THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE MS. JUSTICE J. UMA DEVI

WRIT PETITION NO.17465 OF 2017

O R D E R
(*per* Justice Sanjay Kumar)

Challenge in this writ petition is to the order dated 05.04.2017 passed by the Debts Recovery Appellate Tribunal, Kolkata, in Appeal No.80 of 2013/46, whereby the order dated 21.03.2013 passed by the Debts Recovery Tribunal, Hyderabad, in S.A.No.105 of 2010 stood confirmed. A consequential direction is sought to quash the later order also, apart from setting aside all the measures taken by the State Bank of India under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the SARFAESI Act') in respect of the petitioner's property, bearing House No.12-5-4/1B, admeasuring 383.85 square yards, situated at Bathukamma Kunta, Secunderabad.

Notice having been served, Sri M.Srikanth Reddy, learned counsel, entered appearance for the State Bank of India and filed a counter. Notices sent to the third and fourth respondents were returned with the endorsement 'Unclaimed' which would amount to deemed service. They did not choose to enter appearance before this Court.

Heard Sri Srikanth Hariharan, learned counsel representing Sri V.Hariharan, learned counsel for the petitioner, and Sri M.Srikanth Reddy, learned counsel for the State Bank of India.

Facts, to the extent relevant, are as follows: The petitioner claims title and ownership over the property in question under an agreement of sale-cum-General Power of Attorney dated

26.12.1995 executed in her favour by the third respondent herein. She further claimed that physical possession of the property was delivered to her thereunder. Earlier, the fourth respondent had executed an agreement of sale-cum-General Power of Attorney dated 15.12.1995 in favour of the third respondent. The petitioner filed O.S.No.113 of 2007 before the learned III Senior Civil Judge, City Civil Court, Secunderabad, against the third and fourth respondents seeking specific performance of the sale agreement in her favour and for registration of the sale deed in relation to the subject property. This suit was decreed on 15.09.2014. E.P.No.129 of 2016, arising therefrom, is stated to be pending.

The State Bank of India, on the other hand, claimed rights over the subject property under the mortgage created in its favour on 27.03.1996 by the fourth respondent, by deposit of the original sale deed dated 03.02.1978 executed in his favour. This mortgage was a guarantee for the loan facilities advanced to the company, M/s. Herbert Raman Systems Limited, in which the fourth respondent was a director. As the said loan facilities were thereafter classified as non-performing assets, the bank issued demand notice dated 01.11.2008 under Section 13(2) of the SARFAESI Act followed by possession notice dated 29.10.2009 under Section 13(4) of the SARFAESI Act read with Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 (for brevity, 'the Rules of 2002'). Thereafter, the bank approached the Chief Metropolitan Magistrate, Nampally, Hyderabad, *vide* Crl.M.P.No.4719 of 2009 filed under Section 14 of the SARFAESI Act, for securing physical possession of the subject property. This application was allowed on 05.01.2010 and actual physical possession of the subject property was taken by the bank on 28.01.2010.

Earlier, the bank had filed O.A.No.1427 of 1999 before the Debts Recovery Tribunal, Hyderabad, under the provisions of the Recovery of Debts Due to the Banks and Financial Institutions Act, 1993 (for brevity, 'the Act of 1993'), for effecting recoveries in relation to the very same loan accounts. Final Order dated 03.02.2005 was passed in the said O.A., whereupon recovery proceedings in R.P.No.33 of 2005 were initiated by the bank before the Recovery Officer. Significantly, the petitioner filed Claim Petition No.24 of 2005 in R.P.No.33 of 2005 but the same was dismissed for default on 27.03.2008.

Aggrieved by the subsequent proceedings initiated by the bank under the SARFAESI Act, the petitioner filed S.A.No.105 of 2010 before the Debts Recovery Tribunal, Hyderabad. This S.A. was dismissed on 21.03.2013. Perusal of the said order reflects that the Tribunal found that the bank had not violated the procedure prescribed under the SARFAESI Act and the rules framed thereunder while taking measures under Section 13(4) and Section 14 of the SARFAESI Act. Further, the Tribunal found that the third respondent had no clear and conclusive rights as she was claiming ownership over the subject property only on the strength of an unregistered and insufficiently stamped agreement of sale-cum-General Power of Attorney. The Tribunal also took note of the fact that the petitioner had failed in the claim petition preferred by her in the recovery proceedings instituted in O.A.No.1427 of 1999. The Tribunal therefore held that the petitioner had no claim over the subject property as she was not the rightful owner thereof and dismissed the securitisation application filed by her. Aggrieved thereby, the petitioner preferred Appeal No.80 of 2013/46 before the Appellate Tribunal at Kolkata. This appeal was dismissed on 05.04.2017, confirming the findings of the Tribunal below. Perusal of the said order demonstrates that the Appellate Tribunal expressed agreement with the Tribunal below on the issue of the petitioner lacking title or lawful right over the subject property as her claim was only based on an unregistered agreement of sale executed by another agreement of sale holder, as opposed to the mortgage created over the said property by the lawful owner in favour of the bank. The Appellate Tribunal further observed that the decree for specific performance relied upon by the petitioner would not confer any rights upon her in relation to the property, which had already been mortgaged with the bank on 27.03.1996 as the bank, by virtue of such mortgage, would have a first charge for recovering its dues thereunder. The Appellate Tribunal therefore dismissed the appeal.

In the backdrop of the aforestated facts, the claim of the petitioner is that she had no privity of contract with the bank and therefore, creation of the equitable mortgage on 27.03.1996 against the subject property was a void transaction. She claimed that the bank resorted to fraud by obtaining possession of the subject property though she was in actual physical possession as on that date, being the owner thereof. Having stated so, she complained that the bank was now taking steps to put the subject property to auction and forcibly dispossessed her as well as other tenants who were in occupation. Upon these pleadings, she sought invalidation of the orders passed by both Tribunals and consequential reliefs.

The Chief Manager and Authorised Officer, Stressed Asset Recovery Branch, State Bank of India, stated as follows in his counter-affidavit: M/s. Herbert Raman Systems Limited availed a medium term loan facility of Rs.5.17 lakh and working capital loan facility of Rs.25.00 lakh upon executing security documents on 27.03.1996. The fourth respondent herein, being one of its directors, created an equitable mortgage on the said day over the subject property by deposit of his original sale deed dated 03.02.1978. Upon default in repayment of these loans, the bank filed O.A.No.247 of 1998 before the Debts Recovery Tribunal, Bangalore. This application was transferred to the Debts Recovery Tribunal, Hyderabad, and renumbered as O.A.No.1427 of 1999. It was allowed by the Tribunal on 03.02.2005, pursuant to which a recovery certificate was issued on 16.02.2005 for a sum of Rs.1,28,34,794.83 ps. Claim Petition No.24 of 2005 was filed by the petitioner before the Recovery Officer basing on the unregistered agreement of sale-cum-GPA dated 26.12.1995, which was thereafter dismissed for default. However, the bank chose to initiate proceedings under the SARFAESI Act at that stage and issued demand notice dated 01.11.2008 under Section 13(2) of the SARFAESI Act which was thereafter followed by possession notice dated 29.10.2009 under Section 13(4) thereof. This possession notice was published in Andhra Jyothi and Indian Express daily newspapers on 03.11.2009. Physical possession of the subject property was taken by the bank on 28.01.2010 through the Advocate Commissioner appointed under the order secured under Section 14 of the SARFAESI Act. The Chief Manager pointed out that the entire claim of the petitioner rested on an unregistered agreement of sale-cum-GPA allegedly executed in her favour on 26.12.1995 by the third respondent and the decree dated 15.09.2014 secured by her on the strength thereof in O.S.No.113 of 2007. He pointed out that as the mortgage in favour of the bank was created by the fourth respondent, the lawful owner, and the petitioner's case rested only on the alleged agreement of sale executed by the third respondent, who herself did not have title to the property in question when she did so, the petitioner could claim no rights in the subject property over and above those vesting in the bank. He stated that a sum of Rs.1,28,34,794.83 ps. was to be recovered in terms of the recovery certificate dated 16.02.2005 and as the final order in O.A.No.1427 of 1999 had never been set aside, the petitioner could not seek any relief by way of this writ petition.

No reply affidavit was filed by the petitioner rebutting the aforestated counter-affidavit averments.

Sri Srikanth Hariharan, learned counsel, would point out that the bank, having initiated proceedings under the Act of 1993 in the first instance, secured recovery certificate dated 16.02.2005 therein but, surprisingly, chose to initiate proceedings thereafter under the SARFAESI Act. He would submit that the challenge presently is only in relation to the proceedings initiated under the SARFAESI Act and therefore, the proceedings in O.A.No.1427 of 1999 before the Debts Recovery Tribunal, Hyderabad, have no relevance to the present case. According to the learned counsel, initiation of proceedings under the SARFAESI Act by the bank in the year 2008 was barred by limitation in terms of Section 36 of the SARFAESI Act. He would, however, fairly concede that this aspect of the matter was never raised by the petitioner before either of the Tribunals below or even before this Court, in the writ affidavit. Learned counsel would argue that as the facts on record would clearly bear out this aspect of the matter, it would be open to this Court to consider the same, despite the settled legal position that an issue of limitation poses a mixed question of law and fact. He would also place reliance upon the decree dated 15.09.2014 secured by his client in the specific performance suit in O.S.No.113 of 2007.

Per contra, Sri M.Srikanth Reddy, learned counsel, would point out that as per Article 54 of the Schedule to the Limitation Act, 1963 (for brevity, 'the Act of 1963'), the period of limitation prescribed for seeking specific performance of a contract is three years from the date fixed for performance, or, if no such date is fixed, when the plaintiff had notice that performance was refused, and assert that the very fact that the petitioner did not institute a suit for specific performance of the alleged agreement of sale dated 26.12.1995 till the year 2007 clearly indicated her lack of *bonafides*. He would assert that the decree secured by her therein against the third and fourth respondents was a collusive and self-serving one and would therefore not vest her with any rights against the bank. Perusal of the said judgment reflects that the first defendant, the third respondent, filed a written statement practically admitting the petitioner's case, while the second defendant, the fourth respondent herein, remained *ex parte*.

In the light of the law laid down by the Supreme Court in ***TRANSCORE V/s. UNION OF INDIA***[1], there is no bar to the bank initiating proceedings simultaneously under the Act of 1993 and

[1] (2008) 1 SCC 125

the SARFAESI Act. Therefore, merely because the bank initially chose to invoke the provisions of the Act of 1993, the same did not estop it from taking recourse to the SARFAESI Act thereafter.

However, it is the case of Sri Srikanth Hariharan, learned counsel, that the SARFAESI proceedings initiated by the bank would be barred by limitation as per the mandate of Section 36 thereof. No doubt, Section 36 states to the effect that no secured creditor would be entitled to take any measures under Section 13(4) unless his claim in respect of the financial asset is made within the period of limitation prescribed under the Act of 1963. However, as it is an admitted fact that this aspect of the matter was never raised by the petitioner, be it before the Debts Recovery Tribunal, Hyderabad, or the Debts Recovery Appellate Tribunal, Kolkata, or even before this Court, in the writ petition, it is too late in the day for the petitioner to now choose to do so.

Be it noted that this Court, in exercise of its extraordinary jurisdiction under Article 226 of the Constitution, would only undertake judicial review of the orders under challenge and no more. When the petitioner, in her own wisdom, did not choose to raise this aspect before the Tribunals below and as the issue of limitation is indubitably a mixed question of law and fact, this Court does not think it appropriate to entertain a challenge based on this factual premise at this late stage.

Further, it is an admitted fact that the petitioner remained unsuccessful in her claim petition filed in O.A.No.1427 of 1999 and the dismissal of her claim petition attained finality. It is also an admitted fact that her vendor, the third respondent, herself had inchoate rights as she also claimed under an unregistered agreement of sale allegedly executed in her favour by the fourth respondent, who then executed a mortgage in favour of the bank in respect of the said property. The charge so created would prevail over any inconclusive and incomplete ownership rights that emanate on the strength of the unregistered agreements of sale. The proceedings initiated by the bank for recovery of its dues under the said mortgage would therefore prevail over and override any rights that may accrue to the petitioner under the decree dated 15.09.2014 in O.S.No.113 of 2007 on the file of the learned III Senior Civil Judge, City Civil Court, Secunderabad, based on her agreement of sale.

Sri Srikanth Reddy, learned counsel, placed reliance on ***SURAJ LAMP AND INDUSTRIES PRIVATE LIMITED V/s. STATE OF HARYANA***[2], wherein the Supreme Court categorically held that a sale agreement or a deed of general power of attorney would neither convey title nor create any interest in immovable property and denounced the observations made by the Delhi High Court in ***ASHA M. JAIN V/s. CANARA BANK***[3] to the effect that the concept of power-of-attorney sales was recognised as a mode of transaction. The Supreme Court observed that a sale agreement or a deed of general power of attorney transaction could not be treated as a concluded transfer of immovable property and reiterated that immovable property can be legally or lawfully transferred or conveyed only by a registered deed of conveyance.

Be it viewed from any angle, this Court finds no error committed by either of the Tribunals below warranting interference in this writ petition. The writ petition therefore fails and is

---

[2] (2012) 1 SCC 656
[3] (2001) 94 DLT 841

accordingly dismissed. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

SANJAY KUMAR, J

J. UMA DEVI, J

19th JANUARY, 2018

Svv