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

% **Pronounced on: 02.11.2017.**

+ CM(M) 760/2016 & CM No. 26681/2016(*stay*)

PUNJAB NATIONAL BANK Petitioner

Through Ms.Nishi Chaudhary, Advocate

versus

MS. BHARTI SEHGAL AND ANR. Respondents

Through Mr.Rakesh Mukhija, Mr.M.Migani &
Mr.Gaurav Migani, Advocates

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. By the present petition filed under Article 227 of the Constitution of India, the petitioner seeks to impugn the order dated 12.01.2016 passed by the appellate court confirming the interim order passed by the trial court in favour of respondent No.1 in a suit filed by respondent No.1. The petitioner was restrained from interfering in the peaceful possession of the plaintiff/respondent No.1 of the suit property. The plea of the petitioner that the suit is barred under the SARFAESI Act was rejected.

2. The brief facts are that respondent No.1/plaintiff has filed a suit for permanent and mandatory injunction claiming herself to be the sole owner and in possession of the property bearing No. G-338, 2nd Floor, Preet Nagar Cooperative House Building Society, Preet Vihar, Delhi- 110092. It is urged that she purchased the said property from respondent No.2 through a registered Sale Deed dated 01.02.2010. Immediately after purchase of the said property, the said respondent No.2 proposed and offered to sell the said suit property to the plaintiff/respondent No.1 after reconstructing the same.

The plaintiff/respondent No.1 accepted the said offer and the parties entered into a Construction Agreement dated 01.02.2010 whereby it was agreed that respondent No.2 will demolish the existing structure and erect a fresh building upto third floor and he will hand over the fully furnish second floor of the property to respondent No.1 by 30.07.2010. As respondent No.2 failed to complete his promise and only raised an incomplete structure, respondent No.2 handed over the physical possession of the second floor to respondent No.1 in July, 2010. Thereafter respondent No.1 got the remaining work completed at a cost of Rs.10 lacs. She is said to be residing there peacefully along with her family members. She was shocked when on 06.01.2015 she received a letter dated 05.01.2015 issued by the petitioner/defendant No.1 and from the said letter she learnt that there was a reference to some loan agreement and that the property had been mortgaged with the petitioner bank by respondent No.2. Hence, the present suit.

3. The case of the petitioner is that respondent No.2 is a proprietor of a concern M/s Harshit Enterprises and approached the petitioner bank for sanction of Cash Credit Limit(*in short 'the CC Limit'*) of Rs.250.00 lacs. The CC Limit was sanctioned and apart from the other documents, respondent No.2 on 24.12.2009 created an equitable mortgage by deposit of title deeds of immovable property bearing G.338, Preet Vihar, Delhi-110092. On 02.12.2010, the CC Limit for M/s Harshit Enterprises was enhanced from Rs.250.00 lacs to Rs.350.00 lacs. The equitable mortgage was duly extended. The account for M/s Harshit Enterprises was closed on 09.05.2014 after adjusting the outstanding dues etc.

4. However, one Sh.Kailash, being the proprietor of M/s Vishkarma Enterprises through respondent No.2 is said to have approached the petitioner bank for sanction of CC Limit of Rs.190 lacs and the same was sanctioned. In order to secure said loan, said respondent No.2 stood as a

guarantor and executed an agreement of guarantee dated 08.05.2014. He also created an equitable mortgage against the said immovable property and acknowledged the deposit of title deeds. The original title deeds of the property which had been deposited by respondent No.2 with the petitioner bank on 24.12.2009 continued to remain deposited with the petitioner bank to secure repayment of CC Limit sanctioned (new loan) to M/s Vishkarma Enterprises.

5. As the above M/s Vishkarma Enterprises failed to adhere to financial discipline and make payment of the amount, the account was declared as Non-Performing Assets (*in short 'NPA'*) on 31.03.2015 and possession notice under Section 13(2) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as '*the SARFAESI Act, 2002*') was issued to respondent No.2 to pay a sum of Rs.2,02,69,661/- within sixty days. The petitioner is said to have taken symbolic possession of the property and a notice under Section 13(4) of the SARFAESI Act, 2002 was also issued. It is stated that the petitioner under Section 14 of the SARFAESI Act, 2002 filed an application before the court of learned CMM, Karkardooma Court on 10.8.2015. The court appointed a receiver to take possession of the property from respondent No.1 on 11.09.2015 by locking the doors of the respective floors of the building. Hence, the petitioner bank is in physical possession of the complete property except the second floor. It was pleaded by the petitioner that the suit is barred under Section 34 of the SARFAESI Act.

6. The trial court vide its order dated 07.07.2015 rejected the contention of the petitioner that the suit is not maintainable under Section 34 of the SARFAESI Act, 2002. It noted the plea of respondent No.1 that she is the victim of a fraud played by respondent No.2 and the officials of the petitioner. Relying upon the judgment of the Supreme Court in *Mardia*

Chemicals Ltd. v. Union of India, AIR 2004 SC 2371 and of this court in *Ashok Kumar Raizada v. The Bank of Rajasthan & Anr., 207(2014) DLT 10*, the trial court held that suit can continue on account of the fraud having been played by the defendants.

7. The trial court also held that as per the petitioner, an equitable mortgage was created on 24.12.2009 and a mortgage deed was executed by respondent No.2 by deposit of title deeds of the suit property. Subsequently, on 08.05.2014, it is admitted that first mortgage created on 24.12.2009 came to an end and the dues of the petitioner were cleared by respondent No.2. Thereafter, a subsequent mortgage dated 08.05.2014 is said to have been created independent of the first mortgage. The principal debtor in the second mortgage dated 08.05.2014 is one M/s.Vishkarma Enterprises whereas respondent No. 2 is a surety. In contrast, in the initial mortgage dated 24.12.2009, the principal debtor was M/s.Harshit Enterprises proprietorship concern of respondent No.2. On these facts, the trial court also noticed that under Section 3 of the Transfer of Property Act, any person is said to have notice of facts which he actually knows, or when, but for willful abstention from an enquiry or search which he ought to have made, he would have known it. Reliance was also placed on Explanation II appended to the said Section which states that any person acquiring any immovable property or any share or interest thereof shall be deemed to have notice of the title of any person who is for the time being in actual possession thereof. Based on the above, it was concluded by the trial court that the petitioner Bank and his officials were grossly negligent and appear to have connived with respondent No. 2 while creating the second mortgage in 2014, as they failed to carry out a physical inspection of the property. Had they carried out such an inspection, it would be evident that the entire nature of the property has changed and that respondent No. 2 is no longer in physical possession.

Hence, the plea of the petitioner that the present suit is not maintainable under Section 34 of the SARFAESI Act was rejected keeping in view the observations of the Supreme Court in *Mardia Chemicals Ltd. v. Union of India(supra)*. Hence, the defendant/petitioner and respondent No.2 were restrained by way of temporary injunction from interfering in the peaceful possession of respondent No.1 in the suit property.

8. The appellate court upheld the above order of the trial court. It noted that in 2014, the petitioner bank has in the case of M/s Vishkarma Enterprises sanctioned CC Limit and continued the equitable mortgage. It also holds that if the officials of the petitioner bank had visited the property in question, then the actual position could have come to the notice of the appellant bank with regard to different owners of the property in question but no such course was adopted by the appellant bank and hence, it is clear that a fraud has been played by respondent No.2 on the petitioner and the court confirmed the interim order.

9. I have heard the learned counsel for the parties.

10. Section 34 of the SARFAESI Act, 2002, reads as follows:

“34. Civil court not to have jurisdiction.- No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).”

11. The Supreme Court in the case of *Mardia Chemicals Ltd. vc. Union of India and Ors.*(supra) carved out an exception to the jurisdiction of the Civil Court in paragraph 51 as follows:

“51. However, to a very limited extent jurisdiction of the civil

court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages.”

12. Similarly this Court in the case of *Ritu Gupta & Anr. vs. Usha Dhand & Ors. in 205(2013)DLT218* in para 16 held as follows:-

“16. Without expressing any final view on the above contentions of the parties, the Court, prima facie, is satisfied that the pleas urged by the parties raises triable issues. Prima facie, it also does appear that the Sale Deeds executed by defendant No. 1 in quick succession in respect of the same property are of doubtful validity and that the plea that they are vitiated on account of fraud would require evidence to be led by the parties before a final view can be taken in the matter. The Court is of the view that the case falls within the exceptional category pointed out by the Supreme Court in the *Mardia Chemicals vs. Union of India* (supra), with the caveat that it is premature for the Court to express any view as to which of the parties has been party to the fraud that prima facie appears to have been committed.”

13. The facts here prima facie show that the petitioner accepts that respondent No.2 created the mortgage on 24.12.2009 by deposit of title deeds in respect of the suit property. The principal debtor was M/s. Harshit Enterprises. Thereafter the account of M/s. Harshit Enterprises, the proprietorship concern of respondent No. 2 was closed on 09.05.2014. Respondent No. 2 is said to have executed a letter of continuity dated 09.05.2014 and had agreed to continue the aforesaid equitable mortgage for a CC facility sanctioned to one Vishkarma Enterprises whose proprietor is one Sh.Kailash. The petitioner claims that after closing of CC limit of the original debtor, namely, M/s. Harshit Enterprises the papers of the

immovable property were never redeemed by respondent No. 2 but the same remained deposited with the petitioner. As the new principal debtor-M/s Vishkarma Enterprises is said to have defaulted, the petitioner is said to have taken steps under Section 13 of the SARFAESI Act against the said Vishkarma Enterprises/against the suit property being the mortgaged property.

14. The trial/appellate court has however relied upon Section 3 of the Transfer of Property Act to hold against the petitioner. Relevant para of Section 3 of the Transfer of Property Act reads as follows:-

“3. Interpretation clause.—In this Act, unless there is something repugnant in the subject or context,-

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“a person is said to have notice” of a fact when he actually knows that fact, or when, but for willful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

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Explanation II.—Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III: A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.”

15. There is merit in the view taken by the trial court relying on Explanation II to Section 3 of the Transfer of Property Act. The two

transactions are between different parties and can prima facie be termed to be different transactions. The first loan to Harshit Enterprises came to an end in 2009. It is thereafter that the second loan to Vishkarma Enterprises was disbursed. Had the officials of the petitioner exercised due diligence and carried out a physical inspection of the suit property, they would have duly noticed the changed ground situation and about the fact that respondent No. 1 is in possession of a portion of the mortgaged property.

16. However, the issue is would these facts warrant a conclusion that Section 34 of the SARFAESI Act has no application to these proceedings in view of the observations of the Supreme Court in *Mardia Chemicals Ltd. v. Union of India*(supra).

17. This court in the case of *Neha Aggarwal vs. PNB Housing Finance Ltd. & Ors., 2016 (158) DRJ 286* on a similar plea noted as follows:-

“19. The aforesaid exception carved out by the Supreme Court has led to persons interested in defeating the actions of the banks and financial institutions under the SARFAESI Act inundating the civil courts with pleadings to bring their cases within the exception aforesaid. Unless the civil courts, before entertaining any such suits, scrutinize the pleadings in the plaint carefully, the same will result in Section 34 of the SARFAESI Act being rendered illusory and thereby also frustrating the very objective of enactment of SARFAESI Act. Supreme Court in *Mardia Chemicals supra* carved out an exception, if I may humbly so opine, only in respect of claims by a mortgagor of the action of the secured creditor to be fraudulent. Though the Supreme Court chose not to expand as to what facts may qualify for an action of the mortgagee to be called fraudulent, an inkling thereof is evident from the reference therein to the two decisions supra of the Madras High Court. The claim of the mortgagor therein was of the power to sell under Section 69 of the Transfer of Property Act, 1882 being exercised by the mortgagee contrary to the terms of the mortgage i.e. a mortgagee seeking to do what it was not entitled to do under the terms of mortgage. However we are herein concerned with a claim of the appellant/plaintiff to title to the mortgaged property adversely to the title professing which

the mortgagor had created the mortgage. Such a claim, in my view would not qualify within the exception carved out by the Supreme Court and would be within the jurisdiction of the DRT under Section 17 of the SARFAESI Act and hence the jurisdiction of the civil court would be barred with respect thereto. It has been held by the Division Bench of this Court in Onil Sadh Vs. Federal Bank Ltd. MANU/DE/3449/2015 : (2015) 224 DLT 556 that the claim to the mortgaged property adversely to the mortgagor or the mortgagee can be made only before the DRT under Section 17 and not before the civil court. The exception carved out by the Supreme Court in Mardia Chemicals supra is available in my humble opinion only when the bank or financial institution is perpetuating a fraud in the enforcement of the mortgage like as before the Madras High Court i.e. of exercising the rights as mortgagee contrary to the terms of the mortgage.

20. In this respect, the claim of the appellant/plaintiff herein is similar to that of the plaintiff in Jagdish Singh supra. The claim of the appellant/plaintiff therein also was of the mortgagor having no right to mortgage and thus the auction thereof being bad and which claim was held by the Supreme Court to lie before the DRT only and the jurisdiction of the civil court being barred with respect thereto. Merely because in making such a claim fraud is alleged in the creation of the mortgage would not oust the jurisdiction of the DRT or come within the exceptions carved out in Mardia Chemicals supra.

21. Division Bench of High Court of Madras in V. Thulasi Vs. Indian Overseas Bank MANU/TN/1939/2011 : , in this regard has held that by clever and astute drafting, the plaintiff may create an illusion of cause of action by trying to bring civil suit within parameters laid down in Mardia Chemicals supra but it is the duty of the Court to see if such allegations of fraud are thrown just for the purpose of maintaining a suit and if finds so, to throw out the plaint as keeping the same pending frustrates the Banks compelling them to agree to one time settlements.”

18. As held by the learned Single Judge of this court that every dispute between the mortgagor and a third party claiming title to the property

regarding the rights of the mortgagor to mortgage the property cannot be taken out from the ambit of Section 34 of the SARFAESI Act. The exception provide in *Mardia Chemicals Ltd. v. Union of India(supra)* only pertains to a fraudulent act of the secured creditor. In the present case, at best, the secured creditor can be accused of negligence, namely, of not carrying out a visual/physical inspection of the suit property when the second mortgage was created in 2014. That itself cannot lead to a conclusion of a fraud though it may not necessarily imply validity of the mortgage transaction.

19. The Supreme Court in the case of *Bhaurao Dagdu Paralkar v. State of Maharashtra & Ors., (2005) 7 SCC 605* defined ‘fraud’ as follows:

“10. A “fraud” is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another’s loss. It is a cheating intended to get an advantage. (See *S.P.Chengalvaraya Naidu v. Jagannath*)”

20. In view of the above, the acts as pleaded by the plaintiff/respondent No.1 cannot prima-facie tantamount to a fraud on behalf of the secured creditor. There may be a fraud by respondent No.2 on the petitioner/respondent No.1. It may on adjudication lead to a conclusion that the mortgage was not validly carried out as the mortgagor had no title or rights to carry out the mortgage in 2014. These are issues which the DRT is well capable of looking into.

21. From the facts as available, it appears that the petitioner has not filed any application under Order 7 Rule 11 CPC for rejection of the plaint. However, keeping in view the provision of Section 34 of the SARFAESI Act it would be manifest that the present suit would not be maintainable.

22. The suit has been pending for quite some time. It would not be appropriate to deny respondent No.1 an opportunity to challenge the acts of the petitioner. The remedy of respondent No. 1 is in approaching the DRT

under Section 17(1) of the SARFAESI Act. Respondent No.1 does not appear to have taken any such steps. In order to avoid any complexity of limitation, liberty is granted to respondent No.1 to approach the DRT within 45 days from receipt of certified copy of the order of this court by filing the objections as stated in the present plaint before the DRT in the appropriate prescribed format. In the eventuality of the respondent No.1 taking such steps, the DRT will deal with the objections of the respondent No.1 as per law. In case respondent No.1 approaches DRT within the prescribed period, the interim orders passed by the Trial Court and confirmed by the Appellate Court shall continue to operate until it is modified/varied or vacated or confirmed by the DRT. Impugned order stands modified as above.

23. Petition stands disposed of.

JAYANT NATH, J.

NOVEMBER 2, 2017/v

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