

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 1223 OF 2017

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Edelweiss Asset Reconstruction Company
Limited

...Petitioner

Versus

The State of Maharashtra & Ors.

...Respondents

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Mr.Rohit Gupta a/w Mr, Nikhil Rajani, i/b M/s. V. Deshpande and Co., for
the Petitioner.

Mr.Hemant Haryan, AGP for the Respondent No.1State.

Mr. Saikumar Pathrudu M, for the Respondent No. 3.

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CORAM : A.A. SAYED &**RIYAZ IQBAL CHAGLA, JJ.****DATED : 12 APRIL 2019****P.C.:**

Learned Counsel for the Petitioner has pointed out order dated 10 April 2019 passed by the learned Single Judge of this Court in Chamber Summons (L) No.1810 of 2018 in Execution Application No.921 of 2013, wherein the Petitioner is the Applicant and the Respondent No.3-M.Mithraraj R. is the Judgment Creditor. The said order reads as follows:

“1. The Applicant, Edelweiss Asset Reconstruction Company Limited is an assignee of Bank of India. That bank sanctioned from early 2009 various credit facilities to one Aqua Logistics Limited, now in liquidation. The repayment of those loans was secured inter alia by a mortgage of 28th March 2009 of the residential premises in question, Flat Nos. 901

and 902, Shri Swami Samartha Prasanna, Oshiwara (East) Unit No. 13, CHSL, Building No. 12, Indradarshan-II, Oshiwara, Andheri (East), Mumbai 400053.

2. The Judgment Creditor obtained an arbitral award dated 2nd September 2013 from a sole Arbitrator. The claim was apparently was under an agreement dated 1st November 2008 and for a recovery of what is described as a friendly loan. It seems that the claim was in the amount of Rs.1.25 crores and the agreement that was sought to be enforced also said that if not paid this so-called friendly loan would be adjusted to purchase price. The Arbitrator directed the Respondent to transfer these very premises to the Award Holder and then said that the Award Holder had a charge and lien over the premises. The Award Holder then put that Award into execution and attached the two flats i.e. the subject matter of the mortgage with no notice of the execution or attachment whatsoever to the Bank of India or to its assignee.

3. It is inconceivable that a secured creditor could be sought to be compromised in this fashion. In a private transaction the statutory rights of a secured creditor cannot possibly be curtailed like this. Those rights are independently available to the secured creditor and Edelweiss has in fact moved under the SARFAESI already. The present Award Holder has intervened in those proceedings. The resultant order caused Edelweiss to move the Writ Court. I have seen a copy of the Magistrate's order and it does not seem to take into account the fact that Edelweiss is entitled under the SARFAESI to enforce its security and that statutory right is not circumscribed by execution proceedings or by private arbitration in this fashion.

4. Be that as it may, this attachment cannot presently continue. There is an application made for an adjournment to file a detailed reply Affidavit. I

will give the Award Holder one opportunity to file a return, but in the meantime the execution will be stayed. This is also entirely without prejudice to Edelweiss's rights to move under the SARFAESI Act, when it succeeds in its challenge to the Metropolitan Magistrate's order.

5. Affidavit in Reply to be filed and served on or before 3rd May 2019. Affidavit in Rejoinder, if any, to be filed and served on or before 14th June 2019.

6. List the Chamber Summons for hearing and final disposal on 19th June 2019."

2. In view of the aforesaid order raising the attachment, the impugned order dated 25-01-2017 of the Chief Metropolitan Magistrate returning the Application of the Petitioner under section 14 of the SARFAESI Act cannot be sustained, inasmuch as the impugned order was passed essentially on the premise that there was attachment of the flat in question by orders passed by this Court in the Execution Application No.921 of 2013. In the circumstances, we pass the following order:

ORDER

(i) The impugned order dated 25-01-2017 of the Chief Metropolitan Magistrate is set aside.

(ii) The Petitioner is permitted to file a fresh Application under section 14 of the SARFAESI Act before the Chief Metropolitan Magistrate, which will be decided on its own merits and in

accordance with law without being influenced by the impugned order.

(iii) The fact that the impugned order dated 25-01-2017 of the Chief Metropolitan Magistrate is set aside will not come in the way of the Respondent No.3 in prosecuting the Application under section 340 of Cr.P.C.

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

(RIYAZ IQBAL CHAGLA,J.)

(A.A.SAYED, J.)