IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 1834 OF 2015

Abdulla Hasan Aboo,	**}**	
Alias M. A. Abdulla	**}**	**Petitioner**
versus		
Dena Bank and Ors.	**}**	**Respondents**

Mr. Shrihari Aney-Senior Advocate with Mr.S.R. Nargolkar and Ms. Meenakshi Sakhare for the Petitioner.

Mr. A. R. Bamne for Respondent No. 1.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

DATED :- SEPTEMBER 8, 2015

P.C. :-

By this Writ Petition under Article 226 of the Constitution of India, the Petitioner prays for issuance of Writ of Certiorari or any other appropriate Writ, Order or direction, calling for the records and proceedings relating to case No. 178/SA/2015 and the order dated 6th June, 2015 of the Learned Chief Metropolitan Magistrate, Esplanade, Mumbai (Annexure 'M' to the Petition) and thereafter, this Court, on scrutiny thereof, should quash and set aside the same.

2) Very few facts are required to be set out for appreciating the contentions of the learned Senior Counsel appearing for the Petitioner.

3) The Petitioner does not dispute that the first Respondent is the Bank and that the first Respondent made an application to the learned Chief Metropolitan Magistrate under section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short the 'SARFAESI Act'). In that application, the Bank pointed out that the SARFAESI Act applies to it and relied upon section 2(1) clause (c) of the same. It relied upon the fact that an immovable property situated at ground floor consisting of 28 rooms including 23 guest rooms, one linen room, one store room, one waiting lounge, one reception area and one entrance lobby, totally admeasuring 5500 square feet and two shops admeasuring 36.42 meters and 26.53 square meters respectively, situate at Shalimar House, opposite Bharat Nagar Society, Grant Road, Mumbai 400 007 is the immovable property, in which the security interest is created in favour of the Bank.

4) One M/s. Hanjer Biotech Energies Pvt. Ltd., through its Directors (Respondent No. 2 to this Writ Petition) applied for a loan/credit facility styled as termed loan facility in the sum of Rs.100 crores. In consideration of an application made in that behalf, a sanction letter was issued setting out the terms and conditions. This sanction letter is dated 4th June, 2012 and the condition *inter alia* is that

this loan should be secured by a simple mortgage in favour of Respondent No. 1 Bank. Accordingly and in consideration of the facilities sanctioned and granted, it is common ground that the Respondent No. 2 Borrower to the knowledge of the owner - Nineth Respondent to this Writ Petition executed a Deed of Mortgage dated 27th June, 2012 and it was duly registered with the Sub-Registrar, Mumbai. No objection was ever raised to this Mortgage by any of the Respondents.

5) The said borrower Respondent No. 2 availed of the loan facility, but, neither the borrower nor the guarantors, their group company, repaid the loan amount and in the time stipulated in the sanction letter, resulting in the first Respondent Bank classifying the account and debt of the borrower Respondent No. 2 to the Petition as a non performing asset. That is how the SARFAESI Act enabled the first Respondent Bank to enforce the security interest and in terms of Chapter III thereof, particularly under section 13. That is how it complied with sub-section (2) of section 13 by issuing the requisite notice. Upon non-compliance with the requisitions contained in the notice and in terms of the further sub-sections of section 13, the Bank was empowered to take possession of the secured asset of the borrower, including the right to transfer and that is how the subject notice under section 13(2) was sought to be enforced.

6) It is common ground that section 14 of the SARFAESI Act empowers the Bank to move the competent Court and for seeking direction to take physical possession and control of the secured asset. That is how on 3rd August, 2015, the subject application was made.

7) Preceding the application, was the notice, copy of which is to be found in the paper book which came to be issued on 16th December, 2014. A reply thereto was given by the second Respondent borrower and what is relied upon is the portion where the borrower and the guarantor is supposed to inform the first Respondent and the Bank that the notice is misconceived, *ultra vires* and in any event, it has seriously hampered the day to day operation of the company and multiplex project (including third party public), which is currently being operated by a Licencee on business conducting basis.

8) These are thus the undisputed facts and Mr. Aney relies upon a further undisputed fact that there are three agreements and on which the Petitioner places reliance. The Petitioner is supposed to have been inducted in the premises and which are styled as larger premises. He would submit that the 28 rooms are but part of the larger property. In that regard, he relies upon the document, copy of which is at Annexure 'A' styled as Conducting Agreement dated 19th December, 2003. Mr. Aney would submit that these agreements are much prior to

the transactions with the first Respondent Bank. Mr.Aney submits that the Petitioner does not dispute that the agreement is styled as Conducting Agreement. However, there is possession, which is handed over to the Petitioner and of the premises under the Conducting Agreement exclusively. If the possession has been handed over and in terms of this Conducting Agreement, then, in passing the impugned order, the learned Chief Metropolitan Magistrate has overlooked the recitals and terms thereof. Our attention has been invited to the first Conducting Agreement and thereafter the second agreement, copy of which is at page 67 of the paper book. It is submitted that this is a continuation of the transaction or arrangement, but what is important and for being borne in mind is that the owner could not have disturbed the Conductor Petitioner from conducting the business. The owner has agreed not to disturb the physical possession. Reliance is also placed upon clause 7 (a) and (c) to urge that the agreement is in force and comprises of fully completed 30 rooms on the ground floor along with existing 19 rooms on the mezzanine and first floor and 12 rooms on the third floor aggregating 61 rooms with furniture and specifications. So long as this Conducting Agreement is in force and stated to be under a lock-in period up to 30th June, 2022, there is no question of the Petitioner's possession being disturbed. Mr. Aney relies upon the reply given by the borrower to the securitisation notice pointing out that third party interest has been created and third parties have been put in possession. In that regard, our attention is invited to pages 206 and 210 so also page 212 of the paper book. This is nothing but a part of the exhaustive reply of the borrower. It is in these circumstances that Mr. Aney criticised the approach of the learned Chief Metropolitan Magistrate. He submits that from paras 3 and 4 of the order impugned in this Petition, it is evident that none of the relevant and germane facts, much less nature of the agreement and the transaction has been looked into by the Magistrate. Mr. Aney would submit that if there is non-consideration of the fact that part of the premises are with the Licencee and this is not a clean and clear right to resume possession and conferred by the SARFAESI Act, then, minimal adjudication and in terms of the law laid down by the Hon'ble Supreme Court of India in the case of *Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and Ors.* reported in **(2014) 6 SCC 1** is contemplated. It is in these circumstances that he would submit that the Writ Petition be entertained. The course open for this court is to set aside the impugned order and direct the learned Chief Metropolitan Magistrate to consider the application under section 14 of the SARFAESI Act afresh or to enable the Petitioner to avail of such remedies as are available in law, but by protecting the possession of the Petitioner till then. For all these reasons, he would submit that the Writ Petition be entertained.

9) Mr. Bamne appearing for the only contesting Respondent, namely, the Bank submits that this Court must appreciate the nature of the transaction or agreement between the owner and the Petitioner. Throughout, the agreement is styled as a Conducting Agreement. One cannot forget the fact that what is allowed to be conducted is a running business or business operation of the owner and by the Conductor. The Conductor is inducted only for the purpose of carrying on said business and throughout, it has not derived any right, title and interest in the property. His status is that of an agent. In such circumstances and by reading all the documents as a whole, Mr. Bamne would submit that the list of documents, on which heavy reliance is placed, will not enable the Petitioner to question the action under section 14 of the SARFAESI Act. There is nothing erroneous or illegal, much less perverse about the impugned order. The Petition is nothing but an abuse of process of this Court and must be dismissed. To such a case, the law laid down by the Hon'ble Supreme Court of India in *Sondagar's* case (supra) is inapplicable.

10) We have, with the assistance of learned Counsel appearing for both sides, perused the Petition and all the Annexures thereto, including the impugned order.

11) It is common ground that section 14 of the SARFAESI Act

has been inserted to assist the secured creditor in taking possession of the secured assets. By sub-section (1) of this section, the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him, take possession of such asset and documents relating thereto and forward such asset and documents to the secured creditor.

12) The proviso thereto states that the application that is being required to be made by the secured creditor must accompany an affidavit duly affirmed by the authorised officer and with the declarations therein. The further proviso to this sub section (1) of section 14 mandates that on receipt of the affidavit of the aurhotised officer, the Chief Metropolitan Magistrate shall, after satisfying the contents of the affidavit, pass suitable orders for the purpose of taking

possession of the secured asset. Thereafter by sub-sections 1(a), (2) and (3) there are certain enabling powers and provisions in that behalf. By sub section (3) of section 14 of the SARFAESI Act, it is clarified that no act of the chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any Court or before any authority.

13) Once this Chapter and which is titled as "Enforcement of security interest" contains such provisions, then, it is but natural that they enable enforcement of the security interest. The Act seeks to achieve expeditious realisation of the loan and other amounts due and payable to the secured creditor by enforcement of security interest.

14) It is on such an application, which was made that the Magistrate has observed in the impugned order that there is compliance with the first proviso and second proviso to sub-section (1) of section 14 that the underlying facts are undisputed, namely, sanction of the loan, disbursement of the amount, the account being classified as non performing asset, the requisite notice under section 13(2) having been issued and served and the only observation that is being criticized before us is that the Magistrate observes that the borrower did not raise any objection by replying the said notice nor repaid the amount within the stipulated time. In para 4 of the impugned order, the Magistrate

observed that the secured assets are neither in possession of Lessee nor any Suit is pending in respect thereof.

15) It is in this regard and on such observation that we must note the case of the present Petitioner. Undisputedly, the Petitioner relies upon a Conducting Agreement, copy of which is to be found annexed to the paper book and containing the admitted recitals, terms and conditions. There, the party M/s. Shalimar Exhibitors is styled as owner and it is party of the first part. The other part are the Petitioners. It is stated in the recitals that the owner is seized and possessed of mezzanine and first floor premises at Shalimar House, 335, Maulana Shaukat Ali Road, Grant Road, Mumbai 400 007, admeasuring 4000 square feet built up area and having 19 rooms with bathrooms. They are running guest house from the above said premises, which has been licenced by the Mumbai Municipal Corporation. The owners are not having time to carry on the business of M/s. Shalimar Exhibitors and they therefore desire to give the said business only on conducting basis. The Petitioner has approached them and requested it for conducting this guest house business and both sides agreed that this shall not be termed as or construed as any tenancy, lease or deed of assignment or otherwise creating any other right or interest in favour of the Conductor. We do not see any alteration in this primary and

foundational agreement between the parties. It may be that M/s. Shalimar Exhibitors and who are now impleaded as Respondent and the private limited company (borrower) are one and the same entity but what we find is that the possession is handed over only to conduct the running business. In terms of this agreement, which must be read as a whole, it is evident that none of the rights and of the nature contemplated by law and as covered by the Hon'ble Supreme Court judgment in *Sondagar's* case (supra) are created in favour of the Petitioner. That this agreement which was initially brought into effect from 19th December, 2003 has continued in more or less the same form, save and except the additional rooms is evident by Annexure 'B' at page 46, which is another Conducting Agreement for Guest House dated 31st July, 2009. There also the primary recitals and evidencing the arrangements above are exactly as above and identical. The recitals, which are to be found preceding para 1 are part and parcel of this agreement. Mr. Bamne therefore is right in urging that though the Conductors have been termed as exclusive agents to maintain services and managing the rooms, what they are prohibited from doing is to create any interest in favour of any party, much less third party. It may be that this agreement states that the activities shall be in the own and independent capacity of the Petitioner and they would be liable for the same on their own accord, but what follows thereafter are identical clauses, where the words 'owners' and 'conductors' appear, the same responsibility is cast and it is the conducting of the same guest house business that is contemplated.

16) Thereafter, reliance is placed on the agreement and which is taken to be last in point of time and in force. As far as that agreement is concerned, what is evident therefrom is that the same is executed on 2nd April, 2012 and that all recitals therein are identical to the first agreement, copy of which is at Annexure 'B-1' at page 67 of the paper book. Similarly, clause (3) of the same says appointment of Conductor and terms the Conductor as the exclusive agent to let, maintain, serve and manage the rooms. That other clauses relied upon by Mr. Aney and particularly sub clause (e) of clause (4) cannot be read in isolation. What is not to be disturbed is the possession of Conductor and it is not in his own right but it is for the purpose of managing the business of guest house originally conducted and carried on by the owner. That there are specific restrictions on the Conductor is apparent from clause (6) of this agreement and the preceding clauses. None of this would therefore would assist the Petitioner in urging that the Magistrate was obliged to consider this as a case of the Petitioner's possession independent of that of the owner and not to be interfered with by anybody including the Respondent Bank. To our mind, even the

borrower has pointed out that he has inducted somebody by virtue of a Conducting Agreement and nothing more. That such arrangement did not create any right, title or interest in favour of the Petitioner is apparent. In form and substance such agreement can never be equated with a lease or tenancy. In the case before the Hon'ble Supreme Court of India [*Harshad GovardhanSondagar* (supra)], what was brought to the notice of the Hon'ble Supreme Court was the undisputed factual possession of the said Sondagar claiming to be tenant of different premises. The premises were mortgaged to the Bank for securing the loans. The borrowers defaulted in repayment. Their accounts in respect of such debts were declared and classified as non performing assets and then, the SARFAESI Act was resorted to enabling the Bank to take possession. The Chief Metropolitan Magistrate proceeded on the footing that these persons and before the Hon'ble Supreme Court have no independent right in the property, but their case was otherwise. Their case was that they are not borrowers but Lessees of the borrowers. During the course of rival contentions, the Hon'ble Supreme Court further noted that such leases and in favour of the Appellants were created prior to the mortgage or the creation of security interest in favour of the Bank or the assignment thereof. It is in that regard and bearing in mind these contentions that the Hon'ble Supreme Court held that the remedy of parties like the Appellants before it therefore was to approach this Court in its Writ Jurisdiction under Article 226 of the Constitution of India. They could not have take recourse to the right of Appeal conferred by section 17 of the SARFAESI Act. Construing and interpreting section 17, the Hon'ble Supreme Court held that if the lease in favour of the Lessee was made prior to the creation of mortgage or lease created after creation of mortgage is in accordance with section 65A of the Transfer of property Act, that lease was valid and binding on the mortgagee and the lease is yet to be determined. Hence, the Debts Recovery Tribunal will not have the power to restore possession of the secured asset to the lessee.

17) We cannot forget that the observations in the paragraph relied upon are in the context of a lease and which by itself creates a right or interest in the immovable property. If that is the right conferred and by the Transfer of Property Act, 1882, then, to that extent, the provisions of the Transfer of Property Act, by which the said right is created, cannot be controlled or rather will not be overridden by the provisions referred and of the same Act so also that of SARFAESI Act. We have therefore to see whether any of the rights, as claimed in the present Petition, fall within the purview of a lease. We have already held that bearing in mind the clauses in the agreements relied upon by the Petitioner, each of which have to be read together and as a whole,

the Petitioner cannot claim any right, title and interest in the property. Mr. Bamne is therefore right in his submissions that the word 'agent' having been used, the possession of the present Petitioner is not of an independent nature, much less creating any right of the nature claimed in the Hon'ble Supreme Court judgment.

18) For the aforementioned reasons, we are unable to agree with Mr. Aney that the order passed in the present case is vitiated by an error of law apparent on the face of the record or that germane and relevant facts have been omitted from consideration or that the Magistrate has exceeded his powers and jurisdiction under section 14 of the SARFAESI Act. For the reasons mentioned, we do not see any merit in the Writ Petition. It is accordingly dismissed. No costs.

19) This Petition is filed by an individual. This individual is put in possession by Respondent No. 9, who is the owner of the premises. That the Respondent No. 2 borrower and Respondent No. 3, together with Respondent Nos. 4 to 8 mortgaged these very premises and created security interest in respect thereof in favour of the secured creditor Respondent No. 1 is undisputed. But, after this order is passed, Mr.Aney – learned Senior Counsel appearing for the Petitioner states that the ad-interim order passed by this Court enures for the benefit of the Petitioner and the present Petitioner is in possession and occupation

of the premises, which are covered by the mortgage deed and to the extent of 28 rooms including guest house, as indicated therein. He would submit that the Petitioner would like to challenge this order in a higher Court and therefore we should continue this ad-interim arrangement for a period of two months so as to enable the Petitioner to challenge this order by approaching the higher Forum/Court.

20) This request is opposed by Mr. Bamne. He submits that these arrangements, which are now pleaded, were not to the knowledge of the Bank and have been placed before this Court for the first time. Be that as it may, having heard the learned Counsel appearing for both sides on this point, we are of the opinion that the order passed by this Court on 25th June, 2015 and continued from time to time till today shall continue for a period of eight weeks from today, but on the condition that the Petitioner who is in possession and physical occupation of the subject premises, shall not induct any third party in possession or occupation thereof until the security interest is enforced in terms of Chapter III or till an order is passed by the higher Court.

(B.P.COLABAWALLA, J.) **(S.C.DHARMADHIKARI, J.)**