Darshan Patil

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 18722 OF 2024

M/s Royal Traders,]
Unit No. 302, 3rd Floor,]
Tardeo Air Condition Market,]
Also having office at 3rd Floor,]
Kamla House, Kamla Mills Compound,]
Senapati Bapat Marg, Lower Parel,]
Mumbai – 400013] …Petitioner

VERSUS

Asset Reconstruction Company of India Ltd.,]
10th Floor, The Ruby, 29,]
Senapati Bapat Marg, Dadar West,]
Mumbai, Maharashtra PO:400028] …Respondent

WITH

WRIT PETITION (L) NO. 19404 OF 2024

Asset Reconstruction Company (India) Limited,]
(Trustee of Arcil-CPS-II-Trust)]
A company incorporated under the]
Companies Act, 2013 having its address]
at 10th Floor, The Ruby, Senapati Bapat]
Marg, Dadar (West), Mumbai 400 013.] …Petitioner

VERSUS

Royal Traders]
Having its office at Unit No.2, 3rd floor,]
Tardeo Air Condition Market, Tardeo,]
Mumbai – 400034] …Respondent

WITH

WRIT PETITION (L) NO. 19406 OF 2024

Asset Reconstruction Company (India) Limited,]
(Trustee of Arcil-CPS-II-Trust)]
A company incorporated under the]
Companies Act, 2013 having its address]
at 10th Floor, The Ruby, Senapati Bapat]
Marg, Dadar (West), Mumbai 400 013.] …Petitioner

VERSUS

Royal Traders]
Having its office at Unit No.2, 3rd floor,]
Tardeo Air Condition Market, Tardeo,]
Mumbai – 400034] …Respondent

WITH

WRIT PETITION (L) NO. 19411 OF 2024

Asset Reconstruction Company (India) Limited,]
(Trustee of Arcil-CPS-II-Trust)]
A company incorporated under the]
Companies Act, 2013 having its address]
at 10th Floor, The Ruby, Senapati Bapat]
Marg, Dadar (West), Mumbai 400 013.] …Petitioner

VERSUS

Royal Traders]
Having its office at Unit No.2, 3rd floor,]
Tardeo Air Condition Market, Tardeo,]
Mumbai – 400034] …Respondent

APPEARANCES-

Ms Pinky Anand, **Senior Advocate**, a/w Mr Samrat Pasriccha, Ms Pooja Gera, Mr Umang Mehta, Ms Aalisha Sharma i/b. Dhruve Liladhar & Co., for the Petitioner in

WPL/18722/2024 and for Respondents in WPL/19404/2024, WPL/19406/2024, WPL/19411/2024.

Mr Nitin Thakker, Senior Advocate, a/w Ms Megha Gupta, Ms Priyanka Dubey, Ms Pranjali Khemnar i/b. Hedgehog & Fox LLP, for the Petitioner in WPL/19404/2024, WPL/19406/2024, WPL/19411/2024 and for Respondent in WPL/18722/2024.

CORAM : M.S.Sonak & Jitendra Jain, JJ.

RESERVED ON : 18 December 2024

PRONOUNCED ON : 19 December 2024

JUDGMENT (*Per MS Sonak J*):-

1. Heard learned counsel for the parties.

2. Rule in each of these petitions. The Rule is made returnable immediately at the request of and with the consent of learned counsel for the parties.

3. Learned counsel for the parties agree that a common judgment and order can dispose of these petitions. In any event, Writ Petition (L) No. 18722 of 2024, the challenge is to the Debts Recovery Appellate Tribunal's ("DRAT") order dated 04 June 2024, to the extent this order does not grant the petitioner the waiver under the 3rd proviso to Section 18(1) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**"). In the remaining three petitions, the petitioners challenge the very same order dated 04 June 2024, to the extent the said order does not consider the interest

component for determining the debt due. Accordingly, it is only appropriate that a common judgment and order dispose of these petitions.

4. Ms Pinky Anand, learned senior advocate for the petitioner in Writ Petition (L) and 18722 of 2024 ("**borrower**") submitted that under the scheme of Section 13(2) of the SARFAESI Act, the invocation of jurisdiction under the SARFAESI Act is pre-conditioned by the account in question being classified as a Non-Performing Asset (NPA). She submitted that unless this jurisdictional fact was established, the proceedings and the SARFAESI Act could never be launched, and, if launched, were ex-facie without jurisdiction and ultra vires. She referred to the provisions of Section 13(2) of the SARFAESI Act and relied upon **M/s Sravan Dall Mill Private Limited Vs. Central Bank Of India**[1] in support of this submission.

5. Ms Anand then referred to the notice dated 08 May 2021 by which proceedings under the SARFAESI Act sought to be initiated and pointed out to the statement in paragraph 9, in which it was stated that the petitioner's account had been classified as NPA on 04 May 2021. She then referred to Schedule 2B to the deed of assignment dated 01 December 2022, by which the debt in question was assigned to the Asset Reconstruction Company (India) Limited ("**ARCL**") which refers to the date of the petitioner's account being classified as NPA as 05 July 2022.

6. Ms Anand submitted that this was a serious discrepancy. Therefore, if the jurisdictional fact about the petitioner's

[1] AIR 2010 AP 35

account being classified as an NPA was uncertain and, in any event, not achieved before proceedings were launched under the SARFAESI Act, such proceedings were void ab initio.

7. Ms Anand also referred to ARCL's reply before the DRAT. She submitted that some admissions were made about the borrower paying amounts even after ARCL issued notice under Section 13(2) of the SARFAESI Act. She submitted that accepting such amounts after the issue of Section 13(2) notice disentitles ARCL from proceeding further under the said notice. In any event, she submitted that these amounts have not been accounted for to determine the debt allegedly due by the borrowers to ARCL.

8. Ms Anand submitted that based on the above factors, the borrower had made a very strong prime facie case to succeed in the appeal before the DRAT. She submitted that even the DRAT admits to the discrepancies and states that the petitioner has made out an arguable case. However, DRAT incorrectly concludes that the petitioner has not made out '*a strong prima face case*'. On this reasoning, the DRAT declines the waiver, rendering the petitioner's right to appeal DRAT's order illusory. She submitted that the right to appeal is virtually the right of access to justice. Therefore, this right should not have been taken away in this fashion. She, therefore, submits that the impugned order warrants interference.

9. Ms Anand submits that necessary averments about financial hardships were made in the application seeking waiver. She even referred to the income tax returns of the borrower - firm while admitting that these returns were not

produced before the DRAT. She submitted that the DRAT also did not consider the impact of the COVID pandemic. She submitted that the issue of financial hardship is not dispositive of the jurisdiction of the appellate tribunal. She submitted that DRAT must evaluate whether a prime facie case has been made out for grant of waiver. She relied on **Sterlite Technologies Ltd. Vs. Union of India and Ors.**[2] to support her contention.

10. Based upon the above contentions, Ms Anand submitted that the DRAT's impugned order dated 04 June 2024 warrants interference. She further submitted that this was a fit case where the petitioner-borrower must be allowed to prosecute the appeal by making a pre-deposit of 25% of the debt due instead of nonsuiting the petitioner-borrower by insisting upon a deposit of 50% of the debt allegedly due. She pointed out that the petitioner had already deposited an amount of Rs.10 Crores to show bona fide.

11. Mr Thakker learned senior advocate for ARCL, defended the impugned order to the extent the same has declined any waiver under the 3rd proviso to Section 18(1) of the SARFAESI Act based upon the reasoning reflected therein. He referred to the application for waiver and submitted that there were virtually no pleadings on financial hardships, and even the ground about the borrower not being liable to be classified or not classified as NPA was never raised or argued before the DRAT.

12. Mr Thakker submitted that the only argument was about some alleged discrepancies in the debt amount. Such

[2] (2012) (2) Mh. L.J. 112

discrepancies were also highly trivial, and based upon such discrepancies, no prima facie case was made out. He submitted that the borrower's account was correctly classified as NPA on 04 May 2021. However, in the deed of assignment, an inadvertent typographical error in the schedule indicated this date as 05 July 2022. Subsequently, the document was rectified, and the correct date, 04 May 2021, was introduced. He submitted that the borrower can take no undue advantage based upon such typographical error, which is already corrected. Mr Thakker submitted that the borrower has not come up with any positive case about its account not being NPA as of 04 May 2021. Neither were there any pleadings nor were any documents produced to this effect. He, therefore, submitted that not even a prima facie case was made out by the borrower, much less any strong primary case.

13. Mr Thakker submitted that the borrower has deliberately tried to mislead the DRT and DRAT on the issue of payments. He submitted that whatever payments were made by the borrower were duly accounted for under the loan terms. He submitted that the amounts paid have to be adjusted against the interest component, and the accounts projected by the borrower are too simplistic but grossly incorrect. He submitted that there was never any serious challenge to the accounts or the quantum of debt due. He, therefore submitted that the borrower made out no prime case.

14. In support of the Petitions instituted by ARCL, Mr. Thakker submitted that the record of the order dated 04 June 2024 contained an apparent error, as this order calculated the debt due as Rs.32.58 lacs. He submitted that in reaching this

amount, the DRAT completely ignored the provisions of the SARFAESI Act and the law laid by this Court in **Sony Mony Developers Pvt. Ltd. & Ors. Vs. Asset Care & Reconstruction Enterprises & Anr.**[3]

15. Mr.Thakker submitted that in terms of the above decision and the decision in **M/S. Mrb Roadconst Pvt. Ltd vs Rupee Co-Op. Bank**[4], the interest component had to be included for determining the amount of debt due when instituting appeal before the DRAT. He submitted a calculation chart by including this interest component and contended that the impugned order be modified accordingly. Accordingly, Mr. Thakker submitted that the borrower's writ petition may be dismissed, and ARCI's petitions may be allowed by directing the necessary modifications in the impugned order dated 04 June 2024.

16. In rejoinder, Ms. Anand handed in a compilation of documents. She explained that these documents referred to events after the DRAT made the impugned order dated 04 June 2024. She submitted that notices for taking over possession of some of the borrower's assets were entirely based on the impugned order dated 04 June 2024 and the consequent dismissal of the borrower's appeal for non-compliance with the directions for pre-deposit. She submitted that since the DRAT order regarding pre-deposit was challenged before this Court, the DRAT was not justified in dismissing the appeal pending the borrower's petition in this Court.

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[3] Writ Petition No. 797 of 2024 decided on 29 January 2024

[4] (2016) 3 MhLJ 589

17. Ms. Anand submitted that the issue of the borrower not being classified as NPA was raised before the DRAT, and ARCL admits to this in its pleadings. She also submitted that the borrower made out a strong prima facie case, and financial hardships are evident from the record.

18. Ms. Anand submitted that there could be no serious dispute with the principle in *Sony Mony Developers (supra)* about including the interest. She submitted a statement without prejudice regarding interest calculations. Based on the same, she submitted that in terms of the ARCI's internal documents, the debt due, even after including the interest component, would come to Rs.73.8 crores. She submitted that if the calculations are made based on the Section 13(2) notices dated 08 May 2021, the debt due would come to Rs.103.86 Crores. She clarified that this calculation sheet was submitted clearly without prejudice.

19. Based on the above contentions, Ms. Anand submitted that the borrower's petition may be allowed, and ARCI's petition may be dismissed or disposed of by making suitable orders.

20. The rival contentions now fall for our determination.

21. In these Petitions, the following two issues arise for determination: -

> (A) Whether the borrower (Petitioner in Writ Petition (L) No.18722 of 2024) has made out a case for waiver of pre-deposit to the extent indicated in the third proviso to Section 18(1) of the SARFAESI Act that is to

prosecute the appeal by depositing only 25% of the debt referred to in the second proviso?

(B) Is ARCL (Petitioners in the remaining three Writ Petitions) justified in contending that the expression "debt due from him" includes the interest component on the principal amount up to the date of the institution of the appeal before the DRAT?

22. Regarding the first issue, reference is necessary to the provisions of Section 18 of the SARFAESI Act, which are transcribed below for the convenience of reference:-

> "**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 alongwith such fee, as may be prescribed] to the 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."

23. Section 18 provides that any person aggrieved by any order made by the Debts Recovery Tribunal ("**DRT**") under Section 17 may prefer an appeal along with such fee as may be prescribed to the Appellate Tribunal (DRAT) within thirty days from the date of receipt of the DRT's order. The second proviso provides that no appeal shall be entertained unless the borrower has deposited with the DRAT 50% of the amount of debt due from him, as claimed by the secured creditors or determined by the DRT, whichever is less. The third proviso provides that the DRAT may, for reasons to be recorded in writing, reduce the amount to not less than 25% of the debt referred to in the second proviso.

24. Thus, the standard rule is that the DRAT will not entertain an appeal under Section 18(1) unless the borrower has deposited with the DRAT 50% of the amount of debt due from him, as claimed by the secured creditors or determined by the DRT, whichever is less. However, the DRAT may entertain such an appeal by reducing this pre-deposit amount to not less than 25% for reasons to be recorded in writing. The question of the considerations on which the DRAT could exercise its waiver discretion under the third proviso to Section 18(1) was considered in *Sterlite Technologies Ltd.* (supra).

25. The Division Bench comprising D. Y. Chandrachud and A.A. Sayed, JJ., (as Their Lordships then were) held that the exercise of power under the third proviso to Section 18(1) was a judicial power which was further structured by the requirement that reasons had to be recorded in writing for reducing the amount to be deposited to less than 75% of the debt as determined by the Tribunal or claimed by the secured

creditor, whichever was lesser. The Court held that at the stage of considering an application for waiver, the DRAT is not expected to render a final finding on the merits of the contentions urged regarding the DRT's judgment. That may have to await the final determination of the appeal. But it was well settled principle of law that even at that stage, the question as to whether a prima facie case has been made out had to be evaluated by the DRAT.

26. The Court held that for the limited purpose of considering whether a dispensation should be granted, the DRAT had to necessarily evaluate whether a prima facie case was made out, and the reasons to be formulated must be confined only to that determination. In considering whether a waiver should be granted, the DRAT would have to consider both the elements of a prima facie case and the question of financial hardship. The Court also held that financial hardship is not dispositive of the jurisdiction of the DRAT. The DRAT must evaluate whether a prima facie case has been made for the waiver grant. Thus, the DRAT must consider the element of a prima facie case and the question of financial hardship when considering the application for a waiver. However, considering financial hardship is not dispositive of the DRAT's jurisdiction.

27. In the present case, the pleadings about financial hardship are extremely sketchy and almost suggest that no such plea was seriously raised or pursued by the borrower.

28. In paragraph 46 of the waiver application, there is a bald statement which reads as follows:-

> "…. Given the compelling circumstances of the present case, the Appellants earnestly request the Hon'ble Tribunal to consider reducing the waiver amount from 50% to 25%. A copy of the Bank Statements mentioning the amount paid by the Appellants against the Loan is annexed hereto and marked as "Exhibit D"."

29. In paragraph 48, the borrower sought leave to rely on the averments in the appeal memo and the exhibits/annexures to the appeal memo, which should be read and considered part of the waiver application. However, nothing was pointed out to us regarding financial hardships in the appeal memo or the exhibits/annexures to the appeal memo.

30. Finally, in paragraph 52 of the waiver application, the borrower pleaded as follows: -

> "The Appellants state that if they are forced to pay the amount, it would cause undue hardship and may result in the denial of the right to appeal in case they fail to make the deposit."

31. Based on the above pleadings, or even after considering the pleadings as a whole, the DRAT was not expected to consider the alleged financial hardship. Therefore, the impugned order cannot be faulted for not considering this aspect.

32. Even before this Court, the borrower firm's income tax return was relied upon, even though it was not the document produced before the DRAT. Mr Thakker objected to the consideration of this document, and he was justified in so objecting. However, notwithstanding his objection, we have considered it as Exhibit "N" (Page 586) because Ms Anand

submitted that this was an issue of access to justice and no relevant document should be shut out.

33. The income tax return declares a loss of approximately Rs.12 crores. This return is for the Assessment Year 2022-2023 and reflects the borrower's income as per I.T. Act and not financial health as of 31 March 2022. The appeal before the DRAT was filed on 1 April 2024. If the borrower was serious about the ground based on financial hardship, then at least some documents reflecting the borrower's financial health as of 1 April 2024 should have been produced.

34. Apart from producing the income tax return acknowledgement, no other documents, like balance sheets, tax audit reports, etc. are produced by the borrower. At least these documents would have given an idea about the borrower's financial health. The argument about the COVID-19 pandemic is also entirely misconceived. There are no pleadings to this effect before the DRAT or this Court. Mr Thakker submitted that if such arguments are to be accepted, then even ARCL should be allowed to produce material to show how the partners of the borrowers have been expending massive amounts attending film festivals at Cannes in France and other such material.

35. Based on the material before the DRAT and the material now produced before us, we are satisfied that the borrowers never claimed financial hardships. Therefore, the impugned order cannot be faulted for not considering this aspect. Even upon independent consideration of the material placed before us, we are satisfied that the borrower did not claim financial hardships. In any event, no such case is made out. Neither the

sketchy pleadings nor the scanty document supports the plea of financial hardships. Having regard to the object of the SARFESI Act and the normal rule of fifty per cent pre-deposit, the onus was on the borrower to make out a waiver case.

36. Ms Anand, however, pointed out that financial hardship is not dispositive of the DRAT's jurisdiction in deciding a waiver application. Therefore, she urged that we consider the prima facie case and a waiver must be granted if a prima facie case is made. She reiterated that this was a question of access to justice, and a liberal approach was warranted in such matters.

37. As regards the prima facie case, we do not find that the contentions now raised before us were raised or at least seriously raised and pressed before the DRAT. This is not just a case of giving the borrower access to justice as urged by Ms Anand. This is also a case of permitting the borrowers with a serious case to be considered from availing the opportunity of an appeal. The borrower's interests and the interests of expeditious loan recoveries by curbing frivolous defences and delays must be balanced. The constitutional validity of the requirement of pre-deposit at the appeal stage has already been upheld. However, giving the borrower the utmost latitude, even if we were to proceed based on the premise that such contentions were raised, we are afraid we cannot hold that any prima facie case was made out for allowing the waiver application in the facts and circumstances of the present case.

38. The only two contentions raised and pressed before us regarding the issue of prima facie case were as follows: -

(A) That there was no clarity about the borrower's account being NPA as of 8 May 2021 (or as of 4 May 2021). This was because of an entry in the Schedule to the assignment agreement indicating this date as 5 July 2022.

(B) That the borrower paid some amounts to the secured creditor after the receipt of notice under Section 13(2) of the SARFAESI Act and the acceptance of such amounts constitutes some waiver of the notice, and in any event, the amounts so paid, have not been accounted for to determine the dues or the account's status as NPA. For this, reliance was placed on paragraph 9(xvi) of ARCL's reply in this Court.

39. Regarding the first contention, Section 13(2) notice dated 8 May 2021, very clearly states that since the interest and/or instalment of principal has remained overdue for more than 90 days, the borrower's account has been classified by the secured creditor as NPA on 4 May 2021 in accordance with the prudential guidelines issued by the asset's classification by the regulatory body. In the assignment deed dated 1 December 2022, by which the secured creditor assigned its debts and the rights to recover the same to ARCL, Schedule 2B, which gives the details of financing documents, refers to the date of NPA as 5 July 2022.

40. Based only on the above discrepancy, which was corrected by executing a rectification deed in 2024, the borrower contends that there is no clarity about the precise date on which the borrower's account was classified as NPA. In this context, it is pretty clear that the borrower's account was classified as NPA after the accounts reflected that interest and instalment of principal remained overdue for more than

90 days on 4 May 2021. These are matters readily ascertainable by documents and accounts. By taking advantage of an incorrect entry in the Schedule to the deed of assignment, no prima facie case can be said to have been made out by the borrower about any alleged lack of clarity about the date and, moreso, about any doubt regarding the status of the borrower's loan account being classified as NPA.

41. Significantly, the borrower has produced no documents to show that as of 4 May 2021, the borrower's loan account could not have been classified as NPA. For this, all that the borrower had to show was that interest and/or instalment of the principal had not remained overdue for more than 90 days. These records would indeed be available to the borrower if the borrower had serviced the loan in terms of the loan agreement. No such documents were produced. No clear case of the borrower's account not being liable to be classified as NPA was made out, nor was prima facie established. Based only upon the error, an attempt is made to draw the disproportionate mileage. No prima facie case can be said to have been made out based on such a circumstance.

42. The circumstance that the borrower may have paid some amount after receiving Section 13(2) notice cannot constitute a waiver as was feebly suggested. In any event, at least prima facie, it is difficult to say that this amount has not been accounted for. The amount is accounted for, though there may be a dispute about the manner of such accounting. Mr Thakker, the learned Counsel ARCL, submitted that in terms of the loan agreement and the law on the subject, the amounts paid had to be appropriated against the interest component. He submitted that all amounts paid by the

borrower have been duly accounted for and appropriated in terms of the loan agreement and the law on the subject.

43. The borrower wishes to rely on a statement in paragraph 9(xvi) of the ARCL's affidavit in reply to Writ Petition (L) No.18722 of 2024. This paragraph reads as follows: -

> "That during course of argument the Petitioner tried to create doubts in the mind of Ld. DRAT by showing the figures in section 13 (2) notice and the figure in the Assignment Agreement and the date of NPA in 13 (2) notice and the Assignment Agreement. The Respondents state that by the 2nd Supplemental Rectification Deed dated 29" May 2024 the date of NPA in assignment deed was rectified. Further, in so far the alleged discrepancies in the outstanding mentioned in the Assignment Deed, the figure mentioned therein were as of October 2022. With reference to the documents on record it was shown that the different figures were because of some payments made in the account by the borrowers between the date of NPA and March 2022. Thus, there were no discrepancies in the account. Furthermore, these points were only raised for the first time during the course of Petitioner's argument and were not raised in the Waiver IA, Appeal or SA."

Based upon the statement that some payments were made in the account by the borrowers between the date of NPA and March 2022, we cannot hold that a prima facie case about any serious error in the accounts maintained by the secured creditor or ARCL was made out. Again, no details of the payments made have been produced. The without-prejudice calculation sheet produced at the stage of rejoinder hardly inspires much confidence and, in any event, is insufficient to make out a prima facie case in the context of the waiver application.

44. The terms "prima facie" and "prima facie case" are not defined in any statutes. Although no attempt has been made to encase these terms within the confines of a judicially evolved definition or to evolve an inflexible formula for universal application, the terms have been judicially interpreted to mean a case that is not bound to fail on account of any technical defect and needs investigation. According to Shorter Oxford English Dictionary (3rd Edition), the term "prima facie" means at first sight; on the face of it; based on first impression. According to this dictionary "prima facie case" would be synonymous with "a case resting on prima facie evidence." 11. According to Halsbury (Halsbury's law of English, 3rd edition, vol, 15, para 506) (*) "prima facie evidence" is "evidence which, if accepted by the tribunal, establishes a fact in the absence of acceptable evidence to the contrary. Unless a particular enactment otherwise provides, sufficient evidence usually means prima facie evidence, which may establish a fact if there is no contradictory evidence.

45. Thus, this is a case where the borrower has failed even to plead a case of financial hardship. In any event, even if we were to consider the materials sought to be now placed before us, the borrower makes out no case for financial hardship. Independent of this aspect of financial hardship, not even any prima facie case is made out by the borrower as would justify allowing the borrower's application for waiver. The borrower has not produced any credible material, and by simply relying upon an inadvertent error, which, in any event, stands rectified, undue and disproportionate mileage was sought to be drawn by the borrower. Again, there is also no credible material regarding any grave errors in accounting by the

secured creditor or ARCL. Based on all this, no prima facie case can be said to have been made out by the borrower. The DRAT's finding about the borrower failing to make out a prima facie case warrants no interference, even by applying the most liberal review standards since Ms Anand submitted that this was a question of access to justice.

46. Regarding the legal proposition in *M/s. Sravan Dall Mill Private Limited* (supra), there can be no dispute, and Mr Thakker raised at least none on behalf of ARCL. However, based on the alleged discrepancy or the inadvertent error in the Schedule to the deed of assignment, there is no case to even prima facie hold that the borrower's account was not classified or was not classifiable as NPA as of 4 May 2021. Therefore, based on the decision cited, we cannot hold that any prima facie case was made out by the borrower. Accordingly, at the behest of the borrower, we find no good ground to interfere with the impugned order.

47. Regarding the Petitions instituted by the ARCL, we must refer to the definition of "Debt" in Section 2(ha) of the SARFAESI Act. The same reads as follows: -

> "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;"

48. The word "Debt" is defined in Section 2(g) of The Recovery of Debts and Bankruptcy Act, 1993. The same reads as follows: -

> "2(g) "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;]]"

49. In *Sony Mony Developers Pvt. Ltd (supra)* the Coordinate Bench of this Court comprising of B. P. Colabawalla & Somasekhar Sundaresan, JJ has held that the above definition of "Debt" is extremely wide and means any liability inclusive of interest which is claimed as due from any person by a bank or a financial institution. The Court, in paragraph 6, observed as follows:-

> "6. We are of the considered view that on an ex facie reading of the said definition it is clear that the word 'debt' has been given an extremely wide meaning and means any liability inclusive of interest which is claimed as due from any person by a Bank or a financial institution. On a plain reading of the 2nd proviso to Section 18(1) of the SARFAESI Act, r/w the definition of the word 'debt' as defined in Section 2(g) of the RDB Act, it is clear that before an 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 creditor or as determined by the DRT whichever is less. If there is no determination of the debt by the DRT (as in the present case), then the borrower would have to deposit 50% of the amount of "debt due" from him as claimed by the secured creditor. The provision on a plain reading does not in any way exclude taking into consideration future interest that is accrued on the debt owed by the borrower to the secured creditor. In fact, the definition to the word 'debt' means any liability (inclusive of interest) which is claimed as due from any person by a Bank or a financial institution. Therefore, if the claim made by the secured creditor in the Section 13(2) notice includes future interest (as in the present case), the same would certainly be included in the amount of "debt due" from the borrower to the secured creditor as contemplated under the 2nd proviso to Section 18(1) of the SARFAESI Act. We, therefore, find no justification in the statute to hold that it is only the figure that is mentioned in the 13(2) notice that is to be taken into consideration, and not the future interest accrued on the said sum, whilst determining the deposit amount under the 2nd proviso to Section 18(1) of the SARFAESI Act. The amount of deposit would have to be determined on the basis of the amount of the "debt due" by the borrower to the secured creditor on the date when the Appeal is filed in the DRAT. This would not only include the amount mentioned in the Section 13(2) notice but also interest accrued thereon till the date of filing of the Appeal under Section 18 of the SARFAESI Act. We find that this issue is no longer res integra and is covered by a decision of a Division Bench of this Court to which one of us was a party (B.P. Colabawalla, J.) in the case of MRB Roadconst. Pvt. Ltd. Vs. Rupee Co-Op Bank (2016 (3) Mh.L.J. 589). The relevant portion of this decision reads thus:

> “18. On a plain reading of the 2nd proviso to section 18(1) of the SARFAESI Act read with the definition under the word "debt" as defined in section 2(g) of the RDDB Act, it is clear that before an 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. If there is no determination of the debt by the DRT under the provisions of the RDDB Act, then the borrower would have to deposit 50% of the amount of debt due from him as claimed by the secured

creditors. The provision on a plain reading does not in any way exclude taking into consideration the future interest that is accrued on the debt owed by the borrower to the secured creditor. In fact, the definition of the word "debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution. Therefore, if the claim made by the secured creditor in the section 13(2) notice includes future interest, the same would certainly be included in the "amount of the debt due" from the borrower to the secured creditor as contemplated under the 2nd proviso to section 18(1) of the SARFAESI Act. There is therefore no justification to hold that it is only the figure that is mentioned in the Section 13(2) notice that is to be taken into consideration and not the future interest accrued on the said sum, whilst determining the deposit amount under the 2nd proviso to section 18 of the SARFAESI Act. The amount of deposit would have to be determined on the basis of the amount of debt due by the borrower to the secured creditor on the date when the appeal is filed in DRAT. This would not only include the amount mentioned in the section 13(2) notice but also interest accrued thereon till the date of filing of the appeal under section 18 of the SARFAESI Act. To our mind, this is the only interpretation that is possible of the 2nd proviso to section 18 of the SARFAESI Act. If we were to accept the contention of the petitioner that the amount to be deposited by the borrower [under the 2nd proviso to section 18(1)] would be only on the basis of the sum/figure as mentioned in the section 13(2) notice and not the interest accrued thereon after the date of the said notice, the same would be violating the plain language of the statute. To interpret the 2nd proviso to section 18(1) in this fashion, to our mind, would clearly violate the plain and unambiguous language of the said section.

19. We must mention here that after the issuance of the notice under section 13(2) and before the appeal is filed in the DRAT under section 18 of the SARFAESI Act, if the borrower has made any part payment of the debt due to the secured creditors, then credit for the same would have to be given to the borrower and for the purposes of deposit under the 2nd proviso to section 18(1), the reduced amount (after giving credit) would have to be taken into consideration for determining the amount required to be deposited by the borrower. This

> is simply because on the date of filing of the appeal, the debt due to the secured creditor would be reduced after giving credit for the amount already paid."

50. Thus, the statutory definitions and the decisions of this Court in *Sony Mony Developers Pvt. Ltd (supra)* and *MRB Roaconst. Pvt. Ltd. (supra)* clarify that the interest component up to the date of institution of the appeal before the DRAT must be included in determining the debt due. Ms. Anand, the learned counsel for the borrower, quite fairly did not even contest this position.

51. The DRAT's impugned order does not appear to have taken cognizance of the above legal position emanating from the statutory definitions and the two decisions of this Court. To that extent, therefore, the calculations or the determination made by the DRAT warrant interference.

52. However, since we do not have the precise details, it will be impossible to determine the interest component so that the same could be included or added to the determination made by the DRAT in the impugned order.

53. Mr. Thakker handed in a calculation sheet stating that the dues as of 10 May 2024 would be approximately Rs.130.42 crores. Ms. Anand disputed this. Ms. Anand handed in a without prejudice calculation sheet under which the dues would be Rs.103.86 crores as of 08 May 2021. The relevant date in this case would be 01 April 2024, i.e., the date the borrower filed the appeal before the DRAT. Therefore, this figure of Rs.103.86 crores would be considerably enhanced given the interest for the last three years. Mr Thakker disputed this calculation sheet.

54. However, even if we go by the calculation sheet submitted by Ms. Anand, without for a moment accepting that the same reflects the position of debt due by the borrower correctly, the borrower will still have to make a pre-deposit of Rs.51.93 crores or Rs.52 crores before the DRAT to have its appeal entertained. This amount would be further enhanced because the appeal was instituted in April 2024.

55. However, now that the DRAT has already dismissed the borrower's appeal, there is no point in modifying the impugned order and directing the borrower to deposit 50% of the debt due by taking cognisance of the statutory definitions and the decisions of this Court in *Sony Mony Developers Pvt. Ltd (supra) and MRB Roaconst. Pvt. Ltd. (supra)*. If the appeals were pending, we would surely have modified the impugned order and directed a deposit of an additional amount as a pre-condition for the entertainability of the appeal.

56. Though it was not argued before us, we considered whether we should order the restoration of the borrower's appeal and grant the borrower an opportunity to deposit Rs.52 crores initially pending determination of the amount due as of the date of filing of the appeal (which would be more than Rs.52 crores). However, upon due consideration of the material on record, we think such a course of action would only prolong the proceedings.

57. The borrower does not appear to be interested in making any pre-deposit, and the entire endeavour is to buy some time, which makes it difficult for ARCL to recover its dues. Therefore, even after considering the Rs.10 Crore

deposit made by the borrower in this court, we think that no indulgence should be granted to the borrower, and the loan recovery should not be protracted any further. This deposit must be considered in the context of the dues, which, even on a conservative estimate, is over Rs 110 crores.

58. The jurisdiction under Articles 226 and 227 of the Constitution of India is discretionary and equitable. Such extraordinary jurisdiction cannot be exercised to assist the borrower who has no intention of repaying/clearing even the admitted debt dues. This borrower appears to be interested in taking disproportionate advantage of some typographical error in one of the documents (loan assignment document). In any event, now that we have upheld the impugned order to the extent it had dismissed the borrower's application for waiver, there is no case made out to interfere with the DRAT's order dismissing the appeal for non-compliance with the directions for pre-deposit. Ms Anand had submitted that dismissing the appeal or the notices for taking possession of the borrower's properties were only consequential to the order impugned in this petition.

59. For all the above reasons, we dismiss the Writ Petition (L) No. 18722 of 2024 and dispose of the remaining three Writ Petitions in terms of the observations made above. The Rule is discharged in Writ Petition (L) No.18722 of 2024 and disposed of in the remaining three Writ Petitions.

60. The interim order, if any, is vacated. Interim Applications, if any, do not survive and are disposed of.

(Jitendra Jain, J) **(M. S. Sonak, J)**