IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2442 OF 2014

Hillary Maurice Fernandes ...Petitioner
vs.
Corporation Bank & anr. ...Respondents

Mr. Owen Menezes i/b. Mr. R.S. Tripathi for Petitioner.
Mr. Rakesh Singh a/w. Ms. Purvi Davda i/b. M.V. Kini & Co. for respondent – Corporation Bank.

CORAM : A.A. SAYED &
V.L. ACHLIYA, JJ.

DATE : JUNE 28, 2018

P.C.:

The Petitioner has filed this Petition under Article 226 of the Constitution seeking the following reliefs :-

> *" a) that this Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records and proceedings from the Respondents leading to the issuance of the possession notice dated 12th May, 2009 (Ex. A), the sale notice dated 2nd February, 2010 (Ex.B) and the sale-cum-tender notice (Ex. G) and after going into the legality thereof quash and set aside the same ;*
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> *b) that this Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India directing the Respondents to furnish to the Petitioner all documents pertaining to the loan sanctioned more particularly the documents mentioned on the reverse of said possession notice dated 12th May 2009 (Ex.A) ;*
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> *c) that pending the hearing and final disposal of the above Petition, the Respondents, theirs officers, servants and agents be restrained by an order and injunction of this Hon'ble Court from selling / disposing of the property being Flat Nos. 1 and 2 on the ground floor of the building 'The Madonna" situate at Opp. Soonawala Agiary, Mahim (W), Mumbai 400 016, which is the subject matter of the sale notice dated 2nd February, 2010 (Ex.B) and sale-cum-tender notice (Ex.G)."*

On 9th April 2015, Rule was issued and interim relief was granted in terms of prayer Clause (c).

2. The Petitioner is the owner of the plot of land along with a building standing thereon namely "Madonna", comprising of a ground floor and three upper floors situate on Plot No. 593, C.T.S. No. 1285 of Mahim Division, Off. Soonawala Agiary Marg, 281-A, L.J. Road, Mahim, Mumbai 400 016 (hereinafter referred to as said property). The case of the Petitioner in the Petition is as follows :-

(i) He is settled in Australia since last 17 years. In the year 1995 he was working as a Manager in the Company Wipro. In the year 1996 he met the alleged borrower one Anselm D'Souza and they became good friends. The said Anselm D'Souza in the year 1997 represented to him that he desired to start a business and as flat Nos. 1 and 2 (hereinafter referred to as said flats) on the ground floor of the said property were vacant, the same were handed over to him to start his business and he promised to vacate the said flats within two years. No Agreement was executed in favour of the said Anselm D'Souza in respect of the said flats.

(ii) In the year 1997, the Petitioner and his family left for New Zealand and thereafter in 2000 they moved to Australia and are presently residing there. The documents of title relating to the said flats are in

possession of the Petitioner. In the year 2003, in his absence and without his permission Anselm D'Souza had mortgaged the said flats by creating false and bogus documents in collusion with the officers of the Respondent -Bank to show equitable mortgage was created in respect of a loan availed by the said Anselm D'Souza from the Respondent-Bank. Presently, the said flats are in possession of the Authorized Officer (Respondent No.2) of the Respondent-Bank under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) The said flats were allegedly mortgaged by Anslem D'Souza in the name of "M/s. Comptel Network Systems (India) Limited" whose Directors were the said Anselm D'Souza and his wife. The Petitioner has not created any right, title and interest in respect of the said Company "M/s. Comptel Network Systems (India) Limited". The Directors of the Company had committed fraud and forgery and prepared bogus documents in collusion with Respondent-Bank in order to create documents of title on the basis of which the equitable mortgage was allegedly created. The original documents of title are still in possession of the Petitioner.

(iii) The original documents were deposited with the City Civil Court in Suit No. 1216 of 2010 which suit was filed by the Petitioner against one other occupant in the said Madonna building. The said suit

was decreed in favour of the Petitioner vide judgment and order dated 31st July, 2012. The First Appeal No.1452 of 2012 challenging the aforesaid judgment and order was also dismissed by judgment and order dated 14th August. 2014 passed by the learned Single Judge of this Court.

(iv) The alleged borrower "M/s. Comptel Network Systems (India) Limited" and its Directors had taken loan from Respondent-Bank by creating equitable mortgage in respect of the said flats and have committed defaults in repayment of the loan. The State Bank of India also appears to have given loan to the said borrowers and Respondent-Bank was the leading bank which took action under the SARFAESI Act against the borrower and guarantors. The amount due to the banks as on 30/11/2010 was Rs.18.35 crores. Since the borrower and its guarantors failed to pay loan amounts to the secured creditors, the Respondent-Bank sent notice under Section 13(2) of the SARFAESI Act and the Authorized Officer of the Respondent-Bank took possession of the said flats vide possession notice dated 12/5/2009. It is at this stage that the Constituted Attorney of the Petitioner came to know about the mortgage of the said flats with the Respondent–Bank. The Respondent -Bank had also issued sale notice dated 2/2/2010 under the SARFAESI Act in newspaper.

(v) The Petitioner had sent legal notice dated 10/2/2011 through

his Advocate to the Respondent-Bank inter alia bringing it to their notice that fraud had been committed by the alleged borrower in collusion with the officers of the Respondent– Bank and also calling upon Respondent-Bank to furnish the documents in respect of the alleged mortgage. The Petitioner also addressed another letter dated 20/4/2011 to the Senior Inspector of Police, Mahim, Mumbai. The Petitioner also gave public notice dated 7/7/2011 cautioning the public not to deal with the said flats.

(vi) Respondent - Bank issued a sale-cum-tender notice in respect of the sale of the mortgaged properties of the borrower including the said flats and the reserved price of the said flats was fixed at Rs.1.85 crores. The tender notice was to be opened and considered by the Respondent-Bank on 17/12/2011. The said flats could not be sold and are in possession of the Respondent–Bank and its Authorized Officer.

(vii) Though several efforts were made by the Petitioner and his CA, the Respondent-Bank has deliberately and intentionally not given the documents to the Petitioner on the basis of which the loan was granted and the said flats were mortgaged. The Petitioner sent legal notice dated 6/6/2014 to the Respondent-Bank calling upon them to withdraw the possession notice which was ex-facie, illegal and beyond the authority of Respondent-Bank. The proceedings adopted by the Respondent-Bank are

non-est in the eyes of law. Though the Petitioner had issued repeated notices to the Respondent-Bank to furnish him all the documents culminating in the possession notice dated 12th May, 2009 and sale notice dated 2/2/2010, the Respondent-Bank refrained from furnishing the Petitioner the copies and fraud was perpetrated upon the Petitioner. In absence of the necessary documents, it is not possible for the Petitioner to file an Appeal under Section 17 of the SARFAESI Act.

3. An Affidavit-in-Reply dated 14th July, 2015 has been filed on behalf of the Respondent-Bank. The case of the Respondent-Bank in the Affidavit-in-reply is interalia as follows :-

The two flats in question had been sold by the Petitioner to "M/s. Comptel Network Systems India Pvt. Ltd." in the year 1997 for a price of Rs.36 lakhs and Rs.26 lakhs respectively under Agreements, copies whereof have been annexed to the Affidavit-in-reply. For securing financial help "M/s. Comptel Network Systems India Pvt. Ltd." executed an equitable mortgage in favour of the Respondent-Bank in respect of the said flats. The said "M/s. Comptel Network Systems India Pvt. Ltd." was the actual borrower which subsequently failed to pay debt amount and therefore the Respondent-Bank initiated proceedings under SARFAESI for recovery of the same after the account of "M/s. Comptel Network Systems India Pvt. Ltd." was classified as NPA. The outstanding dues were more *than Rs.3,48,45,968/-. The said flats were valued through registered Valuer at Rs.1.85 crores. No buyer came forward to purchase the same. The Respondent-Bank issued Sale Notice dated 2/2/2010 and sought to auction the said flats mortgaged with the Respondent–Bank. The present Petition was filed with the sole motive to stall the action of sale notice taken by the Respondent-Bank to defy the Respondent-Bank's claim.*

4. The Petitioner has filed an Affidavit-in-Rejoinder, wherein it is inter alia stated as follows :-

The Respondent-Bank has played fraud and intentionally not annexed copies of the documents relied upon in the possession notice annexed at Exh. A to the Petition viz. i) Security Agreement ii) Guarantors/Obligators iii) Title certificate furnished by the borrower iv) Verification of property / Title of security by creditor i.e. Bank and v) Amount paid under security Agreement. The disclosure of the documents was absolutely vital and would disclose as to in what manner nationalised Banks disburse loans against alleged security furnished by a borrower. The Respondent -Bank may be directed to disclose the said documents on oath. There is no title deed in respect of each individual floor or flat as the entire land and building which is ground and 3 upper storeys is owned by the Petitioner. The Agreement dated 29/5/1997 has not been executed by the Petitioner and he does not know the alleged witnesses to the

Agreement. Though in the Agreement it is stated that the Petitioner has received amount of Rs.36 lacs the total amount shown therein is Rs.37 lacs. No cheques or demand draft had been received by the Petitioner as stated in the receipts. All the cheques bear the date of May 1997. The borrower has deposited a cheque of Rs.3 lacs in the Petitioner's bank account on 3rd May, 1997 and few days thereafter the said amount of Rs.3 lacs has been re-credited to the borrower. The cheque of Rs.3 lacs is dated 3/5/1997 when the alleged Agreement is dated 29th May 1997. The alleged Agreement is in respect of flat Nos. 1 and 2 on the ground floor and is only Agreement for Sale and confers no title on the purchaser (borrower) and in the absence of the same being registered and it cannot be said to be a document of title. The alleged Agreement for Sale dated 21st November, 1997 is in respect of only flat No.2. The said Agreement is sham and bogus document and has not been executed by the Petitioner and he does not know the alleged witnesses to the Agreement. Under the Agreement dated 21st November, 1997, flat No.2 on the ground floor is shown to be sold once again by the Petitioner. The Agreement was not executed by the Petitioner as the Petitioner was not in India in November 1997. The Agreement shows that the same has been executed by the borrower as Vendor in his capacity of "Authorized Director on behalf of M/s. Comptel Networks India Pvt. Ltd." and the purchaser is "M/s. Comptel Network Systems India Pvt. Ltd." which has been executed by the wife of *the borrower in her capacity as Authorized Director. The said document is sham and bogus created by the borrower and his wife. It is absolutely surprising that Respondent-Bank furnished loan on the basis of the said two Agreements without verifying the title. The documents show that Rs.4 lacs is allegedly paid vide cheque No.513673 dated 29th May, 1997. Though the document shows that the stamp duty and registration charges have been paid, the document is not registered and hence confers no title. The amount of Rs.4 lacs has been deposited in the account on 14th October, 1997 and the same amount has been re-credited to the company after two days. Further, three cheques totalling Rs.7 lacs have been deposited in the Petitioner's account on 2nd December, 1997 and the cheque had returned dishonoured on 4th December, 1997. The said cheques have again been deposited in the account on 6th December, 1997 and the amount of Rs.7 lakhs re-credited to the Company on 10th December, 1997. It is not understood as to how cheques dated 29th May, 1997 could have been deposited on 2nd December, 1997 as the validity period of the cheque was then only six months. The grant of the loan (which is not disclosed to the Petitioner) to the borrower was under fabricated documents which have not been registered. The amount of Rs.6 lakhs which was due to be paid under clause (b) of the Agreement has also not been paid. If the three cheques dated 29/5/1997 each for an amount of Rs.4 lakhs were in fact paid, the same would have immediately* *been deposited in the month of May, 1997 and no Vendor would wait till 2nd December, 1997 to deposit the said cheques and that too after the validity of the six months had expired. The documents annexed to the Affidavit-in-Reply came to the knowledge of the Petitioner for the first time when the Affidavit-in-Reply was served on the Advocate on 20th July, 2015. Copy of the Bank Account Statement of the Petitioner is annexed at Exh.'I' to the Affidavit-in-Rejoinder. The Petitioner has not executed the Affidavit (Exh.C to his Petition), Indemnity Bond (Exh.D to the Petition) and General Power of Attorney (Exh.E to the Petition).*

5. We have heard learned Counsel for the Petitioner and the learned Counsel for the Respondent-Bank.

6. At the outset we note that the Petitioner is essentially challenging the action/measures of the Respondent-Bank taken under the provisions of the SARFAESI Act. However, the grievance of the Petitioner is that he has not been furnished with the documents under which the said two flats were allegedly mortgaged by borrower "M/s. Comptel Network Systems India Pvt. Ltd." Learned Counsel for the Petitioner submitted that in absence of the documents, despite repeated demands, it was not possible for the Petitioner to file appropriate proceedings before the DRT and therefore, one of the prayers in the

Petition is for furnishing necessary documents pertaining to loan transaction.

7. We find that the dispute essentially is about loan taken by one "M/s. Comptel Network Systems India Pvt. Ltd." and its Directors by creating an equitable mortgage by deposit of title deeds of flat Nos. 1 and 2 in the property owned by the Petitioner. According to the Petitioner, the entire property as also the flat Nos. 1 and 2 are owned by him and he had never executed any Agreements for Sale in respect of the said flats. According to the Petitioner a fraud was committed by Anslem D'Souza, who is the Director of the "M/s. Comptel Network Systems India Pvt. Ltd." in collusion with Respondent-Bank. The learned Counsel for the Petitioner submitted that the documents of title of the property are in possession of the Petitioner.

8. We prima facie find that the Agreement for Sale dated 29th May, 1997 and the Agreement for Sale dated 21st November, 1997 do not confer any title in respect of the said flats on the said borrowers "M/s. Comptel Network Systems India Pvt. Ltd." and could not form the basis on which loan could not have been granted by the Respondent – Bank.

9. We find that there are several disputed question of facts and it is not possible for this Court in its writ jurisdiction to rule on these disputed question of facts. We find that the Petitioner is essentially aggrieved by the action of the Bank and the measures taken by the Bank under SARFAESI Act and the Petitioner has remedy before DRT under Section 17 of the SARFAESI Act. As a matter of fact, the Petition itself proceeds on the basis that though the Petitioner has a remedy before the DRT under Section 17 of the SARFAESI Act, in absence of the documents it is not possible for the Petitioner to approach DRT. During the course of the arguments learned Counsel for the Respondent-Bank stated that apart from the documents relied upon in the Affidavit-in-Reply there are other documents which Respondent-Bank has in its possession. Learned Counsel for the Petitioner on the other hand submitted that the entire transaction is in respect of the said flat Nos. 1 and 2 is fraudulent and undue advantage has been taken by the borrowers because of the absence of the Petitioner from India who is settled in Australia since 1997. Learned Counsel for the Respondent-Bank has pointed out that Respondent - Bank has filed OA No. 171 of 2009 in DRT against the borrower. The learned Counsel for the Respondent-Bank fairly stated that Respondent-Bank shall furnish copies of entire set of papers and proceedings in the said OA to the Petitioner as also all the documents pertaining to the loan transaction and which have been deposited by the *borrower at the time of granting of loan to the borrower. In view of the aforesaid statement of the Respondent-Bank, so far as prayer clause (b) of the Petition is concerned, the same stands worked out.*

10. Having regard to the fact and circumstances of the case and since several disputed questions of facts are involved as also the fact that the Petitioner is essentially aggrieved by the action/measures taken under SARFAESI Act, it would only appropriate that the Petitioner is relegated to Debt Recovery Tribunal (DRT) to file appropriate Application under Section 17 of the SARFAESI Act. The Supreme Court in the case of **United Bank Of India vs Satyawati Tondon & Ors (2010 (8) SCC 110)** *has held that ordinarily the High Court will not entertain the Petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person. In* **Agrawal Tracom Pvt. Ltd. vs. Punjab National Bank & Ors. (2018 (3) Mh.L.J. 645)***, the Supreme Court has held in paragraphs 34 and 35 as follows :-*

> *"34. In the light of foregoing discussion, we are of the considered opinion that the Writ Court as also the Appellate Court were justified in dismissing the appellant's writ petition on the ground of availability of alternative statutory remedy of filing an application under Section 17(1) of SARFAESI Act before the concerned Tribunal to challenge the action of the PNB in forfeiting the appellant's deposit under Rule 9(5). We find no ground to interfere with the impugned judgment of the High Court.*
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> *35. The appellant is, accordingly, granted liberty to file an application before the concerned Tribunal (DRT) under Section 17(1) of the SARFAESI Act, which has jurisdiction to entertain such application within 45 days from the date of this order. In case, if the appellant files any such application, the Tribunal shall decide the same on its merits in accordance with law uninfluenced by any of the observations made by this Court and the High Court in the impugned judgment."*

11. It is noticed that the Petition was filed in the year 2014 and while granting Rule on 9th April, 2015, the Petitioner has been granted interim relief, whereby Respondent-Bank was restrained from disposing of the said flat Nos. 1 and 2 which is the subject matter of sale notice dated 2nd February, 2010 and sale-cum-tender notice by confirming the ad-interim relief granted to the Petitioner earlier.

12. Taking an overall view of the matter, in our opinion, the following order would meet the ends of justice :

ORDER

i) We record the statement of the learned Counsel for the Respondent-Bank that the Respondent-Bank shall furnish all papers and proceedings of O.A.No.171 of 2009 filed by the Respondent-Bank (along with State Bank of India) against "M/s. Comptel Network Systems India Pvt. Ltd.", as also all the documents pertaining to the loan transaction by creating equitable mortgage of the two flats viz. Flat Nos. 1 and 2, "Madonna" Building, comprising of a ground floor and three upper floors situate on Plot No. 593, C.T.S. No. 1285 of Mahim Division, Off. Soonawala Agiary Marg, 281-A, L.J. Road, Mahim, Mumbai 400 016, to the Advocate for the Petitioner within 3 weeks.

ii) The Petitioner is granted liberty to file Securitization Application under Section 17 of the SARFAESI Act to challenge the measures taken by the Respondent-Bank *within 3 weeks from the time the aforementioned documents are furnished to the Advocate for the Petitioner. We record the statement of the learned Counsel for the Respondent-Bank upon taking instructions that if an Application of condonation of delay is filed by the Petitioner, the same shall not be opposed. Having regard to the facts and circumstances of the case and as also the fact that the Petitioner was prosecuting his remedy before this Court, the DRT shall entertain and decide the Securitization Application on merits.*

iii) O.A. No. 171 of 2009 and the Securitization Application, if filed, shall be decided and disposed of together by DRT.

iv) We record the statement of the Respondent-Bank on instructions that pending the Securitization Application, the Respondent-Bank shall not take further steps/measures in respect of the said Flat Nos. 1 and 2.

v) Subject to the above, all contentions are kept open.

vi) The time-lines stipulated above shall operate from the time this order is uploaded.

13. The Petition is disposed of in the aforesaid terms.

(V.L. ACHLIYA, J.) **(A.A. SAYED, J.)**