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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 24th December, 2020

+ W.P. (C) 11175/2020

DHARMENDER KUMARPetitioner

Through: Mr. Jasmeet Singh, Advocate

versus

YES BANK LTD & ORS.Respondents

Through: Mr. Rajat Katyal, Advocate

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

JUSTICE RAJIV SAHAI ENDLAW

CM APPL. No. 34867/2020 (for exemption from filing certified copies, typed copies, margin copies of the annexures, original documents and also the dim annexures.)

1. Allowed, subject to just exceptions and as per extant rules.
2. The application is disposed of.

W.P. (C) 11175/2020, CM APPL. No.34866/2020 (for ad-interim stay)

3. The petition has been listed on urgent mentioning and has been received post court commencement hours.
4. None appeared for the respondents.

5. On perusing the facts, it transpired that respondent No.1 Yes Bank Ltd. is the only contesting party. The counsel for the petitioner was requested to contact Mr. Rajat Katyal, counsel for respondent No.1 and the matter passed over and has been taken up at 15:00 hrs.

6. The counsels have been heard.

7. The petition impugns the order dated 24th February, 2020 of the Debt Recovery Appellate Tribunal ('DRAT'), Delhi in Miscellaneous Appeal No.19/2020.

8. It is the case of the petitioner, (i) that the petitioner is the owner of the entire built up, basement, ground floor and first floor, without roof rights/terrace rights, of freehold property No.G-364 constructed over land admeasuring 160.53 sq. mts. i.e. 192 sq. yds., bearing No.G-364, Preet Vihar, Delhi; (ii) the land underneath the said property was allotted to Sh. Sant Lal Paroothi, father of the petitioner, who died on 9th April, 2015 leaving a *Will* bequeathing the property aforesaid to the petitioner; (iii) that the petitioner has been in actual physical possession of the property, uninterruptedly and continuously; (iv) that the respondent No.3 Rohit Chadha was known to the petitioner for a number of years; the respondent No.3, in March, 2018 approached the petitioner for purchasing the subject property for a total sale consideration of Rs.1,70,10,000/- and upon the petitioner agreeing thereto, paid a sum of Rs.50,00,000/- only to the petitioner by way of advance and against execution and registration of the sale deed on 13th April, 2018, issued cheques for Rs.80,00,000/- and Rs.38,39,900/- towards

balance sale consideration in favour of the petitioner; (v) that on request of the respondent No.3, the said cheques for the balance sale consideration were not presented immediately and the petitioner agreed to not present the same till the first week of May, 2018; since the entire sale consideration had not been paid, the petitioner did not deliver possession of the property sold to the respondent No.3 and it was agreed that the petitioner will continue to be in possession, till encashment of the cheques; (vi) that the respondent No.3, in the first week of May, 2018, requested the petitioner to not deposit the cheques, representing that he was suffering from financial difficulty, and the petitioner agreed to the said request; (vii) that when, even after a lapse of three months, the respondent No.3 did not consent to the presentation of the cheques, the petitioner agreed to wait further, on issuance of fresh cheques in lieu of the cheques earlier issued, believing the assurances and representations of the respondent No.3; (viii) that the petitioner ultimately deposited the said cheques when, they were returned dishonoured on 1st October, 2019 for the reason of “Funds Insufficient” in the account of the respondent no. 3; (ix) that since the entire sale consideration has not been paid, the petitioner is in the position of unpaid seller and owing to non-payment of entire sale consideration, has a first charge and lien on the property; (x) that the petitioner continued to pursue the respondent No.3 for balance sale consideration but the respondent No.3 started evading the petitioner; (xi) that from the aforesaid conduct of the respondent No.3, the petitioner realized that a fraud had been

played on him by the respondent No.3; (xii) that the petitioner came across notice dated 27th September, 2019 of the respondent No.1 Yes Bank Ltd, under Sections 6(2) and 8(6) of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act); (xiii) that it was then that the petitioner learnt that the respondent No.1 Yes Bank Ltd, in collusion with the respondent No.3, had created a mortgage of the subject property in favour of the respondent No.3; (xiv) that had the officials of the respondent No.1 Yes Bank Ltd visited the property, they would have found that the petitioner was in possession thereof; (xv) the petitioner alone has been paying electricity and water bills with respect to the property, even of after the date of the sale deed; (xvi) that the petitioner filed a civil suit in the court of the District Judge, against the respondent No.3, seeking declaration of the sale deed as bad and the reliefs of permanent and mandatory injunction; (xvii) that the petitioner is not the borrower, mortgager or the guarantor of the financial facilities, if any, granted by the respondent No.1 Yes Bank Ltd. to the respondent No.3 and/or the respondent No.2 M/s. Orion Automobile Pvt. Ltd., being a company promoted by the respondent No.3; the respondent No. 4 Deepak Kapoor is a guarantor of the loan taken by the respondents No.2 & 3 from respondent No.1 Yes Bank Ltd; (xviii) that the respondent No.1 Yes Bank Ltd, in the matter of advancing financial facilities if any, to the respondents No.2 to 4, on the security of the property aforesaid of the petitioner, has not exercised due diligence; (xix)

that the petitioner filed an application under Section 17 of the SARFAESI Act before the Debt Recovery Tribunal ('DRT'); the said application under Section 17 is still pending; (xx) that the petitioner filed an application for interim relief in his application under Section 17 of the SARFAESI Act and which application was disposed of vide order dated 24th December, 2019, permitting the respondent No.1 Yes Bank Ltd to take possession but directing that the rights of the petitioner under Section 55(4) of the Transfer of property Act, 1881 shall remain reserved; (xxi) that the petitioner, against the said order of the DRT, approached the DRAT which has vide the impugned order dated 24th February, 2020 dismissed the said appeal; (xxii) that the respondent No.1 Yes Bank Ltd. has filed an application under Section 14 of the SARFAESI Act before the Chief Metropolitan Magistrate (CMM), for taking physical possession of the property and which has been allowed; and, (xxiii) that the respondent No.1 Bank, in pursuance to the aforesaid, will any day take physical possession of the property from the petitioner and hence this petition.

9. As aforesaid, this petition is filed impugning the order aforesaid of the DRAT but which order is of more than 10 months prior to today, when this petition has come up before this court for the first time. There is no explanation whatsoever for the long delay in preferring the petition and which is indicative of the petitioner being satisfied with the order of the DRAT and having acquiesced in the order of the DRT protecting the rights, if any, of the petitioner under Section 55(4) of the Transfer of Property Act.

10. The counsel for the petitioner states that the respondent No.1 Yes Bank Ltd. also has preferred an appeal to the DRAT against the order dated 24th December, 2019 aforesaid on the application for interim relief of the petitioner, insofar as protecting the rights of the petitioner under Section 55(4) of the Transfer of Property Act.

11. The counsel for respondent No.1 Yes Bank Ltd. confirms the same and further states that the appeal preferred by the respondent No.1 Yes Bank Ltd. is still pending.

12. Since the appeal is still pending, it would not be proper for us to observe anything more.

13. We have enquired from the counsel for the petitioner, the stipulation, if any, in the registered sale deed admittedly executed by the petitioner in favour of the respondent No.3, with respect to the physical possession of the property.

14. The counsel for the petitioner states that as per the said sale deed, the physical possession of the property was handed over by the petitioner to the respondent No.3 at the time of execution and registration of the sale deed. It is however contended that on the spot possession was not handed over and it is evident from the payment of electricity and water bills of the property of a date after the execution of the sale deed by the petitioner as well as from the reports of the Surveyor of the respondent No.1 Yes Bank Ltd as well as the report of the Commissioner appointed by the Chief Metropolitan Magistrate, that in fact the possession is of the petitioner.

15. Even if that be so, the fact remains that the legal possession,

as per the sale deed, has already been delivered by the petitioner to the respondent No.3. Moreover Section 55(4)(b) of the Transfer of Property Act, only entitles an unpaid seller of immovable property to a charge on the property and to no other right.

16. The counsel for the petitioner states that it is evident from other writings also that the physical possession of the property was not handed over. However on enquiry, it is stated that none of the said writings is registered.

17. Since as per the registered sale deed, physical possession was delivered by the petitioner to the respondent No.3, the said term could have been changed/alterd only by a registered instrument and not otherwise.

18. The counsel for the petitioner has then drawn our attention to the plaint in the suit filed by the petitioner against the respondent No.3.

19. However in the said plaint/suit, the petitioner is only found to have sought the relief of cancellation of the sale deed but in the facts, as aforesaid, the said relief to us appears to be misconceived. The remedy as aforesaid, if any of the petitioner, is only under Section 55(4)(b) and reference in this respect may be made to (i) **Kaliaperumal vs. Rajagopal** (2009) 4 SCC 193; (ii) **Bunta Devi vs. Amit Talwar** 2014 SCC OnLine Del 3494 [SLP (C) 30709/2014 preferred whereagainst was disposed of on 28th October, 2016 as being settled between the parties]; (iii) **Rajinder vs. Harsh Vohra** 2009 SCC OnLine Del 3889 [SLP (C) 5977/2010 preferred whereagainst was dismissed on 12th March, 2010]; (iv) **Shashi**

Garg vs. M/s Shitiz Metals Ltd. 2014 SCC OnLine Del 2730 [RFA (OS) 128/2014 and SLP(C) 3473/2016 preferred whereagainst were dismissed on 20th August, 2015 and 10th May, 2016 respectively]; (v) ***Parshottam Prakash vs. Swati Bharara*** 2013 SCC OnLine Del 2447 [SLP (C) 35568/2013 preferred whereagainst was dismissed on 13th December, 2013]; (vi) ***Rohtash Singh vs. New Zone Buildtech Pvt. Ltd.*** 2019 SCC OnLine Del 7810.

20. The counsel for the respondent No.1 Yes Bank Ltd. has contended that in fact it is the petitioner who is in collusion with the respondent No.3. It is stated that the respondents No.2 & 3 availed of financial facilities from the respondent No.1 Yes Bank Ltd. on 25th May, 2018 i.e. soon after the sale deed dated 13th April, 2018 and the account of the respondents No.2 & 3 was declared Non-Performing Asset (NPA) on 1st May, 2019 and proceedings under the SARFAESI Act commenced as far back as on 11th June, 2019. It is further argued that the cheques towards balance sale consideration, mentioned in the sale deed, were never even banked by the petitioner and all actions stated to be taken by the petitioner in assertion of his right on the property are all of after the commencement of the proceedings under SARFAESI Act with respect to the property.

21. The counsel for the petitioner then expresses fear that even the protection granted by the DRT to the petitioner of Section 55(4)(b) of the Transfer of Property Act may be done away by the DRAT in the appeal of the respondent pending thereagainst.

22. This court cannot pass any order on the basis of fears. If the petitioner is aggrieved from the order, if any, to be passed by the DRAT, would have his remedies thereagainst. Hence, no merit is found in the petition.

23. Dismissed.

24. We have however drawn attention of the counsel for the petitioner to the fact that the petitioner, in the suit filed, is not seeking to enforce the charge and without the petitioner enforcing the charge, the petitioner would not be entitled to claim the relief of Section 55(4) either.



**RAJIV SAHAI ENDLAW
(JUDGE)**

**ASHA MENON
(JUDGE)**

DECEMBER 24, 2020

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