

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 8348 of 2015****FOR APPROVAL AND SIGNATURE:****HONOURABLE SMT. JUSTICE ABHILASHA KUMARI**

=====

| | | |
|---|---|--|
| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | |
| 2 | To be referred to the Reporter or not ? | |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | |

=====

KANIZA FATIMA GULAM RASOOL SHAIKH....Petitioner(s)

Versus

ADARSH COOPERATIVE BANK LIMITED & 4....Respondent(s)

=====

Appearance:

MR DHAVAL D VYAS, ADVOCATE for the Petitioner(s) No. 1

MS SHRUTI PATHAK, LEARNED ASSISTANT GOVERNMENT PLEADER for the Respondent(s) No. 5

MS ARCHANA R ACHARYA, ADVOCATE for the Respondent(s) No. 1

NOTICE SERVED BY DS for the Respondent(s) No. 2 - 4

=====

CORAM: HONOURABLE SMT. JUSTICE ABHILASHA KUMARI**Date : 30/09/2015****ORAL JUDGMENT**

1. Rule be issued to respondents Nos.1 and 5. Ms.Archana R. Acharya, learned advocate, waives service of notice of Rule for respondent No.1 and Ms.Shruti Pathak, learned Assistant Government Pleader, waives service of notice of Rule for respondent No.5. As per the statement made by the learned advocate for the petitioner, respondents Nos.2 to 4 are not contesting parties and have not appeared pursuant to the issuance of notice in the present Petition. Respondent No.1 is the main contesting party. Hence, there is no requirement of issuance of Rule to the said respondents.

2. Looking to the facts and circumstances of the case and with the consent of learned counsel for the respective parties, the petition is being heard and decided, finally.

3. By preferring this petition under Article 226 of the Constitution of India, the petitioner has made the following prayers:

"A) The Hon'ble Court may be pleased to issue writ of Mandamus and/or any other appropriate writ, direction and order to quash and set aside the order dated 4.4.2015 passed by the District Magistrate, Surat and the public notice dated 18.04.2015.

B) The Hon'ble Court may be pleased to issue a writ of prohibition directing the respondent no.1 from taking any steps or measures under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

C) Pending hearing and final disposal of the petition, Your Lordships be pleased to stay the implementation, operation and execution of the order dated 4.4.2015 passed by the District Magistrate, Surat, and further be pleased to direct the respondent Bank to restore possession of the subject premises to the petitioner.

D) To pass such other and further order/s necessary in the interest of justice."

4. Initially, when the petition was heard at length, several contentions were raised by Mr.Dhaval D. Vyas, learned advocate for the petitioner. However, on 16.09.2015, learned advocate for the petitioner has

confined his submissions to only one issue. He has submitted that the amendment under Section 2(c)(iva) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the SARFAESI Act" for short) came into effect on 15.01.2013, whereas the notice under Section 13(2) of the SARFAESI Act has been issued by respondent No.1-Bank on 21.12.2012, that is, before the amendment came into effect. It is submitted that as the respondent-Bank is a Multi State Co-operative Bank, the notice issued prior to the date of amendment would be illegal and invalid. Hence, the said notice being without jurisdiction, as well as the consequential proceedings, be quashed and set aside.

5. In support of the above submissions, reliance has been placed upon a judgment of the Division Bench of this Court in Special Civil Application No.1012 of 2014 and connected matters, rendered on 24-25.06.2015. A similar issue arose in the case before the Division bench, which has dealt with it in the following manner:

"43. It is an admitted position that the Amending Act is brought into force w.e.f. January 2013, hence any action taken by the Bank against borrower or creditor prior to the Amending Act under the Securitisation Act cannot be maintained by respondent Bank, but at the same time, it will be for the concerned respondent Bank to initiate fresh action under the Securitisation Act and under the RDDB Act, as the case may be against the respective borrower or the guarantor, as the case may be and to proceed in accordance with law. At this stage, we may also record that SCA No.1330 of 2013, the learned Counsel for respondent No.2 Bank had also declared accordingly. However, the other matters where the action stands initiated after the amending Act and such actions are challenged by way of consequential relief, such relief cannot be granted, as this Court has held that the Amending Act under Securitisation Act as well as under RDDB Act is not ultra vires the Constitution and the same is found to be a valid piece of legislation. Under these circumstances, the prayer made in the respective petitions would fail."

6. The learned advocate for the petitioner has also relied upon the order dated 04.09.2015, passed by the Division Bench of this Court in Special Civil Application No.9442 of 2015 and connected matters,

wherein it is held as below:

"9. As Mr.K.K. Nanavati appearing for the respondent Bank is agreeable for re-entrustment of the possession of the property with liberty to the Bank to take further action under the Securitisation Act, we do not find that further observations and discussion are necessary to be issued in this regard.

10. Hence it is observed and directed that the action taken by the respondent No.2 Bank under the Securitisation Act prior to the amending Act, i.e. January, 2013 is held to be bad in law. Consequentially, property in question, possession of which is taken over, will be required to be re-entrusted by respondent Bank to the petitioner by drawing appropriate Panchnama, with further condition that it would be open to the respondent Bank to deploy security for guarding of the property and there will be further prohibitory injunction against the petitioner not to transfer or alienate the possession, title or rights in the property in any manner whatsoever for a period of four months from the date of re-entrustment of the property by the respondent Bank to the respective petitioners. It is also further observed that the respondent Bank after re-entrustment of the property shall be at liberty to initiate fresh action under Section 13

of the Securitisation Act qua security interest of the respondent Bank in the property in question and at that stage, rights and contentions of both the sides shall remain open."

7. The above two judgments would squarely apply to the case in hand as, in this case as well, the notice under Section 13(2) of the SARFAESI Act has been issued by respondent No.1-Bank prior to the amendment to Section 2(c)(iva) of the SARFAESI Act, which has come into effect on 15.01.2013.

8. Ms.Archana R. Acharya, learned advocate for respondent No.1-Bank, has submitted that the interest of the Bank may be suitably protected so as to ensure that the petitioner does not transfer or alienate the secured asset. It is further submitted that the Bank may be granted liberty to initiate fresh proceedings, in accordance with law.

9. Having heard the learned counsel for the respective parties, there is no dispute regarding the position of law, insofar as this petition is concerned. The notice under Section 13(2) of the

SARFAESI Act has been issued by respondent No.1-Bank on 21.12.2012, that is, much prior to coming into force of the amendment, on 15.01.2013. There can be no dispute that the said notice is without jurisdiction and is unsustainable in law. It, therefore, follows that once the notice is set aside, all consequential proceedings would also be set aside and the property would have to be re-entrusted to the petitioner.

10. The petitioner has filed an undertaking on 28.09.2015, which is on the record of the petition. The petitioner has undertaken before this Court that she shall not alienate, transfer or encumber the said premises in any manner, till the final order is passed in the proceedings that may be instituted by respondent No.1-Bank, hereinafter.

11. In view of the above facts and circumstances, the following order is passed:

The notice dated 21.12.2012, issued by respondent No.1-Bank under Section 13(2) of the SARFAESI Act, the action of respondent No.1-Bank taken under Section

13(4) of the SARFAESI Act as well as the order dated 04.04.2015, passed by the District Magistrate under Section 14 of the SARFAESI Act, are quashed and set aside. The respondent Bank is, however, not precluded from initiating fresh proceedings, in accordance with law. The possession of the property in question shall be restored to the petitioner on 06.10.2015. The petitioner shall abide by the undertaking given by her. All contentions available to the parties are kept open.

12. The petition is partly-allowed, in the above terms. Rule is made absolute, accordingly.

Direct Service of this order is permitted.

(SMT. ABHILASHA KUMARI, J.)

piyush