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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on 29th April, 2015

+ W.P.(C) 8579/2014, C.M. No. 19788/2014

RAVINDER SINGH PAYAL Petitioner
Through: Ms. Deepali Gupta, Adv.

versus

GIC HOUSING FINANCE LTD. & ANR Respondents
Through: Mr. Kanwal Chaudhary and Mr. Akhil
Gupta, Advs.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE R.K.GAUBA

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1. In these proceedings the jurisdiction of this Court under Articles 226-227 of the Constitution of India is invoked to assail the order dated 17.10.2014 of Debt Recovery Appellate Tribunal Delhi (hereinafter referred to as "the DRAT) in appeal No.25/2013 arising out of Securitization Application (SA) No.29/2007 which had been dismissed by the Debt Recovery Tribunal-II Delhi (hereinafter referred to as "the DRT") by order dated 16.07.2012.

2. The background facts, briefly stated, are that the petitioner, intending to purchase a lower income group (LIG) residential flat (bearing No. C-2 (LIG), second floor, plot No.436, Niti Khand-1, Indirapuram, Ghaziabad

“the property”) from the second respondent (“the builder”) had approached the first respondent (the creditor) for financial support. An application was made on 31.12.2001 for housing loan of ₹5,25,000/-. The sale consideration of the property purchased from the second respondent is shown in the sale documents to be ₹2,61,000/-. A tripartite agreement was executed on 29.05.2002 by the petitioner and the respondents whereby loan of ₹5,25,000/- was advanced to be repaid by the petitioner over 15 years through 180 equated monthly installments (EMIs) of ₹6,133/-. As per the agreement, the rate of interest was fixed at 11.5% per annum. The first respondent initially made over to the second respondent an amount of ₹4,75,000/- followed by release of further ₹50,000/- on 28.06.2002. In terms of the contract executed at the stage of the loan, the property was mortgaged with the first respondent as security. It, however, needs to be noted that the petitioner had also entered into two agreements with the second respondent (builder), one concerning sale of the flat, for consideration of ₹2,61,000/- and another for finishing work against consideration of ₹3,24,000/-.

3. Admittedly, there was default on the part of the petitioner in payment of EMIs. It appears the petitioner had made some representations to the first respondent, firstly on 07.08.2002 and then on 18.12.2002 seeking rectification of the document to show the loan amount in respect of the purchase of the property for ₹2,61,000/- only. The pleadings and documents on either side do not clarify as to whether these representations were considered by the respondent bank or any response communicated to the petitioner in that context at any stage.

4. The respondent bank invoked the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as “the SARFAESI Act”) and issued a notice on 21.11.2005 (dispatched on 18.01.2006) under Section 13(2). The petitioner objected to these measures. The bank issued another notice under Section 13(2) on 29.05.2006, followed by still another notice, now under Section 13(4), on 14.11.2006 taking out symbolic possession of the mortgaged property. The petitioner sent a reply on 29.11.2006. It appears the bank approached the Additional District Magistrate, Ghaziabad (ADM) under Section 14 of the SARFAESI Act, information in which regard was given by the ADM to the petitioner in terms of his order dated 26.06.2007.

5. Eventually, the petitioner moved DRT by submitting the SA under Section 17 of the SARFAESI Act on 06.08.2007. In the course of hearing on the said SA, the petitioner sought for interim protection which was granted subject to the condition of his depositing with the first respondent of an amount of ₹15,000/- within a month followed by further payment of ₹3,000/- per month till further orders.

6. The SA was dismissed by DRT by order dated 16.07.2012. It appears that the petitioner’s contentions on the question of limitation and the amount of loan given against the mortgage did not find favour with the Tribunal. The DRT found the petitioner in default and the action under Section 13(4) of the SARFAESI Act valid. The petitioner appealed, but unsuccessfully, before DRAT which rejected his contentions by the impugned order passed on 17.10.2014.

7. When this petition came up for consideration on 08.12.2014, another Division Bench of this Court, then in *seisin* of the case, recorded its observations as under:-

“On facts, we are not inclined to interfere with the impugned order. The contention of the petitioner that only ₹2,61,000/- were advanced to him, has been rightly disbelieved and rejected by the Debt Recovery Tribunal as well as Debt Recovery Appellate Tribunal. The respondent bank had urged relying upon the loan agreement executed on 29.05.2002 amongst the petitioner, respondent-bank and the builder, that loan of ₹5,25,000/- was advanced by way of the two cheques. The first cheque of ₹4,75,000/- was issued on 29.05.2002 and the second cheque of ₹50,000/- was issued on 28.06.2002. These cheques were in favour of the builder as per the tripartite agreement.

The bank had also asserted that two agreements were executed on 04.06.2002 between the petitioner and the builder. The first agreement was the sale deed for ₹2,61,000/- and the second agreement was styled as finishing agreement for ₹3,24,000/-. In the sale deed, the figure of ₹3,24,000/- was not mentioned, as it would have entailed payment of stamp duty. Thus, the petitioner and the builder had avoided referring to the finishing agreement, to evade stamp duty.

The bank in the reply has referred to the default in payment of EMIs by the petitioner herein. ₹6900/- was paid in the year 2002-03 and ₹10,000/- was paid in the year 2005-06. No other payments were made till 2008-09.

The petitioner along with the present appeal has not filed photocopies of the tripartite agreement dated 29.05.2002 as well as the finishing agreement dated 04.06.2002 for ₹3,24,000/-. Noticeably, cheque of ₹4,75,000/- was issued in favour of the builder on 29.05.2002, before the sale deed dated 04.06.2002 was executed.

We agree with the two Tribunals that the story propounded by the petitioner that only ₹2,61,000/- was advanced under the loan agreement, is made up and unbelievable”

8. The counsel for the petitioner, however, submitted on 08.12.2014 that equitable mortgage in respect of the property could not have been created under Section 58 (f) of the Transfer of Property Act, since the Ghaziabad District had not been notified for such purpose. Taking note of the fact that this plea had not been raised before the two forums below, the Court nonetheless sought clarification. On 22.12.2014, it was submitted that there is a notification to such effect vis-à-vis District Ghaziabad. The contention to that effect was not insisted upon thereafter by the petitioner. He instead pressed the writ petition restricted to relief on the question of interest.

9. Against above back-drop, the matter was considered and this Court passed the following order on 08.04.2015:-

“After hearing counsel for the parties this Court is of the opinion that in the given circumstances of the case since the notice under Section 13(2) of SARFAESI Act has issued on 29.05.2006, and the bank has been charging the contractual rate at 11½% per annum all the while, which has been applied resulting in the current outstanding amount of ₹10,22,765/- even though the petitioner has concededly deposited a sum of ₹10,92,359/- towards the original loan of ₹5,25,000/-, the bank should re-work the liabilities by applying the reduced rate of interest w.e.f. 1.1.2007 i.e. 6% per annum. The bank shall produce the calculation in this regard on the next date of hearing..”

10. Pursuant to the directions in the above quoted order dated 08.04.2015, the first respondent has submitted a statement of calculation of total dues worked out on the basis of reduced rate of interest @ 6% per annum with

effect from 01.01.2007. In terms of these calculations, the total amount that remains outstanding from the side of the petitioner in favour of the first respondent is ₹3,38,115/- only.

11. The counsel for the first respondent, however, submitted that the bank would suffer losses if the contractual rate of interest is reduced. He nonetheless fairly conceded that against the original loan of ₹5,25,000/- taken in 2002, for purposes of acquiring a residential flat shown in the sale document against total consideration of ₹2,61,000/- only, the petitioner has deposited till date an amount of ₹10,92,359/-.

12. It is not disputed that the petitioner has been paying the installments of ₹3,000/- per month in terms of the interim order granted on 21.07.2008 by DRT during pendency of the SA. The loan amount was declared to be a Non-performing Asset (NPA) sometime around November, 2005. The bank invoked provisions of the SARFAESI Act by issuing notices under Section 13(2) on 21.11.2005 and 29.05.2006. The petitioner had moved the DRT under Section 17 of the SARFAESI Act on 06.08.2007. It appears some confusion has prevailed in his mind, under some advise, as to the amount of the mortgage money, apparently on account of his two separate agreements with the builder, one concerning purchase of the property showing the total consideration of ₹2,61,000/- only. Technically, his contentions are unacceptable and these have been rightly rejected by DRT and DRAT. But, in the given facts and circumstances, we are of the opinion, that the application of the contractual rate of interest at 11.5% per annum, post initiation of action under the SARFAESI Act which became subject matter of challenge under Section 17, would act oppressively. We, thus, find a case made out for some relief on this score.

13. Keeping in view the statement of calculation submitted by the first respondent pursuant to directions in the order dated 08.04.2015, we are of the view that ends of justice would be met if the petitioner is directed to pay to the first respondent an amount of ₹5 lakhs to discharge in full his liability arising out of the loan in question.

14. For the foregoing reasons, the petitioner's liability is limited to ₹5 lakhs in the circumstances of the case. The same shall be paid to the respondent within six weeks from today. The impugned orders of the DRT and the DRAT are accordingly set aside.

15. It is clarified that in the event of non-compliance with the court's order, the respondents are at liberty to revive the proceedings to recover their dues in terms of the DRAT order.

16. The writ petition and pending application are disposed of in the above terms.

R.K.GAUBA, J

S. RAVINDRA BHAT, J

APRIL 29, 2015

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