

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 10309 OF 2014

Gurleen Sahney	}	Petitioner
versus		
The State of Maharashtra	}	
and Ors.	}	Respondents

Mr. Sandeep Parikh with Mr. Praveen Shetty i/b. M/s. Res Legal for the petitioner.

Ms. Aparna Vhatkar – AGP for respondent nos. 1 and 7.

Ms. Medha Rane i/b. M/s. M and S. Legal Venture for respondent no. 4.

**CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.**

DATED :- OCTOBER 10, 2016

P.C. :-

1. We have heard Mr. Parikh for the petitioner and the advocate for the contesting respondent.

2. The writ petition under Article 226 of the Constitution of India challenges an order dated 17th June, 2014 passed by the Additional Chief Metropolitan Magistrate, 3rd Court, Esplanade, Mumbai. He is the In-charge Chief Metropolitan Magistrate, Mumbai. He passed the following order:-

“ORDER

- (a) Application is allowed.
- (b) Assistant Registrar, Smt. P. U. Sawant, Borivali Center of Courts, Mumbai is hereby appointed to take possession of the secured assets viz. **402**, Challenger Towers No. 1, Thakur Village, Kandivali (East), Mumbai 400 101, and to take further steps in the matter.
- (c) In the event the Assistant Registrar may break open the lock, if the premises found locked.
- (d) After taking possession of abovesaid property and the documents relating thereto from the Respondents, Assistant Registrar shall prepare inventory of articles in the property therein, and hand over the articles to the Authorized Officer of applicant alongwith possession of the secured assets.
- (e) In case, if the Respondents failed to hand over peaceful possession of the secured assets within stipulated period or any other person found in possession of the secured assets, the Assistant Registrar is permitted to take the legal steps as well as to take the assistance of concerned Police Station, for taking possession of the property i.e. secured assets. Assistant Registrar shall report compliance of the order within one month, without fail. The expenses that may be incurred in respect of taking possession of the property from the Respondents, shall be borne by the applicant bank.

Mumbai
Date 17th June, 2014

(P. S. Ghate)
Addl. Chief Metropolitan Magistrate,
3rd Court, Esplanade, Mumbai.
I/c. Chief Metropolitan Magistrate.”

3. Mr. Parikh learned counsel appearing for the petitioner would submit that this writ petition was moved before a Division Bench of this court on 18th November, 2014. This court noted that the petitioner claims to be a bonafide purchaser of the flat.

That was purchased without notice of the mortgage. According to the petitioner, the property register card (Index II) does not reflect the equitable mortgage, which was executed and registered between the bank and one Mr. Avalani, the principal borrower. It was urged that the petitioner has no other remedy but to approach this court in its jurisdiction under Articles 226 and 227 of the Constitution of India. Reliance was placed upon a judgment of the Hon'ble Supreme Court of India in the case of *Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and Ors.*¹.

4. There was a preliminary objection raised to the maintainability of the petition. On 18th November, 2015, after hearing both sides, this court passed the following order:-

“1. The Petitioner claims to be a bonafide purchaser of a flat, which was purchased without notice that the said flat was mortgaged. According to the Petitioner the Index II does not reflect the equitable mortgage which was executed and registered between the Bank and the Mr.Avalani, who was the principal owner of the flat at one point of time.

2. The learned counsel for the Petitioner has submitted that the Petitioner has no other option but to approach this Court under Article 226 and 227 of the Constitution of India to challenge the order passed by the Magistrate under section 14 of the Secularization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Reliance is placed on the judgment of the Apex Court in the case of **Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited and Ors. [2014) 6 SCC 1]**.

¹ (2014) 6 SCC 1

3. On the other hand, the learned counsel appearing on behalf of the Bank has raised a preliminary objection regarding maintainability of the petition. It is submitted that the ratio of the judgment of the Apex Court in the case of **Harshad Govardhan Sondagar (supra.)** is not applicable to the facts of the present case. It is submitted that the Petitioner had given an offer by his letter that he is willing to deposit of an amount of Rs.9,15,000/- which was the principal amount payable by the borrower. It is submitted that since the principal borrower who was the owner of the flat, had executed an equitable mortgage, the subsequent purchaser does not have a right in the said property.

4. In our view, arguable points are raised in the petition and therefore, we would like to consider these questions at the stage of admission itself. Respondent No.4 may file his reply. In the meantime, however, the impugned order passed by the Learned Magistrate is stayed. Stand over to 2.12.2014. Matter to be shown on the supplementary board. The learned counsel waives service on behalf of Respondent No.4. Interim order to continue till then."

5. When the petition was placed before us today, it is stated that the petitioner offered to settle the claim and further it was stated that for some reasons, not wholly attributable to the petitioner, the claim of the bank could not be settled.

6. We have heard Mr. Parikh at some length and perused, with his assistance, the writ petition and the annexures thereto.

7. The petitioner claims to be a lawful owner of flat being No.402, admeasuring 94'7 square feet and more particularly described in the agreement for sale dated 2nd January, 2009. That was an agreement with one Naresh Kikubhai Patel. It is stated that this agreement is duly registered with the Sub-

Registrar of Assurances, Borivali, Mumbai. Annexure 'A' is the copy of this agreement. The petitioner states that she has been enrolled as a member of the Challengers Co-operative Housing Society and a share certificate is also issued in her favour. It is stated that the fourth respondent made an application seeking to enforce the measures under section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and sought assistance of the Chief Metropolitan Magistrate. That was to enable the bank to take possession of this flat. It is stated that respondent nos. 5 and 6 to this writ petition availed certain finance/loan from Associates India Financial Services Pvt. Ltd. This entity is a non-banking finance company. That loan was purportedly assigned to respondent no. 4 bank.

8. Apart from the contention that the acts and deals so also the transaction as between respondent no. 4 as also its predecessor in title and respondent nos. 5 and 6 do not bind the petitioner, it has been submitted that the non-banking finance company had granted these facilities. That is not an entity which can invoke the SARFAESI Act. Reliance is placed on a Division Bench judgment in the case of *Kotak Mahindra Bank Ltd. vs. Trupti Sanjay Mehta and Ors.*², decided on 16th July, 2015.

² Writ Petition No. 722 of 2015

9. After having carefully perused para 3 of the writ petition and sub paras thereof and some of the annexures to the writ petition, we do not see how a writ petition under Articles 226 and 227 can be entertained to resolve the factual dispute. There is a clear factual dispute, inasmuch as the petitioner claims to be a lawful owner. She seeks to establish her title to the property, namely, an immovable property covered by the order passed by the In-charge Chief Metropolitan Magistrate, Mumbai and impugned in this writ petition. Whether that order could have been passed at the behest of respondent no. 4 bank and whether any financial deal of respondent no. 4 and respondent nos. 5 and 6 would bind the petitioner are not matters which can be resolved in writ jurisdiction. For that, we will have to interpret contents of the documents relied upon by the petitioner. We would also have to record oral and documentary evidence. This is not possible in our limited jurisdiction. The petitioner has ample remedies and she can approach the DRT under section 17(1) of the SARFAESI Act or bring a substantive suit to establish her right, title and interest in the immovable property.

10. We uphold the preliminary objection raised by respondent no. 4.

11. In the light of the above discussion, we dismiss the writ petition. We do not express any opinion either on the Division Bench judgment in the case of *Kotak Mahindra* (supra) or the applicability of *Harshad Govardhan Sondagar* (supra). All contentions insofar as the merits of the issue are kept open.

12. At this stage, a request is made to continue the order passed on 18th November, 2014 for a period of six weeks to enable the petitioner to approach the competent court.

13. This request is opposed by respondent no. 4.

14. Having heard both sides on this point and finding that there was an ad-interim order in force from 18th November, 2014, interest of justice would be served if that is continued for a period of six weeks from today. The continuation thereof shall not create any equities in favour of the petitioner nor that order or the present order will bind any competent court.

(B.P.COLABAWALLA, J.) (S.C.DHARMADHIKARI, J.)