IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.06.2015
DATE OF DECISION : 12.06.2015

CORAM:

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

W.P.No.530 of 2015
and
M.P.Nos.1 to 3 of 2015

Hotel Amuthas,
rep by its Partner,
V.Bahavanth
S/o.S.Venkatachalam,
No.3,4, K.R.G. Nagar, 7th Extension Street,
Ganapathy,
Coimbatore-641 001. ... Petitioner

Vs

1. The District Collector,
   Coimbatore.

2. The Tahsildar South,
   Coimbatore.

3. Indian Overseas Bank,
   rep by its Chief Manager,
   Oppanakara Street,
   Coimbatore-641 002.

4. M/s.Nithyakumar & Co.,
   rep by its Managing Partner C.Rajagopal,
   No.155, Ponnurangam Road,
   R.S.Puram,
   Coimbatore-641 002. ... Respondents

The Writ Petition is preferred under Article 226 of the Constitution of India praying for a writ of Certiorari calling for the records of the first respondent dated 31.10.2014 bearing No.CMP No.10865/2014/E3.

For petitioner : M/s.P.T.Asha
for M/s.Sarvabhauman Associates

For respondents : Mr.N.Sakthivel, GA for RR1 and 2
Mr.F.B.Benjamin George for R-3

ORDER

SATISH K. AGNIHOTRI, J.

Assailing the legality and validity of the order dated 31.10.2014 passed by the District Magistrate and District Collector, Coimbatore / first respondent, the petitioner has come up with this petition.

2. The brief facts relevant for adjudication of the dispute are as under:

The property in question was mortgaged by the fourth respondent for obtaining term loans. According to the third respondent Bank, the fourth respondent defaulted in repayment of monthly instalments to the tune of Rs.4.12 Crores, and as such, demand notices under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act") were issued on 05.11.2013, calling upon the respective borrowers, including the fourth respondent to pay the amount to the tune of Rs.3,87,71,475/- and Rs.7,05,41,110.32 respectively.

3. According to the third respondent Bank, after taking symbolic possession, an appropriate application under Section 14 of the SARFAESI Act was made before the first respondent, which was ordered on 31.10.2014. It is also the case of the third respondent Bank that the entire property was in physical possession of the borrowers when mortgage was originally created on 1.8.2006. However, the petitioner was inducted in possession of a portion of the property, admeasuring 3500 sq.ft., and as such, it was not necessary to give any notice to the petitioner before taking orders from the District Magistrate under Section 14 of the SARFAESI Act. It is also stated that the impugned order dated 31.10.2014 has already been executed by the second respondent on 30.12.2014.

4. The case of the petitioner is that having known the issuance of demand notice to the fourth respondent, the petitioner has sent a communication on 29.1.2014 to the third respondent Bank, informing that the petitioner has been inducted in possession as per lease deed

dated 5.4.2008, much before the demand notice was issued and also had paid a sum of Rs.20 lakhs as rent in advance. Despite having clear information about the occupancy and possession of a portion of the premises, the Bank without impleading the petitioner as party in the application under Section 14 of the SARFAESI Act, had obtained the order, which is illegal and nullity in view of the clear judicial pronouncement of the Supreme Court in Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited and others[1].

5. Heard the learned counsel for the parties and perused the pleadings and documents appended thereto.

6. All the facts as stated in the preceding paras are not disputed by the parties. There is no dispute that the third respondent Bank had full information about possession of the petitioner in a portion of the property in view of the lease deed created in his favour as the bank was duly informed by the petitioner vide communication dated 29.1.2014. In that view of the matter, the bank ought to have impleaded the petitioner as party respondent before seeking a direction / order from the District Magistrate to obtain possession of the property in question. It also transpires that a civil suit, being O.S.No.298 of 2014, has been filed before the District Munsif, Coimbatore against the landlord and bank, which is pending consideration.

7. Section 14 of the SARFAESI Act enables secured creditor to make an application for possession of any secured asset before the Chief Metropolitan Magistrate or the District Magistrate, as the case may be. In the instant case, the competent officer is the District Magistrate. The first proviso to Section 14 prescribes that the application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor declaring as under :

> "(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;
>
> (ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;
>
> (iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

1 (2014) 6 SCC 1.

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets:

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.]"

8. What is the requirement of such affidavit came into consideration in Harshad Govardhan Sondagar (supra), wherein the Supreme Court observed as under :

"25.The opening words of sub-section (1) of Section 14 of the SARFAESI Act make it clear that where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured assets is required to be sold or transferred by the secured creditor "under the provisions of the 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 found, to take possession thereof. Thus, only if possession of the secured asset is required to be taken under the provisions of the SARFAESI Act, the secured creditor can move the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset. We have already held that Section 13 of the SARFAESI Act does not provide that the lease in respect of a secured asset will get determined when the secured creditor decides to take the measures in the said section. Hence, possession of the secured asset from a lessee in lawful possession under a valid lease is not required to be taken under the provisions of the SARFAESI Act and the Chief Metropolitan Magistrate or the District Magistrate, therefore, does not have any power under Section 14 of the SARFAESI Act to take possession of the secured asset from such a lessee and hand over the same to the secured creditor. When, therefore, a secured creditor moves the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset, he must state in the affidavit accompanying the application that the secured asset is not in possession of a lessee under the valid lease made prior to creation of the mortgage by the borrower or made in accordance with Section 65-A of the Transfer of Property Act prior to receipt of a notice under sub-section (2) of Section 13 of the SARFAESI Act by the borrower. We would like to clarify that even in such cases where the secured creditor is unable to take possession of the secured asset after expiry of the period of 60 days of the notice to the borrower of the intention of the secured creditor to enforce the secured asset to realise the secured debt, the secured creditor will have the right to receive any money due or which may become due, including rent, from the lessee to the borrower. This will be clear from clause (d) of sub-section (4) of Section 13, which provides that in case the borrower fails to discharge his liability in full within the notice period, the secured creditor may require, at any time by notice in writing, any person who has acquired any of the assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

9. Thus, the secured creditor is obliged to state in the affidavit accompanying the application that the secured asset is not in possession of a lessee or tenant under the valid lease made prior to creation of the mortgage by the borrower or made in accordance with Section 65-A of the Transfer of Property Act prior to receipt of a notice under sub-section (2) of Section 13 of the SARFAESI Act by the borrower.

10. The right of the lessee created by the mortgagor under the mortgage deed has been discussed at length by the Supreme Court in Harshad Govardhan Sondagar (supra), as under :

> "17. After the mortgage of an immovable property is created by the borrower in favour of a secured creditor, the right of the borrower to lease a mortgaged property is regulated by Section 65-A of the Transfer of Property Act. Section 65-A of the
>
> Transfer of Property Act is extracted hereinbelow:
>
> > "65-A. Mortgagor's power to lease.—(1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.
> >
> > (2)(a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.
> >
> > (b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.
> >
> > (c) No such lease shall contain a covenant for renewal.
> >
> > (d) Every such lease shall take effect from a date not later than six months from the date on which it is made.
> >
> > (e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and condition of re-entry on the rent not being paid within a time therein specified.
> >
> > (3) The provisions of sub-section (1) apply only if

> and as far as a contrary intention is not expressed in the mortgage deed; and the provisions of sub-section (2) may be varied or extended by the mortgage deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section."

Thus, sub-section (1) of Section 65-A of the Transfer of Property Act states that the mortgagor has the power to make lease of a mortgaged property while he is in lawful possession of the same subject to the provisions of sub-section (2) of Section 65-A of the Transfer of Property Act and such lease is binding on the mortgagee. Sub-section (3) of Section 65-A further provides that such a power is available with the mortgagor to make a lease of the mortgaged property only if and as far as a contrary intention is not expressed in the mortgage deed. Thus, so long as the mortgage deed does not prohibit a mortgagor from making a lease of the mortgaged property and so long as the lease satisfies the requirements of sub-section (2) of Section 65-A, a lease made by a borrower as a mortgagor will not only be valid but is also binding on the secured creditor as a mortgagee."

11. In such situation, it is a clear case of misrepresentation for obtaining an order concealing the relevant facts for proper adjudication.

12. As a sequel, we are of the opinion that the order dated 31.10.2014 passed by the District Magistrate and District Collector, Coimbatore, in exercise of powers under Section 14 of the SARFAESI Act, has been obtained on misrepresentation and misleading facts and as such, the same is a nullity. Accordingly, the impugned order dated 31.10.2014 is set aside and the matter is remitted back to the District Magistrate and District Collector, Coimbatore, to consider the matter and pass appropriate orders in accordance with the law laid down in Harshad Govardhan Sondagar and also any other law relevant in the case, after affording an opportunity of hearing to all parties concerned, including the petitioner, within a period of three months from the date of filing of a certified copy of this order by either party. We further make it clear that status quo in respect of possession of the property by the writ petitioner shall be maintained till the disposal of the application by the District Magistrate and District Collector.

13. Resultantly, the writ petition is allowed. No costs. Consequently connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

vvk

To

1. The District Collector,
   Coimbatore.

2. The Tahsildar South,
   Coimbatore.

3. The Chief Manager,
   Indian Overseas Bank,
   Oppanakara Street,
   Coimbatore-641 002.

+1cc to M/s.Sarvabhauman Associates, Advocate, S.R.No.28850
+1cc to Mr.F.B.Benjamin George, Advocate, S.R.No.28833

W.P.No.530 of 2015

JSV(CO)
CA(18/06/2015)