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

% Date of decision: 06th August, 2024

\+ W.P.(C) 10348/2024

KAMAL GARG DIRECTOR OF BREEK CONSTRUCTION PVT LTD .....Petitioner

Through: Ms. Ekta Choudhary, Mr. Divyank Dutt Dwivedi, Ms. Aditi Sharma and Mr. Dipanshu, Advs.

versus

SOUTH INDIAN BANK LTD & ORS. .....Respondents

Through: Mr. S.K. Garg, Adv. for Bank

CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA

DHARMESH SHARMA, J. (ORAL)

CM APPL. 42444/2024 (Ex.)

1. Allowed, subject to all just exceptions.

2. The application stands disposed of.

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3. The petitioner is invoking the extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, for issuance of appropriate directions/orders for quashing of order dated 27.01.2024 passed by the learned Additional Chief Metropolitan Magistrate-02, Central District, Tis Hazari Courts, Delhi[1], whereby while issuing notice on an application under Section 340 of the Cr.PC moved by the borrowers *viz.* respondents No. 2 and 3 in the present

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[1] ACMM

writ petition, the Court stayed the appointment of the 'Receiver' under Section 14 of the SARFAESI Act, 2002[2] *vide* order dated 04.01.2024 and thereby restrained him from taking possession of the property bearing No. 2181/62 built on Plot No. 529/2, and construction as well as easement rights situated in Khasra No. 1414/529, Block j, Gali No. 61 & 62, Hari Singh Nalwa Street, Naiwala, Gurudwara Road, Karol Bagh, New Delhi.

4. Learned counsel for respondent No. 1/South Indian Bank Ltd. is present on advance notice through Video Conferencing.

5. None appeared on behalf of the respondents No. 2 and 3, despite sending advance notice.

6. Having heard the learned counsel for the parties present and on perusal of the record, *ex-facie* the impugned order dated 27.01.2024 passed by the learned ACMM cannot be sustained in law.

7. Shorn off unnecessary details, respondent No.1/ South Indian Bank Ltd., being a secured creditor initiated proceedings against the borrowers *viz.* respondents No. 2 and 3 on their account becoming NPA[3] under the provisions of the SARFAESI Act, 2002 and eventually on 04.01.2023 Sale Notice qua the mortgage property was duly served upon respondents No. 2 and 3 on 06.11.2023 informing them that the property would be sold through and e-auction on 'as is where is' basis on 07.12.2023 at a reserved price of Rs. 5.36 crores. Subsequently, respondent No. 1/ South Indian Bank Ltd. filed an application under Section 14(1) of the SARFAESI Act, 2002 for

[2] Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
[3] Non Performing Asset

taking over the possession of the mortgaged property, bearing M.A. No. 232/2023 before the learned CMM, Central District, Tis Hazari Courts, Delhi. Aggrieved thereof, respondents No. 2 and 3 filed an application bearing IA No. 4638/2023 in Securitization Application[4] No. 594/2023 and the Hon'ble Tribunal *vide* order dated 07.12.2023 dismissed the IA No. 4638/2023 by way of a speaking order and thereby allowed the respondent bank to conduct E-Auction and the sale shall be subject to outcome of the S.A.

8. The petitioner in the present writ petition is the auction purchaser in the bidding held on 10.01.2024 and he has already deposited the bid amount of Rs. 5,36,25,000/- in respect of the mortgaged property. The S.A. was taken up by the learned DRT[5] for hearing on IA No. 220/2024 for restraining the respondent bank/Court Receiver from taking physical possession of the property in question, on 29.01.2024 and the same was eventually rejected *vide* order dated 22.01.2024.

9. Learned counsel for the petitioner has urged that in a motivated manner, the borrowers moved an application under Section 340 Cr.PC before the learned ACMM-02 on 27.01.2024 and after hearing the matter for several dates, learned ACMM-02 passed the impugned order, and thereafter, the issue has not been taken up for hearing despite several request and now, the matter is listed for hearing on 23.09.2024. The impugned order reads as under:-

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[4] S.A.

[5] Debt Recovery Tribunal

"27.01.2024

Ld. Presiding Officer is on leave today.
This is an application u/s 340 Cr. PC r/w Section 195 Cr.PC on behalf of respondent against Sh. Sreelal B. Authorized Officer of the Bank.
Present: Sh. Amit Sharma, Ld. Counsel for applicant u/s 340 Cr. PC.

The present objection/application filed on behalf of respondent/applicant herein alleging that the petitioner Bank has obtained an order dated 04.01.2024 passed by this Hon'ble Court by concealing material facts from Court as the subject property in question i.e. No.2181/62, Plot No. 529/2, admeasuring 106 Sq. Yds situated at Khasra No.1414/529, Block -J, Gali No. 61 & 62, Hari Singh Nalwa Street, Naiwala, Gurudwara Road, Karol Bagh, New Delhi is already auctioned, proceedings have become infructuous and the same has not been disclosed on affidavit or in petition u/s 14 SARFAESI Act. The said property in question was sold on 07.12.2023. The petitioner bank deliberately, intentionally and knowingly given false information that subject property has already been sealed by MCD and also never disclosed the description of the property. The physical possession of the property in question is on 29.01.2024 vide Court Receiver notice dated 09.01.2024 which is invalid and void ab initio. The affidavit filed by the Authorized Representative of the Bank is non-est in law. Therefore, applicant prayed that receiver be restrained from taking possession of the property in question on 29.01.2024, and to stay the order dated 04.01.2024 passed by the Hon'ble Court, and to initiate proceedings u/s 195 Cr. PC against AR Sh. Sreelal B. and punish him as per provision u/s 340 Cr. PC, and to recall the order dated 04.01.2024 passed by the Hon'ble Court as the same has been obtained by playing fraud on this Court and pass any such other order(s) as this Court may deem fit and proper.

Ld. Counsel for applicant relied upon the judgment of Hon'ble Supreme Court in "***A.V. Papayya Sastry & Ors Vs Government of A.P. & Ors." 2007 V AD (S.C) 21*** that any order obtained by fraud is non est and need not be acted upon. It has been further held that the factum of fraud can be raised before any court/forum in any proceedings whatsoever.

Further, if an order is obtained by playing fraud on the Court, same would not be applicable.

Since, in the present case, property in question was sold on 07.12.2023 by the Bank i.e. South Indian Bank Ltd. and order of appointment of Receiver to take possession of property was obtained by petitioner bank by not disclosing this fact before the

Court which amounts to concealment of true facts. Accordingly, it is directed that Receiver appointed by the Court vide order dated 04.01.2024, need not proceed with the possession of the property in question till further orders from this Court.

Issue notice of the present application to the non applicant on filing of PF for **11.03.2024**."

10. Without further *ado*, it is well settled that in proceedings under the SARFAESI Act, 2002, the learned court of ACMM performs ministerial and not adjudicatory functions and the Magisterial Court is not obligated to give a notice for any hearing to the borrower. The issue raised in the present matter is squarely covered by a decision of a Co-ordinate Bench in the case of **Cholamandalam Investment and Finance Company Ltd. v. Sh. Mahesh Taneja and Ors.**[6], wherein it was observed as under:-

> "21. Before passing such an order the learned CMM or District Magistrate is not even obliged to give notice or afford any hearing to the borrower. This itself shows that the function to be performed by the Magistrate under Section 14 of the SARFAESI Act is ministerial and not adjudicatory. Thus, it will not be within the purview of the Magistrate's jurisdiction under Section 14 of the SARFAESI Act to entertain any objection either of the borrower or of any third party questioning the exercise of powers under the said provision. As a logical extension of this proposition, the learned CMM cannot entertain an application under Section 340 CrPC while exercising his limited powers of extending assistance to the secured creditor in taking possession or control of any secured asset.
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> 22. Reference may also be had to the decision of a coordinate bench of this court in Munish Kumar Bhunsali Vs. Kotak Mahindra Bank Ltd. 2019 SCC OnLine Del 9702, wherein it was observed that the role of the Magistrate while dealing with an application is not adjudicatory. The relevant part of the decision reads thus:

[6] (2024) ibclaw.in 613 HC decided on 01.07.2024

> "27. Thus, the role of the Magistrate while dealing with an application under Section 14 of the Act is not adjudicatory nor is he obliged to give notice to the borrower. By filing an application under Section 14 of the Act, the secured creditor exercises one of the options available with him to take possession of the secured asset. All that the Magistrate at this stage is required to see is that requirements of the Act and the rules framed thereunder are satisfied in the affidavit filed on behalf of the secured creditor and proceed to pass an order." (emphasis supplied)

> 23. Another related facet of the controversy which needs to be noted is that the power under Section 340 CrPC read with Section 195(1)(b) CrPC can be exercised only where someone fabricates false evidence or gives false statement in the judicial proceedings, and not in other proceedings. This becomes evident from the reading of Sections 193, 199, 204 and 209 of the Indian Penal Code which have been referred to in Section 195(1)(b) CrPC. The said provisions use the expression "judicial proceedings" or "Court of Justice". The expression "Court of Justice" has been defined under Section 20 IPC as under:
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> > "20. "Court of Justice".—The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.

11. In view of the aforesaid proposition of law, the impugned order dated 27.11.2024 cannot be sustained as it is beyond the powers vested with the learned ACMM-02 under the SARFAESI Act, 2002.

12. Accordingly, the present writ petition is allowed, thereby directing that the impugned order dated 27.01.2024 passed by the learned ACMM-02 in Complaint Case No. 186/2024, whereby the order dated 04.01.2024 with regard to appointment of the receiver for taking physical possession of the property bearing No. 2181/62 built on Plot No. 529/2 admeasuring 106 sq. yards situated at Khasra No.

1414/529, Block-J, Gali No. 61 & 62, Hari Singh Nalwa Street, Nailwala Gurudwara Road, Karol Bagh, New Delhi, had been stayed, is hereby quashed.

13. Insofar as the relief of revalidating the sale certificate dated 10.01.2024 is concerned, learned counsel for respondent No. 1 submits that the same shall be done in accordance with law.

14. The above-stated writ petition is disposed of in the aforesaid manner further providing that if the borrowers *viz.* respondents No. 2 and 3 have any grievance, they shall be at liberty to approach the learned DRAT[7] in accordance with law.

DHARMESH SHARMA, J.

AUGUST 06, 2024

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[7] Debt Recovery Appellate Tribunal