IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3158 OF 2024

Kiran J. Upadhyay .. Petitioner

Versus

The State Bank of India & Anr. .. Respondents

Dr. Uday Warunjikar a/w Sumit Kate i/b. Aditya Kharkar for the Petitioner.

Adv. Merlyn Vasudeo Nee Monteiro for Respondent No.1.

Mr. Kalim Ansari for Respondent No.2.

Kiran Upadhyay, Petitioner is present.

CORAM: B. P. COLABAWALLA & SOMASEKHAR SUNDARESAN, JJ.

DATE: MARCH 05, 2024

P. C.

1. The above Writ Petition is filed *inter-alia* challenging the order dated 5th October, 2023 under Section 14 of the SARFAESI Act, 2002, passed by the learned Additional Chief Metropolitan Magistrate, Esplanade, Mumbai in Case No. 1924/SA/2022. Consequently, the Possession Notice dated 1st October, 2022 under Section 13(4) and the Demand Notice dated 25th June, 2022 under Section 13(2) of the SARFAESI Act 2002 are also challenged.

2. The Writ Petition has been urgently moved before us because a Possession Notice dated 13th February, 2024 is issued by the learned Court Commissioner to take physical possession of the secured asset pursuant to the order passed under Section 14 of the SARFAESI Act.

3. Mr. Warunjikar, the learned Counsel appearing for the Petitioner submitted that urgent ad-interim relief is required because the Petitioner would be dis-housed from her residential property. He submitted that in the facts of the present case, the secured asset was bought in the joint names of the Petitioner and Respondent No.2-husband by taking a loan from Respondent No.1 [State Bank of India]. He submitted that serious disputes arose between the Petitioner and Respondent No.2-husband and they are living separately. The Petitioner is residing in the secured asset, whereas, Respondent No.2, being a Government servant, is residing in the quarters provided to him. He submitted that this whole issue has been precipitated because Respondent No.2 wants to evict the Petitioner from the secured asset which is her matrimonial home. He therefore submitted that urgent ad-

interim relief be granted, otherwise grave injustice would be done to the Petitioner.

4. On the other hand, the learned Advocate appearing for Respondent No.1 [State Bank of India], submitted that admittedly a loan was taken by the Petitioner and Respondent No.2 jointly, and for which, a mortgage of the secured asset was created. Admittedly, since there has been a default in repayment of the loan, 1st Respondent-Bank issued a demand notice under Section 13(2) of the SARFAESI Act, 2002. Taking the SARFAESI proceedings forward, the 1st Respondent-Bank also took symbolic possession under Section 13(4) of the said Act and thereafter approached the Magistrate under Section 14 seeking physical possession. The Magistrate after being satisfied that the requirements of Section 14 are complied with, passed the order dated 5th October, 2023. It is to execute this order that the possession notice dated 13th February, 2024 is issued by the learned Court Commissioner for taking physical possession today. She submitted that the Hon'ble Supreme Court has time and again reiterated that the High Courts under Article 226 of the Constitution of India ought not to entertain any writ petitions challenging the orders passed by the Magistrate under Section 14 because the aggrieved party has an alternate remedy under Section 17 of

the SARFAESI Act, 2002. She submitted that whatever may be the internal dispute between the Petitioner and Respondent No.2, the 1st Respondent-Bank is not concerned with the same. She submitted that admittedly, the Petitioner and Respondent No.2 are both co-borrowers and it hardly lies in the mouth of the Petitioner to seek any relief when the dues of the 1st Respondent-Bank have not been paid. She, therefore, submitted that there is no merit in the above Petition and the same be dismissed allowing the Petitioner to avail of the alternate remedy under Section 17 of the SARFAESI Act, 2002.

5. The learned Advocate appearing for Respondent No.2-husband submitted that after the possession notice dated 13th February, 2024 was issued by the Court Commissioner, the Petitioner has approached the Metropolitan Magistrate, 22nd Court at Andheri, Mumbai by filing a Miscellaneous Application in the pending Domestic Violence Case *inter-alia* seeking a relief to direct Respondent No.2 to move the Petitioner to her matrimonial home in Virar, namely, Flat No. 212, Unique Apartments, Opp. Bus Depot, Virar (W), Palghar-401303 or any other flat of Respondent No.2 located in Virar. He submitted that this application of the Petitioner is pending adjudication. Though, Respondent No.2 has much to say with reference to the said domestic

violence case, he submitted that the same does not form the subject matter of the present Petition and is therefore not making any submissions thereon before us. He submitted that in the event, the Petitioner makes out a case, the concerned Court would grant whatever reliefs it thinks fit in favour of the Petitioner. He submitted that in the present case, it is in the interest of the Petitioner as well as Respondent No.2, if the 1st Respondent-Bank is permitted to take over physical possession of the secured asset, and thereafter sold, so that the interest component on the loan which is availed of by the Petitioner and Respondent No.2 stops accruing. He, therefore, also submitted that the above Petition be dismissed.

6. We have heard the learned Counsel for the parties at some length. We have also perused the papers and proceedings in the above Writ Petition. As mentioned earlier, the above Writ Petition challenges the order dated 5th October 2023, passed under Section 14 of the SARFAESI Act, 2002 by the learned Additional Chief Metropolitan Magistrate, Esplanade, Mumbai.

7. It is not in dispute before us that the Petitioner and Respondent No.2 are both co-borrowers of the 1st Respondent-Bank.

The loan taken by the Petitioner and Respondent No.2 has been secured by a mortgage of Flat No. B 1803, 15th Floor, admeasuring 56.98 sq.mtrs. (carpet), in a building known as "HILLCREST", constructed on the plot of land Opp. Seepz Gate No.3, Off JVLR, Andheri East, Mumbai 400093 [**"secured asset"**]. Once this is the case, we find that it would not be appropriate for us to entertain the above Writ Petition as the Petitioner has an alternate remedy of approaching the DRT under Section 17 of the SARFAESI Act, 2002. Though there are certain disputes between the Petitioner and Respondent No.2, we agree with the argument canvassed by the 1st Respondent-Bank that it is not concerned with any internal dispute between Respondent No.2 and the Petitioner. The fact of the matter remains that the dues of the 1st Respondent Bank have not been paid either by the Petitioner or Respondent No.2 [who are co-borrowers], and therefore, the 1st Respondent-Bank would be entitled to proceed to recover its dues by invoking the provisions of the SARFAESI Act, 2002.

8. At this stage, Mr. Warunjikar, purely on humanitarian grounds, requested that possession of the secured asset not be taken for a period of one month and the Petitioner undertakes (i) to hand over physical possession of the secured asset to the authorised officer of the

1st Respondent-Bank on 08th April, 2024; and (ii) not to challenge any of the measures taken or to be taken by the 1st Respondent-Bank under the provisions of the SARFAESI Act, 2002.

9. The learned Advocate appearing for the 1st Respondent-Bank stated that if the Petitioner is willing to give an undertaking to handover physical possession of the secured asset on a fixed date and time, purely on humanitarian grounds, the 1st Respondent-Bank would not execute the order passed by the Magistrate, under which, possession was scheduled to be taken today. The learned Advocate appearing for Respondent No.2 has also stated that Respondent No.2 has no objection to this course of action being adopted. The same is duly noted.

10. Considering the fair stand taken by the 1st Respondent-Bank, we accept the undertaking of the Petitioner that she will hand over physical possession of the secured asset to the authorized officer of the 1st Respondent-Bank on 8th April, 2024 at 11.00 am. We also accept the undertaking of the Petitioner that she shall not challenge any of the measures taken or to be taken by the 1st Respondent-Bank under the provisions of the SARFAESI Act, 2002. The Petitioner shall file a written undertaking in this Court that she will hand over physical

possession of the secured asset on 8th April, 2024 at 11.00 am to the authorized officer of the 1st Respondent-Bank and also state in the said undertaking that she will not challenge any of the measures taken or to be taken by the 1st Respondent-Bank against the secured asset.

11. The authorized officer of the 1st Respondent-Bank shall remain present at site on 8th April, 2024 at 11.00 am for the purposes of taking over physical possession of the secured asset.

12. Mr. Warunjikar, the learned Counsel appearing for the Petitioner, also requested the Court that the Chief Metropolitan Magistrate, 22nd Court, Andheri Mumbai be directed to hear the miscellaneous application filed by the Petitioner on 24th February, 2024, as expeditiously as possible, because the Petitioner would be without a roof over her head in light of the order passed today.

13. Considering the peculiar circumstances of the present case, we would request the said Court to hear the miscellaneous application filed by the Petitioner herein, as expeditiously as possible, and preferably within a period of one month from today.

14. The above Writ Petition is accordingly disposed of. No order as to costs.

15. It is needless to clarify that this order is passed without prejudice to the rights of the Petitioner to approach the 1st Respondent-Bank to either regularize the account or even settle the account. If the Petitioner approaches the Bank with such an offer, the same shall be considered by the Bank as the per its Rules and Regulations.

16. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[SOMASEKHAR SUNDARESAN,J.] **[B. P. COLABAWALLA, J.]**

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