

BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

I.A. No. 293/2023(Stay)

In

Misc. Appeal No. 67/2023

Between

Govinda Choudhary

... Appellant/s

V/s.

The Saraswat Co-operative Bank Ltd. & Ors.

... Respondent/s

Mr V.N. Ajikumar, Advocate for Appellant.

Mr Charles D'Souza along with Mr Rupak Sawangikar, i/b M/s V. Deshpande & Co., Advocate for Respondent No.1 Bank.

Mr Mayank Bagle, i/b Mr Durgesh Rege, Advocate for Respondent No. 3.

:- Order dated: 15/09/2023:-

This is an application filed by the Appellant for an interlocutory order of stay of the impugned order dated 10.04.20223 in I.A. No. 468 of 2023 in Securitisation Application (S.A.) No. 62 of 2023 on the files of the Debts Recovery Tribunal-I, Mumbai (D.R.T.). The Applicant/Appellant had filed the aforesaid S.A. challenging the Sarfaesi measures initiated by the first Respondent Saraswat Co-operative Bank Ltd. for recovery of debt due from the second Respondent borrower by proceeding against flat No. F-305 on the third floor of complex F in an Apartment Complex named 'Supreme by the Woods' in Bardez, Goa, admeasuring 111.25 sq. mtrs. (secured asset). The creditor bank had initiated steps for taking physical possession of the secured asset under Sec. 13(4) read with Sec. 14 of

the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interests Act, 2002 ('SARFAESI Act', for short). The Appellant claims to be the exclusive owner in possession of the secured asset by virtue of a registered agreement for sale executed in his favour by the third Respondent builder on 29.04.2019. The Appellant claims to be the bona fide purchaser of the property on due diligence, and claims to have paid the entire sale consideration to the third Respondent after availed a loan from the fourth Respondent Axis Bank Ltd.

2. The first Respondent bank would contend that the secured asset was purchased by the second Respondent on 17.02.2017 by way of a registered agreement to sell from the third Respondent builder after availing a loan from the first Respondent and had provided as security the title deeds of the flat and created a mortgage by deposit of title deeds. On receipt of a notice to take over physical possession of the secured asset, the Appellant filed the S.A. being an aggrieved person affected by the Sarfaesi measures and also filed I.A. No. 468/2023 for an interlocutory order to protect his possession till the S.A. was disposed of. Vide the impugned order, the Ld. Presiding Officer declined to grant any protection order stating that the Appellant is a subsequent purchaser of the property which was already mortgaged and hence, cannot be protected. The Appellant is aggrieved and hence, in appeal.

3. Heard the rival arguments advanced by both sides. Records perused.

4. It is the contention of the Appellant that in consequence of the registered agreement of sale dated 29.04.2019 the possession of the secured asset was handed over to the Appellant and a possession certificate was also issued. The occupancy certificate indicates that he is in possession of the property. A certificate of registration has also been issued by the Assistant Registrar of Co-operative Societies on 05.09.2018 which indicates that the apartment complex has been registered as “Supreme by the Woods Co-operative Housing Society”. A share certificate was also issued by the society in favour of the Appellant on 05.04.2021.

5. The Ld. Counsel appearing for the Appellant would contend that there is sufficient evidence on record to establish the actual possession of the flat by the Appellant. The Ld. Counsel would point out that the society had also issued a ‘no objection certificate’ in favour of the secured creditor prior to granting a loan to the Appellant. On the other hand, the report produced by the first Respondent does not indicate that the property was occupied by anyone else. The Ld. Counsel also points out to the photographs produced by the first Respondent which would indicate a picture of flat No. 305 with the latch on the right side of the main entry door. The Ld. Counsel has produced recent photographs to indicate that the latch on the door is actually on the left side. The Ld. Counsel relies on such evidence to indicate that the actual inspection of the property was not done as claimed by the first Respondent. It is further contended that CERSAI registration was obtained by the first Respondent bank only on 04.03.2021 whereas the CERSAI registration of Axis Bank which has

lent money to the Appellant is on 24.06.2019.

6. The third Respondent developer had contended that the agreement for the sale of the flat to the second Respondent by agreement dated 13.02.2017 was cancelled and a memorandum of the cancellation of the agreement was executed on 24.04.2019. The Ld. Counsel for the Appellant would also rely upon a letter dated 11.08.2022 issued by the third Respondent builder to the first Respondent bank wherein it is clearly stated that the agreement with the second Respondent regarding the intended sale of the secured asset has been cancelled and money refunded to him.

7. On coming to know about the earlier agreement and the mortgage, a police complaint was filed by the Appellant on 20.03.2023 and an FIR was registered for offences punishable under Sections 465 and 468 of the IPC. The specific contention made in the complaint is that the mortgage in favour of the first Respondent was forged.

8. It is submitted by the Ld. Counsel appearing for the Appellant that in the impugned order the Ld. Presiding Officer has erroneously observed that the Appellant has himself admitted knowledge of the agreement of sale dated 13.02.2017 in favour of the second Respondent borrower.

9. Per contra, the Ld. Counsel appearing for the first Respondent contends that the agreement for sale in favour of the second Respondent borrower by the third Respondent on 13.02.2017 was by way of a registered document. Neither the Appellant nor his creditor the fourth Respondent bank conducted due diligence before purchasing or financing the secured asset. The existence of a registered

agreement to sell could not have gone unseen or unnoticed. It is also stated that on 01.02.2021 there is a tripartite agreement between the first Respondent bank, second Respondent borrower and third Respondent builder. In that tripartite agreement it is specifically stated that the sale deed could not be executed by mutual consent and the existence of an agreement of sale between the second Respondent and third Respondent is admitted. It is pointed out that the Housing Society was not yet registered in 2017 and obviously, could not have issued a share certificate in favour of the second Respondent. The builder has subsequently challenged the execution of the tripartite agreement and accused the bank of forgery which is being investigated. The Ld. Counsel appearing for the first Respondent bank also points to a letter from the third Respondent to Axis Bank wherein the existence of another loan from the SBI is referred to. The Ld. Counsel for the first Respondent also points out that a registered agreement for sale could not have been cancelled by an unregistered memorandum relied upon by the third Respondent. In order to indicate that due diligence was not performed by the Appellant and the fourth Respondent, the Ld. Counsel points to the encumbrance certificate which was obtained by the Appellant only for a period of one year from 12.06.2019. The Ld. Counsel for the 1st Respondent relies on the decision of the High Court of Delhi in *Sh. Ishar Dass Malhotra vs. Sh. Dhanwant Singh & Ors.* 1983 SCC OnLine Del 284 in which relying upon the decision of the Hon'ble Supreme Court in *K.J. Nathan vs. S.V. Maruthi Rao* AIR 1965 SC 430, it was held that the question of the subsequent purchaser having bought the property

subject to a mortgage by deposit of title deeds bona fide, with or without notice, is of no relevance. The subsequent purchaser cannot avoid the mortgage by leading evidence to show that he made reasonable inquiries to find out if the property is subject to a mortgage by deposit of title deeds or not. It is held that section 48 of the Transfer Property Act does not admit any such exception. According to the section, when a person purports to create, any transfer at different times, rights in or over the same immovable property, and such rights cannot exist or be exercised to their full extent together, each later created right shall in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created. Further, the proviso to section 48 of the Registration Act enacts that the mortgage by deposit of title deeds shall take effect against any mortgage deed subsequently executed and registered relating to the same property. Thus, a subsequent sale could not have priority over a mortgage by deposit of title deeds created before the sale.

10. The Ld. Counsel for the Appellant has relied upon the cancellation deed executed between the builder and the borrower. It is admittedly not a registered deed. The Hon'ble Supreme Court has in *Dabiben vs. Arvindbhai Kalyanji Bhanusali (2020) 7 SCC 366* held that even if the averment of the plaintiff that the entire sale consideration had not in fact been paid, is taken to be true, it could not be a ground for cancellation of the sale deed. The fact is that they have other remedies in law for recovery of the balance sale consideration, but could not be granted the relief of cancellation of the registered sale deed. Prima

facie therefore, the Appellant would not stand a chance of ignoring the earlier agreement to sell in favour of the borrower who created the mortgage over the secured assets in favour of the 1st Respondent bank. I find no reason to interfere with the findings of the Ld. Presiding Officer in the impugned order. The Appellant is not entitled to any stay of the impugned order. The I.A. is dismissed.

The reply to the appeal shall be filed by the respondent.

Post the appeal on 01.12.2023 for hearing.

Sd/-
Chairperson

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DRAFT MUMBAI