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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision: 31st October, 2011

+ RFA (OS) 69/2011

RAM PRAKASH MEHRA Appellant
Through: Mr.Jagjit Singh, Advocate

versus

UNION BANK OF INDIA & ORS. Respondents
Through: Mr.Gautam Gupta for Aditya Madan,
Advocate for R-1
Mrs.Mala Goel and Mr.Yashpal Singh,
Advocates for R-6

RFA (OS) 70/2011

POONAM MALHOTRA Appellant
Through: Mr.Jagjit Singh, Advocate

versus

UNION BANK OF INDIA & ORS. Respondents
Through: Mr.Gautam Gupta for Aditya Madan,
Advocate for R-1
Mrs.Mala Goel and Mr.Yashpal Singh,
Advocates for R-6

RFA (OS) 71/2011

HARSH ARORA Appellant
Through: Mr.Jagjit Singh, Advocate

versus

UNION BANK OF INDIA & ORS. Respondents
Through: Mr.Gautam Gupta for Aditya Madan,
Advocate for R-1
Mrs.Mala Goel and Mr.Yashpal Singh,
Advocates for R-6

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE S.P.GARG

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

PRADEEP NANDRAJOG, J. (Oral)

1. Three suits pertaining to the basement, ground floor and second floor of property bearing Municipal No.S-455, Greater Kailash, Part-I, New Delhi, seeking a declaration that Sh.Krishan Gopal Sharma was neither the owner nor had any right to create a mortgage on 21.12.1989 in respect of property No.S-455, Greater Kailash, Part-I, New Delhi and as a consequence declare void the notice (undated) issued by the Union Bank of India under Sub-Section 4 of Section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 and decree for injunction to restrain the bank from proceeding further with the sale of the property have been held to be barred by virtue of Section 34 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002.

2. Section 34 of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 reads as under:-

“34. Civil Court not to have jurisdiction

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.”

3. A bare perusal of the language of Section 34 noted above would reveal that it bars the jurisdiction of a civil court, to entertain a suit, in respect of any matter which the Debts Recovery Tribunal or the Appellate Tribunal constituted under the Act is empowered to so determine. Thus, our job is to see whether the subject matter of the suit(s) filed by the appellants embraced a subject matter belonging to the jurisdiction of the Debts Recovery Tribunal.

4. Since acts of omission or commission give birth to litigation, we note the relevant facts.

5. DLF Housing & Construction Pvt. Ltd. (hereinafter referred to as ‘DLF’) obtained a license from the Municipal Corporation of Delhi to develop a parcel of land in South Delhi and sell plots therein. The developed land was named Greater Kailash Part-I and Greater Kailash Part-II and the plot of land bearing No.S-455 Greater Kailash Part-I was sold by DLF, under a

sale deed dated 4.6.1964, in favour of Sh.Jai Narain Seth and Sh.Sharan Jeet Singh who became the free-hold owners of the land in question.

6. On 5th February 1966 Jai Narain Seth sold his half-share in Plot No.S-455 Greater Kailash Part-I to his co-owner i.e. Sharan Jeet Singh. The sale deed stands registered as Document No.1144, Additional Book No.1, Vol. No.1471 at pages 153 to 155 and the date of registration is 19th February 1966.

7. On 9th June 1989 by and under a sale deed of even date Sharan Jeet Singh sold the land to Rajesh Khurana and the sale deed is registered as Document No.5026, Additional Book No.1, Volume No.6437 at pages 152-201 dated 9th June 1989.

8. Rajesh Khurana obtained a sanction from the Municipal Corporation of Delhi to construct a building on the plot and completed construction and obtained completion certificate No.332/CC/90 dated 12th March 1991 from the Municipal Corporation of Delhi. The building constructed consisted of a basement, a ground floor with mezzanine, a first floor and a second floor.

9. Thereafter, under different sale deeds executed on different dates in the months of February and March 1992 and August 1991, Rajesh Khurana sold different portions of the property to different persons and ultimately the three appellants purchased the basement, the ground floor and the second floor respectively.

10. This is the line of title flowing, commencing from DLF and the first purchasers under DLF being Jai Narain Seth and

Sharan Jeet Singh. Title is derived by the appellants in the manner aforesaid and suffice would it be to state that having executed the sale deed dated 5th February 1966 conveying his half share in the land to his co-owner Sh.Sharan Jeet Singh, as per the appellants, Jai Narain Seth was left with no right, title or interest in the land.

11. On 21st December 1989, one Krishan Gopal deposited a sale deed executed on 5th January 1979, bearing registration No.1144, Additional Book No.1, Volume No.1471 at pages 45-47 with the Sub-Registrar Delhi in respect of a loan granted by the Union Bank of India to S.K.Trading Company of which Krishan Gopal Sharma was alleged to be the proprietor thereof. It may be highlighted that the registration particulars as per sale deed dated 5th January 1979 are the same as are of the sale deed dated 5th February 1966 whereunder Jai Narain Seth conveyed his half share in the plot to the co-owner Sh.Sharan Jeet Singh.

12. There being default in the loan advanced to S.K.Trading Company, the bank proceeded under Section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 and as per the mandate of sub-section (2) thereof left an undated notice at the building on 11th May 2001 recording therein that Krishan Gopal Sharma, as owner of the property had mortgaged the same to the Union Bank of India and there being outstanding dues, the bank would be proceeding to sell the mortgaged property.

13. Attempts by the appellants to satisfy the bank that it had been cheated by Krishan Gopal Sharma failing in the bank

to withdraw the notice issued, resulted in the three appellants filing three identical suits praying for identical decrees, in relation to different portions of the building purchased by them.

14. Without issuing summons in the suit, at the ex-parte hearing, i.e. the very first day when the suits were listed before Court, the learned Single Judge held that the bar of Section 34 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 rendered the complaints to be rejected.

15. Clause (f) of sub-section (1) of Section 2 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 defines a 'borrower' as under:-

“(f) "borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance;

16. A bare perusal of the definition of the word 'borrower' would show that a borrower would be a person who has been granted financial assistance by a bank or a financial institution or a person who has given guarantee or created a mortgage or pledge as security for the financial assistance granted and would include a person who becomes borrower of a securitization company or reconstruction company consequent

upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance.

17. Under the General Law of Devolution of Interest upon death of a person, a borrower would include the legal representative of a person who would be a borrower as per the definition of the said word in the statute.

18. Section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 governs the procedure to be followed in enforcing a security. It reads as under:-

“13. Enforcement of security interest

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub section (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured

creditor in the event of non-payment of secured debts by the borrower.

(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 one week 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.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only where the

substantial part of the business of the borrower is held as security for the debt:

PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is

received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

PROVIDED that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956:

PROVIDED FURTHER that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues

with the liquidator in accordance with the provisions of section 529A of that Act:

PROVIDED ALSO that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

PROVIDED ALSO that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

PROVIDED ALSO that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation : For the purposes of this sub-section,--

(a) "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets,

the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.”

19. The amended Section, with the amendments carried out in light of the decision of the Supreme Court reported as 2004 (4) SCC 311 Mardia Chemical Ltd. & Ors. vs. UOI & Ors., vide sub-section (2) thereof, obliges the secured creditor to serve a notice upon the borrower to discharge full liability within 60 days failing which the secured creditor would be entitled to take recourse to sub-section (4) of Section 13 i.e. take possession of the secured asset and sell the same. Vide sub-section (3A) the borrower has a right to represent against the proposed action. If aggrieved, a right of appeal has been conferred under Section

17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 and we note the same. It reads as under:-

“17. Right to appeal

(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

PROVIDED that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation : For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in

accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

PROVIDED that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as

specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

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

20. Suffice would it be to state that the right of appeal has been conferred upon any person and includes the borrower if the grievance relates to a measure referred to in sub-section (4) of Section 13.

21. Any person referred to in Section 17 would obviously include a person other than the borrower and the question would be whether this ‘any person’ would include persons placed in the position as the appellants find themselves i.e. persons having no concern with the financial assistance given by the bank.

22. Now, borrower as defined in the Act means not only the person who has been granted financial assistance but includes a person who has given a guarantee or created a mortgage and since the definition of the word ‘borrower’ is wide enough to encompass persons other than the one who has availed the financial assistance, ‘any person’ referred to in Section 17 in

whom the right of appeal is vested would obviously be a person other than a borrower. (Borrower being a person defined in the definition of the word 'borrower').

23. Thus, at first blush it would appear that the view taken by the learned Single Judge is correct, but we find that in para 51 of the decision in Mardia Chemicals (Supra), fraud is one area, where the Supreme Court has recognized continued vesting of jurisdiction in a Civil Court.

24. On the facts of the instant case, Explanation-II to Section 3 of the Transfer of Property Act 1882 needs to be considered. We note the same:-

“Explanation II. – Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.”

25. By the time the mortgage was created on 21.12.1989, possession of the plot was with Rajesh Khurana and issue would arise pertaining to his possessory rights being a deemed notice of his interest in the property to the bank when the mortgage was created on 21.12.1989 by Krishan Gopal Sharma.

26. The bank claims the mortgage being created on 21st December 1989 by deposit of the sale deed dated 5.1.1979, registration particulars whereof, as noted by us herein-above, would prima-facie evidence that it could not be so registered as Document No.1144, Additional Book No.1, Volume No.1471, the particulars of registration which it bears, for the reason these are the registration particulars of the sale deed dated 5th

February 1966 executed by Jai Narain Seth in favour of Sharan Jeet Singh.

27. A serious issue, pertaining to a serious fraud arises on the facts stated herein-above and we dwell no further lest we prejudice either party at the trial as our endeavour is to note the rival facts and see whether an issue pertaining to a fraud of a serious kind arises for consideration in the suits filed by the appellants.

28. Indeed, if the appellants prove at the trial, the sale deed dated 5.2.1966 the same would evidence Jai Narain Seth being left with no title in the subject property. With reference to the registration particulars of the sale deed dated 5.1.1979, which are the same as those of the sale deed dated 5.2.1966, upon proof thereof, the apparent fraud could be brought to light and this may include either lack of due diligence or complicity of an officer of the bank inasmuch as a proper due diligent search of the record of the Sub-Registrar Delhi would have made known to the bank that the sale deed dated 5.1.1979 was a fraudulent document.

29. The appellants are not claiming any title through the borrower i.e. Krishan Gopal Sharma, in whose favour exists the sale deed dated 5.1.1979 inasmuch as the sale deeds relied upon by the appellants would evidence that the executant of the sale deed dated 5.1.1979 i.e. Jai Narain Seth was left with no title in the land on 5.2.1966. The appellants claim title through Sharan Jeet Singh.

30. We allow the appeals and set aside the impugned order dated 31.5.2011. CS(OS) No.1405/2011, CS(OS) No.1406/2011 and CS(OS) No.1407/2011 are restored for adjudication on merits and since the appeals restore the suit, plaint(s) which were rejected being held to be barred by law, we direct 50% Court Fee paid in appeal to be refunded to the appellants and for which the Registry would issue the necessary certificate.

31. Since the three suit plaints were rejected ex-parte without notice to the bank, we impose no costs.

32. The last mantra. Nothing stated by us herein above would be treated as an expression on the merits of the rival claims. We have noted the facts and reflected thereon to highlight the issue of fraud which is surfacing and hence requiring a trial before a Civil Court.

PRADEEP NANDRAJOG, J.

S.P.GARG, J.

OCTOBER 31, 2011
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