" means any liability (inclusive of interest) which is claimed as due from any person [or a pooled investment vehicle as defined in clause (da) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956),] by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application [and includes any liability towards debt securities which remains unpaid in full or part after notice of ninety days served upon the borrower by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of debt securities or;]"

13. As per Section 2(ha) of the SARFAESI Act, "debt" shall have the same meaning assigned to it in clause (g) of Section 2 of the Act 1993. As per section 2(g) of the Act 1993, "debt" means any liability inclusive of interest which is claimed as due from any person....., by a bank or a financial institution during the course of any business activity undertaken by the bank or the financial institution, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on the date of the application. That the "debt" means any liability inclusive of interest.

As per Section 18 of the SARFAESI Act, any person aggrieved, by any order made by the DRT under section 17, may prefer an appeal within thirty days to an appellate Tribunal (DRAT) from the date of receipt of the order of DRT. Second proviso to section 18 provides that no appeal shall be entertained unless the "borrower" has deposited with the Appellate Tribunal fifty percent of the amount of "debt due" from him, as claimed by the secured creditors or determined by the DRT, whichever is less and only and only then, an appeal under Section 18 of the SARFAESI Act is permissible against the order passed by the DRT under Section 17 of the SARFAESI Act. Under Section 17, the scope of enquiry is limited to the steps taken under Section 13(4) against the secured assets. Therefore, whatever amount is mentioned in the notice under Section 13(2) of the SARFAESI Act, in case steps taken under Section 13(2)/13(4) against the secured assets are under challenge before the DRT will be the 'debt due' within the meaning of proviso to Section 18 of the SARFAESI Act. In case of challenge to the sale of the secured assets, the amount mentioned in the sale certificate will have to be considered while determining the amount of pre-deposit under Section 18 of the SARFAESI Act. However, in a case where both are under challenge, namely, steps taken under Section 13(4) against the secured assets and also the auction sale of the secured assets, in that case, the "debt due" shall mean any liability (inclusive of interest) which is claimed as due from any person, whichever is higher.

14. As observed hereinabove and as per the second proviso to Section 18 of the SARFAESI Act, it is the "borrower" who has preferred an appeal before the Appellate Tribunal and the "borrower" who shall have to deposit 50% of the amount of "debt due" from him. If the words used in the second proviso to Section 18 of the SARFAESI Act are "borrower has to deposit", it is not appreciable how the amount deposited by the auction purchaser on purchase of secured assets can be adjusted and/or appropriated towards the amount of pre-deposit, to be deposited by the borrower. It is the "borrower" who has to deposit the 50% of the amount of "debt due" from him. At the same time, if the borrower wants to appropriate and/or adjust the amount realised from sale of the secured assets deposited by the auction purchaser, the borrower has to accept the auction sale. In other words, the borrower can take the benefit of the amount received by the creditor in an auction sale only if he unequivocally accepts the sale. In a case where the borrower also challenges the auction sale and does not accept the same and also challenges the steps taken under Section 13(2)/13(4) of the SARFAESI Act with respect to secured assets, the borrower has to deposit 50% of the amount claimed by the secured creditor along with interest as per section 2(g) of the Act 1993 and as per section 2(g), "debt" means any liability inclusive of interest which is claimed as due from any person.

15. An identical question came to be considered by the Bombay High Court in the case of Eskays Construction Pvt. Ltd. (supra). Before the Bombay High Court, it was the case on behalf of the borrower that though as per Section 18 of the SARFAESI Act, 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 creditor or as determined by the DRT, whichever is less, however, that does not mean that in a case where the properties of the borrower are sold and the entire dues of the bank are recovered from that sale, the borrower still has to deposit 50% as contemplated under Section 18 of the SARFAESI Act. While negativing the said submission, the Bombay High Court considered the purpose and object of the SARFAESI Act in paragraph 14 as

under:

> "14. 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 non-performing 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." Thereafter, the Bombay High Court considered in detail Section 18.

> After considering the decision of this Court in the case of Narayan Chandra Ghosh v. UCO Bank, (2011) 4 SCC 548, it was observed and held that provisions of Section 18, more particularly the second and the third proviso thereto are mandatory in nature and that the DRAT has no power to grant full waiver of deposit. In paragraph 16, it is observed as under:

> "16. 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 3 rd 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." That thereafter the Bombay High Court considered the submission on behalf of the borrower that as the bank had already sold the secured assets for a consideration that fully secured their claim and therefore there was no requirement for the borrower to deposit any amount as contemplated under Section 18 of the SARFAESI Act. The Bombay High Court did not accept the said submission by observing that it would be ludicrous to suggest that the money realised by the bank from sale of the secured assets could be used by the borrower to fulfil the condition of pre-deposit under Section 18. The Bombay High Court has observed that it would be a different matter if the sale is accepted and confirmed by the borrower. The Bombay High Court further observed that the borrower cannot be permitted to use the sale proceeds received from the sale of the subject properties to be adjusted/given credit for in the application for waiver of deposit and at the very same time challenge the sale of very same subject properties. The said decision of the Bombay High Court has been confirmed by this Court as the special leave petition preferred impugning the same, has been dismissed. Even otherwise, we are in full agreement with the view taken by the Bombay High Court in the case of Eskays Construction Pvt. Ltd. (supra). We are of the firm opinion and view that in a case where the borrower challenges the auction sale, thereafter it will not be open for the borrower to pray to use the sale proceeds received from the sale of the secured properties to be adjusted/given credit in an application for waiver of pre-deposit.

16. In view of the above and for the reasons stated above, in the present case, the respective High Courts have seriously erred in directing to adjust/appropriate the amount realised by auction sale of the secured properties/deposited by the auction purchasers while considering the 50% of the amount as pre-deposit to be deposited by the borrower, while preferring an appeal before the DRAT. Even the High Court of Delhi has erred in excluding the amount payable towards interest while considering the "debt due". As per Section 2(g) of the Act 1993, "debt" means liability inclusive of

interest as claimed by the bank/financial institution.

17. In view of the above and for the reasons stated above, the respective appeals preferred by the financial institution/assignee and auction purchasers being civil Appeal Nos. 8970, 8972, 8973 and 8974 of 2022 are hereby allowed. The appeal preferred by the borrower against the judgment and order passed by the Delhi High Court being Civil Appeal No. 8969/2022 deserves to be dismissed and is accordingly dismissed. It is observed and held that the borrower has to deposit 50% of the amount of "debt due" as claimed by the bank/financial institution/assignee along with interest as claimed in the notice under Section 13(2) of the SARFAESI Act and the borrower is not entitled to claim adjustment/appropriation of the amount realised by selling the secured properties and deposited by the auction purchaser when the auction sale is also under challenge.

18. Civil Appeal Nos. 8970, 8972, 8973 & 8974 of 2022 are accordingly allowed except Civil Appeal No. 8969 of 2022. Consequently, Civil Appeal No. 8969 of 2022 stands dismissed, as observed hereinabove. However, in the facts and circumstances of the case, there shall be no order as to costs.

.....J.
[M.R. SHAH]

NEW DELHI; .....J.
JANUARY 05, 2023. [B.V. NAGARATHNA]