IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.11.2015

DATE OF DECISION : 01 .12.2015

CORAM

THE HON'BLE Mr. JUSTICE SATISH K.AGNIHOTRI
and
THE HON'BLE Dr. JUSTICE P.DEVADASS

W.P.No.11637 of 2015
and
M.P.Nos.1 and 2 of 2015

M/s.Bharat Petroleum Corporation Ltd.,
Karur Retail Territory,
Erode Road,
Attur P.O.,
Karur-639 002. .. Petitioner

Vs.

1.The Authorised Officer,
Union Bank of India,
Pudukottai Branch,
Aalangudi Branch,
Pudukottai.
2.Ramachandradurai Raja
3.Debts Recovery Appellate Tribunal,
Ethiraj Salai Road,
Chennai-600 008. .. Respondents

Petition filed under Article 226 of The Constitution of India praying to issue a writ of certiorari to quash the order of the third respondent dated 05.03.2015 made in RA(SA) No.3/2013 setting aside the order dated 22.11.2012 made in SA No.120/2012 on the file of the Debt Recovery Tribunal-III, Chennai.

For Petitioner .. Mr.R.Thiyagarajan, SC
for Mr.O.R.Santhanakrishnan

For Respondents.. Mr.A.V.Arun for R-1
Notice served on R-2 – No appearance
R3 Tribunal

- - - -

ORDER

SATISH K.AGNIHOTRI, J.

Questioning the correctness of the order dated 5th March, 2015 passed by the Debts Recovery Appellate Tribunal, Chennai, whereunder the petitioner herein was directed to remove all superstructure belonging to it to enable the first respondent Bank to proceed with the sale of the land in question in accordance with the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act"), the petitioner is before us.

2 The facts, as culled out from the pleadings, are indisputable. The petitioner Corporation entered into the possession of a parcel of the land situated in T.S.No.6091/3B of Pudukkottai Town, Palace Gate, admeasuring 12,000 sq.ft (1115 sq.mts.) [127.9 feet (39 mtrs) North to South and 94 feet (28.65 mtrs) East to West], on the strength of the lease deed executed on 4th August, 2006 between the Corporation and the landlord / second respondent herein for the term of 29 years and 11 months, commencing from 1st July, 2006 on payment of monthly rental, as under :

PERIOD	RENTAL PER MONTH
01.07.2006 to 30.06.2011	Rs.12,000 (1st - 5 Years)
01.07.2011 to 30.06.2016	Rs.14,400 (2nd - 5 Years)
01.07.2016 to 30.06.2021	Rs.17,280 (3rd - 5 Years)
01.07.2021 to 30.06.2026	Rs.20,736 (4th - 5 Years)
01.07.2026 to 30.06.2031	Rs.24,883 (5th - 5 Years)
01.07.2031 to 31.05.2036	Rs.29,860 (4 years & 11 months)

3 The details of a parcel of the land, which was leased out, as per the lease deed, reads as under:

> "NOW THE INDENTURE WITNESSETH that in consideration of the rent being paid by the Lessee and of the covenants and conditions herein contained observed and performed, the Lessor / Lessors doth/do hereby demise unto the Lessee ALL THAT piece or parcel of land situated at PUDUKKOTTAI comprised in bearing T.S.No.6091 / 3B of Pudukkottai Town, containing by admeasurement an area of 12,000 sq.ft. (1115 sq.mts) 127.9 feet (39 mtrs) North to South and 94 feet (28.65 mtrs) East to West in all 1115 sq.mts or 12,000 sq.ft of there abouts, morefully described in the schedule hereunder and shown on the plan annexed hereto within red border (hereinafter

called 'the said land') together with all rights, easements and appurtenances whatsoever belonging or appertaining to the said land"

4 The lease deed was duly registered. The second respondent mortgaged the property in question on 10th October, 2007 with the first respondent bank for obtaining loan from the bank. The second respondent defaulted in making repayment of dues / interest, as on 31st August, 2011 and a sum of Rs.72,66,259.26 was held as outstanding. Accordingly, a demand notice, dated 17th September, 2011, seeking enforcement of the security interest under the provisions of Section 13(2) of the SARFAESI Act was served on the second respondent / borrower. It appears, thereafter, a possession notice, dated 27th February, 2012 under Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 (for short "the Enforcement Rules"), was served on the second respondent. The sale notice under the provisions of Rule 8(6) of the Enforcement Rules was issued on 29th February, 2012. The petitioner, feeling aggrieved by the aforestated sale notice, moved the Debt Recovery Tribunal-III, Chennai in S.A.No.120/2012. The learned Tribunal, by order dated 22nd November, 2012, set aside the sale notice dated 1st March, 2012 and allowed the application of the petitioner herein, holding as under :

> "The applicant has a specific case that he is a lessee in the property and the lease deed was executed much prior to the mortgage. It is not challenged by the 1st respondent. Moreover, in the reply, the 1st respondent raised a contention that the borrower has been running the business in the property and not by the applicant. But no proof other than the lease deed is available to strengthen its case. It is evident that the impugned Sale Notice contains particulars of the retail outlet/petrol bunk and the super structures therein as property to be sold wherein it is an admitted fact that the land alone is mortgaged with the bank. The respondent has no satisfactory explanation regarding the same. Therefore, I am bound to accept the applicant's case. Point is found accordingly.
>
> 7.Point No.2 :
>
> In view of the foregoing discussion, the SARFAESI application is to be allowed and accordingly it is allowed without costs.
>
> 8.In the result, the SARFAESI application is allowed and the impugned Sale Notice dated

1.3.2012 is hereby set aside. ....”

5 Being aggrieved the first respondent Bank preferred an appeal under Section 18 of the SARFAESI Act before the Debt Recovery Appellate Tribunal, Chennai. The learned Chairperson, examining all the facts of the case, held that the land in question belongs to the second respondent and the superstructure, machinery and the bunker embedded in the earth belong to the petitioner corporation and as such, a direction was issued to the petitioner Corporation to remove all the superstructure belonging to it, so that the first respondent Bank can proceed with the sale to recover the outstanding dues. Thus, this petition.

6 Mr.R.Thiyagarajan, learned Senior Counsel appearing for the petitioner Corporation submits that the learned appellate Tribunal failed to appreciate that the land itself was leased out to the petitioner corporation by the second respondent on payment of monthly rental. The lease was for the period of 29 years and 11 months and was duly registered. It is also contended that the petitioner Corporation was in possession of the land in question on the strength of the valid lease and as such, the same cannot be terminated under the provisions of the SARFAESI Act.

7 It is next urged that the installation of the fuel station and the superstructure was an independent agreement between the second respondent and the petitioner Corporation. The second respondent was appointed as dealer of the petitioner corporation by virtue of Dispensing Pump and Selling Licence agreement dated 31st October, 2007. Thus, the finding of the appellate Tribunal that the superstructure and machinery belongs to the petitioner corporation and after removal of the same, the first respondent bank was competent to proceed with the sale was erroneous and illegal.

8 Relying on the judicial mandate of the Supreme Court in Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited and others[1], it is lastly urged that the lease in respect of the property in question cannot be terminated under the provisions of the SARFAESI Act.

9 Per contra, Mr.A.V.Arun, learned counsel appearing for the first respondent Bank would contend that there was lease of superstructure, machinery, etc. Only the lease of the land was incidental, as condition precedent to grant dealership. Once dealership was terminated, the petitioner Corporation is entitled to superstructure, machinery, etc and cannot claim right over the land. It is further contended that the petitioner

1 (2014) 6 SCC 1

Corporation has failed to establish that the lease deed was executed in accordance with the provisions of the Transfer of Property Act. The said document was only leave and license and not lease.

10 We have heard the learned counsel for parties and perused the pleadings and documents appended thereto.

11 Indisputably, the lease was in respect of the land, as aforestated, for a period of 29 years and 11 months on regular rental payment. The document itself indicates that the lease was duly registered. There is no gain-saying that the mortgage deed was executed by the second respondent / borrower only after execution of the lease deed. As per the averment made by the first respondent Bank, the mortgage was created over the property to an extent of 29.70 cents in T.S.No.6091/22, Block No.92, Pudukkottai Town. The second respondent defaulted in making payment, which led to taking over symbolic possession under Section 13(4) of the SARFAESI Act by issuing notice on 27th February, 2012 followed by the publication in two dailies.

12 Now, the question which arises for consideration is whether the lease executed prior to mortgage of the property duly registered can be terminated under the provisions of the SARFAESI Act?

13 The issue is no longer res integra. In Harshad Govardhan Sondagar (supra), this very issue came into consideration. The Supreme Court laid down that the valid lease in respect of the secured asset will not be determined under the provisions of the SARFAESI Act, observing as under :

> 18. We may now consider whether the provisions of the SARFAESI Act have the effect of terminating these valid leases made by the borrower or the mortgagor made in accordance with the provisions of the Transfer of Property Act. Section 35 of the SARFAESI Act, on which the High Court has placed reliance in Trade Well[1] as well as in the impugned judgment[2] is reproduced hereinbelow:
>
> > "35. The provisions of this Act to override other laws.—The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."
>
> Section 35 of the SARFAESI Act, therefore, provides that the provisions of the SARFAESI Act shall have effect, notwithstanding anything

inconsistent therewith contained in any other law for the time being in force. Thus, if there is any provision in the SARFAESI Act and if there is any provision in any other law which is inconsistent therewith, the provision of the SARFAESI Act will have effect and not the provision of any other law.

x x x x x x x x x x x

22. We may now consider the nature of the right of the lessee and as to when the lease under the Transfer of Property Act gets determined. Sections 105 and 111 of the Transfer of Property Act, which are relevant in this regard, are quoted hereinbelow:

> "105. Lease defined.—A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.
>
> Lessor, lessee, premium and rent defined.—The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.
>
> * * *
>
> 111. Determination of lease.—A lease of immovable property, determines—
>
> (a) by efflux of the time limited thereby;
>
> (b) where such time is limited conditionally on the happening of some event—by the happening of such event;
>
> (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event;
>
> (d) in case the interests of the lessee

> and the lessor in the whole of the property become vested at the same time in one person in the same right;
>
> (e) by express surrender, that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;
>
> (f) by implied surrender;
>
> (g) by forfeiture, that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) [24] the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease;
>
> (h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other."

Section 105 thus provides that a lessee of an immovable property has a right to enjoy such property, for a certain time or in perpetuity when a lessor leases an immovable property transferring his right to enjoy such property for a certain time or in perpetuity. Section 111 of the Transfer of Property Act, 1882 provides the different modes by which a lease gets determined. Thus, so long as a lease of an immovable property does not get determined, the lessee has a right to enjoy the property and this right is a right to property and this right cannot be taken away without the authority of law as provided in Article 300-A of the Constitution. As we have noticed, there is no provision in Section 13 of the SARFAESI Act that a lease in respect of a secured asset shall stand determined when the secured creditor decides to take the measures mentioned in Section 13 of the said Act. Without the determination of a valid lease, the possession of the lessee is lawful and such lawful possession of a lessee has to be protected by all courts and tribunals."

14 The question as to whether the lease agreement and the dealership agreement had inextricable connection and once dealership is cancelled, whether the land owner/dealer is entitled to retain possession over the land, came into consideration in Rahul Yadav and another Vs. Indian Oil Corporation Limited and others[2]. In that case, the Letter of Intent was issued in favour of the petitioner, granting retail outlet dealership under the stipulation of the Letter of Intent. The appellant/petitioner was required to own a suitable plot of land and enter into a long term lease with the corporation at the rate acceptable to the respondent corporation. The appellant executed a long term lease for 30 years in favour of the respondent corporation and by virtue of the Letter of Intent, the dealership agreement was entered into between the appellant and the respondent corporation. In the meantime, on account of certain illegalities, the dealership was cancelled. The appellant claimed ownership of the land leased out to the petitioner as aforestated. The Supreme Court clarified the issue and held as under :

> "20. On a plain reading of the aforesaid agreement, it is clear as noon day that it has no connection whatsoever with the lease agreement. Both the agreements are independent of each other. The appellant was a dealer under the lessee, that is, the Corporation. The dealership is liable to be cancelled on many a ground. In case there is a termination, dealership is bound to be cancelled and at that juncture, if the lease deed is treated to have been terminated along with the dealership, it will lead to a situation which does not flow from the interpretation of the instruments. The dealership agreement has been terminated because of the decision rendered by this Court in Mukund Swarup Mishra[3]. The consequence of cancellation of the dealership is a sequitur of the judgment. The inevitable consequence of that is that the appellant has to vacate the premises and the Corporation has the liberty to operate either independently or through another dealer. The appellant cannot be allowed to cause obstruction or create an impediment. The submission that the appellant entered into the lease agreement at a monthly rent of Rs 10,000 as it was given the dealership is a mercurial plea, only to be noted to be rejected. The dealership was availed of as

2 (2015) 9 SCC 447

has been held by this Court in an inapposite manner. In such a situation, consequences are to be faced by the appellant.”

15 Applying the well settled principles of law to the facts of the case, wherein indisputably the lease of the petitioner corporation is still in subsistence as the lease was duly registered, the same cannot be terminated under the provisions of the SARFAESI Act. The direction of the appellate authority is unsustainable, erroneous and deserves to be set aside. Accordingly, the impugned order is set aside, upholding the order dated 22nd November, 2012 passed by the Debts Recovery Tribunal-III, Chennai. The writ petition is allowed. Costs made easy. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-VII)

True Copy

Sub Assistant Registrar

To

1.The Authorised Officer,
Union Bank of India,
Pudukottai Branch,
Aalangudi Branch,
Pudukottai.

2.Debts Recovery Appellate Tribunal,
Ethiraj Salai Road,
Chennai-600 008.

+1cc to Mr.O.R.Senthana Krishnan, Advocate Sr.65271

PRE DELIVERY ORDER IN
W.P.No.11637 of 2015

vs[co]
srg 11/12/2015