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

\+ W.P.(C) 5126/2015

MAHAVIR PRASAD GARG ..... Petitioner

Through : Mr. Rajesh Sharma with Mr. Ravi Data, Advocates

versus

CANARA BANK & ORS ..... Respondents

Through : Mr. V.K. Tandon, Advocate for R-1. Mr. Vikram Jit Saini, Advocate for R-4.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI

O R D E R

% **19.10.2016**

1. The present petition has been filed by the petitioner impugning inter alia an order dated 1.4.2015, passed by the learned CMM dismissing his application filed in proceedings pending under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short **'the SARFAESI Act'**). Secondly, directions are sought to the respondent No.1/Bank to restore the actual physical possession of two shops situated on the ground floor of premises bearing No.4635-4638, Deputy Ganj, Sadar Bazar, Delhi on the ground that he is a *bona fide* tenant of the shops much prior to the creation of a mortgage thereof by the respondents No.2 and 3 in favour of the respondent No.1/Bank.

2. Before noting the submissions made by the counsel for the petitioner, it is necessary to recapitulate the relevant sequence of dates and events that

led to passing of the order dated 01.4.2015 by the learned CMM. On 4.12.2006, respondent No.2 (wife of the respondent No.3) had created an equitable mortgage over the subject shop in favour of the respondent No.1/Bank, to enable the respondent No.3 to avail of credit facilities. Later on, respondent No.3 had defaulted in making payments to the respondent No.1/Bank. As a result, on 31.3.2002, respondent No.1/Bank had declared the account of the respondent No.3, as a NPA, invoked the provisions of Section 14 of the SARFAESI Act and approached the learned ACMM (Central Delhi), Tis Hazari Courts for appointment of a Receiver for taking over possession of the subject shops.

3. Vide order dated 6.11.2009, passed by the learned CMM, a Receiver was appointed to take over the possession of the two shops and deliver the same to the respondent No.1/Bank. In terms of the above order, the Receiver served a notice dated 19.12.2009 on the respondents No.2 and 3 for taking over possession of the shops on 9.1.2010. On 8.1.2010, knowing that he would not be available on 09.01.2010 to take over possession of the shops, the Receiver served a fresh notice dated 8.1.2010 on the respondents No.2 and 3 for taking over possession on 28.01.2010 and the said notice was also pasted on the doors of both the shops and photographs of the site with the pasted notice were duly taken.

4. On 28.1.2010, the Receiver once again visited the two shops and discovered that one shop consisting of ground floor and basement with cemented staircase was lying unlocked, empty and vacant. The second shop was found to be locked. The Receiver directed a locksmith accompanying him to break open the lock of the second shop. After opening the shop some goods were found lying there. The said goods were inventorized by the

Receiver and new locks were affixed on both the shops and keys thereof were handed over to the officers of the respondent No.1/Bank present at the spot. A report dated 5.2.2010, recording inter alia the said proceedings was prepared by the Receiver and filed in the court of the learned CMM (Annexure P-4).

5. Aggrieved by the aforesaid action of the Receiver, on 03.2.2010 the petitioner had filed an application before the Debt Recovery Appellate Tribunal-III, Delhi (DRT-III) under Section 17 of the SARFAESI Act. During the pendency of the said application, on 18.3.2010, the petitioner gave his no objection for the sale of the subject shop to the respondent No.1/Bank. Subsequently, vide order dated 8.12.2012, the DRT-III dismissed the petitioner's application by holding that he was not even in possession of the subject shop as he had failed to file any documents or rent receipts to show that he was a tenant or in possession thereof (Annexure P-8). Reference was also made to the report of the Receiver to the effect that Shop No.6 was found locked and the lock had to be broken for preparing an inventory of the goods lying inside.

6. Aggrieved by the order dated 18.12.2012 passed by the DRT, on 03.1.2013, the petitioner preferred an appeal before the Debt Recovery Appellate Tribunal, Delhi (DRAT) under Section 18 of the SARFAESI Act. It was a matter of chance that on the very same date, the respondent No.1/Bank issued a Sale Certificate in respect of the subject shop in favour of the respondent No.4/auction purchaser. Initially, vide order dated 9.1.2013, the DRAT had restrained the respondent No.1/Bank from creating any third party interest in the subject shop. However, vide order dated 3.9.2014, the appeal filed by the petitioner was dismissed as not

maintainable by the DRAT in view of the decision of the Supreme Court in the case of Harshad Goverdhan Sondagar vs. International Assets Reconstruction Company Ltd., reported as **(2014) 6 SCC 1.**

7. On 9.9.2014, the petitioner filed an application before the learned CMM, Tis Hazari Courts, Delhi asking for restoration of the shop in his favour. Simultaneously, the petitioner proceeded to file a writ petition in the High Court, registered as WP(C)No.8492/2014, praying inter alia for setting aside the order dated 3.9.2014 passed by the DRAT, Delhi. Vide order dated 8.12.2014, the Division Bench permitted the petitioner to withdraw the captioned petition noting that he had already filed an application before the learned CMM, Delhi, which was pending adjudication. After four months, vide order dated 1.4.2015, the learned CMM dismissed the petitioner's application. Aggrieved by the said dismissal order, the present petition has been filed by the petitioner.

8. Notice was issued on the present petition on 22.5.2015 and the respondents were directed to maintain *status quo* in respect of the subject shop. On the said date, facts of the case were briefly taken note of, but in view of the fact that counsel for the respondent No.1/Bank was absent, the case was adjourned to 3.11.2015. Subsequently, on 23.5.2016, the interim order dated 22.5.2015 granted in favour of the petitioner was vacated on the ground that repeated adjournments to address arguments were being sought on his behalf. Thereafter, on 11.7.2016 the respondent No.1/Bank had handed over vacant physical possession of the subject shop to the respondent No.4.

9. Learned counsel for the petitioner contends that while passing the impugned order, the learned CMM failed to take into consideration the Sale

Deed dated 9.10.1998 executed in respect of the subject shops by one Mr. Ashok Kumar Jain in favour of the predecessor-in-interest of the respondent No.2, Smt. Phoola Rani, which had recorded therein that the tenancy of the petitioner was @ Rs.70/- per month. He canvasses that the said document clearly demonstrates that the petitioner is a protected tenant under the Delhi Rent Control Act, 1958. He argues that the security interest was created by the respondent No.2 over the subject shop on 4.12.2006 and the tenancy of the petitioner having been created prior to the said date, the respondent No.1/Bank was not entitled to take over possession of the subject shop. Learned counsel also draws the attention of the Court to a letter dated 30.10.2007, addressed by the petitioner's counsel to the respondent No.2's son requesting that bills in respect of the rent of the subject shops be forwarded to him for making payment.

10. Pertinently, respondent No.2 had created a security interest in respect of the shop in favour of the respondent No.1/Bank as an owner thereof on the basis of a Sale Deed dated 27.4.2005 executed in her favour by Smt. Phoola Rani. The Court has perused the aforesaid Sale Deed, which clearly states in para 2 of the recitals that the entire premises is already in possession of the purchaser and the seller has only handed over symbolic possession and ownership rights thereof on the spot. No reference whatsoever of the petitioner or any shop being under his tenancy has been made in the said Sale Deed.

11. As far as the letter dated 30.10.2007 addressed on behalf of the petitioner to the son of the respondent No.2 is concerned, it has been enquired from learned counsel for the petitioner that if the petitioner was so eager to deposit the rent of the subject shop and was under a bonafide doubt

as to whom the rent was payable, did he take any steps under Section 27 of the Delhi Rent Control Act, 1958 to approach the learned Rent Control Tribunal for seeking permission to deposit the admitted rent, the reply is in the negative.

12. It has also been enquired from learned counsel for the petitioner, who admits that the petitioner is an income tax assessee, as to whether he had filed before the DRT or the learned CMM copies of the Income Tax returns and Sale Tax returns for the relevant period or for that matter, any electricity bills relating to the shop after April, 2005, to demonstrate that the address mentioned therein is that of the subject shop. Counsel for the petitioner fairly concedes that no such document was filed by the petitioner either before the DRT or the learned CMM or for that matter, in the present proceedings. Fact of the matter is that no document has been filed to demonstrate that the petitioner was ever in actual physical occupation of the subject shop at the time of execution of the Sale Deed dated 27.04.2005.

13. Learned counsel for the petitioner seeks to explain that as the Receiver had taken over possession of the subject shop behind the petitioner's back and all his documents and articles were lying inside the shop, the petitioner is not in possession of the said documents and could not produce the same. If that was the case, then the petitioner could have approached the respondent No.1/Bank for release of the inventorized articles in question, including the documents, if any lying in the shop. But no such steps were taken by the petitioner at any stage.

14. In aforesaid facts and circumstances, this Court is of the opinion that the petitioner has miserably failed to establish that he was in continuous possession of the subject shop prior to the date of creation of security

interest therein by the respondent No.2 in favour of the respondent No.1/Bank. As a result, it has to be held that the petitioner is not entitled to restoration of the physical possession of the subject shop.

15. The writ petition is accordingly dismissed as being devoid of merits. Parties are left to bear their own costs.

HIMA KOHLI, J

OCTOBER 19, 2016
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