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

Date of decision: 3rd March, 2020

\+ **CM(M) 157/2020, CM APPLs. 5131/2020 & 8447/2020**

MADAN LAL CHAWLA & ANR ..... Petitioners

Through: Mr. A. Maitri, Ms. Radhika and Mr. Sekhar, Advocates (M: 9810146222).

versus

ALLAHABAD BANK & ORS ..... Respondents

Through: Mr. Anil Kumar Singh, Advocate for R-1. (M:9868213110)
Mr. Sonal Anand and Mr. Aayush Sai, Advocate for R-2 to 4. (M:9811101222)

CORAM:
JUSTICE PRATHIBA M. SINGH

<u>Prathiba M. Singh, J.</u> (Oral)

1. The present petition has been filed challenging the impugned order dated 12th September, 2019 passed by the Chief Metropolitan Magistrate (CMM) giving effect to orders passed by the Debts Recovery Tribunal (DRT) under Section 14 of the SARFAESI Act, 2002 seeking assistance of the Court for taking possession of the secured asset.

2. The brief background is that the property bearing No. 842-843 (Old), New No. 580-581 situated at Chatta Chah Shirin Farashkhana, Shradhananad Market, Delhi was sold to Respondent Nos. 3 and 4 - Mr. Sanjay Kapoor and Mr. Nitin Chawla who are partners in Respondent No. 2 firm - M/s Sai Sales Corporation *(hereinafter collectively referred to as 'borrowers')*. The title of the property was transferred by a registered sale deed dated 21st December, 2012, executed by one Mr. Inder Arora, in favour

of Respondent No.3 and 4.

3. Subsequent to the sale, the borrowers had mortgaged the property with M/s. Allahabad Bank. There was a default in the loan and the same resulted in proceedings before the DRT. In the proceedings before the DRT the Petitioners i.e., Mr. Madan Lal Chawla and Ms. Raj Rani Chawla, filed an application on the ground that they are subsequent purchasers of the property from the same seller i.e., Mr. Inder Arora who had sold the property to Respondent Nos. 3 and 4. They thus, sought impleadment and filed objections from the property being proceeded further under the provisions of the SARFAESI Act. The said application/objections filed by the Petitioners herein was decided by the DRT on 17th September, 2018. Vide the said order, the DRT considered the entire matter including the fact that the subsequent sale by a sale deed dated 26th September, 2017 in favour of the Petitioners herein was contrary to law inasmuch as the first sale which had taken place in 2012, had vested the property with the borrowers. The DRT arrived at the conclusion that the Petitioners herein/Objectors therein were not the *bona fide* owners of the property and that there was no illegality or irregularity in the actions/ measures taken by the bank in respect of the property. The findings of the DRT in the said order dated 17th September, 2018 are as under:

> *"9. Apparently, the sale deed 21.12.2012 was duly executed by Inder Arora in favour of Sanjay Kapoor & Nitin Chawla with respect to the same property in question for which the applicants are claiming themselves to be owners & in possession by virtue of sale deed dated 26.09.2017. The contention of the applicant is that the possession of the said property was never delivered to Sanjay Kapoor & Nitin Chawla*

as they filed a civil suit before the Ld. ADJ Central, Tis Hazari, Delhi, hence, Sanjay Kapoor & Nitin Chawla were not entitled having any right and interest in the property in question to mortgage the property in favor of the respondent no.1 bank. Whereas the title documents i.e. sale deed dated 21.12.2012 clearly reflects that vacant & peaceful possession of the said property has been given to vendees by the vendor, who have occupied the same. Merely, filing civil suit does not show that the sale deed dated 21.12.2012 was not executed in favour of Sanjay Kapoor & Nitin Chawla with respect to the property in question. Apparently, the signature therein of Inder Arora are similar in both the sale deeds therefore, it could not be said that earlier sale deed dated 21.12.2012 executed by Inder Kapoor in favour of Sanjay Kapoor & Nitin Chawla was forged and fabricated one.

10. On behalf of the applicant, a copy of FIR no.0220 dated 16.12.2017, has been placed on record, which was lodged by Sanjay Kapoor against Inder Arora and his wife-Kanchan Arora and It is being contended that it was well within the knowledge of Sanjay Kapoor that, property was mortgaged with Punjab National Bank and the dues of the said bank have been paid by the applicant, accordingly, Sanjay Kapoor & Nitin Chawla were not having right and interest in the property in question. No doubt, the abovesaid FIR got registered, wherein it is being pleaded on behalf of Sanjay Arora that assurance was made by Inder Arora & his wife Kanchan Arora that the property is free from any kind of encumbrances. But, now the dues of the concerned bank are being paid and the property in question stands discharged and as per the sale deed dated 21.12.2012 Sanjay Kapoor & Nitin Chawla are having every fight and title in the said property. In such like circumstances, Section 48 of Transfer of Property Act comes into play, which is as under:

" ..... Where a person purports to create by transfer at

different times rights in of…. over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created...."

11. Further, after discharging the liability of Punjab National Bank, Sanjay Kapoor & Nitin Chawla become the owners of the said property, thus, the Section 48 of Transfer of Property Act is based on maxim, qul prior est tempore potlor est, jure, which means that one which is first in time is better in law. The transferor cannot prejudice the rights of the transferee by any subsequent dealing with the property. Hence, the subsequent transfer of the said property by Inder Kapoor in favour of the present applicants cannot stand in the way of sale deed dated 21.12.2012 executed in favour of Sanjay Kapoor & Nitin Chawla, who had mortgaged the said property with the respondent no.1 Bank i.e., property with the respondent no.1 bank i.e., Allahabad Bank on 10.09.2015, therefore, all the actions/ measures of the respondent no.1 bank taken under the SARFAESI Act, qua the said property are valid one. Accordingly, every right, title and interest has been accrued in favour of the respondent no.1 bank i.e., Allahabad Bank by way of equitable mortgage on 10.09.2015 by depositing the sale deed dated 21.12.2012, whereas after execution of the said sale deed dated 21.12.2012 no right and interest has been left with Inder Arora, therefore, he could not transfer better title to the present applicants by way of sale deed dated 26.09.2017, while creating equitable mortgage, the intention of the parties have to be seen. Hence, after depositing the sale deed with the respondent bank by Sanjay Kapoor & Nitin Chawla a valid equitable mortgage stands created. Apart that, the applicants have also not impleaded Sanjay Kapoor, Nitin Chawla *and Inder Kapoor as parties in the present matter, who were necessary parties. Hence, the present application is bad of non-joinder of necessary parties.*

12. In the light of aforesaid discussion, this Tribunal comes to conclusion that the securitization applicants failed to prove on record that they are the bonafide owners of the property in question and there is any illegality or irregularity in the actions/ measures taken by the respondent no.1 bank qua the property in question."

4. With the above observations, the Petitioners' objections were dismissed.

5. The Allahabad Bank thereafter moved before the CMM under Section 14 of the SARFAESI Act, for taking possession of the property in question. The Petitioners who were in possession of the property had sub-divided the property and had converted the same into three shops. This fact was brought to the notice of the CMM. The ld. CMM considers the entire matter and observes that the Petitioners have no right in law inasmuch as the DRT has already decided the matter in favour of the borrowers and the bank and thus, the ld. CMM permits the bank to take possession of the property in question. The observations of the CMM are as under:

"15. In view of this position, I hereby appoint Ms. Shubhangi Jain, Advocate, Enrolment No. D/2337/2017, Chamber No. 74, Civil Side, Tis Hazari Courts, Delhi, Phone no. 8587050314, as Receiver to take the physical possession of the secured asset, that is, immovable property described as "One Shop measuring 26'-6" x 30' x 6" and One Office measuring 10'-0" x 9'-0" (approx) on Ground Floor, without terrace/roof rights, out of freehold property bearing no. 842-843 (old) and new number 580-581 along with

proportionable undivided, indivisible and impartible ownership rights of the underneath land of the said shop/office, with super structure situated at Chhata Chah Shirin, Farashkhana, Shraddhanand Market, Delhi along with fixtures and furniture items".

16. The Receiver shall give possession notice to the Authorized Officer of the secured creditor the borrowers, as well as the objectors, to be served personally / speed post at least fifteen days in advance. A copy of such fifteen-days' advance notice shall also be affixed on the main door or other conspicuous part of the said property so as to bring the matter to the notice of any other person who might be aggrieved by the actions being taken. A copy of this order be also affixed along with such notice and photographs be also taken as proof of the same.

17. After expiry of the notice, the receiver shall take possession of the aforesaid property. The responsibility to identify the property shall be that of the bank officials only. The entire proceedings shall be photographed or video-recorded as per the demand of the situation. The Receiver shall be empowered to break open the locks, doors, windows, shutters and to remove any other kind of obstruction, if required, for taking possession of the property. In such eventuality, the Receiver shall prepare an Inventory of the articles found lying therein, which shall be duly signed by the witnesses. Copies of the inventory shall be handed over to the borrowers or occupiers. If present at the site, under acknowledgement and also to the Authorized Officer of the petitioner.

18. After taking over the possession of the aforesaid asset, the Receiver shall forward the same to the petitioner through its authorized *officer. The Receiver shall exercise all due care and caution and not to violate the orders of any Court or forum relating to the aforesaid property, if operating against the petitioner bank.*

19. The petitioner shall furnish all necessary details to the Receiver and would extend full co-operation for the purpose of execution of this order. The SHO of the concerned PS is also directed to provide police assistance to the Receiver to ensure smooth execution of this order.

...

22. For removal, of doubts, it is made clear that objections/applications, if any, may be preferred by any borrower, guarantor, mortgagor, lessee or any other aggrieved person before the Ld. Debt Recovery Tribunal having jurisdiction as per the amended provisions of section 17 of SARFAESI Act."

6. As per the above order, the CMM came to the conclusion that since the property was mortgaged and was a security with the Allahabad Bank, the same deserved to be auctioned. However, the CMM has also made it clear that if there are any objections to the said order by any party, the same shall be entertained before the Debt Recovery Tribunal (DRT) as per Section 17 of the SARFAESI Act.

7. The submission of Mr. A Maitri, ld. counsel for the Petitioners, is that if a third party is in possession of the property, it is only the DRT which can pass orders in respect of the possession of the property being taken over from the third party and not the CMM. He relies upon the judgment of the Division Bench in ***Gopal Krishan Bhasin v. State Bank of Patiala & Anr., [WP(C) 3003/2015, decided on 25th March, 2015]***.

8. Mr. Maitri further submits that the original documents i.e., the title documents and the link documents were all with the Punjab National Bank which are in the possession of the Petitioners and were released by the Punjab National Bank to the Petitioners when the Petitioners paid off the loan taken by Mr. Inder Arora in favour of the Petitioners. It is further urged that under Section 14, the CMM did not permit sale of the property and thus, the subsequent auction notice which has been issued by the bank is contrary to the order passed by the CMM. He submits that the property in question was earlier mortgaged with the Punjab National Bank, prior to the sale to the borrowers and the original title deeds etc., stood deposited with the Punjab National Bank. The sale to the borrowers was made subsequent to the said mortgage and thus, the Petitioners who had in fact got the property released from the Punjab National Bank and paid money to the Punjab National Bank as also to Mr. Inder Arora had a superior right in respect of the said property. It is further submitted that the borrowers had filed a suit against the Petitioners where the Petitioners' predecessor and the Petitioners have been restrained from selling the suit property.

9. Under these circumstances, it is submitted that when the civil litigation is pending, though possession of the property has been taken over by the bank, the bank ought not to be permitted to go ahead with the sale/auction of the property.

10. On the other hand, ld. counsel appearing for the bank submits that the Petitioners have no *locus standi.* The bank is not a party to the civil suit pending between the parties though the bank has sought impleadment in the said proceedings. The objection application of the Petitioners has been rejected. He further submits that the Section 14 application having been

allowed by the CMM, possession has also been taken over by the Receiver and has been vested with the bank. The bank is thus free to proceed to recover its dues by auction of the property.

11. Ld. counsel has entered appearance on behalf of the borrowers i.e. Respondent Nos. 2 to 4 and submits that the Petitioners have no rights in the property inasmuch as the predecessor-in-interest for both parties is one Mr. Inder Arora from whom the Borrowers had purchased the property in 2012. He submits that the documents in favour of the Petitioners have been executed by Mr. Inder Arora in 2017 and accordingly, Mr. Inder Arora had cheated both the sides. A criminal complaint was filed by the Borrowers due to which, Mr. Inder Arora was also kept in judicial custody for more than a year. He submits that the Petitioners have no rights in the property and thus the possession of the property has been rightly taken over by the Receiver. It is also submitted by him that a suit for possession filed by the Borrowers is pending before the Tis Hazari Courts.

12. On behalf of the borrowers, it is submitted that the present petition itself is not maintainable inasmuch as under the amended SARFAESI Act, the entire jurisdiction including at the behest of *`any person who is aggrieved'* by any order passed by the ld. CMM would lie to the DRT and no petition under Article 227 ought to be entertained. Reliance is also placed on a judgment of the Supreme Court even under the unamended Act namely ***Punjab National Bank vs. O C Krishnan & Others, 2001 (6) SCC 569,*** to argue that judicial prudence would demand that the petition under Article 227 ought not to be entertained when SARFAESI proceedings are going on before the DRT. It is further submitted on behalf of the borrowers that the sale deed which was registered in favour of the Petitioners itself, is suspect,

inasmuch as the interim order passed in the suit filed by the borrowers dated 26th September, 2017 was duly served upon the Sub-Registrar, Kashmere Gate on 27th September, 2017 and despite the said service having been effected, the Sub-Registrar had gone ahead and registered the property as on 28th September, 2017. The said sale deed being contrary to the interim order passed by the Civil Court dated 26th September 2017, is completely invalid and *void ab initio*. It is further submitted that a criminal complaint has been filed by the borrowers pursuant to which FIR has been registered being FIR No. 0220/2017. PS, Lahori Gate wherein investigation has been conducted even against the Petitioners. Reliance is placed on the proceedings of the Metropolitan Magistrate (MM) dated 20th May, 2019 titled *State v. Inder Arora and Anr.* where further investigation in respect of the Petitioners has also been mentioned. It is further submitted on behalf of the borrowers that there is a contempt case pending in the Civil Court.

13. A perusal of the findings given by the DRT in its order dated 17th September, 2018 shows that all the objections which are now sought to be raised, have all been considered by the DRT in the said order. The rights of the bank have also been crystallised by the DRT order dated 17th September, 2018 which has been passed, dismissing the objections of the Petitioners. On facts, thus, there is nothing new that has been argued on behalf of the Petitioners. The main ground on which the present petition is being pressed is that the order of the CMM is beyond the jurisdiction conferred upon him under Sections 13 and 14 of the SARFAESI Act. The argument of Mr. Maitri, ld. counsel is that the property which is in the form of three shops cannot be taken possession of, as the same is not identical to the property dealt with by the DRT and there are separate occupants in the said shops.

14. A perusal of the order dated 17th September, 2018 shows that the DRT has, in its order clearly held that the Petitioners are not the *bona fide* owners of the property. The property in question is identical. The distinction is being sought to be drawn, only because of the sub-division of the property into three shops. That would not make a difference in the CMM giving effect to the order of the DRT. The order of the DRT directing the bank to take measures towards possession/auction of the property, cannot be set at naught by stating that the possession cannot be taken from a third party.

15. Moreover, the scheme of SARFAESI Act does not permit intervention by this Court, as is sought to be raised. Under Section 17 of the SARFAESI Act, all aggrieved persons have to approach the Debt Recovery Tribunal. If the possession is wrongly taken, even then, the jurisdiction would be of the DRT. This is clear from a reading of Section 17(3) of SARFAESI Act which reads as under:

> *"**[17. Application against measures to recover secured debts].**— (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this chapter, [may make an application along with such fee, as may be prescribed,] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:*
>
> *[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]*
>
> *[Explanation.—For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of*

communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section. (1). of section 17]

...

17(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower <u>or other aggrieved person</u>, it may, by order, -

(a) declare the recourse to any one or more measures referred to in-sub-section (4) of section 13 taken by the secured creditor as invalid; and

(b) restore the possession of the secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other directions as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13."

16. The above provision has been clearly interpreted by the Supreme Court in its unamended form in ***Punjab National Bank v. O.C. Krishnan and Others, (2001) 6 SCC 569.*** In the said case, the Supreme Court has held that a Court exercising jurisdiction under Article 227 ought to refrain from exercising the said jurisdiction, especially when a specialized Tribunal is dealing with the matter under the DRT Act.

*"**6.** The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of*

> *appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. <u>Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act.</u>"*

Insofar as the issue as to whether the CMM could have directed possession of the property to be taken is concerned, the DRT having rejected the objections of the Petitioners, the CMM is merely implementing the order passed by the DRT and nothing more. The persons who are in possession of the said property (i.e., the three shops) at best claim rights only through the Petitioner and do not have any independent rights in the property. Under such circumstances, it would be impermissible to frustrate the orders passed in favour of the bank to take over possession of the property and further auction the same.

17. The order of the CMM is also clear to this effect that in para 22 where it observed as under:

> *22. For removal, of doubts, it is made clear that objections/applications, if any, may be preferred by any borrower, guarantor, mortgagor, lessee or any other aggrieved person before the Ld. Debt Recovery Tribunal having jurisdiction as*

per the amended provisions of section 17 of SARFAESI Act."

18. A perusal of this extracted portion also shows that the remedy if any of the Petitioners would only be before the DRT and not before this Court. Insofar as the submission relating to the title documents and the link documents are concerned, the scope of this Petition does not extend to the interpretation of those documents. These submissions have in any event, been considered by the DRT in its order dated 17th September, 2018.

19. There can be no doubt about the principle laid down by a ld. Division Bench of this Court in ***Gopal Krishan Bhasin (supra),*** that petitions under Article 226 can be entertained to correct jurisdictional errors. However, this Court does not find any error in the jurisdiction exercised by the ld. CMM while directing the Receiver to take possession of the property and the further auctioning of the property. The entire purpose of enacting the DRT Act and the SARFAESI Act which is to protect financial institutions and banks, would be defeated if multiple levels of challenge are permitted to be entertained in this manner. The Petitioners, have a grievance with the sale made by Mr. Inder Arora in favour of the borrowers, who thereafter mortgaged the property with Allahabad Bank. The Petitioners have availed of their remedies by filing objections before DRT which have been decided on merits. The said order dated 17th September, 2018 has not been challenged by the Petitioners. The ld. CMM is merely giving effect to the order dated 17th September, 2018 passed by the DRT. Under these circumstances, the present petition is not liable to be entertained.

20. The remedies of the Petitioners, if any, in accordance with law before the DRT or the DRAT under the SARFAESI Act are however, left open.

The next date of hearing is cancelled. None of the observations made herein would bind any independent adjudication by the appropriate forum, which the Petitioners may approach.

21. The petition and all pending applications are disposed of in the above terms.

22. *Dasti* under signatures of Court Master.

PRATHIBA M. SINGH
JUDGE

MARCH 03, 2020
Dj/A.S.
(corrected and released on 07th March, 2020)