



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION (L) NO.4188 OF 2023
WITH
COURT RECEIVER'S REPORT NO.51 OF 2020
IN
SUIT NO.634 OF 2017

Caparo Financial Solutions Ltd. ...Applicant
In the matter between
Robin Karamchandani ...Plaintiff

Versus

Jem and Associates & Ors. ...Defendants

Mr. Shrey Fatterperkar with Ameet Mehta, Nirav Marjadi and Vinay Shingada and Nikita Deora i/b. M/s. Solicis Lex for the Plaintiff.

Mr. Ashish Kamat, Senior Counsel, Mohit Khanna, Venkat Rao, Sindhu K. and Akash Gaonkar i/b. Legalserve and Associates for Caparo for the Applicant.

Karl Tamboly, Deepak Shukla and Ronish Mehta i/b. Vinod Mistry & Co. for Defendants.

Mrs. Rekha Rane, 2nd Asstt. to C.R. is present.

CORAM : R.I. CHAGLA J.
DATE : 24 APRIL 2023.

ORDER :

1. By this Interim Application, the Applicant is seeking a direction to the Court Receiver to hand over vacant and peaceful possession of the subject mortgage property to the Applicant.

2. Mr. Ashish Kamat, learned Senior Counsel for the Applicant has referred to the order dated 12th March, 2020 passed by this Court. By the said order this Court was informed that both the Properties are mortgaged to Caparo Financial Solutions Limited and Reliance Home Finance Limited and the allotment letters are annexed to the mortgage documents. Certified copies of the mortgage documents (but not the allotment letters) were already with the Court Receiver. This Court had held that given the fact that there are two admitted mortgages, clearly, a no objection of the two lenders will be required for any sale. In the meantime, the Court Receiver was directed to write to both financial institutions asking whether they are agreeable to the sale and will their no objection to the sale of these two premises, but making it clear that the mortgage debts will be cleared from the sale proceeds first.

3. The Court Receiver had addressed letter dated 16th March, 2020 in compliance with the said order. In response the Applicant has addressed letter to the Court Receiver dated 10th June, 2020 in which they have given their conditional consent / no objection for sale of the subject mortgage property. The conditions have been mentioned in Paragraph 6 of the said letter.

4. In view of non compliance of the conditions mentioned in letter dated 10th June, 2020, the Applicant addressed another letter dated 7th March, 2022 to the Court Receiver wherein it is stated that the subject mortgage property is not yet sold and that in view of the subject property having been mortgaged to the Applicant, a right recognized both by the Plaintiff and Defendants under Consent Minutes dated 3rd November, 2018 forming part of the Consent Order dated 3rd November, 2018 passed in Contempt Petition (L) No.123 of 2018, as secured Creditor, under SARFAESI Act, the Applicant had issued notice under Section 13(2) of the SARFAESI Act and called upon the Defendants herein to pay the debts of the Applicant. The matter has accordingly been proceeded with under the SARFAESI Act. Further, the Applicant had initiated the process of taking over possession and other actions under Section 13(4) of the SARFAESI Act and in this regard symbolic possession of the subject mortgaged property has been taken by issuance of notice dated 2nd March, 2022 to the borrowers and guarantors including the Defendants. By the said letter Court Receiver was directed to not to deal with the subject mortgaged property in any manner and / or not to create any kind of hindrance or impediment in carrying out actions under Section 13(4) of the SARFAESI Act in respect of the

subject mortgaged property.

5. Mr. Kamat has submitted that in view of the steps initiated under the SARFAESI Act, including 13(4) of the Act, the present Application has been taken out for directions to the Court Receiver to hand over the subject mortgaged property to the Applicant. He has placed reliance upon the decision of this Court in *Mineral Sales Pvt. Ltd. Vs. Otoklin Plants & Equipment Ltd. (In Liquidation)*¹. He has submitted that this Court in the said decision had considered a similar application made by the Applicant for direction to the Official Liquidator to hand over the secured assets of the Company in liquidation which had been mortgaged to the Applicant. This Court had considered that the Applicant had exercised powers under the Securitization Act (SARFAESI Act.) The learned Single Judge placed reliance upon the decision of this Court in *Akola Oil Industries Vs. State Bank of India*², wherein it was held that a secured creditor while proceeding under the RDB Act or Securitization Act does not need the permission of the Company Court. Section 35 of the Securitization Act gives overriding effect to

1 Company Application No.1170 of 2009 in Company Petition No.970 of 1997 decided on 26th November, 2009.

2 2005(5) Bom C.R. 706.

the provisions of the Act notwithstanding anything inconsistent therewith contained in any other law in force. Accordingly, this Court had allowed the application and directed the Official Liquidator to handover the mortgaged properties to the Applicant.

6. Mr. Kamat has submitted that the Court Receiver has been appointed by this Court in the present Suit and it is an admitted fact that mortgage of the subject property had been created in favour of the Applicant. This Court has taken note of this fact as well as making clear in the said order that mortgage debts will be cleared from the sale proceeds first. Considering that the Court sale has not gone through as well as proceedings have been instituted under the SARFAESI Act, the Applicant has made the present Application for handing over of the subject mortgaged property. In light of the law laid down in the aforementioned decisions as well as Section 35 of the SARFAESI Act the relief sought for in the present Interim Application be granted.

7. Mr. Tamboly learned Counsel for the Defendants has submitted that Applicant by the present Application is circumventing the provisions of the SARFAESI Act under which in the event

possession of the subject property cannot be taken under Section 13(4) of the SARFAESI Act, then apply the secured creditor is statutorily mandated by Section 14 of the Act to make an Application before the Chief Metropolitan Magistrate or District Magistrate for assistance in taking possession of the secured assets. He has submitted that a Section 17 application has been preferred under the SARFAESI Act by the Judgment Debtor challenging the notice under Section 13(2) and steps taken under Section 13(4) of the SARFAESI Act. The Application is pending. Further, he has submitted that there are arbitral proceedings between the Applicant and the Defendants which are also pending. In the arbitral proceeding monies have been claimed from the Applicant which are due to the Defendants. He has accordingly submitted that no orders be passed in the present application in view of the statutory mandate of the SARFAESI Act as well as the arbitral proceedings in which the debt of the Applicant is yet to be determined.

8. Mr. Tamboly has relied upon the decision of the Division Bench of this Court in the case of *Pratap G. Somaiya S/ o. Goverdhandas Vs. Rajesh Thakker, S/o. Prabhudas Thakker*³ wherein

³ Appeal (L) No.162 of 2016 decided on 6th October, 2016.

this Court in a similar Application made directing the Court Receiver to hand over the mortgaged property to ARCIL (Secured Creditor) had considered the provisions of Section 13(2) and 13(4) of the SARFAESI Act and had further considered that the proceedings under Section 14 had not been taken. The Division Bench of this Court was of the view that in the event of any order being passed by the Chief Metropolitan Magistrate permitting the bank to take possession, the Court Receiver shall hand over possession of the mortgaged properties to ARCIL. Mr. Tamboly in that connection submitted that in view of a similar application being made in the present case, the relief sought for ought not to be granted as this would give the Applicant possession of the mortgaged property where otherwise the Applicant would have had to resort to proceeding under Section 14 of the SARFAESI Act.

9. Mr. Fatterperkar, the learned Counsel appearing for the Plaintiff has submitted that the conditions which had been imposed by the Applicant can easily be satisfied including filing an Affidavit by Defendants in terms of the said order dated 12th March, 2020. The mere delay in compliance with the conditions cannot result in the subject mortgaged property which is custodia legis being handed

over by the Court Receiver to the Applicant.

10. Mr. Fatterperkar has further submitted that the notice was issued under Section 13(2) of the SARFAESI Act by the Applicant way back on 15th January, 2021 and thereafter in view of the physical possession of the subject property being unable to be taken by the Applicant as the subject mortgaged property is custodia legis, the present Application is now made without following the provisions of the SARFAESI Act including filing the requisite proceedings under Section 14 of the Act. He has submitted that no relief be granted in the present Interim Application.

11. Having considered the submissions, it can be seen from the said order dated 12th March, 2020 that the learned Single Judge of this Court was informed that both the Properties are mortgaged to Caparo Financial Solutions Limited and Reliance Home Finance Limited and the allotment letters are annexed to the mortgage documents. Certified copies of the mortgage documents (but not the allotment letters) were already with the Court Receiver. The learned Single Judge held that given the fact that there are two admitted mortgages, clearly, a no objection of the two lenders will be

required for any sale. It is in view of these observations that the Court Receiver was directed to write both the financial institutions which included the Applicant herein as to whether they are agreeable to the sale and will give their no objection to the sale of these two premises. It was further made clear that the mortgage debts will be cleared from the sale proceeds first.

12. It is to be noted that the Court Receiver had accordingly addressed letter dated 16th March, 2020 to the Applicant. In response thereto, the Applicant had by letter dated 10th June, 2020 addressed a letter giving their conditions to be satisfied for granting their consent / no objection for sale of the subject mortgaged property. Admittedly these conditions have not been met.

13. The Applicant has accordingly by letter dated 7th March, 2022 addressed to the Court Receiver withdrawn their consent for the Court sale and called upon the Court Receiver not to deal with subject property and / or create any kind of hindrance or impediment in carrying out the Applicant's actions under Section 13(4) of the SARFAESI Act in respect of the subject mortgaged property.

14. This Court in the case cited by Mr. Kamat on behalf of the Applicant namely *Mineral Sales Pvt. Ltd. (Supra)*, where an Official Liquidator had been appointed for the Company (In liquidation), an application had been made directing the Official Liquidator to hand over of the mortgaged property to the Applicant therein. In that case though other Creditors had made claims against the Company (In liquidation), this Court upon considering the provisions of the SARFAESI Act and placing reliance upon the *Akola Oil Industries (Supra)* held that secured creditors proceeding under the Securitization Act does not need permission of the Company Court. Further, Section 35 of the Securitization Act gives overriding effect to the provisions of the Act, notwithstanding anything inconsistent therewith contained in any other law for time being in force. This Court had accordingly granted the relief sought for in the Application by directing the Official Liquidator to handover the mortgaged property to the Applicant.

15. In so far as the decision in *Pratap G. Somaiya (Supra)* relied upon by Mr. Tamboly for the Defendants, it is distinguishable on facts. Further, the prior decisions of this Court in *Mineral Sales Pvt. Ltd. (Supra)* and *Akola Oil Industries (Supra)* have

not been considered. Under Section 35 of the SARFAESI Act, there is an overriding effect given to the provisions of the SARFAESI Act. It is clear from the SARFAESI Act that in the event physical possession of the Secured Act cannot be taken then proceedings under Section 14 of the Act, are to be taken by the secured creditor taking possession of the secured assets. In normal course possession of the Secured Asset would be taken from the borrower. However, considering that the subject mortgaged property in the present case is custodia legis, the Judgment Debtor cannot use this as a shield to prevent the Applicant from taking possession of the secured asset. In fact reliance placed upon Section 14 of the SARFAESI Act by the Defendants in contending that the Applicant would necessarily have to apply to the Chief Metropolitan Magistrate for an order assisting the Applicant / as Secured Creditor in taking possession of the secured assets, is misplaced as in this case it is not the borrower who is retaining possession of the secured asset / mortgaged property but the possession as mentioned is with the Court Receiver and thus custodia legis.

16. In my view, considering that the subject mortgaged property is in the custody of this Court, it is for this Court to assist

the Applicant in taking possession of the secured asset particularly when the conditions for consent to the Court sale have not been satisfied. This Court is cognizant of this fact that the said order was passed way back on 12th March, 2020. This Court cannot continue with the possession of the subject mortgaged property. The mortgage debt would require to be satisfied first as held in the said order.

17. Accordingly, the present Application is allowed and the Court Receiver is directed to hand over vacant and peaceful possession of the subject mortgaged property to the Applicant. The rights and contentions of the Defendants in the SARFAESI proceedings including the Application made under Section 17 of the SARFAESI Act as well as the ongoing arbitral proceedings between the Applicant and Defendants are kept open and the observations in this order will not have a bearing on those proceedings which shall be decided independently on their merits.

18. Interim Application is accordingly disposed of.

19. The Applicant is at liberty to make application before the Court Receiver for handing over possession of the subject

property. Once the Application is made, the Court Receiver shall handover the subject property after a period of two weeks.

20. Liberty is granted to the Plaintiff to apply to the appropriate Court / Tribunal in the event there is a surplus after the settlement of the dues of the Applicant.

[R.I. CHAGLA J.]