IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO. 3918 OF 2017
WITH
CIVIL APPLICATION NO. 2372 OF 2018

M/s. Royal Builders and Developers **... Petitioner**

V/s.

The Special Recovery Officer,
Maratha Sahakari Bank Ltd. and Ors. **... Respondents**

Mr. Ashok Saraogi for the Petitioner.
Mr. K.S. Deval i/b J.M. Joshi for the Respondent Nos. 1 and 2.
Mrs. Sushma Bhende, AGP for Respondent Nos. 3 and 9.

CORAM : K. K. TATED, &
N.J.JAMADAR, JJ.
DATE : 31st OCTOBER, 2018

P.C.:

1 Heard learned Counsel for the parties.

2 By this petition under Article 226 of the Constitution of India, the Petitioner challenges the order dated 09.03.2017 passed by the learned Chief Metropolitan Magistrate, Esplanade, Mumbai in Case No. 666/SA/2016 on an application filed by Respondent-Bank under Rule 107(11)(vi)(a) of the Maharashtra Co-Operative Societies Rules, 1961 (hereinafter will be referred to as "**the MCS Rules**") for taking possession of the suit property i.e. Flat No. 801, 8th floor, Royal Accord Co-operative Housing Society Ltd., Survey Nos. 267, 271, 272,

Chakala, Andheri (East) Mumbai – 400 099.

3 The learned counsel Mr. A.M. Saraogi, appearing on behalf of Petitioner submits that neither the Petitioner is a borrower, nor a guarantor with the Respondent-Bank. He submits that even Respondent-Bank has not made them party in application filed by them under Rule 107 of the MCS Rules before the Chief Metropolitan Magistrate, Esplanade, Mumbai

4 The learned counsel for the Petitioner submits that Petitioner is a builder. He submits that Petitioner agreed to sell the suit flat by registered Agreement for Sale dated 28.08.2009 to the Respondent No.5 for the sum of Rs.2,66,25,000/-. He submits that Respondent No.5 paid only sum of Rs.25,00,000/- at the time of execution of Agreement for Sale dated 28.08.2009. He submits that though the said Agreement for Sale dated 28.08.2009 is a registered document with the Authority, Respondent No.5 failed and neglected to pay further amount as per the terms and conditions. Therefore, the Petitioner issued notice dated 03.02.2011 for cancellation of the said agreement. At the same time, the Petitioner and Respondent No.5 entered into Deed of Cancellation dated 03.02.2011 (Exh. 'E' page 75 of the petition). The learned counsel for the Petitioner submits that thereafter, the Petitioner filed Short Cause Suit No. 1938 of 2013 in

Bombay City Civil Court at Dindoshi, Borivali Division, Goregaon under Sections 34 to 38 of the Specific Relief Act with following prayers:

> *"a) That this Hon'ble Court be pleased to declare that the Defendants have no right in respect of the suit premises viz.flat No.801, adm.about 4440 sq. ft. Built-up area on 8th floor of the building namely Royal Accord situate on the property bearing Survey No. 267, 271 AND 272 situate at Village: Chakala, Taluka: Andheri, of Mumbai Suburban District known as Royal Accord,Chakala Road, Chakala, Andheri [E], MUMBAI 400099, within the jurisdiction of registration District and sub District of Mumbai Suburban Districts AND within the Municipal Limit of K-EAST Ward Office in pursuance of agreement dated 28.08.2009 and Deed of Cancellation dated 03/02/2011, in respect of the suit premises as the same is revoked, cancelled and withdrawn in view of the settlement between the Plaintiff and the Defendant and payment of the settled amount.*
>
> *b) That this Hon'ble court be pleased to restrain the Defendant, his servant, agent, person or persons claiming through him from dealing with, creating third party interest alienating, encumbering and or hypothecating the same in any manner what so ever in pursuance of agreement dated 28.08.2009 and in respect of the suit premises viz.Flat No.801, adm. About 4440 sq. ft. Builtup area on 8th Floor of the building namely Royal Accord situate on the property bearing Survey No. 267,271 AND 272 situate at Village: Chakala, Taluka: Andheri, of Mumbai suburban District known as Royal Accord,Chakala Road, Chakala, Andheri [E] MUMBAI 400099, within the jurisdiction of registration Districts AND within the Municipal Limit of K-EAST Ward Office.*
>
> *c) Interim and ad interim relief in terms of prayer clause [b] herein above;*
>
> *d) Costs of this suit be provided for to the Plaintiff;*
>
> *e) Such other and further relief as the nature and circumstances of the case may require and this Hon'ble court deem fit and proper be granted for."*

5 The learned counsel for the Petitioner submits that in that suit, the Respondent Bank preferred Chamber Summons No. 1116 of 2015 for joining them as party with following prayers:

> *"(a) That this Hon'ble court may be pleased to allow the Applicant to intervene in the above Suit as an intervener;*
> *(b) That this Hon'ble court be pleased to further direct the Plaintiffs to implead/ join the Applicants as a party Defendant in the suit;*
> *(c) For such other and further reliefs as this Hon'ble Court may deem fit and proper;"*

6 The learned counsel for the Petitioner submits that the said Chamber Summons is pending for hearing on its own merits. He submits that inspite of having knowledge about the suit filed by the Petitioner, Respondent-Bank made incorrect statement in their application under Rule 107 of the MCS Rules for obtaining order dated 09.03.2017 from the Chief Metropolitan Magistrate, Mumbai. To that effect, he has relies on paragraph 7 of the said order, which reads thus:

> "*7) The authorised officer of the applicant has in the affidavit categorically stated that, no suit is pending against the applicant restraining it from enforcing the security interest created upon the said attached property. No stay order appears to have been passed by any authority in respect of the attached property."*

7 The learned counsel for the Petitioner submits that in any case as of today, the Petitioner is the owner of the suit property. Therefore,

there is no question of allowing Respondent-Bank to take forcible possession of the same for recovery of their dues. Therefore, present Writ Petition may be made absolute by setting aside the order dated 09.03.2017 passed by the learned Chief Metropolitan Magistrate, Esplanade, Mumbai in Case No. 666/SA/2016.

8 The learned counsel for the Petitioner submits that whatever documents produced by the Bank before the learned Metropolitan Magistrate for obtaining order dated 09.03.2017 were forged documents.

9 On the other hand, learned counsel for the Respondent-Bank submits that Respondent No.5 at the time of obtaining loan, mortgaged the suit property by executing the Mortgage Deed dated 28.03.2011. He further submits that not only that the Respondent No.5 also submitted no objection from the Petitioner for mortgaging the said property. He submits that they have to recover more than Rs.4,96,36,518/- as on 31.10.2018. To that effect, Advocate for the Respondent Nos. 1 and 2 placed on record the certificate dated 03.09.2018. Same is taken on record and marked 'X' for its identification.

10 The learned counsel for the Respondent Nos. 1 and 2 submits that alternate efficacious remedy is available to the Petitioner to

challenge the order passed by the learned Metropolitan Magistrate, Mumbai dated 09.03.2017. Therefore, there is no question of entertaining the present Writ Petition under Article 226 of the Constitution of India.

11 We heard both the sides at length. It is to be noted that in the present proceeding, at the time of passing the order dated 09.03.2017, the learned Chief Metropolitan Magistrate, Mumbai has considered documents placed on record by the Respondent-Bank including Mortgage Deed dated 28.03.2011 and no objection certificate issued by the Petitioner builder. It is to be noted that though the Respondent Bank preferred Chamber Summons No. 1116 of 2015, in a S.C.Suit No. 1938 of 2013 filed by the Petitioner against Respondent No.5, the same is pending for hearing on its own merits. Therefore, whatever is recorded by the learned Metropolitan Magistrate in paragraph 7 in order dated 09.03.2017 is absolutely correct. Till today there is no order from any Authority and/or Court restraining Respondent Nos.1 and 2 from taking any action in respect of the secured assets. Therefore, prima facie, it is not possible to hold that Respondent Bank placed on record forged documents for obtaining order dated 09.03.2017 from the learned Metropolitan Magistrate.

12 Considering the fact that as on today Respondent Nos. 1 and 2

have to recover more than Rs.4,96,36,518/- from the Respondent No.5, Respondent No.5 executed Mortgage Deed dated 28.03.2011 along with no objection certificate from the Petitioner in respect of suit property, we do not find any reason to entertain the present Writ Petition. Apart from that, the alternate efficacious remedy is available to the Petitioner to take appropriate steps to protect his interest, if any.

13 It is to be noted that the Apex Court in the matter of ***Punjab National Bank Vs. O.C. Krishnan & Ors. (2001) 6 SCC 569*** held that if an alternate remedy is available, then the High Court should not entertain the petition under Article 227 of the Constitution of India and should direct the party to take recourse to the appeal mechanism provided by the Act. Paragraph 6 of the said judgment reads thus:

> *"6 The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available, judicial prudence demands that the court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."*

14 Similarly, the Apex Court, in the matter of ***General Manager, Sri Siddeshwara Cooperative Bank Ltd. & Ors. Vs. Ikbal and Ors. (2013) 10 SCC 83*** held that if an alternate efficacious remedy is available under the SARFAESI Act, the High Court should not exercise the powers under Article 226 of the Constitution of India in respect of the matters arising from SARFAESI Act. Portion of paragraph 28 reads thus:

> *"28. ……..In our view, there was no justification whatsoever for the learned Single Judge to allow the borrower to bypass the efficacious remedy provided to him under Section 17 and invoke the extraordinary jurisdiction in his favour when he had disentitled himself for such relief by his conduct. The Single Judge was clearly in error in invoking his extraordinary jurisdiction under Article 226 in light of the peculiar facts indicated above. The Division Bench also erred in affirming the erroneous order of the Single Judge."*

15 The Apex Court also in the matter of ***Authorized Officer, State Bank of Travancore and Ors. Vs. Mathew K.C. (2018) 3 SCC 85*** held that the SARFAESI Act is a complete Code by itself providing for expeditious recovery of the dues out of loans granted by the Financial Institutions, the remedy of appeal by the aggrieved under section 17 before the DRT is provided. It is also held by the Apex Court that the normal Rule is that a Writ Petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available. Paragraphs 3, 7 and 8 of the said judgment read thus:

> *"3. The SARFAESI Act is a complete code by itself, providing for expeditious recovery of dues arising out of*

loans granted by financial institutions, the remedy of appeal by the aggrieved under Section 17 before the Debts Recovery Tribunal, followed by a right to appeal before the Appellate Tribunal under Section 18. The High Court ought not to have entertained the writ petition in view of the adequate alternate statutory remedies available to the Respondent. The interim order was passed on the very first date, without an opportunity to the Appellant to file a reply. Reliance was placed on United Bank of India Vs. Satyawati Tandon and Others 2010 (8) SCC 110 and Sri Siddeshwara Cooperative Bank Ltd. Vs. Iqbal and Others *2013 (10) SCC 83. The writ petition ought to have been dismissed at the threshold on the ground of maintainability. The Division Bench erred in declining to interfere with the same.*

7. The Section 13(4) notice along with possession notice under Rule 8 was issued on 21.04.2015. The remedy under Section 17 of the SARFAESI Act was now available to the Respondent if aggrieved. These developments were not brought on record or placed before the Court when the impugned interim order came to be passed on 24.04.2015. The writ petition was clearly not instituted bona fide, but patently to stall further action for recovery. There is no pleading why the remedy available under Section 17 of the Act before the Debt Recovery Tribunal was not efficacious and the compelling reasons for by-passing the same. Unfortunately, the High Court also did not dwell upon the same or record any special reasons for grant of interim relief by direction to deposit.

8. The statement of objects and reasons of the SARFAESI Act states that the banking and financial sector in the country was felt not to have a level playing field in comparison to other participants in the financial markets in the world. The financial institutions in India did not have the power to take possession of securities and sell them. The existing legal framework relating to commercial transactions had not kept pace with

changing commercial practices and financial sector reforms resulting in tardy recovery of defaulting loans and mounting non-performing assets of banks and financial institutions. The Narasimhan Committee I and II as also the Andhyarujina Committee constituted by the Central Government Act had suggested enactment of new legislation for securitisation and empowering banks and financial institutions to take possession of securities and sell them without court intervention which would enable them to realise long term assets, manage problems of liquidity, asset liability mismatches and improve recovery. The proceedings under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, (hereinafter referred to as 'the DRT Act') with passage of time, had become synonymous with those before regular courts affecting expeditious adjudication. All these aspects have not been kept in mind and considered before passing the impugned order."

16 In view of this facts, we do not find any substance in this petition.

17 At this stage, the learned counsel for the Petitioner submits that this order may be stayed for atleast 15 days to enable the Petitioner to test this order in the higher Court.

18 The learned counsel for the Respondent Nos. 1 and 2 vehemently opposed the said request.

19 Considering the fact that Respondent Nos. 1 and 2 is going to take possession of suit property on 02.11.2018 and as on today more than Rs.4,96,36,518/- is due and payable by Respondent No.5, we do not find any reason to stay the operation and implementation of this

order. Hence, oral request is rejected.

20 Hence, following order is passed:

a) Writ Petition stands rejected.

b) No order as to costs.

c) In view of rejection of Writ Petition, nothing survives in the Civil Application No. 2372 of 2018. Hence, same is dismissed as infructous.

(N.J.JAMADAR, J.) **(K.K.TATED, J.)**