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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 5688 OF 2017

Sumit Woods Pvt. Ltd. … Petitioner

Vs.

Union of India,
through Secretary & Ors. … Respondents

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Mr. Ghanshyam Upadhyay i/b Law Juris, for the Petitioner.

Mr. Vatsal Shah i/b MMK Law Associates, for Respondent No. 4 Bank.

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CORAM : B. R. GAVAI, &
RIYAZ I. CHAGLA, JJ.

DATE : JULY 26, 2017

PC.

1. Mr Upadhyay, the learned counsel appearing for the Petitioner submits that the issue with regard to the applicability of the provisions of the Secularization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (for short "SARFAESI Act") to the Co-operative societies and cooperative bank, including Multi-state cooperative society is pending before the Hon'ble Apex Court. He therefore, submits that on account of

judicial propriety, this Court should not take up the matter for admission.

2. The learned counsel Mr. Vatsal Shah, appearing for Respondent No. 4, on the contrary, submits that the issue pending before the Apex Court is only with regard to the cooperative society and cooperative bank, and not with regard to the multi-state cooperative bank. The learned counsel further submits that in view of the amendment to the SARFAESI Act, the said Act is also applicable to the multi-state cooperative bank.

3. Before going into other aspects to decide this issue, we may note here that the Hon'ble Apex Court even in many cases of the cooperative societies and cooperative banks has imposed condition of deposit of 50% of the amount due, for grant of protection. We have put a query to Mr. Upadhyay, the learned counsel as to whether Petitioner is willing to deposit 50% of the amount due, so as to consider the petition on merits, the learned counsel submits that the Petitioner is neither borrower nor a guarantor, therefore, such a condition cannot be imposed on it.

4. A blanket interim order is operating in favour of the

Petitioner since 24th May, 2017. We are therefore, of the considered view that unless the Petitioner shows its bonafides by depositing 50% of the amount due, the efforts of the Petitioner to protract the matter after obtaining interim order should not be encouraged. We are also of the considered view that entertaining such a plea would amount to defeating the benevolent provisions of the SARFAESI Act. In that view of the matter, we decline to adjourn the matter and request the learned counsel for the parties to proceed on merits.

5. The Petitioner challenges the order of rejection of its preliminary objection by the Metropolitan Magistrate. We have heard learned counsel Mr. Upadhyay for the Petitioner and the learned counsel Mr. Vatsal Shah for Respondent No. 4 – Bank.

6. Mr. Upadhyay, the learned counsel submits that Petitioner is neither borrower nor guarantor but developer. He submits that the borrower in collusion with the officers of Respondent No. 4 Bank had fraudulently executed the mortgage-deed of the property which is owned by the Petitioner. He, however, submits that the borrower by taking loan from the Bank has appropriated the said amount to himself and not paid the said amount

to the Petitioner. Reliance is placed on the provisions of Section 54 of the Transfer of Property Act. He submits that on the basis of agreement of sale, the charge could not have been created on the properties which are owned by the Petitioner and which is in possession of the Petitioner.

7. The learned counsel Mr. Vatsal Shah, on the contrary submits that after all the necessary documents were executed by the present Petitioner to facilitate giving of loan to the borrower, the loan was sanctioned. He further submits that the documents produced by the Bank would show that the entire amount under transaction was received by the Petitioner.

8. With the assistance of the learned counsel for the parties, we have perused the material placed on record.

9. It would be relevant to refer to the following averments in the memo of petition:

> "4. … So far as the petitioner is concerned, it was not aware with regard to the respondent no. 6 having mortgaged the property under question with the respondent no. 4 for availing cash credit facilities. The respondent no. 6 went on assuring and promising the petitioner to make the balance payment but protracted and prolonged the same on one or the other pretexts. So far as the possession of the

> property under question is concerned, it was never ever given to the respondent no. 6 and the same is in exclusive, uninterrupted, lawful and peaceful possession of the petitioner."

10. It could thus be seen that it is the specific case of the Petitioner, as pleaded in memo of petition, that so far as mortgage is concerned, it was never aware that Respondent No. 6 has mortgaged the property with Respondent No. 4 for availing cash credit facilitates. In the light of these pleadings, it will be relevant to refer to the pleadings made by the very same Petitioner in a complaint filed before the learned Metropolitan Magistrate at Borivali, which is as under:

> "5. After entering into the agreement for sale in respect of all the aforesaid commercial / residential premises of the complainant and registration thereof, the accused no. 4 procured from the complainant letters in the form of NOCs, confirmation letters, noting of lien letter, etc. by making representation to the complainant / its concerned directors / officers that since, the aforesaid agreements for sale have been executed in his personal name, though in the capacity of director of his aforesaid companies but according to his bankers, no CC facilities can be granted in the account of his aforesaid companies, unless and until the aforesaid NOCs, confirmation letters, noting of lien letters, etc. are issued by the complainant and submitted by him to the bankers and the said commercials / residential premises are mortgaged. He further made representations to the complainant / its concerned directors / officers that upon

> the complainant executing the aforesaid letters, he shall be in a position to arrange the funds for paying the balance amount concerning the aforesaid commercial / residential premises by utilizing the cash credit facilities."

11. It could thus be seen that though Petitioner has claimed total ignorance about the transaction between the borrower and the Bank. In a case before the learned Magistrate, it is stated that the borrower had represented to the Petitioner that since cash credit facility was being sanctioned in his name, it was necessary that the Petitioner should issue NOC confirmation letters, noting of lien letter, etc. It is its specific case before the learned Magistrate that the said documents were issued in favour of the Respondent No. 4 – Bank since the borrower represented that unless such documents are executed, the Bank will not issue cash credit facility and the amount could not be paid to the Petitioner – Developer.

12. In the light of these pleadings, it will also be relevant to refer to the documents filed alongwith the affidavit in reply by Respondent No. 4. The document at Sr. No. 1 shows a receipt whereby a confirmation is issued on behalf of the Petitioner with regard to the receipt of Rs. 89,00,000/- from the borrower. The

document at Sr. No. 2 is a letter addressed by the Petitioner to Respondent No. 4 Bank, thereby giving no objection for giving loan to the buyer and for mortgaging the property in question. The document at Sr. No. 6 is a letter addressed by the Bank to the Petitioner informing the Petitioner that cash credit facilities were sanctioned by the Bank in favour of the borrower and that the Petitioner should sign on the said letter for confirming that the Petitioner has registered Bank's lien on the said flat. The confirmation letter issued by the Bank dated 24th September, 2013 is duly signed by the Petitioners.

13. In the affidavit in rejoinder filed on behalf of the Petitioner, except denial of what is stated in the affidavit in reply and except stating that malafide allegations are made by the Bank against the Petitioner, nothing has been placed on record to dilodge the case of the Respondent – Bank on the basis of documentary evidence.

14. Assuming for a moment that the statements made in the petition, affidavit in reply and the affidavit in rejoinder are only words against words, but we will have to take into consideration the

documents placed on record by the parties.

15. The specific averment made in the complaint filed by the Petitioner falsifies that a specific statement made by it in the memo of petition. A party cannot be permitted to approbate and reprobate. Apart from that, the voluminous documents placed on record by the Respondent Bank would clearly show that the Petitioner was very well aware about the transaction between the Respondent Bank and the borrower and that the transaction was entered with its confirmation / consent and no objection.

16. In that view of the matter, Petitioner is not entitled to any relief as the petition is found to be without substance. The writ petition is therefore, dismissed with costs, which are quantified at rupees one lakh.

17. At this stage, learned counsel appearing for Respondent Bank states that the Bank is not interested in the costs and the said costs be paid to the legal services authority. We therefore, direct that the said costs be paid by the Petitioner to the Maharashtra State Legal Services Authority within a period of two weeks by demand draft.

18. At this stage, Mr. Upadhyay, learned counsel requests for continuation of interim protection which was granted by the learned Vacation Judge. Taking into consideration conduct of the Petitioner, we are not inclined to entertain the prayer of the Petitioner. Request of the Mr. Upadhyay, learned counsel for continuation of interim protection is therefore, rejected.

Sd/-
[RIYAZ I. CHAGLA, J.]

Sd/-
[B. R. GAVAI, J.]

Vinayak Halemath