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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7657 OF 2022

Satishkumar Surendra Shetty,
Age- 42 years, Occu. Business,
R/o Flat No.201, Harbans Apartment,
Plot No.211, Shirvane village, Nerul,
Navi Mumbai, Tal. & Dist. Thane.

.....Petitioner

Vs.

1. The District Collector,
Thane, District Thane.
2. The Sub-Divisional Officer,
Thane, District Thane.
3. The Circle Officer,
Belapur, District Thane.
4. Tahsildar/Executive Magistrate,
Thane, District Thane.
5. Kotak Mahindra Bank Ltd.,
Registered office at 27, Bandra-Kurla
Complex,E-27, G-Block,
Bandra Kurla Complex,
Bandra (East), Mumbai
Through its Manager.

.....Respondents

Mr. Dr. Abhinav Chandrachud a/w Mr. Vinod Sangvikar, Mr. Yogesh Morbale
for Petitioner.

Mr. Rishabh Shah a/w Mr. Sanjay Anabhawane, Ms. Dimple Tejani i/by
Sanjay Anabhawane for Respondent No.5.

Smt. S. D. Vyas, "B" Panel counsel for State.

**CORAM : K. R. SHRIRAM &
A. S. DOCTOR, JJ.**

**RESERVED ON : 8th SEPTEMBER, 2022.
PRONOUNCED ON : 22nd SEPTEMBER, 2022.**

JUDGMENT:- (PER A. S. DOCTOR, J.)

1. The present Writ Petition, impugns, viz.
 - i. an order dated 9th February, 2017, (“the Impugned Order”) passed by Respondent No.2 (the District Magistrate, Thane) under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), and
 - ii. two notices dated 27th March, 2017 (“the first impugned notice”) and 9th February, 2021 (“the second impugned notice”) both issued by Respondent No. 4 (Tahsildar/Executive Magistrate, Thane District).

By the impugned order, Respondent No. 2 has directed Respondent No. 4 to take possession *inter alia* of flat numbers 201 and 301 in the Harbansh Apartment Building, situated, at Shirvane Village, Nerul, Navi Mumbai, Taluka & Dist. Thane (“the said flats”). By the impugned notices Respondent No. 4 has called upon Petitioner to hand over possession of the said flats failing which Respondent No. 4 would take forcible possession of the same.

A Brief Overview

2. The facts of the present case lie within a very narrow compass. Petitioner claims ownership and possession of the said flats. Conversely Respondent No. 5 claims that the said flats were mortgaged by one Yogesh Prabhakar Ahire and Prabhakar Namdeo Ahire (“Borrowers”) as security for a loan granted by ICICI Bank (“ICICI”) to the Borrowers. The said flats were thus secured assets as more particularly defined under the provisions of the SARFAESI Act. Respondent No. 5 is the assignee of the said loan and is thus a secured creditor as defined under the SARFAESI Act. Since the Borrowers defaulted making due repayment of the said loan, Respondent No. 5 in its capacity as secured creditor adopted steps for enforcement of its security interest under Chapter III of the SARFAESI Act. A notice under Section 13 (2) of the SARFAESI Act came to be issued by Respondent No. 5 to the Borrowers despite which Borrowers did not discharge in full their liability under the said loan agreement. It was thus that Respondent No. 5 filed an Application under Section 14 of the SARFAESI Act (“the said Application”) before Respondent No. 2 seeking the assistance of Respondent No. 2 in recovering possession of its secured assets.
3. The genesis of “the dispute” (i.e., basis of the present Writ Petition) is the stand taken by Respondent No. 5 in the Affidavit filed by

Respondent No. 5 (“the said Affidavit”) in support of the said Application. Paragraph 5 of the said Affidavit is for ease of reference reproduced below, viz.

“5. I say and submit that, in consideration to the said credit/home loan facilities granted to the Respondents by the Assignor of the Applicants, the Respondents have created security interest over the said Secured Asset by way of mortgage by deposit of the title Deeds and also deposited original title deeds of the Secured Asset with the Assignor of the Applicant with an intention to secure due repayment of the credit facilities granted to the Respondents. The Applicants further state and submit that, the Respondents have acknowledged the creation of security interest by a valid mortgage over the said Secured Asset by way of executing Declaration/s and that the Applicants is holding a valid and subsisting security interest over said Secured Asset and the claim of the Applicant is within the limitation period.”

It is Petitioners case that Respondent No. 5 has made false statements on oath in the aforesaid paragraph and “has obtained” the impugned order on the basis of these false statements. It is Petitioners case that these false statements amount to fraud and misrepresentation and it is thus that Petitioner has approached this Hon’ble Court invoking its inherent and extraordinary jurisdiction under Article 226 of the Constitution of India despite the availability of an alternate remedy.

Relevant Facts

4. Petitioner has annexed and relied upon copies of several agreements

for sale in support of its contention that Petitioner is the owner of the said flats. Petitioner also claims to be in possession of the said flats. In the year 2017 Petitioner received a copy of the impugned order as also the first impugned notice. Petitioner on receipt of the impugned notice, by its Advocates letter dated 2nd June, 2017, *inter alia*, informed Respondent No. 5 that the said flats belonged to them. It is Petitioner's case that thereafter since no action was taken by either Respondent No. 4 or Respondent No. 5, Petitioner assumed that Respondent No. 5 had accepted Petitioner's contention that it had acted on an erroneous basis.

5. Thereafter there was complete silence on the part of Respondents till such time that Petitioner received ("the second impugned notice") by which Petitioner was once again called upon to hand over possession of the said flats failing which forcible possession of the same would be taken by Respondent No. 4. Petitioner on receipt of the second impugned notice, through its advocates, addressed a letter dated 2nd March, 2021 to Respondent No. 5 and separate letters, all dated 18th March, 2022, to Respondent No. 4, to Respondent No. 3, to the Senior Inspector Nerul and to the Police Commissioner, Navi Mumbai once again pointing out that the said flats belonged to Petitioner. It was thus, in these circumstances, that Petitioner has approached this Hon'ble Court by filing the present

Writ Petition *inter alia* contending that the officials of Respondent No. 5 had acted in connivance with the Borrowers in disbursing a loan on property owned by Petitioner and thus the entire action of Respondent No. 5 was vitiated by fraud on the part of Respondent No. 5.

6. Respondent No. 5, in its Reply, apart from challenging the maintainability of the Writ Petition *inter alia* on the ground of availability of alternate remedy annexed copies of documents to evidence (a) the loan granted by ICICI to the Borrowers; (b) the assignment of the said loan in its favour; and (c) the steps taken by Respondent No. 5 under the provisions of the SARFAESI Act to recover possession of its secured assets (i.e., the said flats). The documents are:-

- i Deed of assignment dated 31st December, 2007 executed by and between ICICI and Respondent No. 5;
- ii. The loan agreement dated 31st December, 2004 entered into between ICICI and Borrowers;
- iii. Copies of title deeds of the said flats as deposited by Borrowers with IHFC (constituted attorneys of ICICI).
- iv. The demand notice dated 14th October, 2015 issued by Respondent No.5 under Section 13(2) of the SARFAESI Act.
- v. Copy of the Application filed by Respondent No. 5 under

Section 14 of the SARFAESI Act.

It was basis of the above that Respondent No.5 has shown that the claim of Petitioner is untenable and that there was no infirmity in the stand taken by Respondent No. 5 in the said Affidavit or in the impugned order.

7. After Respondent No. 5 filed its Affidavit-in-Reply, Petitioner amended the Writ Petition by adding grounds essentially to contend that (a) there was no material to establish that a valid mortgage had been created over the said flats, (b) that Respondent No. 5 had made false statements on oath to the effect that Borrower had executed a declaration that there was a valid and subsisting mortgage and (c) that the officers of Respondent No. 5 had no personal knowledge of the Borrower's intention to create a mortgage (d) there was not a single piece of documentary evidence to support the creation of an equitable mortgage.

Submissions

8. Dr. Chandrachud on behalf of Petitioner, submitted as follows:-
 - i. That a plain reading of the Declaration dated 31st December, 2004 produced and relied upon by Respondent No. 5 made evident that no equitable mortgage of the said flats had infact ever been created by Borrowers in favour of ICICI. In support of his contention he invited

our attention to clause 11 of the said Declaration which reads as follows, viz.

“11. I/We say that as on date I/we have in my/our possession, power and control only those documents, evidences and writings relating to the said property all of which are more particularly described in the Second Schedule hereunder written/hereto attached being the title deeds in respect of the said property.”

He pointed out that a plain reading of clause 11 made it evident that the original documents in respect of the said flats were in the possession of the Borrowers and had only been made available to ICICI presumably for due diligence purposes. He submitted that this was completely contrary to and destructive of the case of Respondent No. 5 that the Borrowers had created security interest over the said flats by way of a mortgage by deposit of the title deeds.

- ii. That the Declaration was a document which was non est and of no legal force and effect since the same was unregistered. He submitted that the said Declaration would require mandatory registration under Section 17 of the Indian Registration Act, 1908 since by virtue of clause 13 thereof, Borrowers had purported to create a charge over the said flats. In support of his contention, he placed reliance upon a judgment of Hon'ble Supreme Court of India in the case of ***State of Haryana Vs. Narvir Singh***¹.

¹ (2014) 1 SCC 105

Thus (a) by relying upon an unregistered declaration which purported to create a charge over the said flats; (b) by failing to point out to Respondent No. 2 that the said Declaration was unregistered and therefore unenforceable; and (c) by stating on oath that the Declaration acknowledged that there was a valid mortgage, Respondent No. 5 had obtained the impugned order by making false statements on oath which amounted to fraud and misrepresentation. Respondent No.5 therefore had approached the District Magistrate with an application under Section 14 of SARFAESI Act with a case based on falsehood and therefore should have been summarily thrown out. In support of his contention reliance was placed upon the judgment of the Hon'ble Supreme Court of India in the case of ***S. P. Chengalvaraya Naidu Vs. Jagannath (Dead) by Lrs and Others***² which is the locus classicus on the issue in which the Hon'ble Supreme Court has held as follows:-

"Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and honest in the eyes of law. Such a judgment/decreed - by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.

5. *The High Court, in our view, fell into patent error.*

² (1994) 1 SCC 1

The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean-hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax- evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court - process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

6. *The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. 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. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Exhibit B-1S) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial tantamounts to playing fraud on the court. We do not agree with the observations of the*

High Court that the appellants-defendants could have easily produced the certified registered copy of Exhibit B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.”

- iii. Additionally, and without prejudice to the above, that the present case was governed by Article 62 of the Limitation Act which provides that in a suit to enforce payment of money secured by a mortgage, the period of limitation is 12 years from the date on which the money sued for becomes due. In a mortgage by deposit of title deeds, the cause of action arises on the date on which the mortgage is made. In support reliance was placed upon the following judgments namely; ***Manoj Kumar Saha Vs. Nabadwip Chandra Poddar***³ and ***Rosy George Vs. State Bank of India***⁴. That in the instant case the deposit of title deeds was made on 31st December, 2004 and the said Application was filed before Respondent No. 2 on 6th January, 2007. That the Application having been filed beyond a period of 12 years the date on which the cause of action arose was *ex facie* barred by limitation. By stating that the claim of Respondent No.5 was not barred by limitation, Respondent No.5 has made a false statement. This is one

3 AIR 1978 Cal 111

4 AIR 1993 Ker 184

more instance of Respondent No.5's application under Section 14 of SARFAESI Act being based on falsehood.

- iv. That there was absolutely no material to establish that a valid mortgage by deposit of title deeds had been created over the said flats. That while the said loan Agreement was executed between ICICI and the Borrowers none of the officers of Respondent No. 5 who had affirmed Affidavits before Respondent No. 2 had or could have had personal knowledge about the creation of such purported mortgage.
- v. That there was not a single piece of documentary evidence which established that any mortgage by deposit of title deeds had been created in favour of ICICI by the Borrowers. The Loan Agreement which was itself unregistered merely described the said flats and that the Declaration infact recorded that the title documents in respect of the said flats were in the possession of the Borrowers. That Section 58 (f) of the Transfer of Property Act, 1882 provides that a mortgage by deposit of title deeds can only be created when the borrower delivers the title documents "*with intent to create a security thereon*". In the facts of the present case, there was nothing to show that the title documents had been deposited by Borrowers with the intention of creating an equitable mortgage. Infact from a plain reading of clause 11 of the said declaration it appeared that the

original documents were retained in the possession of the Borrowers. A Division Bench of this Hon'ble Court in the case of ***Behram Rashid Irani Vs. Sorabji Rustomji Elavia***⁵ was pleased to hold that there was “no evidence whatever of intention to connect the deposit of title deeds with a loan borrowed by the defendant from the plaintiff” and the “mere fact that there was a subsequent or contemporaneous loan” was insufficient to show any intent to create a mortgage by deposit of title deeds. In the case of *Behram Rashid Irani* (supra) the Borrower (in that case) had deposited the title deeds with the Plaintiff (in that case) pursuant to which a loan had been issued by the Plaintiff to the Borrower. In the present case, the mere factum of deposit of title deeds by the Borrower and disbursement of the loan by ICICI to Borrower was insufficient to conclude that there was a mortgage by deposit of title deeds made by Borrower in favour of ICICI. To establish that a valid mortgage had been created by the Borrower in favour of ICICI, it was incumbent upon Respondent No.5 to have produced some cogent evidence to demonstrate that the title deeds of the said flats had been deposited by the Borrower with the intention of creating a mortgage of the said flats. Additionally, that it was incumbent upon Respondent No. 5 to have established conclusively that (a) there was a valid and subsisting mortgage by

5 (1913) 38 ILR Bom 372

deposit of title deeds, and (b) that Borrowers had title to the said flats. Such an enquiry was beyond the scope of the jurisdiction of Respondent No. 2 under Section 14 of the SARFAESI Act since the jurisdiction of Respondent No. 2 under Section 14 was purely ministerial in nature. In this fact scenario, Respondent No.5 ought to have first established title and the creation of a valid mortgage by approaching the Debt Recovery Tribunal and only after having done so, adopted steps for recovery and/or realization of its secured assets.

- vi. That the present Writ Petition was not vitiated by delay and/laches since Respondents had not taken any action pursuant to Petitioners Advocates notice dated 2nd June 2017. Petitioner was under the bona fide belief that the issue had thus been resolved and that Respondents had acted based upon some misunderstanding. It was only when Respondent No. 4 issued the second impugned that Petitioner filed the present Writ Petition after addressing various letters through their advocates *inter alia* to Respondent No.5 and Respondent No.4. Thus, it cannot be said, in the facts of the present case that Petitioner is guilty of delay and laches.
- vii. That in the context of the aforesaid facts, this Hon'ble Court would have the requisite jurisdiction to interfere and exercise its extraordinary jurisdiction under article 226 of the Constitution of India despite the availability of an alternate remedy. In support of his

contention that there is no absolute bar in law from a Court exercising its jurisdiction under Article 226 of the Constitution of India in an appropriate case even when there exists an alternate remedy, viz.

- 1) *Masscorp Ltd. Vs. Cosmos Coop Bank Ltd.*⁶.
- 2) *Standard Chartered Bank Vs. V. Noble Kumar*⁷.
- 3) *Authorized Officer, Indian Bank Vs. D. Visalakshi*⁸
- 4) *Commissioner of Income Tax Vs. Chhabil Dass Agarwal*⁹.

9. Mr. Shah on behalf of Respondent No. 5 submitted as follows, viz.
 - i. That the present Petition was not maintainable as Petitioner had an alternate and equally efficacious remedy by way of filing an Application under Section 17 of the SARFAESI Act. Petitioner has admitted receipt of the impugned order as also the first impugned notice in the year 2017 itself but chose not to take steps to impugn/challenge the same. That the trend of judicial decision was against permitting Borrowers /Third Parties from filing Writ Petitions under Article 226 of the Constitution of India when an alternate remedy under Section 17 of the SARFAESI Act had expressly been provided for. The Hon'ble Supreme Court of India in the case of

6 (2018) SCC Online Bom 2579

7 (2013) 9 SCC 620

8 (2019) 20 SCC 47

9 (2014) 1 SCC 603

Kotak Mahindra Bank Limited Vs. Dilip Bhosale¹⁰ was pleased to hold as follows:-

“Before parting with the Order, we would like to observe that, this Court is consistent of the view and can be noticed from the judgment in United Bank of India Versus Satyawati Tandon & Ors (2010 (8) SCC 110) that when a remedy under the statute is available and in the instant case which indeed was availed by the Respondent/Borrower, filing of a writ petition under Article 226 of the Constitution is to be discouraged by the High Court”

In addition to the said judgment reliance was also placed upon the following judgments viz.,

- 1) ***Authorised officer, State Bank of Travancore & Anr. Versus Mathew K. C.***¹¹
- 2) ***Union Bank of India Versus Satyawati Tandon & Ors.***¹²
- 3) ***Kanaiyalal Sachdev Versus State of Maharashtra & Ors.***¹³
- 4) ***Union Bank of India Versus Panchanana Subudhi & Ors.***¹⁴
- 5) ***Commissioner of Income Tax Versus Chabil Dass Agarwal & Ors.***¹⁵

- ii. In the alternative and without prejudice, Petitioner's contentions that Respondent No. 5 had obtained the impugned order by making false statements on oath before Respondent No. 2 was entirely misplaced and devoid of any merit. The Loan Agreement and Declaration were

¹⁰ Special Leave to Appeal No.13241 of 2019

¹¹ 2018 (3) SCC 85

¹² 2010 (8) SCC 110

¹³ 2011 (2) SCC 782

¹⁴ 2010 (15) SCC 552

¹⁵ 2014 (1) SCC 603

to be read and construed conjointly and not in the disjointed and selective manner which Petitioner has done. That a proper reading of the Loan Agreement and Declaration made it clear and beyond the pale of doubt that the said flats were mortgaged as security by Borrowers for the repayment of the loan granted by ICICI to the Borrowers as could be seen from the following clauses and “Schedule 1” of the of the Loan Agreement, viz.,

“1.7 “PROPERTY” means the residential immovable property, described in the application or any time subsequently, the acquisition/construction of which is financed partly by ICICI Bank and includes:

a) in the case of a flat, the entire built-up area (and any additions thereto), the proportionate share in the common areas of the building in which such flat is/will be situated and the proportionate undivided share in the land on which the said building is situated or is being/will be built OR

b) in the case of an individual house, the house and entire plot of land on which the house is situated or on which the house will be built.”

“3. SECURITY AND CONDITIONS PRECEDENT TO DISBURSEMENT OF THE LOAN

Security -

The BORROWER shall create security and/or guarantee/s as may be considered appropriate by ICICI Bank in favour of the security trustee nominated by ICICI Bank in such manner and form as ICICI Bank may in its sole discretion require as a security for

payment of all the dues of the Borrower under this Agreement or otherwise in relation to the LOAN including principal amounts, interest, EMI, additional interest, costs, serving charges, and all other amounts due. The security may be in such manner and form as ICICI Bank may require. The security trustee shall hold the security for the benefit of ICICI Bank or its assigns.”s

“*SCHEDULE 1*” of the said loan agreement provides “*description of the PROPERTY*” and specifically mentioned the said flats.

- iii. The clauses in the Declaration filed by the Borrowers also indicate the said flats were mortgaged viz.,

“1. I/We say that I/We am/are absolutely seised and possessed of or otherwise well and entitled to the immovable property being the property more particularly described in the First Schedule hereunder written/hereto attached (hereinafter referred to as the “said property”).

2. I/We have disclosed all facts relating to the said Property to the authorised representatives of IHFC as duly constituted attorneys for and on behalf of ICICI Bank Limited and made available to them all documents of title and other deeds and writings in my/our possession and power. I/We confirm the accuracy of all information given by me/us in this regard and also confirm that all prior or subsequent information furnished by me/us in this behalf is true, complete and accurate in every way.

11. I/We say that as on date I/we have in my/our possession, power and control only those documents, evidences and writings relating to the said property all of which are more particularly described in the Second Schedule hereunder written/hereto attached

being the title deeds in respect of the said property.”

That clause 11 which was relied upon by Dr. Chandrachud to contend that the Borrowers retained possession of the title documents had to be read in conjunction with clause 2 and the Schedule of the Declaration and not independently. That clause 2 of the Declaration specifically recorded that the title documents had been made available to the duly constituted attorneys of ICICI, (namely IHFC) and the Schedule to the said Declaration specifically recorded both the “*Description of the Property*” and “*Details of the title deeds*”. That therefore on a cogent and conjoint reading of the Loan Agreement and the Declaration, it was beyond the pale of doubt that a valid mortgage by deposit of title deed had been created by Borrowers in respect of the said flats. He submitted that Respondent No.5 was in possession of the original title deeds and course of the hearing inspection of the same had also been given to Petitioner.

- iv. In so far as Petitioner’s contention that Respondent No.5 had made a false statement qua limitation the same was devoid of any merit and entirely untenable. The Borrowers account was classified as a Non Performing Asset (NPA) on 1st March, 2007 as per the relevant guidelines of the Reserve Bank of India. The demand notice was issued by Respondent No. 5 on 14th October, 2015 under Section 13 (2) of the SARFAESI Act and despite due receipt thereof, the

Borrowers had not discharged in full their liability under the said Loan Agreement. It was thus that Respondent No.5 adopted proceedings under Chapter III of the SARAFESI Act for recovery of its secured assets (i.e., the said flats). He invited our attention to the definition of “*default*” as defined in Section 2(j) of the SARFAESI Act and pointed out that on account of the non-payment of dues by Borrowers, the account of the Borrowers was declared NPA on 1st March, 2007. Therefore the Borrowers right to enforce the mortgage (security interest) arose only on and from that date. The demand notice dated 14th October, 2015 issued by Respondent No.5 was therefore within the period of 12 years mentioned in Article 62 of the Schedule to the Limitation Act.

10. Section 96 of the Transfer of Property Act provides as follows:-

“96. Mortgage by deposit of title deeds – The provisions hereinbefore contained which apply to simple mortgage shall, so far as may be, apply to mortgage by deposit of title deeds”

Thus all the provisions which applied to a simple mortgage were applicable to an equitable mortgage and therefore, the period of limitation would be twelve years from the date when the money becomes due.

11. Therefore in the facts of the present case the question of the said Application being barred by limitation did not arise at all. That Petitioners contention that limitation in the case of an equitable mortgage was twelve years from date of deposit of title deeds was ex-facie wrong and contrary to the provisions of Article 62 of Limitation Act read with Section 96 of Transfer of Property Act.

Conclusion and Reasons

12. After having heard learned counsel, perusing the documents produced and considering the case law relied upon by both sides we find that the Petitioner has failed to make out a case which warrants any interference by this Hon'ble Court, in its extraordinary jurisdiction under Article 226 of the Constitution of India for the following reasons, viz.
 - A. The entire fulcrum of Petitioners challenge is that Respondent No. 5 has obtained the Impugned Order by making false statements on oath in paragraph 5 of the said Affidavit in support of the application which amounts fraud and misrepresentation. The allegations of fraud and misrepresentation are indeed very grave and serious in nature. These allegations should not be made in a casual or flippant manner. It is well settled that any person who has approached any Court, Judicial Authority and/or Tribunal on the basis of any fraud, willful misrepresentation and/or deliberate suppression of facts must

be shown the door. However, there must be compelling material and evidence to support the allegations of fraud and misrepresentation. Pleadings of fraud cannot be based merely on suspicion and conjecture. It is therefore necessary to consider whether in the facts of the present case, Respondent No. 5 has made any false statements on oath or has made any misrepresentation in paragraph 5 of the said Affidavit based on which the Impugned Order has been passed. Respondent No. 5 has in paragraph 5 of the said Affidavit has essentially stated viz.

- i. That the Borrowers have created security interest over the said Secured Asset (i.e., the said flats) by way of mortgage by deposit of Title Deeds;
- ii. That the Borrowers have deposited original title deed of the Secured Asset (i.e., the said flats) with the Assignor (ICICI) with intention to secure due repayment of the credit facilities granted to Borrowers;
- iii. That the Borrowers have acknowledged the creation of security interest by valid mortgage over the said Secured Asset (i.e., the said flats) by way of executing Declaration/s;
- iv. That the Respondent No. 5 is holding a valid and subsisting security interest over the said Secured Asset (i.e., the said flats).
- v. The claim of the Applicant is within the period of limitation.

We find that Respondent No. 5 has on the basis of the loan agreement, declaration and the original title documents taken steps in its capacity as a Secured Creditor under the SARAFESI Act. It is the understanding of Respondent No.5 that the documents it had created security interest of the said flats by way of deposit of title deeds. That cannot be the reason to say Respondent No. 5 has made any false statements on oath in paragraph 5 of the said Affidavit. It is not as though Respondent No. 5 had filed the said Application without there being any loan agreement or without having possession of the original title deeds of the said flats or there being no assignment of the said loan in favour of Respondent No. 5. Had such a fact scenario been established, Petitioner would be justified in alleging fraud and/or misrepresentation. However we find that in the present case no such fact scenario has emerged. What therefore really emerges from the facts of Petitioners' case is that Petitioner is essentially claiming title to the said flats. Whether the documents relied upon by Respondent No.5 establishes security interest by way of mortgage by deposit of title deeds or Borrowers deposited the title deeds of the said flats with ICICI with intention to secure due payment or to create a valid mortgage etc. is not something which can be decided and/or examined by this Hon'ble Court in its

jurisdiction under Article 226 of the Constitution of India or for that matter by Respondent No.2 exercising jurisdiction under Section 14 of the SARFAESI Act. This being so, it was incumbent upon Petitioner to have availed of the appropriate remedy to either establish its title and/or challenge the impugned order or both. This cannot be done by this Court in its extraordinary jurisdiction under Article 226 of the Constitution of India.

B. Additionally, even both the other contentions raised by Petitioners (a) that the title documents in respect of the said flats were retained with the Borrowers and (b) that there was nothing to demonstrate that Borrowers had deposited the title documents “*with intent to create a security thereon*” are also beyond the scope of the jurisdiction of Respondent No.2 under Section 14 of the SARAFESI Act. It is well settled that the jurisdiction of Respondent No. 4 when considering an Application under Section 14 of the SARAFESI Act is purely ministerial in nature and Respondent No.2 does not have the jurisdiction “*to decide*” any issues or for that matter even hear a Borrower and/or Third Party. The scope of the jurisdiction under Section 14 of the SARFAESI Act as has been reiterated by this Hon’ble Court in the case of ***Phoenix ARC Private Limited vs The State of Maharashtra & Ors***¹⁶. Petitioner has accepted this position in the

16 2022 SCC OnLine Bom 1710

Petition as also in the course of arguments advanced. Proceedings under Section 14 of the SARFAESI Act being ex-parte in nature would necessarily put a higher onus on the Applicant to ensure strict compliance with both content (i.e., truth thereof) and form of the said application and procedure contemplated under Section 14 of the SARFAESI Act. If there is even the slightest hint of an applicant being untruthful in either the content or form prescribed under Section 14 of the SARFAESI Act, the same would render the Application susceptible to challenge by way of Writ Petition. In any event, in the present case we find it most curious that the Petitioner having on the one hand questioned the very creation of a valid mortgage has on the other hand failed and neglected to join as Respondents the Parties between whom the mortgage was created, namely the Borrowers and ICICI . Having said that, we find Petitioner contention that Borrowers had retained possession of the original title deeds of the said flats to also be entirely misplaced and untenable and contrary to a proper reading of the loan agreement and the declaration. In any event, the same has been belied by Petitioner's Advocate being given and taking inspection of the original title documents produced by Respondent No.5. Insofar as Petitioner's contention that there was nothing to show and/or demonstrate the intention of creating a mortgage by Borrowers we find that the same is also beyond the scope of the

jurisdiction of Respondent No.2 under Section 14 of the SARAFESI Act.

- C. Insofar as the said Application being barred by limitation we find that that same is also misplaced and devoid of merit. Respondent No.5 has taken steps in its capacity as a secured creditor under the provisions of the SARFAESI Act to recover its dues. Respondent No. 5 has set out that its right to enforce the said mortgage/security interest arose only when the borrower's account turned Non Performing Asset (NPA) which was on 1st March, 2007. Though the demand notice was issued after inordinately long time, i.e., on 14th October, 2015 the same was within the period of 12 years when Respondents right to enforce the mortgage was valid and subsisting. Thus Petitioner's contention that the claim was beyond limitation is also entirely untenable and in any event not one which would amount to being a false statement. In any event, the same is a ground which could be raised as a ground of appeal in the alternate remedy provided for in law.

13. In the circumstances and for the reasons stated above we find no merit in this Petition and the same is accordingly dismissed. We make it clear that the observations in the present Petition have been made only in the context of considering the maintainability of the said present Writ Petition. The observations shall not come in the way

of Petitioner should Petitioner choose to adopt appropriate proceedings to either establish its title to the said flats and/or challenge the impugned order.

14. Petition disposed. No order as to costs.
15. Dr. Chandrachud seeks continuation of the stay for Petitioner to take such steps as advised. Mr. Tejani on instructions states that before Respondent No.1 takes any action, they shall give minimum 15 working days notice. Statement accepted as an undertaking to this Court.

(A. S. DOCTOR, J.)

(K. R. SHRIRAM, J.)