IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 27-01-2015

CORAM:

THE HONOURABLE MR. JUSTICE SATISH K. AGNIHOTRI
AND
THE HONOURABLE MR. JUSTICE M. VENUGOPAL

W.P. No.1770 of 2015 and M.P. No. 1 of 2015

J. Musthaq Ali ... Petitioner

Vs.

1 International Asset Reconstruction Company Pvt. Ltd.
No.2-B, K.G. Retreat
Old No.119
New No.26, G.N. Chetty Road
T. Nagar
Chennai 600 017

2 Axis Bank Ltd.
Represented by its Manager
No.192 Karumuttu Nilayam
Anna Salai
Chennai 600 002

3 Umarani

4 Paris Dakner Microsphreules Pvt. Ltd.
No.5, Golden Enclave, IV Floor
No.275, Poonamallee High Road
Kilpauk, Chennai 600 010

5 Paris Dakner ... Respondents

Writ Petition under Article 226 of the Constitution of India praying for issuance of a writ of mandamus directing the first respondent to accept the payment and tender of a sum of Rs.67 lakhs for and on behalf of the third respondent guarantor/borrower pursuant to the demand made by the first respondent under letter dated 25.09.2014 and release the property viz., house, ground and premises bearing Old No.2/1, New No.11, New Colony, V.O.C. Nagar, Anna Nagar East, Chennai 600 102, viz., an extent of 1,950 sq. ft. of house site with a building thereon from the equitable mortgage liability.

For petitioner :: Mr. S. Sadasharam

ORDER

(Order of the Court is made by SATISH K. AGNIHOTRI, J.)

The facts in brief, as projected by the petitioner are that the secured creditor, viz., the second respondent bank issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Act") on 28.02.2012 to the third respondent, who mortgaged the property in question as secured asset against the loan advanced by the bank. Thereafter, without the consent of the bank, a lease agreement was executed by the third respondent on 12.12.2012 after a period of 60 days. Subsequently, a sale agreement was executed on 15.11.2013 in favour of the petitioner. The second respondent, having been appointed as Authorised Officer of the bank, exercising power under Section 13(12) of the SARFAESI Act read with Rule 8/9 of the Security Interest Enforcement Rules, 2002, issued a possession notice on 05.06.2014. The factual matrix of other steps taken by the secured creditor-bank under Section 13(4) of the SARFAESI Act is not stated in the affidavit and as such, it is not clear as to whether possession was taken over or not. It appears that the first respondent, after having received the possession pursuant to issuance of notice dated 05.06.2014, applied to the competent authority for taking over of physical possession under the provisions of Section 14 of the SARFAESI Act. It is further stated by the petitioner that he has also made an application on 19.01.2015 in the pending Crl.M.P. No.102 of 2015 before the learned Chief Metropolitan Magistrate, Egmore, Chennai.

2 At this stage, the petitioner is seeking indulgence of this Court by a direction to the first respondent to accept the secured amount from him and release the property in his favour, who claims to be the purchaser, after issuance of notice under Section 13(2) of the SARFAESI Act. At this stage, there are two courses available to the petitioner, i.e., either he can approach the competent authority, wherein, the said proceedings under Section 14 of the SARFAESI Act is pending, for an appropriate relief or may question the action, if any, taken under Section 13(4) of the SARFAESI Act, before the appellate authority, i.e., the Debts Recovery Tribunal, under Section 17 of the SARFAESI Act.

3 While dealing with the right of the petitioner, as purchaser, after issuance of Section 13(2) notice, the Supreme Court, in Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and Others[1], observed as under:

1 (2014) 6 SCC 1

"21. When we read the different provisions of Section 13 of the SARFAESI Act extracted above, we find that sub-section (4) of Section 13 provides that in case the borrower fails to discharge his liability in full within sixty days from the date of notice, as provided in sub-section (2) of Section 13 of the SARFAESI Act, the secured creditor may take recourse to one or more of the measures mentioned therein to recover his secured debt. One of the measures mentioned in clause (a) in sub-section (4) of Section 13 of the SARFAESI Act is to take possession of the secured assets of the borrower including the right to transfer by way of lease. Where, however, the lawful possession of the secured asset is not with the borrower, but with the lessee under a valid lease, the secured creditor cannot take over possession of the secured asset until the lawful possession of the lessee gets determined. There is, however, no mention in sub-section (4) of Section 13 of the SARFAESI Act that a lease made by the borrower in favour of a lessee will stand determined on the secured creditor deciding to take any of the measures mentioned in Section 13 of the said Act. Sub-section (13) of Section 13 of the SARFAESI Act, however, provides that after receipt of notice referred to in sub-section (2) of Section 13 of the SARFAESI Act, no borrower shall lease any of his secured assets referred to in the notice, without the prior written consent of the secured creditor. This provision in sub-section (13) of Section 13 of the SARFAESI Act and the provisions of the Transfer of Property Act enabling the borrower or the mortgagor to make a lease are inconsistent with each other. Hence, sub-section (13) of Section 13 of the SARFAESI Act will override the provisions of Section 65-A of the Transfer of Property Act by virtue of Section 35 of the SARFAESI Act, and a lease of a secured asset made by the borrower after he receives the notice under sub-section (2) of Section 13 from the secured creditor intending to enforce that secured asset will not be a valid lease."

and also with regard to the jurisdiction of the Debts Recovery Tribunal, it was observed by the Supreme Court in the same judgment as under:

"32. When we read sub-section (1) of Section 17 of the SARFAESI Act, we find that under the said sub-section "any person (including borrower)", aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under the chapter, may apply to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measures had been taken. x x x x x x x x x x"

4 Yet in another case, the Supreme Court, in Jagdish Singh vs. Heeralal and Others[2], has explained the scope of Section 17 of the SARFAESI Act as under:

> "19. The expression "any person" used in Section 17 is of wide import and takes within its fold not only the borrower but also the guarantor or any other person who may be affected by action taken under Section 13(4) of the Securitisation Act. Reference may be made to the judgment of this Court in Satyawati Tondon case.
>
> 20. Therefore, the expression "any person" referred to in Section 17 would take in the plaintiffs in the suit as well. Therefore, irrespective of the question whether the civil suit is maintainable or not, under the Securitisation Act itself, a remedy is provided to such persons so that they can invoke the provisions of Section 17 of the Securitisation Act, in case the Bank (secured creditor) adopt any measure including the sale of the secured assets, on which the plaintiffs claim interest."

5 For the reasons stated hereinabove, we are of the considered opinion that this writ petition is premature and the petitioner has a statutory remedy available before the authorities under the provisions of the SARFAESI Act, before approaching this Court under Article 226 of the Constitution of India.

6 Resultantly, we dismiss the writ petition as not maintainable, at this stage, reserving liberty to the petitioner to take recourse to the appropriate statutory forum under the provisions of law, if so advised. No costs. Connected Miscellaneous Petition is closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

cad

2 (2014) 1 SCC 479

To

The Manager
Axis Bank Ltd.
No.192 Karumuttu Nilayam
Anna Salai
Chennai 600 002

+1cc to Mr.S.Sadasharam,Advocate SR.No.3854

W.P. No.1770 of 2015

vd[co]
gp/2.2.15