IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION {L} NO.2597 OF 2016

Umair Islam .... Petitioner
Vs.
Allahabad Bank & Others .... Respondents

Mr. Rohan Cama with Mr. Prathamesh Kamat,
Mr. T.N. Tripathi & Ms Sapna Rachure i/by M/s. T.N. Tripathi & Co. for the Petitioner.
Mr. Bhavik Manek with Mr. V.N. Aji Kumar for Respondent No.1-Bank.

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

DATE : SEPTEMBER 29, 2016

P.C:

1. By this petition under Article 226 of the Constitution of India, the petitioner challenges an interim order of the Debts Recovery Tribunal (DRT). The Presiding Officer of the DRT, by the impugned order dated 26-9-2016, refused interim relief. The interim application was filed by the petitioner/applicant who had moved Securitisation Application No.113 of 2016, invoking the jurisdiction of the Tribunal under Section 17 of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the SARFAESI Act").

2. The petitioner/applicant stated in his substantive application under Section 17 that he is an individual and son of one Mohammed Islam, respondent No.3 to that application and who is also respondent No.3 before us.

3. It is stated that he is one of the legal heirs of deceased Mrs. Nasim Sehar, wife of this third respondent. Nasim Sehar expired on 1-9-2008. It was stated that deceased Nasim Sehar was a part-owner of a property being Flat No.1104/B, Shiromani Towers, Rajkamal Lane, Rajkamal Compound, Parel (East), Mumbai - 400 012.

4. The first respondent-Bank initiated measures under the SARFAESI Act. The borrower is one private limited company, styled as M/s. Sky India Metals Private Limited. The third respondent is alleged to be the guarantor and mortgagor in

respect of these credit facilities claimed to be advanced and disbursed by the first respondent-Bank. It is common ground that the application proceeds to state in para 5(c) that a Possession Notice was displayed on 31-12-2015 and a representative of the Bank visited the property and has taken possession without stating any reason. It is stated that thereafter the applicant/petitioner before us understood that the respondent-Bank proceeded by alleging default in repayment of the loan. Till the date of possession, the petitioner was not aware about the property being illegally mortgaged with the Bank by the third respondent. However, assuming that there is a mortgage, that is, illegal, the property could not have been mortgaged to the Bank. The petitioner/applicant relies upon a Will dated 19-7-2008. The widow is supposed to have transferred the said Flat in the name of the present petitioner and her daughter, who was a minor. The argument also was that Nasim Sehar expired in 2008. The Bank has admitted that it has issued Notice under Section 13(2) on Nasim Sehar, being the owner of the Flat and styling her as the alleged mortgagor. The contentions are false as Nasim Sehar expired in 2008 so there is no question of her signing any document with the Bank in 2009. Thus, challenging the action of the Bank as illegal and not binding upon the petitioner/applicant, the application was moved and the grounds are also set out. One of the grounds being that the third respondent has no right to mortgage the property, as alleged by the Bank. The petitioner/applicant is a joint owner of the property and he has never mortgaged or consented for creation of the mortgage.

5. It is in such an application, which was filed by the present petitioner/applicant in February, 2016 that an interim application was filed. The interim application seeks to project the urgency and that is, that the Bank has in terms of the stand taken throughout, namely, that on 4-8-2016 the Chief Metropolitan Magistrate, firstly, passed an order under Section 14(1) and appointed a Commissioner. That Commissioner has fixed an appointment for taking physical possession of the property, namely, the Flat. Accordingly, on 2-9-2016 the Court Commissioner has issued a Notice for taking physical possession

of the secured asset on 29-9-2016. It is on this presumption that the possession would be taken and in terms of this order, so also the mandate flowing from Section 14(1) of the SARFAESI Act that this interim application was filed.

6. The first respondent-Bank has denied all the contentions in the interim application filed on 23-9-2016. The interim application, according to the Bank, relies upon a communication dated 2-9-2016. The interim application, according to the Bank, reiterates the same contentions as are raised in the main application under Section 17. The Bank filed a detailed affidavit of its Chief Manager and stated that Sky India Metals Private Limited is its constituent/client. It has been enjoying certain credit facilities from the Bank through its Khar Branch from time to time. In or about October/November, 2009, the Directors representing the Company approached the Bank and requested the Bank that they need urgent financial requirements of Working Capital Cash Credit facility of Rs.1,73,00,000/- for importing and trading of metal scrap and also participating in bidding of scrap materials/metals. Upon

such assurance and representation by the Company, the Bank sanctioned this cash credit facility. The sanction letter is dated 25-11-2009. The Company as also the Directors accepted and acknowledged the liability and also the terms and conditions on which the loan was sanctioned. The father of the present petitioner, respondent No.3, executed a Declaration-cum-Indemnity Bond, dated 30-11-2009. He stated on oath that he along with three children are the only legal heirs of deceased Nasim Sehar. He also made representation that he is acting as natural guardian being the father of the three children. He also executed an affidavit dated 30-11-2009, which is required for creation of mortgage in respect of property owned by a Muslim widow and wherein he has stated that the subject Flat was purchased from his own fund. It is free from all encumbrances, obstructions and hindrance. That is how he could create a mortgage and deposit the title deeds in relation thereto with the Bank. He has undertaken to pay all the monies and he also stated that the co-operative housing society in whose building this Flat is situated has been duly intimated with regard to the mortgage. In order to secure the cash credit facility, the father of the petitioner personally visited the office of the Bank at Khar Branch on 1-12-2009 and deposited the original title deeds in respect of immoveable properties. Relying upon all these documents and facts, it was urged that there is no merit in the application, whether main or interim. The Bank also by its letter dated 21-12-2009 informed the builder and requested to note the charge of the mortgage of Flat No.1104 in the books and records. Thus, it is submitted that once the liability is admitted, there is a default committed in repayment of the loan. To avoid repayment of this huge outstanding amount, that at the last minute the present application has been made. The petitioner has no locus inasmuch as a natural guardian and even legally entitled to the property that respondent No.3 has acted. It is open for the petitioner to question the authority of this third respondent in appropriate proceedings. More so, when the third respondent is the father and had executed all these documents. Most importantly and materially the third respondent did not disclose any Will dated 19-7-2008 and stated to have been executed by Nasim Sehar (the deceased mother of the petitioner). As and when that Will is produced, the Bank would question for legality and validity.

7. On such an affidavit filed in reply, the learned Presiding Officer has passed the impugned order. He has considered the rival contentions. He has arrived at a prima facie conclusion that the father of the petitioner has created the mortgage, both on his behalf and also on behalf of the minor children. He was thus aware of the death of Nasim Sehar but did not disclose as to how the petitioner, and as is now claiming under the Will, has any right in the property. The Presiding Officer came to the conclusion that originally the securitisation application was filed challenging the symbolic possession taken by the Bank under Section 13(4). Now that the learned Chief Metropolitan Magistrate has passed an order, the present petitioner/applicant sought amending of the securitisation application. However, there is no dispute about availment of loan, creation of mortgage and the relationship between the parties. The only contention was that the mortgage created on

behalf of the petitioner, without obtaining permission from the Court, is invalid in the light of the admitted facts and at this stage the Court expressed a prima facie opinion that even if, and assuming for the sake of argument, permission is not obtained, the transaction is at best voidable. The minor can question it and within three years from attaining the majority.

8. It is such an order which is impugned before us, although the petitioner is aware that the securitisation application is pending and that an appeal before the Debts Recovery Appellate Tribunal (DRAT) to challenge the interim order is maintainable. The writ petition was kept yesterday and by projecting great urgency inasmuch as the petitioner would loose possession on 29-9-2016, that is today, and secondly that the Chairperson of the DRAT did not grant an urgent circulation to list the matter. After the projection of these grievances, it was clarified to Mr. Rohan Cama, learned counsel appearing for the petitioner that being an interim order, the Court is reluctant to interfere therewith unless the discretion is exercised arbitrarily or capriciously or the order is such that no reasonable person in

the position of the learned Presiding Officer would arrive at this conclusion. Meaning thereby, the order suffers from an error of law apparent on the face of the record and can be termed perverse.

9. Mr. Cama would submit that there is, however, an element of perversity and such a legal flaw and error that this Court can be persuaded by the petitioner to interfere in its extra-ordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India. Though cautioned, Mr. Cama would proceed on the footing that there are fundamental principles of Mohammedan Law and which seem to have been completely lost sight of. He relied upon a Judgment of this Court in **Hurbai and Another Vs. Hiraji Byramji Shanja**, reported in 20 Bombay 116 (Vol.X) Indian Decisions, New Series. He would submit that the principles and which are salutary and binding reveal that it is only when these principles are satisfied that the sale of immoveable property in which the applicant minor has a right is protected. Mr. Cama is fair enough to submit that the Judgment is rendered in the context of a sale by a guardian, but

urges that these principles equally apply to mortgage. Therefore, unless these seven circumstances set out in this Judgment are satisfied, the mortgage was not valid or binding on the petitioner. Secondly, he would submit that the Presiding Officer proceeded on the footing that the issue involved is of applicability of principles of Hindu Law, whereas the applicable law was the Mohammedan Law. Mr. Cama then criticised the order in failing to note that the alienation must be by natural guardian such as the father or by the guardian appointed by Court. The property has to be held by him so as to protect the interest and benefit of the minor. The alienation is only subject to these seven principles which are also recognised by the Hon'ble Supreme Court in the Judgment in the case of **Meethiyan Sidhiqu Vs. Muhammed Kunju Pareeth Kutty & Others**, reported in (1996) 7 SCC 436.

10. Finally, it is contended that the whole proceedings are vitiated, for the Bank proceeded to issue a Notice under Section 13(2) of the SARFAESI Act and served it on the deceased widow of respondent No.3 and mother of the

petitioner. The Bank did this knowing fully well that she has expired long back on 1-9-2008. Mr. Cama relied upon a Division Bench Judgment of the Madras High Court in Writ Petition No.15272 of 2009 {***Sheeba Philominal Merlin And Esther Evelyan Vs. Repatriates Co-op Finance And Development Bank Ltd. (Govt. of India Enterprises)***}, decided on 10-8-2010. He submits that this Judgment lays down the principle that service of Notice under Section 13(2), on a deceased, would render the proceedings null and void ab initio. He invited our attention to paras 31 to 33 of this Judgment. For all these reasons, it is submitted that the writ petition is maintainable, even though there is an alternate remedy available to the petitioner of pursuing the appeal before the DRAT.

11. On the other hand, Mr. Manek, appearing for respondent No.1-Bank submitted that the DRT has only passed an interim order. The exercise of discretion in refusing interim relief is ordinarily not capable of interference in writ jurisdiction, even if another view of the matter is possible. Unless and until it is demonstrated that the discretion is

exercised arbitrarily or capriciously or that there is a perversity on the part of the learned Presiding Officer, this Court cannot be persuaded to interfere in writ jurisdiction. He also highlights the conduct of the petitioner to submit that this is a last minute attempt by none other than the borrower and he has put up the petitioner, his own son, to resist the action of the Bank, which is lawful. Therefore, the writ petition be dismissed.

12. After having heard Mr. Cama at great length, we are unable to persuade ourselves to interfere with the impugned order. The Notice under Section 13(2) of the SARFAESI Act was issued to Mohammed Islam, respondent No.3, being the Director and guarantor and to Mrs. Nasim Sehar. Mrs. Nasim Sehar may have been not alive on the date on which the Notice dated 30-10-2015 was served, but certainly respondent No.3 was aware of the Notice having been served duly by the Bank and equally its receipt by him. He does not question the Notice nor does he approach the Bank for settlement of the loan. He even does not approach the DRT by invoking its jurisdiction under Section 17 of the SARFAESI Act. He puts his son, the petitioner,

before us to invoke that jurisdiction and avail of the remedy of an appeal under Section 17. We presume that Section 17 can be treated as an original proceeding and an interim application could have been filed. However, when the petitioner projected complete innocence of the transactions and about documents in existence from 2009, then, we have to be a little cautious even at this interim stage in accepting the version of the petitioner. The Bank in its Notice has pointed out as to how the father projected and throughout that he is fully empowered to deal with the property being the father and natural guardian of the minors. There is no impediment or obstacle in his creation of mortgage in respect of the Flat so as to secure the loan from the Bank. He has issued several declarations in favour of the Bank in which he has projected that the property is free from encumbrance. He has also projected that there are three minor children but it is also a business loan which is availed of and by a private limited company of which respondent No.3 is one of the Directors. Once having full authority and control over the property and thereafter creating a mortgage in favour of the

Bank, then, all such documents as are relied upon by the Bank in its affidavit in reply could not have been brushed aside by the learned Presiding Officer. The contents thereof could not have been ignored on a specious plea by the petitioner/applicant that the property was not solely owned by respondent No.3-father; their mother had one-half share in the property; she had put in her monies and it was not proper and correct to urge that the father put his own fund in purchasing the property; the Bank should have been aware of the fact that the minors are residing in the Flat; and that the mother had executed a Will, bequeathing her share in favour of the minors. Such a Will is dated 1-7-2008. The Bank has pointed out that respondent No.3 never disclosed any of these facts, nor the execution of the Will. In any event, prima facie, the DRT did not commit any error in arriving at a conclusion that the Bank cannot be expected to be aware of such internal family matters. Unless and until, the minor on attaining majority or during the existence of the documents executed way back in 2009 not questioned them nor approached a Competent Court praying for a declaration that the transaction of mortgage does not bind him, it would not be possible for the Bank to be aware of and in the know of these family matters.

13. It is true that the learned Presiding Officer has also expressed a prima facie opinion on the only contention raised before him and whether the transaction by the minor's father, without the permission of the Court, renders it null and void or voidable. But that is just a prima facie opinion. We are of the view that the securitisation application is pending. All such views, as are expressed in para 5 of the impugned order being tentative and prima facie will not prevent the Tribunal from arriving at a proper conclusion when the proceedings under Section 17 are being disposed of. It is well-settled that all such steps and measures as are taken by the Bank till date would have to abide by the final outcome of the proceedings. The Bank, subject to its lawful rights, would be bound by the orders and directions under Section 17 of the SARFAESI Act. Therefore, it is not as if this Court is required to go into all the contentions. We would assume that the petitioner wants an opinion of this

Court on these contested issues as well. However, it would not be proper, in the absence of complete opportunity to the petitioner, for us to express any final opinion. That would put the petitioner completely out of Court in the event we negate them. The petitioner has ample opportunity to question the contents of the documents which have been placed before the Tribunal by the Bank. It is eventually for the petitioner to prove his case that he was never aware of the mortgage, that the Bank was not told the true and correct factual position, that their father has given away one-half share in the property, without in any manner following the principles of law and enshrined in the above Judgments of this Court and also the Hon'ble Supreme Court. In that process the petitioner would have to establish and prove that none of these writings and documents in favour of the Bank bind him nor their contents can be said to be conclusive. In the presence of such opportunities, we do not think that any prejudice is caused. Prima facie when the conduct of the petitioner is also an issue and the borrower knowing that a huge sum to the tune of Rs.14,65,11,066/- upto 31-10-2015 is due and payable, then, all the more he remaining behind the scene and putting the petitioner/son to invoke Section 17 is an added factor to deny interim relief. Thus, there was no prima facie case, the balance of convenience was in favour of the first respondent-Bank, and given the ambit and scope of the powers of Section 17 of the SARFAESI Act, the petitioner will not suffer any irreparable loss or injury. Therefore, the interim relief has been rightly refused. We find no merit in the writ petition. It is accordingly dismissed.

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