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

WRIT PETITION NO. 77 OF 2021

Phoenix Asset Reconstruction
Company Private Limited and anr. : Petitioners.

Versus

The Recovery Officer,
Co-operative Department, Mumbai and ors. : Respondents.

WITH
INTERIM APPLICATION NO. 5254 OF 2022
IN
WRIT PETITION NO. 77 OF 2021

Mr. Nishant Rana a/w Ms. Chinmayee Ghag i/by Zastriya for Petitioners.
Mr. Harish R. Pawar for Respondent Nos. 1 & 2.

CORAM : DHIRAJ SINGH THAKUR &
ARIF S. DOCTOR, JJ.
DATED : 14th June, 2023

P.C

1 The present Petition impugns two Notices one dated 24th April 2019 and the other dated 4th May 2019 ("the Impugned Notices") issued by Respondent No.2 purporting to attach flats which are the *secured assets* of the Petitioner under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2022 ("the SARFAESI Act"). The said flats have been attached under the provisions of the Maharashtra Co-operative Societies Act, 1960 and the Rules, 1961

framed thereunder for the dues of Respondent No. 4, 7 and 8 which are stated to be owed to Respondent No. 2.

2 The relevant facts, which are not disputed, are as follows, viz.

i. In the year 2015 Respondent Nos 3 to 8 ("the Borrowers") had availed of certain credit/loan facilities from one Religare Finvest Ltd. ("Religare"). The borrowers to secure the said credit/loan facilities executed a Memorandum of Entry dated 2nd February 2016 recording the mortgage by way of deposit of title deeds of the following flats in favour of Religare viz. (i) Flat No.1401, Raviraj Palms, B Wing, Building 4, Prince City Complex, Off. Mira Bhayander Road, Mora Road (East), Mumbai 400 607 and (ii) Flat Nos.301, 302 Shanti Garden Co-op. Hsg. Soc. Ltd., Sector-4 Building No.6, Mira Road (East), Mumbai 401104. Religare duly registered the creation of said security interest in respect of the said flats with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India ("the CERSAI") on 2nd February 2016.

3 It appears that thereafter the Borrowers committed defaults in due repayment of the credit/loan facilities on account of which the account of the borrowers was declared as a Non-Performing Asset ("NPA") on 31st July 2017 by Religare.

4 On 11th October 2017 Religare issued to the Borrowers a demand notice under Section 13(2) of the SARFAESI Act. Religare thereafter issued a public notice on 23rd December 2017 under the provisions of SARFAESI Act.

5 Thereafter by virtue of Deed of Assignment dated 31st March 2018, Religare assigned the said loan account of the borrowers to the Petitioners.

6 The Impugned Notices were thereafter issued by Respondent Nos. 1 and 2 and took possession of the said flats before the Petitioners could take possession of the said flats in their capacity as secured lenders.

7 The Petitioners therefore by their Advocate's letter dated 8th May 2019 brought to the notice of Respondent Nos.1 and 2 that the purported attachment of the said flats was illegal and contrary to the provisions of the SARFAESI Act more particularly Sections 26-B, 26-C and 26-D. However, since Respondent Nos.1 and 2 failed and neglected to respond to this notice nor lift the said attachment, the Petitioners were left with no alternative but to file the present Writ Petition.

8 Learned Counsel for the Petitioners submitted that the Impugned

Notices were bad in law since the same were issued despite the fact that the said flats were the secured assets of the Petitioners under the provisions of the SARFAESI Act. He submitted that the Petitioners were secured creditors who had a first charge and an unfeterred right to proceed in respect of realising the said secured assets. Learned Counsel submitted that the Petitioners had in terms of Sections 26-B, 26-C and 26-D of the SARFAESI Act had registered their security interest in respect of the said flats with the CERSAI on 2nd February 2016. He submitted that in terms of Section 26-C of the SARFAESI Act any registration of transactions of creation, modification or satisfaction of security interest by a secured creditor or other creditor or filing of attachment orders is deemed to constitute a public notice from the date and time of filing of particulars of such transaction with CERSAI. Learned Counsel therefore submitted that Respondent Nos.1 and 2 could never have issued the Impugned Notices three years after they were aware or were deemed to be aware of the fact that the said flats were the secured assets of the Petitioners. He submitted that the action of Respondent Nos.1 and 2 was patently bad in law and was thus liable to be set aside. He pointed out that despite this fact being brought to the knowledge of Respondent Nos. 1 and 2, they had not withdrawn the Impugned Notices.

9 Learned Counsel then without prejudice to above submitted that in the facts of the present case it was not in dispute that the Petitioners were secured creditors and that the claim of Respondent Nos.1 and 2 was that of

an unsecured creditor. He submitted that the law was well settled i.e. that the claim of a secured creditor would prevail over that of an unsecured creditor. He pointed out that the Impugned Notices proceeded to recover the amounts mentioned therein as being arrears of land revenue and that it was well settled that the claim of a secured creditor under the provisions of the SARFAESI Act would take precedence to recover of an amount as arrears of land revenue. In support of his contention, he placed reliance upon the following judgments:-

1. ***Tamil Nadu Mercantile Bank Ltd, Chenai v/s. Rangaswamy & Anr.***[1]
2. ***Marathwada Gramin Bank v/s. Maharashtra State Cooperative Bank Ltd. & ors.***[2]
3. ***ASREC (India) Limited v/s. The State of Maharashtra and ors.***[3]
4. ***State Bank of India and ors. v/s. Income Tax Officer***[4]
5. ***State Bank of India v/s. Tax Recovery Officer (TDS) and ors.***[5]

Basis the above, Learned Counsel submitted that the Impugned Notices must be set aside and that the possession of the said flats be handed over to the Petitioners.

1 AIR 2010 Madras 165
2 AIR 2007 Bombay 92
3 MANU/MH/3491/2019
4 MANU/OR/0855/2016
5 MANU/TN/4408/2019

10 *Per contra*, Mr. Pawar, Learned Counsel appearing on behalf of Respondent Nos. 1 and 2, submitted that the Petition was not maintainable since the Petitioners had an alternate remedy by filing objections before Respondent No.1 as contemplated under Rule 107(19)(a) of the Maharashtra Cooperative Societies Rule 1961.

11 He then without prejudice submitted that the action taken by Respondent Nos. 1 and 2 was in accordance with law. He then pointed out that Respondent Nos.4, 7 and 8 were the Directors of one M/s. Matrubhoomi Inn Ltd. who had availed of loan from Respondent No. 2. He submitted that Respondent Nos. 4, 7 and 8 had personally guaranteed the repayment of the said loan and, since they had defaulted in making repayment of said loan, Respondent Nos.1 and 2 had filed recovery proceedings under the provisions of the Maharashtra Co-operative Societies Act. Learned Counsel then pointed out that Respondent Nos.1 and 2 had not acted arbitrarily but had issued the Impugned Notices pursuant to the recovery proceedings that had filed on account of the failure of Respondent Nos.4, 7 and 8 to comply with the said orders passed in the recovery proceedings.

12 We have heard Learned Counsel for the parties, perused a copy of the Petition and Affidavit in Reply as also the case law cited.

13 While Respondent Nos. 1 and 2 have sought to justify their action

on the basis of the fact that the same was taken pursuant to the recovery proceedings filed against Respondent Nos.4, 7 and 8, there is absolutely no denial to the fact that the Petitioners are infact secured creditors under the provisions of the SARFAESI Act. Equally, there is no denial to the fact that the said flats are the secured assets of the Petitioners as defined under the SARFAESI Act. There is also no denial to the fact that the Petitioners being secured creditors have a superior right in respect of their dues and the said secured assets. It is also not in dispute that Religare from whom the Petitioners had derived their rights had in the year 2017 i.e. well before the Impugned Notices, had sought to enforce their rights as secured creditors to realize the security by issuing a demand notice under Section 13(2) of the SARFAESI Act. Despite this fact Respondent Nos.1 and 2 have proceeded to issue the Impugned Notices as also take physical possession of the said flats. The Impugned Notices and consequent action of taking possession of the said flats is therefore patently bad in law since Respondent No. 2 is clearly an unsecured creditor. Therefore, the Impugned Notices and the action of Respondent Nos.1 and 2 are clearly bad in law and liable to be set aside

14 For the reasons aforesaid, we therefore allow the present Writ Petition in terms of prayer clauses (a) to (e) which read thus :-

> (a) *this Hon'ble Court be pleased to issue Writ of Certiorari or any other appropriate writ or direction in the nature of the Certiorari proper for the nature of the case of the Petitioners and to go into the legality and proprietary*

thereof and to quash and/or set aside the Impugned Notices dated 24th April, 2019 and 4th May, 2019 (Exhibit A-1 and A-2) hereof;

(b) this Hon'ble Court be pleased to issue Writ of Mandamus or a writ in the nature of Mandamus or any other appropriate Writ, Order or direction calling for the records and proceedings resulting in issuance of the Impugned Notices dated 24th April, 2019 and 4th May 2019 passed by the Respondent No.1 and 2 (EXHIBIT "A-1" and "A-2") and after examining the legality, validity and propriety thereof be pleased to quash and set aside the Impugned Notices dated 24th April, 2019 and 4th May 2019 passed by the Respondent No.1 and 2 (EXHIBIT "A-1" and "A-2") and quashed and stuck down the said action of physical possession/attachment in pursuance to the impugned notices.

(c) that this Hon'ble Court be pleased to pass an Order of permanent injunction, restraining the Respondent Nos.1 and 2 from taking any coercive steps pursuant to the possession of the said properties.

(d) That this Hon'ble Court be pleased to pass an order of permanent injunction, restraining the Respondent Nos.1 and 2 from creating third party rights in respect of the said properties.

(e) That this Hon'ble Court be pleased to direct the Respondent Nos.1 and 2 to handover peaceful possession of the said properties to the Petitioners herein;

15 In view of this order, nothing survives for consideration in the Interim Application, and the same is disposed of accordingly.

[ARIF S. DOCTOR, J] **[DHIRAJ SINGH THAKUR, J]**