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

Date of decision: 23.11.2023

\+ **CM(M) 1706/2023**

CHOLAMANDALAM INVESTMENT AND FINANCE COMPANY LTD ..... Petitioner

Through: Mr. Kirti Uppal, Senior Advocate with Mr. Siddharth Chopra, Advocate

versus

RISHI PAL SHARMA & ORS. ..... Respondents

Through: Mr. Samrat Nigam and Mr. Amit Punj, Advocates

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\+ **CM(M) 1707/2023**

CHOLAMANDALAM INVESTMENT AND FINANCE CO. LTD. ..... Petitioner

Through: Mr. Kirti Uppal, Senior Advocate with Mr. Siddharth Chopra, Advocate

versus

KAUSHALYA DEVI & ORS. ..... Respondents

Through: Mr. Samrat Nigam and Mr. Amit Punj, Advocates

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CORAM:
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

<u>J U D G M E N T</u>

MANMEET PRITAM SINGH ARORA, J (ORAL):

CM APPL. 56304/2023 in CM(M) 1706/2023

1. This Petition filed under Article 227 of the Constitution of India impugns the order dated 16.09.2023 passed by CCJ-Cum-ARC (Central), Tis Hazari, Delhi ('Trial Court') in CS SCJ No. 1819/2023, titled as **Rishi Pal Sharma v. Cholamandalam Investment and Finance Company Ltd.,** whereby the Trial Court granted an ex-parte ad-interim injunction restraining the defendant no.1 (i.e., the Petitioner herein) from taking possession of the shop no. 3493, measuring 13.29 sq. mtrs. forming the part of property bearing no. 3485-3496, ward no. 6, Chawari Bazar, Chowk Hauz Qazi, Delhi ('subject property').

1.1. The Petitioner herein is the defendant no.1 and the Respondent No.1 is the plaintiff before the Trial Court.

1.2. The Petitioner herein sanctioned Home Equity Loan of Rs. 1,49,00,000/- in favour of Respondents in 2019. As security against the said loan the Respondent No.1 executed a mortgage deed qua the subject property on 09.08.2019, which was presented for registration before the Sub-Registrar III, New Delhi ('mortgage deed').

1.3. The Respondents defaulted in repayment of the above-said loan and the Petitioner thereafter initiated action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act') and issued a demand notice dated 20.09.2022 under Section 13 (2) of the SARFAESI Act, 2002.

1.4. The Petitioner thereafter preferred an application under Section 14 of the SARFAESI Act, 2002 in MA No. 51/2023 before the appropriate Court, seeking directions to appoint a receiver to take the physical possession of the properties of Respondent No.1. The said application was allowed by the CMM, Central, Tis Hazari Courts, Delhi ('concerned Court') vide order 04.03.2023.

1.5. The Court receiver issued notice dated 12.03.2023 for taking physical possession of the subject property, scheduled for 30.03.2023.

1.6. As per the record, the Respondent No.1 challenged the notice issued by the receiver by filing an application under Section 17 of the SARFAESI Act, 2002 bearing S.A. No. 184/2023, seeking setting aside of the possession notice dated 12.03.2023 issued by the Court receiver. The said application was listed before the Debt Recovery Tribunal-I ('DRT-I') on 29.03.2023 and the Respondents made a statement that entire overdue amount of Rs. 19.50 Lakhs will be deposited with the Petitioner on the same day.

It would be pertinent to note that Respondent No.1 has disputed filing of this application before DRT-I by contending that he has not signed the said application.

1.7. As per the Petitioner, the Respondents herein acted upon the order dated 29.03.2023 and paid the overdue amount of Rs. 19.50 Lakhs with the Petitioner, but failed to get their loan account regularized, which as per the Petitioner was overdue and the Respondents defaulted in making the due payment.

1.8. The Petitioner thereafter moved an application before the concerned Court seeking direction to the Court receiver to take steps in terms of the earlier order dated 04.03.2023. The said application was allowed by the concerned Court vide order dated 18.08.2023. The Court receiver issued fresh possession notices dated 25.08.2023 qua the properties of the

Respondents.

1.9. In the meanwhile, the Respondent No.1 filed a Civil Suit bearing No. 1819/2023 against the Petitioner herein seeking declaration, mandatory and permanent injunction on 15.09.2023 alleging that the Petitioner herein had obtained the mortgage of the subject property by playing fraud, cheating and by committing forgery. In this suit, the Trial Court passed the impugned order restraining the Petitioner herein from taking the possession of the subject property.

1.10. The Petitioner has filed the present petition assailing the impugned order dated 16.09.2023 on the ground that the Trial Court has no jurisdiction to entertain the suit in view of the exclusive jurisdiction of DRT.

2. This Court after hearing the parties on 19.10.2023 stayed the operation of the impugned interim order dated 16.09.2023 passed by the Trial Court.

3. The Respondent No.1 thereafter filed a CM APPL 56304/2023 in the present petition under Section 114 read with Order 47 of the Code of Civil Procedure, 1908 ('CPC') seeking recall of the order dated 19.10.2023 passed by this Court.

4. Mr. Kirti Uppal, Senior Advocate and Mr. Siddharth Chopra, Advocate addressed arguments on behalf of the Petitioner. The learned counsel for the Petitioner states that with the application CM APPL. 56304/2023 the Respondent No.1 has placed on record a sale deed dated 09.08.2019 and has contended that he was present before the concerned Sub-Registrar III, New Delhi on 09.08.2023 for the registration of the said sale deed and was not aware about the presentation of the mortgage deed relied upon by the Petitioner.

4.1. He states that the averments made by the said Respondent No.1 in the application CM APPL. 56304/2023, filed on 30.10.2023 and the subsequent additional affidavit dated 06.11.2023 are at complete variance with each other. He states that the Respondent No.1 has changed his stand entirely with respect to the facts pertaining to execution of the mortgage deed dated 09.08.2019.

4.2. He states that the facts pleaded in the additional affidavit dated 06.11.2023 and reliance placed on the sale deed dated 09.08.2019 is an entirely new case set up by Respondent No.1 and is an afterthought. He states that no such facts were pleaded in the civil suit.

4.3. He states that the mortgage deed, which bears the date of 09.08.2019 was executed by Respondent No.1 and was presented for registration before the Sub-Registrar III, New Delhi on 13.08.2019. He states that this is duly borne out from the contents of the said deed.

4.4. He states that the original conveyance deed of the mortgage property has been deposited with the Petitioner herein in the year 2019 and the Respondent No.1 has failed to explain this material fact in its pleadings.

4.5. He states that the Respondent No.1 should be directed to avail his statutory remedy under the SARFAESI Act and he states that Petitioner will not raise any objection on the ground of limitation if an appropriate application is filed before DRT within the time granted by this Court.

4.6. He states that Respondent No.1 has in fact, filed an application before DRT; however, in the suit Respondent No.1 has falsely disputed the filing of the said application by denying his signatures on the said pleadings.

5. In reply, Mr. Samrat Nigam, learned counsel for the Respondent No.1 states that a perusal of the averment in this petition and more specifically at

paragraph 4 (3) would show that the Petitioner herein has pleaded that the mortgage deed is dated 09.08.2019. He states that in this petition, there is no averment that the mortgage deed was presented before the Sub-Registrar III, New Delhi for registration on 13.08.2019.

4.1 He states that the Respondent No.1 denies that he was present before the Sub-Registrar III, New Delhi on 13.08.2019 for presentation of the mortgage deed. He states that the contents of the mortgage deed which records Respondent No.1's presence before the said Sub-Registrar on 13.08.2023 along with the photographs captured in 'real time' are not admitted.

4.2 He states that the Respondent No.1 visited the office of the Sub-Registrar III, New Delhi only on 09.08.2019 for the purpose of execution of the sale deed dated 09.08.2019. He states that it would be a matter of investigation as to how the alleged mortgage deed dated 09.08.2019 records his presence before the Sub-Registrar III on 13.08.2019 and along with the photograph in the 'real time'.

4.3 He states that the Petitioner herein has recourse to statutory remedy of filing an appeal against the impugned order dated 16.09.2023 or filing an application under Order 39 Rule 4 CPC and therefore, this petition filed under Article 227 of the Constitution of India is not maintainable. He relies upon the judgment of this Court ***Times Now Navbharat vs Naresh Baliyan, 2023 SCC OnLine Del 5217.***

4.4 He further relies upon the judgment of Supreme Court in ***Mardia Chemicals Ltd. & Ors. vs Union of India, (2004) 4 SCC 311,*** to contend that the jurisdiction of the civil court is not ousted by the provisions of Section 34 of the SARFAESI Act. He states that in view of the dispute raised by the Respondent No.1 with respect to the mortgage deed and allegations of fraud, the said suit is maintainable.

4.5 He fairly concedes that the contents of the CM APPL. 56304/2023 and more specifically at paragraph 11 therein are incorrect. He states that the Respondent No.1 instead relies upon the contents of the affidavit dated 06.11.2023.

6. This Court has considered the submissions of the counsel for the parties and perused the record.

7. The registered mortgage deed placed on record as Annexure 3 bears the date of 09.08.2019. It records that the said deed was presented for registration in the Office of Sub-Registrar III, New Delhi on 13.08.2019. The mortgage deed includes the photograph of the Respondent No.1 and the attesting witnesses captured in 'real time'. The said deed has been registered at no.7352 in book no.1, volume no.18,048 at pages 26 to 31.

7.1. The said mortgage deed bears the signatures of the mortgager i.e., Respondent No.1 and his fingerprints.

8. The Petitioner has contended that the original conveyance deed has been deposited with the Petitioner at the time of the execution of the loan documents on 31.07.2019 and the mortgage deed on 09.08.2019. The Respondent No.1 has not disputed that he does not have the custody of the original conveyance deed pertaining to the subject property.

9. The stand taken by Respondent No.1 in the additional affidavit dated 06.11.2023 is admittedly a new stand which is beyond the pleadings in the suit.

9.1. Further, Respondent No.1's stand in CM APPL. 56304/2023 is admittedly incorrect and has therefore been withdrawn by Respondent No.1.

10. This Court is refraining from determining the merit of the defence/stand taken by Respondent No.1 in the affidavit dated 06.11.2023 so as to not prejudice his defence. However, it would be sufficient to note that the shifting stands taken by Respondent No.1 dissuades this Court from accepting the defence of the Respondent No.1 in this extraordinary writ jurisdiction.

11. This Court is, therefore, of the considered opinion that the findings returned by this Court on 19.10.2023 that in view of the registration of the mortgage deed dated 09.08.2019 (Annexure P-3) there is a presumption of the due and valid execution of the said deed before the Sub-Registrar III, New Delhi, is duly borne out from the facts of this case.

12. The Supreme Court while carving out exception with respect to the maintainability of a civil suit in ***Mardia Chemicals Ltd.*** (supra) at paragraph 80.5 held as under:

> *…….5. As discussed earlier in this judgment, we find that it will be **open to maintain a civil suit in civil court**, within the **narrow scope** and **on the limited grounds** on which they are permissible, **in the matters relating to an English mortgage** enforceable without intervention of the court.*
>
> (Emphasis supplied)

12.1. In the light of the above finding of the Supreme Court it is apparent that the said exception will only be attracted in the matters relating to an 'English mortgage'.

12.2. In order to appreciate as to whether the mortgage deed in the present case is an English mortgage or not, it is imperative to refer to the decision of th Supreme Court in the case of ***Raj Kishore Thr LRs v. Prem Singh & Ors., (2011) 1 SCC 657***, wherein the Supreme Court at paragraphs 21 and 22 held as under:

> *21. A plain reading of the above would show that for a transaction to constitute an* **English mortgage** *the following essential conditions must be satisfied:* ***(1) The mortgagor must bind himself to repay the mortgage money on a certain date. (2) The property mortgaged should be transferred absolutely to the mortgagee. (3) Such absolute transfer should be made subject to the proviso that the mortgagee shall reconvey the property to the mortgagor upon payment by him of the mortgage money on the date the mortgagor binds himself to pay the same.***
> *22. It is* ***only in cases where all the three requirements indicated above are satisfied that the transaction constitutes an English mortgage and not otherwise.*** *The case at hand does not satisfy all the three requirements mentioned above. In particular the first requirement whereunder the mortgagor binds himself to repay the mortgage money on a certain date is not satisfied in the instant case. We say so because the sale deed executed by the appellant-plaintiffs does not contain any such stipulation binding the seller to pay the amount of Rs. 6000 on a certain date. As a matter of fact, the sale deed does not even remotely suggest that the transaction is in the nature of a mortgage or that there is any understanding or agreement between the parties whereunder the property sold has to be retransferred to the seller. The only other document which could possibly contain such a stipulation binding the mortgagor to return the mortgage money is the agreement for reconveyance. Significantly, this document is signed only by Prem Singh the purchaser and not by the seller.*
>
> (Emphasis supplied)

12.3. A perusal of the mortgage deed dated 09.08.2019, in the facts of this case, would show that *firstly* in the said deed no 'certain date' is provided for repayment of the loan amount by the Respondent No.1, *secondly* there is no absolute transfer of the subject property and *lastly* since there is no absolute transfer in favour of Petitioner herein by the Respondent No.1, there exists no clause with respect to the re-transfer of the subject property back to Respondent No.1 in the mortgage deed dated 09.08.2019. In the facts of this case, therefore, the mortgage is not English mortgage but is a Simple mortgage as contemplated in Section 58(b) of the Transfer of Property Act, 1882.

12.4. This distinction is not without significance for in case of a Simple mortgage the mortgagee has to seek court intervention for enforcing the mortgage. In the facts of this case as well, the Petitioner herein approached the concerned Court i.e., CMM for taking possession of the subject property through court Receiver. In addition, the statute provides statutory remedy to the Respondent No.1 to assail the said action under the SARFAESI Act.

12.5. On the contrary in the case of an English mortgage, since the mortgagee can deal with the property without court intervention the Supreme Court recognised an exception for such a mortgage in the exceptional circumstance mentioned therein.

12.6. In the light of above discussion this Court is unable to accept the contention of the Respondent No.1 that the facts set out in this case which pertains to a Simple mortgage falls within the exception as contemplated by the judgment of the Supreme Court in ***Mardia Chemicals Ltd.*** (supra) so as to entitle the Respondent No.1 to maintain a civil suit.

12.7. This Court is of the opinion that the Respondent No.1 has a statutory remedy under SARFAESI Act. The Respondent No.1 is granted liberty to approach the appropriate authority under the SARFAESI Act within a period of ten (10) days [on or before 04.12.2023] and until then the Petitioner herein is directed to not to take physical possession of the mortgage property.

12.8. This Court is satisfied that in view of the bar of Section 34 of the SARFAESI Act, the Trial Court did not have jurisdiction to pass the impugned order. Section 34 of the SARFAESI Act reads as under:

> ***Section 34. Civil court not to have jurisdiction***.
> ***No civil court shall have jurisdiction*** *to entertain any suit or proceeding* ***in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered*** *by or under this Act to determine and* ***no injunction***

*<u>**shall be granted** by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993</u> (51 of 1993).*

(Emphasis supplied)

12.9. The bar of Section 34 of the SARFAESI Act is well recognised and in this regard it would be relevant to refer to paragraph 50 of the judgment of the Supreme Court in ***Mardia Chemicals Ltd.*** (supra) which reads as under:

*"50. It has also been submitted that an appeal is entertainable before the Debts Recovery Tribunal only after such measures as provided in sub-section b (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debts. Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr Salve, one of the counsel for the respondents that there would be no bar to approach the civil court. Therefore, it cannot be said that no remedy is available to the c borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. <u>A full reading of Section 34 shows that the **jurisdiction of the civil court is barred** in respect of matters which a Debts Recovery Tribunal or an Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act".</u> <u>That is to say, the prohibition covers even matters which can be taken d cognizance of by the Debts Recovery Tribunal though no measure in that direction-has so far been taken under-sub-section (4) of Section 43.</u> It is further to be noted that <u>**the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal**</u>. <u>**Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus e applies to all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13**</u>."*

(Emphasis supplied)

12.10. In this regard, this Court in its order dated 19.10.2023 has already referred to the order passed by a Coordinate Bench in W.P.(C) 9064/2019 dated 23.08.2019 titled as ***Punjab National Bank v. Shyam Goel & Ors.*** and the order passed by the Division Bench in LPA No. 570/219 dated 25.04.2022, titiled as ***Shyam Goel & Ors. v. Punjab National Bank & Anr.***

The Division Bench held that the suit itself was wrongly instituted and dismissed the suit.

12.11. The reliance placed by the Respondent No.1 on the judgment of this Court in ***Times Now Navbharat v Naresh Baliyan*** (supra) is erroneous. In the said judgment this Court held that the impugned order passed by the concerned civil court therein was within its jurisdiction. The challenge to the impugned order was on the merits. It was in these circumstances, that this Court declined to entertain the petition and directed the petitioner therein to avail the statutory remedies under the CPC.

However, in this matter this Court has returned a finding that the impugned order dated 16.09.2023 is without jurisdiction.

13. Accordingly, the CM APPL. 56304/20213 filed by the Respondent No.1 is dismissed.

14. This petition is allowed and the order dated 16.09.2023 is set aside while reserving liberty to the Respondent No.1 to avail his statutory remedy as recorded hereinabove. It is clarified that this order shall not be construed as an expression of an opinion on the merits of the rival contentions of the parties and the same shall be decided by the appropriate forum in accordance with law. All rights and contentions of the parties are left open.

15. In view of the finding of this Court that the suit filed before the civil court is not maintainable, in view of the order dated 25.04.2022 passed by the Division Bench in LPA No. 570/2019 titled as ***Shyam Goel*** (supra) said suit i.e., CS SCJ No. 1819/2023, titled as **Rishi Pal Sharma v. Cholamandalam Investment and Finance Company Ltd.,** itself is dismissed.

16. Pending application(s) if any stands disposed of.

CM APPL. 56443/2023 in CM(M) 1707/2023

17. This Petition filed under Article 227 of the Constitution of India impugns the order dated 16.09.2023 passed by CCJ-Cum-ARC, (Central), Tis Hazari, Delhi ('Trial Court') in CS SCJ No. 1818/2023, titled as **Kaushalya Devi v. Cholamandalam Investment and Finance Company Ltd.,** whereby the Trial Court granted an ex-parte ad-interim injunction restraining the defendant no.1 (i.e., the Petitioner herein) from taking possession of property bearing No. VI/1614 (old number), VI/3161 (New Number), Mohalla Dassan, Phatak Nanak Chand, Delhi ('subject property')

18. The arguments of the parties were common in both the petitions. However, there was an additional fact mentioned in this petition which has specific relevance to this matter.

19. In this petition as well, Respondent No.1 has withdrawn the contents of averments made in CM APPL. 56443/2023 and more specifically at paragraph 11 therein. Respondent No.1 has instead elected to place reliance on the contents of the affidavit dated 06.11.2023 sworn by her i.e., Respondent No.1.

20. The subject matter of this petition is the registered mortgage deed dated 09.08.2019 executed by Respondent No.1 i.e., Mrs. Kaushalya Devi with respect to the property bearing no, VI/1614 (old number) and 3161 (New Number), admeasuring 88 sq. Yds., situated at Mohalla Dassan, Phatak, Nanak Chand, Ward No. 6, Hauz Quazi Delhi ('subject property').

20.1. The said mortgage deed was presented before the Sub Registrar III, New Delhi on 09.08.2019 and the photographs of Mrs. Kaushalya Devi were captured in 'real time' as an executant and forms part of the said deed.

20.2. The said mortgage deed was registered at no.7242 in book no.1, volume no.18,042 on pages 133 to 138. The same is annexed as Annexure P-3 to this petition.

21. The learned counsel for Respondent No.1 admits that the said Mrs. Kaushalya Devi attended the office of the Sub-Registrar III on 09.08.2019. It is, however, contended that she visited the office of the said Sub-Registrar only to accompany her husband Mr. Rishi Pal who was scheduled to execute a sale deed with respect to a distinct property i.e., five shops on third floor in property bearing municipal no.242, situated at ward no. VIII Phatak Karor, Ajmeri Gate, Delhi 110001.

22. The contents of the additional affidavit dated 06.11.2023 prove that Respondent No.1 admits having visited the office of the concerned Sub-Registrar III, New Delhi on 09.08.2019. The photograph of Respondent No.1, Mrs. Kaushalya Devi captured in 'real time' forms part of the said deed.

23. This Court is refraining from adjudicating this petition on the merits of the explanation offered on her behalf for disputing the execution of the mortgage deed dated 09.08.2019.

24. This Court is of the considered opinion that the findings returned by this Court on 19.10.2023, that in view of the registration of the mortgage deed (at Annexure P-3) there is a prima facie presumption of the due and valid execution of the said deed before the Sub-Registrar III, New Delhi.

25. Accordingly, the CM APPL. 56443/2023 filed by the Respondent No.1 is dismissed.

26. This petition is allowed and the impugned order dated 16.09.2023 is set aside while reserving liberty to the Respondent No.1 herein to avail her statutory remedy under the SARFAESI Act. The Respondent No.1 is

granted liberty to approach the appropriate authority under the SARFAESI Act within a period of ten (10) days [on or before 04.12.2023] and until then the Petitioner herein is directed to not to take physical possession of the mortgaged property.

27. In view of the finding of this Court that the suit filed before the Trial Court is not maintainable, in view of the order dated 25.04.2022 passed by the Division Bench in LPA No. 570/2019 titled as ***Shyam Goel*** (supra), the said suit i.e., CS SCJ No. 1818/2023, titled as **Kaushalya Devi v. Cholamandalam Investment and Finance Company Ltd.,** itself is dismissed.

28. Pending applications stands disposed of.

MANMEET PRITAM SINGH ARORA, J

NOVEMBER 23, 2023/msh/sk

Click here to check corrigendum, if any