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

+ **W.P.(C) 5452/2024 & CM APPL. 22524-22525/2024**

ZAHID HUSSAIN

..... Petitioner

Through: Mr. M. Sufian Siddiqui, Mr. Rakesh Bhugra, Md. Niyazuddin and Ms. Alya Veronica, Advocates.

versus

KOTAK MAHINDRA BANK LTD.

..... Respondent

Through: Mr. Ravi Gupta, Sr. Advocate with Ms. M. Dalta, Ms. Sanya Lamba and Ms. Muskaan Mehra, Advocates.

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Date of Decision: 16th April, 2024

CORAM:

HON'BLE MS. JUSTICE MINI PUSHKARNA

J U D G M E N T

MINI PUSHKARNA, J: (ORAL)

CM APPL. 22525/2024 (For Exemption)

1. Exemption allowed, subject to just exceptions.
2. Accordingly, the application is disposed of.

W.P.(C) 5452/2024 & CM APPL. 22524/2024

3. The present petition has been filed with prayer for quashing the notice dated 01st April, 2024 issued by the receiver.
4. Learned counsel appearing for the petitioner submits that the notice has been issued by the receiver in the name of the petitioner's deceased mother namely late Ms. Tajunnisa, after the date of her death on 16th October, 2020, apropos taking physical possession of her mortgaged



residential property viz. B-4/17, Safdarjung Enclave, New Delhi-110029.

5. Learned counsel submits that no notice can be issued against a dead person and on this account he relies upon the judgment passed by the Madras High Court in the case of *Sheeba Philominal Merlin and Ors. Versus The Repariates Co-op Finance and Development Bank Ltd. (Govt. of India Enterprise) and Ors., 2010 SCC OnLine Mad 4286*. Learned counsel has relied upon the following paragraph:

“26. It is the case of the petitioners that no notice under Section 13(2) and 13(4) was served on the deceased S. Jayakumar or the petitioners being the legal representatives of the S. Jayakumar, as guarantor for the loan. In paragraph '6' of the original counter affidavit filed by the respondent bank, it is stated that they proceeded as per the provisions of the Sarfaesi Act by issuing the demand notice dated 02-01-2008, Possession notice dated 26-04-2008 and the auction notice dated 18-06-2008. In paragraph '4' of the additional counter affidavit of the bank filed on 09-11-2009, the respondent bank stated that it was unable to find out the whereabouts of S. Jayakumar in spite of best efforts taken by the Recovery Officers of the Bank and that the said Authorized Officer issued demand notice dated 02-01-2008. In spite of the notice issued as per the Act, no reply/representation/objection had been received by the Bank.”

6. By referring to the aforesaid judgment, learned counsel appearing for the petitioner submits that in the present case, since notice has been issued in the name of a dead person, the said notice is *non-est* and not maintainable.

7. Learned counsel further submits that the legal heirs of the deceased, namely, the petitioner and three other legal heirs, have not been served any notice. It is submitted that the petitioner is staying in the property in question, and the right of the petitioner to abode cannot be taken away by a *non-est* notice.

8. Learned counsel further submits that the petition before this Court is maintainable, by relying upon the recent judgment dated 10th April, 2024 of the Supreme Court in *SLP (C) No. 8867/2022 titled as PHR Invent*



Educational Society Versus UCO Bank and Ors. Learned counsel has relied upon Para 29 of the said judgment, which reads as under:

“29. It could thus clearly be seen that the Court has carved out certain exceptions when a petition under Article 226 of the Constitution could be entertained in spite of availability of an alternative remedy. Some of them are thus:

(i) where the statutory authority has not acted in accordance with the provisions of the enactment in question;

(ii) it has acted in defiance of the fundamental principles of judicial procedure;

(iii) it has resorted to invoke the provisions which are repealed; and

(iv) when an order has been passed in total violation of the principles of natural justice.”

9. Learned counsel further submits that though proceedings are pending before the learned Debt Recovery Tribunal (“DRT”), however, he submits that the said proceedings before the learned DRT are with respect to a possession notice issued on 22nd June, 2022. He submits that the present petition pertains to only the notice dated 01st April, 2024 issued by the receiver. Thus, he submits that though the said notice has been issued by the receiver under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (“SARFAESI”) proceedings, the present petition would still be maintainable.

10. Learned counsel appearing for the petitioner has also relied upon a judgment dated 31st May, 2023 passed by Division Bench of this Court in *W.P. (C) 7904/2023* and relies upon the following paragraphs:

“xxx xxx xxx

15. A careful perusal of the said extract will show that the respondent/revenue were aware of the factum of death of Mr. Kuldip Kohli, and that the proceeding had been attended by petitioner no. 1, i.e., Mr. Darpan Kohli.



16. It appears that since this fact came to the knowledge of the respondent/revenue, the impugned assessment order, although addressed to the deceased/assessee, adverts to the one of the legal heirs, i.e., Darpan Kohli/petitioner no. 1.

17. As noted above, deceased/assessee had more than one legal heir, which includes petitioner nos. 2 and 3.

18. Given this position, Mr. Sunil Agarwal cannot but accept that the assessment order could not have been directed only against Darpan Kohli i.e., petitioner no. 1.

19. Therefore, according to us, the best way to forward would be to set-aside the assessment order.

20. It is directed accordingly.

21. The AO will issue notice to the petitioners, and grant them opportunity to present their defense qua the merits of the case.

xxx xxx xxx”

11. By referring to the aforesaid judgment, learned counsel appearing for the petitioner submits that the Division Bench of this Court has categorically held that, when the deceased assessee in the said case had more than one legal heir, service of notice to only one legal heir would not suffice. Thus, he submits that even if the impugned notice dated 01st April, 2024 contains the name of one of the legal heirs, service to only one of the legal heirs, is improper and not as per law.

12. He further submits that the service of notice to one of the legal heirs of Ms. Tajunnisa, namely Mrs. Naseem Bano, wife of Late Mr. Abdul Samad, has been issued pertaining to only her portion of the property. Thus, he submits that on that ground also, it cannot be said that any notice has been served to legal heir of the deceased i.e. Ms. Tajunnisa.

13. Learned counsel also relies upon the case of Supreme Court in the



case of ***Kamal Krishan Rastogi & Ors. Versus State of Bihar & Ors., reported as 2 (2008) 15 SCC 105*** to submit that notice to a dead person is unsustainable. He relies upon the following paragraphs:

“xxx xxx xxx

We are unable to agree with the view taken by the High Court.

11. Whether or not the landholder's participation in the proceeding before the Additional Collector would cure the illegality of the reopening order passed by the Collector is a debatable issue but we see that on admitted facts that larger issue does not even arise in the case. It would be hardly fair and just to hold that the landholder took any part in the proceeding after it was reopened by the Collector's order. As seen above, on notice being issued by the Additional Collector, Sarju Madhav Rastogi appeared before him on 30-4-1984 and prayed for time for filing objections. He then never appeared and a few months later died on 27-1-1985. He did not file any objection before the Additional Collector. Had he filed one, he might have taken the precise objection that the proceeding was without jurisdiction because the reopening order was itself illegal and without jurisdiction.

12. Admittedly, after the death of Sarju Madhav Rastogi his heirs were neither substituted nor were they given any notice by the Additional Collector. They did not appear before the Additional Collector. What is significant here is to note that the order of the Additional Collector was made against a dead person and for that reason alone it was unsustainable. It was only after the order of the Additional Collector that the heirs of Sarju Madhav Rastogi came into picture when they tried to challenge the order on many grounds including the one that the order was passed in a proceeding that was held on the basis of the Collector's order that was illegal and without jurisdiction. It is, therefore, quite wrong to say that it was not open to the landholders to question the validity of the reopening order since they had participated in the proceeding after its reopening.

13. As noted above, the order of the Additional Collector was also unsustainable for the additional reason that it was passed against a dead person.

xxx xxx xxx”

14. Thus, he submits that once the very basis of issuance of the impugned notice dated 01st April, 2024 is faulty, no action for possession can be taken



on the basis of the said notice.

15. Per contra, learned Senior Counsel appearing for the respondent-bank vehemently disputes the present petition and submits that the present petition is not maintainable. He submits that against the impugned notice dated 01st April, 2024, which has been issued under the SARFAESI Act, the petitioner has a statutory remedy available, to file appropriate proceedings before the DRT.

16. He further submits that in fact the matter before the learned DRT is already pending with respect to the earlier notice dated 22nd June, 2022 issued under the SARFAESI proceedings. Thus, he submits that there is no legal impediment for the petitioner to approach the learned DRT for challenging the impugned notice dated 01st April, 2024 also.

17. He further draws the attention of this Court to the order dated 09th April, 2024 passed by the learned Division Bench of this Court in *W.P. (C) 13416/2022* to submit that there are already directions by the learned Division Bench to the DRT, to dispose of the appeal pending before the DRT on or before 30th April, 2024. He further submits that the respondent-bank has already made a statement that no action shall be taken against the property of the petitioner till 02nd May, 2024, which is the next date of hearing before the learned Division Bench. He, thus, submits that the petitioner is only forum shopping and forum hunting. Thus, he prays that the present petition be dismissed.

18. I have heard learned counsels for the parties and have perused the record.

19. At the outset, this Court notes that the present petition impugns the notice dated 01st April, 2024 issued by the receiver for taking possession of



the mortgaged property in question. The said notice has been issued by the receiver pursuant to the order dated 05th March, 2021, passed by the learned Chief Metropolitan Magistrate (“CMM”), pursuant to proceedings under Section 14 of the SARFAESI Act.

20. This Court notes that the order dated 05th March, 2021 passed by the learned CMM under Section 14 of the SARFAESI Act has already been challenged by the petitioner before the learned DRT. Thus, there is no legal impediment for the petitioner to challenge the possession notice issued by the receiver, which has been issued pursuant to the order dated 05th March, 2021 passed by the learned CMM.

21. This Court also notes that by order dated 08th July, 2022 in SA/274/2022 passed by Debt Recovery Tribunal-1, Delhi titled as ***Zahid Hussain Versus Kotak Mahindra Bank Limited***, the interim application of the petitioner herein *qua* notice dated 22nd June, 2022 issued under Section 14 of the SARFAESI Act, already stands dismissed. Against the aforesaid order dated 08th July, 2022, the petitioner has approached the Division Bench of this Court in W.P.(C) 13416/2022, wherein, the learned Division Bench has directed the DRT to expedite the hearing of the matter.

22. The contention of the petitioner with respect to issuance of notice against a dead person and other related issue that have been raised before this Court, can be raised before the learned DRT. The petitioner is not barred from raising all these objections before the learned DRT, which has the authority to decide all the relevant issues, after hearing all the parties.

23. This Court further records that under Section 17 of the SARFAESI Act, the petitioner has alternative efficacious remedy to approach the learned DRT against any action that is taken by the secured creditor, i.e., the bank in



the present case. The Section 17 of the SARFAESI Act reads as under:

“17. Application against measures to recover secured debts].—(1) Any person (including borrower) aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this chapter, 145[may make an application along with such fee, as may be prescribed,] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken.

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]

147[Explanation.—For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.]

148[(1-A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction—

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.]

149[(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

150[(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—

(a) declare the recourse to any one or more measures referred to in sub-section (4) of Section 13 taken by the secured creditor as invalid; and



(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of Section 13.]

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of Section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of Section 13 to recover his secured debt.

[(4-A) Where—

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,—

(a) has expired or stood determined; or

(b) is contrary to Section 65-A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of Section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.]

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:



Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.]”

24. This Court also notes that the Division Bench of this Court in its order dated 09th April, 2024 passed in W.P. (C) 13416/2022 has already directed the learned DRT to treat the matter of the petitioner with urgency and dispose of the same on or before 30th April, 2024. Thus, when the learned DRT is already seized of the matter and is hearing the matter with respect to the same mortgaged property, there is no occasion for the petitioner to approach this Court.

25. It is no longer *res-integra* that in the matters pertaining to the SARFAESI Act, this Court will not entertain petitions, when the DRT has jurisdiction to deal with the said questions. Thus, Supreme Court in the case of **Phoenix ARC Private Limited Versus Vishwa Bharati Vidya Mandir and Others**, (2022) 5 SCC 345 has held as follows:

“21. Applying the law laid down by this Court in Mathew K.C. [State Bank of Travancore v. Mathew K.C., (2018) 3 SCC 85 : (2018) 2 SCC (Civ) 41] to the facts on hand, we are of the opinion that filing of the writ petitions



by the borrowers before the High Court under Article 226 of the Constitution of India is an abuse of process of the court. The writ petitions have been filed against the proposed action to be taken under Section 13(4). As observed hereinabove, even assuming that the communication dated 13-8-2015 was a notice under Section 13(4), in that case also, in view of the statutory, efficacious remedy available by way of appeal under Section 17 of the Sarfaesi Act, the High Court ought not to have entertained the writ petitions. Even the impugned orders passed by the High Court directing to maintain the status quo with respect to the possession of the secured properties on payment of Rs 1 crore only (in all Rs 3 crores) is absolutely unjustifiable. The dues are to the extent of approximately Rs 117 crores. The ad interim relief has been continued since 2015 and the secured creditor is deprived of proceeding further with the action under the Sarfaesi Act. **Filing of the writ petition by the borrowers before the High Court is nothing but an abuse of process of court. It appears that the High Court has initially granted an ex parte ad interim order mechanically and without assigning any reasons. The High Court ought to have appreciated that by passing such an interim order, the rights of the secured creditor to recover the amount due and payable have been seriously prejudiced. The secured creditor and/or its assignor have a right to recover the amount due and payable to it from the borrowers. The stay granted by the High Court would have serious adverse impact on the financial health of the secured creditor/assignor. Therefore, the High Court should have been extremely careful and circumspect in exercising its discretion while granting stay in such matters. In these circumstances, the proceedings before the High Court deserve to be dismissed.**

(Emphasis Supplied)

26. The premise on which the petitioner has approached this Court is that no notice can be issued against the dead person. This issue, as noted earlier, can always be raised by the petitioner before the learned DRT, which has the authority to deal with all the legal and factual issues raised before it. The legality of the possession notice dated 01st April, 2024 can be adjudicated by the learned DRT after hearing all the parties.

27. In view of the aforesaid detailed discussion, no merit is found in the present petition. The same is accordingly dismissed along with the pending applications.



28. However, it is clarified that all rights and contentions of the parties are left open, to be raised in appropriate proceedings. This Court has not commented upon the merits of the case of either of the parties.

MINI PUSHKARNA, J

APRIL 16, 2024/MR