

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.5872 of 2015

and

M.P.No.1 of 2015

R.Anandapadmanaban .. Petitioner

Vs

1.The Chief Metropolitan Magistrate,
Egmore, Chennai.

2.Indiabulls Housing Finance Ltd.

Rep by its Authorised Officer / Power of Attorney,
Mr.R.Inbasekaran,
No.20,Apex Chamber, 1st Floor,
Sir Thyagaraya Road,
T.Nagar,
Chennai-600 017.

3.Francis George

.. Respondents

The Writ Petition is preferred under Article 226 of the Constitution of India praying for a writ of Certiorarified mandamus calling for the records of the impugned order issued by the first respondent in Crl.M.P.No.6052/2014 dated 08.09.2014 and quash the same and consequently direct the second respondent to restore the petitioner in possession of the middle portion occupied by the petitioner at Municipal Old Door No.18, New Door No.2, Baskara Sastri Street, Puliyur, Rangarajapuram, Kodambakkam, Chennai-600 024.

For petitioner .. Mr.A.S.Baalaji

For respondents.. Mr.C.Uma Shankar for R-2

Notice served on R-3 - No appearance

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ORDER

SATISH K. AGNIHOTRI, J.

Assailing the legality and validity of the order dated 08.09.2014 passed by the learned Chief Metropolitan Magistrate, Egmore, Chennai

in CrI.M.P.No.6052 of 2014, permitting the second respondent to take possession of the property in question and appointing an Advocate Commissioner to take possession of the property with the assistance of the Station House Officer, R3 Ashok Nagar Police Station, the petitioner has come up with this petition.

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

The third respondent obtained loan for a sum of Rs.3,08,91,574/- from the second respondent and the property in question was mortgaged by the third respondent for obtaining the said loan. As the third respondent failed to make repayment, the second respondent issued a demand notice to the third respondent on 7.6.2013 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act"), calling upon him to make payment of Rs.3,32,18,047/- along with interest. In default, a notice for taking symbolic possession of the property in question was issued. Thereafter, the second respondent Bank took symbolic possession of the mortgaged property on 30.8.2013 under Section 13 (4) of the SARFAESI Act. Subsequently, the second respondent moved the learned Chief Metropolitan Magistrate, Egmore, under Section 14 of the SARFAESI Act for taking possession of the secured assets. That petition was allowed by the impugned order dated 8.9.2014.

3. It is the case of the petitioner that the petitioner is the occupant of a portion of the property in question. A rental agreement, dated 5.6.2010 was executed for 11 months and it was renewed periodically and continued to be in force till April, 2015. When the petitioner was not available, the property in question was illegally sealed. No notice was issued to the petitioner before passing the impugned order by the learned Chief Metropolitan Magistrate, Egmore and he was not a party in the said proceedings. Therefore, the same has to be set aside.

4. According to the second respondent, the third respondent was granted ample opportunities to make payment. After taking symbolic possession, the third respondent wanted to settle the loan through a third party and a tripartite agreement dated 3.1.2014 was executed. The third party has paid Rs.67 lakhs only as part payment to the second respondent. Thereafter no payment has been made. Therefore, steps were taken under the SARFAESI Act to take possession of the mortgaged property. After the possession was taken, a sale notice dated 27.1.2015 was issued by the second respondent. Challenging the sale notice, the third respondent has filed S.A.No.140 of 2015 before the Debts Recovery Tribunal and no stay was granted. The property was also taken on sale. The successful bidder has also paid 10% reserve price and they also paid 25% of sale price. The writ petitioner has not produced any document to establish his tenancy. The alleged rental agreement dated 5.6.2010 was not registered and it was not

extended further. The third respondent has set up the petitioner herein to file this writ petition.

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

6. It is contended by the petitioner that he was not a party to the proceedings before the Chief Metropolitan Magistrate. But the Chief Metropolitan Magistrate held that the second respondent is entitled to take possession of the property in question and assistance to secure the possession of the property was also granted. The learned counsel for the petitioner submits that without affording an opportunity of hearing, no order for taking possession of the property could have been passed and therefore, the order passed by the Chief Metropolitan Magistrate deserves to be set aside.

7. The learned counsel appearing for the second respondent would submit that the son and daughters of the third respondent had also filed a civil suit, being O.S.No.1117 of 2015 on the file of the IV Assistant Judge, City Civil Court, Chennai and sought for injunction. In the meantime, the property in question, after having obtained possession, was put on auction and the successful bidders, namely Thiru M.Rakesh Jain and Mrs.Padma, have deposited 10% of reserve price to the tune of Rs.35 lakhs and also 25% of the sale price was deposited. For depositing the remaining amount, time was granted. In such view of the matter, at this stage, it will not be proper to direct restoration of possession to the petitioner even if possession of the petitioner was lawful.

8. We have examined the facts very carefully. It is manifest that possession was taken over forcefully under the garb of the impugned order dated 08.09.2014 passed by the Chief Metropolitan Magistrate, without affording an opportunity of hearing to the petitioner, who was admittedly in occupation and possession of the property in question. In that event, the order is unsustainable in the eye of law and the same deserves to be set aside.

9. 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. 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;

(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.]”

10. What is the requirement of such affidavit came into consideration in Harshad Govardhan Sondagar Vs. International Assets

Reconstruction Company Limited and others¹, 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

1 (2014) 6 SCC 1.

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."

11. 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.

12. 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."

13. In such situation, it is a clear case of misrepresentation for obtaining an order concealing the relevant facts for proper adjudication. The issues as to whether the rental agreement was created under a registered document or otherwise, whether the same got terminated in the meantime and further, whether the possession and occupation of the petitioner is valid or not, are to be decided by the Chief Metropolitan Magistrate while considering the application under Section 14 of the SARFAESI Act.

14. As a sequel, we are of the opinion that the order dated 08.09.2014 passed by the Chief Metropolitan Magistrate, 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 08.09.2014 is set aside and the matter is remitted back to the Chief Metropolitan

Magistrate, Egmore, to consider the matter and pass appropriate orders in accordance with 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. The Chief Metropolitan Magistrate may consider issuing notice to the successful bidders also while examining the said application for decision. We further make it clear that status quo in respect of possession of the property by the writ petitioner shall be maintained till then.

15. Resultantly, the writ petition is allowed. No costs. Consequently connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

To

1.The Chief Metropolitan Magistrate,
Egmore, Chennai.

2.The Station house Officer,
R3 Ashok Nagar Police station,
Chennai.

+1 cc to Mr.A.S.Baalaji, Advocate,SR.28864

+1 cc to Mr.C.Umashankar, Advocate,SR.28702.

Lrs (co)
krd 22/6

order in
W.P.No.5872 of 2015

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