

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 23.12.2014

+ **W.P.(C) 8963/2014**

PRALEEN CHOPRA

..... Petitioner

versus

**M/S DEWAN HOUSING FINANCE
CORPORATION PVT. LTD. & ORS**

..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr Arjun Singh Bawa with Mr Ritin Rai.

For the Respondents :

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J (ORAL)

CM 21051/2014

As the matter has been taken up for hearing, the early hearing application is infructuous and is disposed of.

CM 21052/2014

For the reasons stated therein, the application is allowed.

CM 20494/2014

Allowed, subject to all just exceptions.

The application is disposed of.

W.P.(C) 8963/2014 & CM No. 20495/2014

1. The petitioner impugns an order dated 26.09.2014 passed by the Chief Metropolitan Magistrate (West), Tis Hazari Court, Delhi under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereafter the 'Act') whereby a receiver has been appointed to take possession of the immovable property being Plot No.47, Third Floor, Right hand side Floor, North Avenue Road, Punjabi Bagh-West, New Delhi-110026 (hereafter the 'said property'). The petitioner has also impugned an order dated 05.11.2014 whereby the petitioner's application for review of the order dated 26.09.2014 was also rejected by the Chief Metropolitan Magistrate (CMM). The orders dated 26.09.2014 and 05.11.2014 are hereinafter referred to as the 'impugned orders'.

2. The petitioner claims to be the holder of a General Power of Attorney of the erstwhile owners of the said property and further claims to be in possession of the same. Essentially, the grievance of the petitioner is that he is being dispossessed of the property even though he is not the borrower.

3. The learned counsel for the petitioner contends that the CMM has passed the impugned orders without considering that the possession of the said property had not been handed over to respondent nos.2, 3 & 4, who had purchased the said property.

4. It is the petitioner's case that he was the owner of the said property as well as the terrace above the said property. It is claimed that the

respondents had approached the petitioner for purchase of the said property and the terrace for a consideration of ₹7,31,00,000/- and this offer was accepted. A part of the said transaction had been concluded; the respondent nos. 2, 3 & 4 had paid a sum of ₹4,50,00,000/- and, accordingly, the petitioner had executed a sale deed on 31.10.2013 for the said property. Thereafter, on 01.11.2013, the petitioner and respondent nos. 2 to 4 had entered into a Memorandum of Understanding (MOU) which, *inter alia*, provided that the balance of ₹2,81,00,000/- would be paid within a period of two months from the date and on payment of the amount the petitioner would hand over the vacant physical possession of the said property along with the terrace above the said property to respondent nos. 2 to 4 and also execute the sale deed with respect to the terrace over the property along with one car parking space.

5. On the basis of the sale deed executed by the petitioner, respondent nos. 2 to 4 had availed a loan from respondent no.1 and had mortgaged the said property by depositing the sale deed. Apparently, respondent nos.2 to 4 have defaulted in repaying the loan availed from respondent no.1 against the said property. Therefore, respondent no.1 had initiated proceedings under the Act for enforcement of its security interest in respect of the said property.

6. The learned counsel for the petitioner submitted that as per the MOU dated 01.11.2013, the petitioner would be entitled to continue to retain the possession of the property and this question has not been examined by the CMM. He further relied upon the decision of the Supreme Court in **Harshad Govardhan Sondagar v. International Assets Reconstruction**

Company Limited and Others: (2014) 6 SCC 1 to contend that under the Act, a person other than the borrower could not be divested of the possession of the property in respect of which security interest had been created in favour of the lender. It is contended that the petitioner retains interest in the said property.

7. Before proceeding further, it would be necessary to refer to Section 14 of the Act which reads as under:-

“14.Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.—(1) Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured assets is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him—

(a) take possession of such asset and documents relating thereto; and

(b) forward such asset and documents to the secured creditor:

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that—

(i) the aggregate amount of financial assistance granted and the total claim of the bank as on the date of filing the

application;

(ii) the borrower has created security interest over various properties and that the bank or financial institution is holding a valid and subsisting security interest over such properties and the claim of the bank or financial institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days' notice as required by the provisions of sub-section (2) of Section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the authorised officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of Section 13 read with Section 14 of the principal Act;

(ix) that the provisions of this Act and the Rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the

authorised officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets:

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.

(1-A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him—

(i) to take possession of such assets and documents relating thereto; and

(ii) to forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority.”

8. A plain reading of Section 14 indicates that a secured creditor can request for an assistance of the Chief Metropolitan Magistrate or the District Magistrate to take possession of secured assets which are required to be sold or transfer under the provisions of the Act. Thus, in all cases, where a secured creditor is entitled to take possession of the secured assets under the Act, the said creditor is also entitled to take assistance of the Chief Metropolitan Magistrate or the District Magistrate for the said

purposes. The Supreme Court in the case of **Harshad Govardhan Sondagar** (*supra*) had explained that in cases where a lessee is in lawful possession under a valid lease, the possession of the secured asset is not required to be taken under the provisions of the Act and, therefore, the Chief Metropolitan Magistrate or District Magistrate would not have the power under Section 14 of the Act to take possession from such lessee.

9. The scheme of Section 14 of the Act also clearly indicates that a secured creditor would have to satisfy the Chief Metropolitan Magistrate or District Magistrate by submitting the necessary affidavit indicating its entitlement to take possession under the Act. The Supreme Court had further held that a secured creditor must also state in an affidavit that the secured asset is not in possession of a lessee. The relevant extract of the said judgment is quoted below:-

“25. The opening words of sub-section (1) of Section 14 of the Sarfaesi Act make it clear that where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured assets is required to be sold or transferred by the secured creditor “under the provisions of the Act”, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof. Thus, only if possession of the secured asset is required to be taken under the provisions of the Sarfaesi Act, the secured creditor can move the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset. We have already held that Section 13 of the Sarfaesi Act does not provide that the lease in respect of a secured asset will get

determined when the secured creditor decides to take the measures in the said section. Hence, possession of the secured asset from a lessee in lawful possession under a valid lease is not required to be taken under the provisions of the Sarfaesi Act and the Chief Metropolitan Magistrate or the District Magistrate, therefore, does not have any power under Section 14 of the Sarfaesi Act to take possession of the secured asset from such a lessee and hand over the same to the secured creditor. When, therefore, a secured creditor moves the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset, he must state in the affidavit accompanying the application that the secured asset is not in possession of a lessee under the valid lease made prior to creation of the mortgage by the borrower or made in accordance with Section 65-A of the Transfer of Property Act prior to receipt of a notice under sub-section (2) of Section 13 of the Sarfaesi Act by the borrower. We would like to clarify that even in such cases where the secured creditor is unable to take possession of the secured asset after expiry of the period of 60 days of the notice to the borrower of the intention of the secured creditor to enforce the secured asset to realise the secured debt, the secured creditor will have the right to receive any money due or which may become due, including rent, from the lessee to the borrower. This will be clear from clause (d) of sub-section (4) of Section 13, which provides that in case the borrower fails to discharge his liability in full within the notice period, the secured creditor may require, at any time by notice in writing, any person who has acquired any of the 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."

10. It is apparent from the above that the Chief Metropolitan Magistrate or the District Magistrate is not to adjudicate any dispute between the person in possession and the secured creditor; he is only to satisfy himself

that the ingredients of Section 14 have been complied with. I find it difficult to accept the petitioner's contention that the powers under Section 14 of the Act are limited to only those cases where the borrower is in possession of the secured asset. No such restriction can be read in Section 14 of the Act. The decision of the Supreme Court in ***Harshad Govardhan Sondagar*** (*supra*) is an authority for the proposition that a Chief Metropolitan Magistrate or a District Magistrate cannot dispossess a lessee who is in lawful possession of the immovable property. This is quite different from the contention advanced by the petitioner and the said decision cannot be read to mean that the Chief Metropolitan Magistrate or District Magistrate has no power to dispossess any person other than borrower.

11. Since the procedure under Section 14 of the Act is concerned with taking over possession of a secured asset under the Act, the recourse to Section 14 is available in all such circumstances where possession is to be recovered under the Act.

12. In this case, the petitioner is not a lessee of the said property. The petitioner can also not claim any interest in the property as the same would be contrary to the express language of the sale deed. Admittedly, the petitioner had executed a sale deed which, *inter alia*, records as under:-

“2. That now the vendors through Attorney doth hereby sell, convey grant transfer and assign all rights titles and interests in the said portion of the said property with super structure standing therein along with proportionate undivided indivisible and impartible share of ownership rights in the land underneath including easements and appurtenances whatsoever pertaining to the said portion of

the said property TO HAVE AND TO HOLD THE SAME unto the vendors ABSOLUTELY AND FOREVER.

3. That the vendors admit they have been left with no right title interest claim or lien of any nature whatsoever in the said portion of the said property hereby sold and the same has become the absolute property of the vendors with the right to use. Enjoy sell and transfer the same by whatsoever mean the vendors like without any demand. Objection claim or interruption by the vendors or any person (So claiming under or in trust for vendors through attorney.

4. That the vendors through Attorney have assured the vendors that the said portion of the said property hereby sold is freehold in nature and is free from well kinds of encumbrances such as prior sale mortgage gift Will lease loan surety security lien of any court or person litigations stay order notices charges family or religious disputes acquisition decree injunction hypothecation income Tax or Wealth Tax attachments or any other registrar or unregistered encumbrances whatsoever and if it is proved otherwise as a result of which if the vendors is deprived off from the said portion of the said property or any part thereof then the vendors through attorney shall be liable and responsible to indemnify all the losses/damages thus suffered by the vendors.”

(underlining added)

13. Respondent no.1 had granted a loan to respondent nos.2 and 3 on the basis of the transfer of title executed by the petitioner. In the circumstances, the petitioner cannot now be permitted to claim any interest contrary to the deed, concededly, executed by him.

14. In my view, the decision of the Supreme Court in ***Harshad Govardhan Sondagar*** (*supra*) would not be applicable in this case. In that case, the appellant before the Supreme Court claimed to be tenants of various premises that had been mortgaged to banks as securities for the loans advanced by the banks. The appellants were, thus, claiming interest in the property. In this case, the petitioner cannot claim any interest in view of the express language of the sale deed executed by him.

15. In the above circumstances, no interference with the impugned orders is called for as the same would impede the legitimate rights of respondent no.1 to enforce its security interest under the Act.

16. The petition and application are, accordingly, dismissed.

DECEMBER 23, 2014
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VIBHU BAKHRU, J