

GAHC010270222022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Review.Pet./5/2023

YAMJE DULOM TAMIN @ YAMJE LORIAK TAMIN
W/O- TAANU TAMIN, PRESENTLY RESIDING AT FLAT NO. 101, 1ST FLOOR,
LUIT REGENCY, BAISTHAPUR, BYE LANE NO. 1, HATIGAON, GUWAHATI-
38, KAMRUP(M), ASSAM.
PERMANENT RESIDENT OF B- SECTOR, WARD NO. 18, H/NO. 301, P.O. AND
P.S. ITANAGAR, DIST.- PAPUM PARE, ARUNACHAL PRADESH.

VERSUS

UNION BANK OF INDIA AND 4 ORS.
REP. BY CHIEF GENERAL MANAGER, REGIONAL OFFICE AT GNB ROAD,
CHANDMARI, GUWAHATI- 781003.

2:THE AUTHORIZED OFFICER
UNION BANK OF INDIA
REGIONAL OFFICE AT GNB ROAD
CHANDMARI
GUWAHATI- 781003.

3:THE BRANCH MANAGER
UNION BANK OF INDIA
BASISTHA BRANCH
GUWAHATI-28.

4:MILAN SAIKIA
S/O- PURNANANDA SAIKIA
R/O- PUBERUN PATH
HATIGAON
GUWAHATI- 28.

5:SIMARANI BORA
W/O- SRI MILAN SAIKIA

R/O- PUBERUN PATH
HATIGAON
Guwahati- 28

Advocate for the Petitioner : MS. M DEV

Advocate for the Respondent : SC, UBI

BEFORE
HONOURABLE THE CHIEF JUSTICE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA

ORDER

07.08.2023

(Soumitra Saikia, J)

Heard Mr. R. Chakravorty, learned counsel for the review petitioner and Mr. M. Sarma, learned counsel for the respondents No. 1 to 5.

2. This review petition is directed against the order dated 16.12.2022 passed in W.P.(C) No. 4611/2020. The petitioner claims to be the owner of an apartment which she had purchased from respondents No. 4 & 5 for a consideration of Rs. 73 Lakhs. The said purchase was executed by an agreement for sale dated 09.06.2017 and it is stated that she is in possession of the said apartment since then. The apartment situated at the address mentioned in the petition came to be possessed by the respondent No.1 /Bank towards discharge of the liabilities against the loan facilities availed of by the private respondents No. 4 & 5 and who had allegedly mortgaged the said apartment to the bank. The learned counsel for the review petitioner submits that the petitioner was neither the borrower nor the guarantor and she had lawfully purchased the said apartment from the private respondents and therefore, the same could not have been possessed by the respondent bank for failure of the obligations to meet the liabilities towards the Bank by the private

respondents No. 4 & 5. According to the review petitioner, she had filed a title suit being Title Suit No. 385/2019 for specific performance of the contract wherein the respondent Bank was arrayed as defendant No. 3. The further case of the petitioner is that she had also filed an FIR against the respondents No. 4 & 5. That apart, OA No. 431/2019 which was filed by the respondent/Bank before the DRT claiming recovery certificate of Rs. 50,15,430.81, the petitioner was arrayed as proforma respondent No. 3, wherein she had filed her written statement raising question of maintainability on the ground of fraud. As the Bank had served her a notice under Section 13(2) of the SARFAESI Act although she was neither the borrower nor the guarantor, the petitioner approached this Court by filing W.P.(C) No. 4611/2020 praying for appropriate order for setting aside the notice dated 13.10.2020 issued by the authorised officer, Union Bank under Section 13 (2) of the SARFAESI Act putting her to notice to make alternative arrangements to enable the bank to take possession of the property. A further direction was sought for not to dispossess the petitioner from the property in question till final disposal of OA No. 431/2019 pending before the DRT Guwahati.

3. Although, this Court by order dated 03.11.2020 while issuing notice, as an interim measure directed status quo with regard to the possession to be maintained, subsequently by order dated 16.12.2022, the said writ petition was disposed of by the following order:

Heard Mr. R. Chakravorty, learned counsel for the petitioner and Mr. M. Sharma, learned counsel for the respondent Nos. 1,2 & 3.

In view of the prayers prayed for, presence of respondent Nos. 4 and 5 is not essential for deciding the present petition.

By way of this petition under Article 226 of the Constitution of India, the

petitioner has challenged the notice issued by the respondent Bank under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'the SARFAESI Act'). It is at that stage that the recovery proceedings undertaken by the Bank under the provisions of the SARFAESI Act have been stayed by this Court.

Considering the fact that the petitioner has also resorted to other proceedings under the relevant provisions of the Act by way of filing an Original Application before the Debts Recovery Tribunal, the petitioner may file a representation or may raise objection as provided under Section 13(3A) of the Act and the Bank shall consider the same in accordance with law within the statutory time provided under the said provision.

With this observation, the writ petition stands disposed of.

However, it is clarified that disposal of this petition shall not prejudice the rights of the petitioner and the Bank shall consider the representation in its true letter and spirit.

Interim relief granted earlier stands vacated.

Notice discharged."

4. The learned counsel for the petitioner submits that the petitioner was neither a borrower nor a guarantor and as such the provisions of Section 13 of the SARFAESI Act (hereinafter referred to as 'the Act') are not at all attracted and therefore, the notice dated 13.10.2020 issued by the Bank ought not to have been issued. However, the writ court by order dated 16.12.2022 having not taken this aspect into consideration and the writ petition having been disposed of, the order needs to be reviewed and recalled. It is the submission of the learned counsel for the petitioner that since the provisions of Section 13 of the Act are not at all attracted in respect of the petitioner, the respondent bank cannot initiate any measures to dispossess the petitioner from the concerned

flat/apartment. The further submission of the learned counsel for the review petitioner is that there was lack of due diligence on the part of the bank in creating the mortgage on 04.05.2018 with the respondents No. 4 & 5 subsequent to the agreement for sale dated 09.06.2017 entered by and between the review petitioner and respondents No. 4 & 5. It is submitted that the petitioner will suffer hardship if the order under review is not recalled as the same will amount to permitting the bank to proceed for recovery of the flat from the petitioner in order to cover up for the lacuna of the bank.

5. Mr. M. Sarma, learned counsel for the bank disputes the contentions raised by the petitioner and submits that there is no error apparent on the face of the record and therefore this order does not call for any review. The title deeds of the apartment are with the Bank as the mortgage was created by respondents No. 4 & 5 for the loan obtained. No sale deed or any relevant document has been produced before the Bank to show that respondents No. 4 & 5 were not the lawful owners at the time of creating of the mortgage. The review petition being devoid of merit it should accordingly be dismissed.

6. The learned counsels for the parties have been heard. Pleadings on record have been carefully perused. It is seen from the pleadings available before the writ court that the petitioner claims to be the owner of the apartment/flat after having it purchased from respondent No. 4 & 5 on the basis of a deed of agreement for sale stated to have been executed by and between the petitioner and the respondents No. 4 & 5. The said deed of agreement for sale is not registered as required under provisions of law. The pleadings available before this Court do not reveal any sale deed that may have been executed by and between the petitioner and the respondents No. 4 & 5 in respect of the apartment in question. It is also not disputed that OA 431/2019 is presently

pending before the DRT where the petitioner is arrayed as a respondent and where she has already filed her objections. While the submissions of the learned counsel for the petitioner may be correct that provisions of Section 13(2) of the Act may not be applicable, but under Section 17 of the Act, remedy is available to the review petitioner to prefer an application to the DRT if it is aggrieved by any of the measures taken by any secured creditor under Section 13(4) of the Act.

7. It was open for the petitioner to approach the appropriate forum by filing necessary application under Section 17 of the Act.

8. In Paragraph 16 of the writ petition in fact, the petitioner had averred that the remedy under Section 17 under the Act of 2002 against the impugned notice dated was available but the same could not be availed of because of the restrictions imposed at that period of time. While the petitioner has pointed out that the Court by order dated 16.12.2022 passed in W.P(C) No. 4611/2020 (order under review) had recorded that since the petitioner had filed an application before the DRT and as such may file a further representations under Section 13(3A) of the Act before the Bank and the Bank will consider the same, and the same has not been filed and that apart the review petitioner has not been able to satisfy the court as to why the remedy under Section 17 of the Act was not pursued.

9. Although it is submitted that the respondents No. 4 & 5 had fraudulently pledged the apartment with the Bank creating a mortgage without her knowledge, but no sale deed has been produced before the Court to substantiate the said contention of the review petitioner.

10. Under such circumstances, this Court does not find any ground to review

and recall the order dated 16.12.2022 passed in W.P(C) No. 4611/2020. There is no error apparent in the order dated 16.12.2022 passed in W.P.(C) No. 4611/2020.

11. The review petition is devoid of any merit and the same is dismissed.

JUDGE

CHIEF JUSTICE

Comparing Assistant