

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CWP No. 18058 of 2018

Decided on : 09.10.2018

Capital First Limited

..... Petitioner

Versus

State of Haryana and others

..... Respondents

**CORAM : HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE AVNEESH JHINGAN**

Present : Mr. Sanjeev Singh, Advocate and
Mr. Harsh Chopra, Advocate
for the petitioner.

Mr. Randhir Singh, Addl.A.G., Haryana.

Mr. Shikhar Sareen, Advocate and
Mr. Vaibhav Sareen, Advocate
for respondent No.5.

Mr. Mrigank Sharma, Advocate
for respondent No.11.

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AVNEESH JHINGAN, J.

The present writ petition has been filed for directions to respondents No.2 and 3 to hand over the physical possession of the secured asset to the petitioner by exercising powers under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the Act').

2. The petitioner is a “Financial Institution” as per the provisions of the Act and by virtue of a notification of Ministry of Finance dated 05.08.2016. The State of Haryana; District Magistrate, Gurgaon; Naib Tehsildar-cum-Executive Magistrate; Sub Tehsil Kadipur, Tehsil and District Gurgaon have been arrayed as respondents No.1 to 3 respectively in the present writ petition. Respondents No.4 to 9 are the borrowers and

respondents No.10 to 12 are the alleged tenants in the mortgaged property.

3. Respondents No.4 to 9 availed a loan of ₹6,80,27,000/- on 30.12.2013 from the petitioner. The loan was to be repaid in 180 monthly installments of ₹ 8,49,547/-each. In order to secure the cash credit facility, respondents No.4 to 9 mortgaged property situated at Khasra No.709(4-8), 711/1 (0-19) situated at Delhi Jaipur Road, Near Hero Honda Chowk, Khandsa, Gurgaon, Haryana Land Admeasuring 7056 Square Yards in 37 KM Stone comprising in favour of the petitioner Company.

4. Respondents No.4 to 9 defaulted in repayment of loan and the account was classified as Non Performing Asset (NPA) on 31.07.2016. The petitioner issued a notice under Section 13(2) of the Act on 24.09.2016. As per the notice, there were outstanding dues of ₹7,35,89,893/- as on 15.09.2016. The petitioner moved an application under Section 14 of the Act in March 2017. Respondent No.2 vide order dated 16.05.2017 appointed receiver for taking possession of the secured asset with the help of police.

5. For quashing of order dated 16.05.2017, the borrowers filed a writ petition bearing CWP-COM No.221 of 2017, the same was dismissed vide order dated 10.07.2017. However, liberty was granted to respondent No.4 to file objections.

6. On dismissal of the writ petition, the borrowers filed objections dated 10.04.2018 alleging tenancy qua the secured asset. In the meantime, respondents No.10 to 12 also filed the objections alleging that they were the tenants in the secured property. Since the physical possession of the property was not being taken by the receiver and the objections were pending before respondent No.2, petitioner filed CWP No.27607 of 2017 and the same was disposed of vide order dated 19.01.2018 and the District Magistrate, Gurgaon

was directed to decide the application and the objections within a period of one month from the date of receiving a certified copy of the order. Liberty was given to the petitioner to approach the District Magistrate for the limited purpose of change of receiver.

7. Respondent No.2 vide order dated 01.05.2018 dismissed the objections filed by the tenants. It was observed that the tenants have to raise their grievance under Section 17(4A) of the Act before the DRT. The Naib Tehsildar-cum-Executive Magistrate, Khadipur, was appointed as receiver for taking over the physical possession of the secured mortgaged assets. The relevant portion extract of the order is reproduced below:-

“After hearing the argument and going through the case file, it has been concluded that as per Section 17(4A) of SARFAESI Act, 2002, grievance of tenants have to be raised before Hon'ble DRT, thus this Court does not have remedy of the objections filed by tenants and hence application is rejected. As requested by lender, receiver to be changed and Naib Tehsildar-cum-Executive Magistrate, Kadipur is appointed as receiver in place of Sh. Sube Singh Yadav, Advocate, who was appointed as receiver for taking physical possession of the mortgaged/secured asset involved in the above said case vide this office Letter No.9082-85/PB dated 18.05.2017 and is directed to refund the amount paid to receiver by the petitioner. The receiver is permitted to break the lock of the above said property, if the premises found locked and take over the possession after making the video-graphy and an inventory of the goods lying in the above said property as per law. However, this order is subject to stay order, if any, granted by any court of law, as order of Civil

Court is binding upon the revenue courts. This order of mine is part & parcel of order dated 16.05.2017 passed in case No.157/SA/DM. Ahlmad is directed to tag this order with original case file.”

8. Despite of the order, respondent No.2 the physical possession of the mortgaged property was not handed over to petitioner. In the meantime, respondent No.11 after dismissal of the objections by respondent No.2, filed a civil suit with a prayer for restraining the defendant i.e. landlord from evicting him from the disputed property without due process of law. The Civil Judge (Jr. Divn.), Gurgaon ordered that status quo be maintained by both the parties and the plaintiff will not be dispossessed without due process of law. The order is reproduced below:-

“Memo of appearance filed by the defendant. The Ld. counsel for plaintiff stated that he is the landlord and he prayed for restraining the defendant for not evicting him without due process of law. The Ld. counsel for defendant orally accepted that he will follow the law. Heard. Status quo is directed to be maintained by both the parties and defendant is directed not to dispossess the plaintiff without due process of law. Now to come upon 25.07.2018 for filing power of attorney and written statement.”

9. The present writ petition has been filed for directions to respondents No.2 and 3 to take over the possession of the secured property and to hand over the same to the petitioner.

10. Heard learned counsel for the parties.

11. Learned counsel for the petitioner argued that inspite of the order passed by respondent No.2, the physical possession of the secured

property has not been taken over as there is status quo granted in a civil suit. He contended that the bank was not made a party to the civil suit and it was only a dispute between the owner of the mortgaged property and his tenant.

12. Learned counsel for respondent No.11 contended that a civil suit is pending and respondent No.11 is protected by the status quo granted by the Civil Court and the physical possession of the property cannot be taken.

13. In the present case, collusion between the borrower of loan and respondent No.11 (alleged tenant) is writ large. Both are hand in glove to stall the recovery proceedings of the petitioner company. The act of respondent No.11 is contumacious. While dismissing the objections, respondent No.2 stated in the order that respondent No.11 can raise his grievance under Section 17(4A) of the Act before the DRT. The objections were dismissed on 01.05.2018. On 17.05.2018, in a suit filed by respondent No.11, the counsel for the defendant i.e. borrower orally accepted that he will follow the law. Thereafter Civil Court ordered that status quo be maintained by the parties.

14. It is pertinent to note here that respondent No.11 being fully aware of the fact that the petitioner company has initiated recovery proceedings and has moved an application under Section 14 of the Act, intentionally did not implead the petitioner as a party in the civil suit. On the basis of status quo order, the borrowers were able to retain the physical possession of the entire mortgaged property inspite of the fact that respondent No.11 was tenant only in a small shop.

15. From the perusal of the written statement filed by respondent No.11, it is evident that the alleged tenancy is based upon the unregistered document in which the period of lease, the amount to be paid by the lessee as rent have been left blank. It is only stated that loan period “commencing

from 01.04.2015 to 31.03.2016”.

16. The Division Bench of this Court in **CWP No.16193 of 2016, titled as “Anand Sagar vs. State Bank of India and others, decided on 11.08.2016** has held as under :-

“8. The petitioner claims to have taken the premises in dispute on monthly rent in the month of November 2012 at the rate of ₹ 4500/- per month. Nothing has been produced on record to establish conclusively that there existed legal, valid and genuine tenancy in favour of the petitioner except to rely upon copy of the alleged rent deed dated 10.11.2012, (Annexure P1) appended alongwith the petition. The alleged tenancy is claimed to be for 15 years but it is not shown that it has been created through a valid document which is enforceable in law. The petitioner can approach appropriate forum for adjudication of disputed questions of fact regarding legal and valid tenancy in his favour, wherein the bank who is a proper and necessary party is also impleaded. Thus, no ground for interference in writ jurisdiction under Articles 226/227 of the Constitution of India is made out.

9. Reliance of learned counsel for the petitioner on the judgment in **Vishal N.Kalsaria vs. Bank of India and others**, AIR 2016 SC 530, is unexceptionable. The principle of law enunciated therein is well recognized. However, the alleged tenant as noticed herein above, is required to establish by leading unimpeachable evidence that the tenancy in his favour was created prior to the mortgage of the property and is genuine. The facts in the relied upon case and the present case being different, the petitioner

cannot derive any advantage from the said decision.”

17. It was held that the alleged tenant is required to establish that tenancy was prior to mortgage by leading an unimpeachable evidence.

18. Section 17 of the Act has been amended and sub section 4A has been inserted by act 44 of 2016 w.e.f. 01.09.2016. The same is extracted below:-

17. Application against measure to recover secured debts.

(1 to 4) XX ` XX XX

(4-A) Where-

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured assets, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,-

(a) has expired or stood determined ; or

(b) is contrary to Section 65-A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage ; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of Section 13 of the Act ; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in 6 of 8 accordance with the provisions of this Act.]”

19. According to this provision, any person claiming tenancy, has a right to approach the DRT. The DRT shall determine whether the tenancy has expired or stood determined; or is contrary to Section 65-A of the Transfer of Property Act; or is contrary to the term of mortgage; or is created after issuance of notice of default and demand by the bank under Section 13 (2) of the Act. In case the DRT finds that the tenancy falls in clauses (a) to (d) of sub clause (i) of Section 17(4A) of the Act then notwithstanding anything to the contrary in any other law, DRT is empowered to pass such order as it deems fit in accordance with the provisions of the Act.

20. Keeping in view the conduct of respondent No.11 that a civil suit was filed intentionally by not impleading the necessary party i.e. the petitioner and on the statement of the borrower, status quo order was obtained, this Court was inclined to impose a cost of ₹2 lakhs on respondent No.11 to be paid in Prime Minister Relief Fund. At this stage, respondent No.11 who is present in Court submitted that a lenient view may be taken and made a statement that he would vacate the premises on or before 30.11.2018 and hand over the possession to the petitioner.

21. The writ petition is allowed with a direction to respondent No.1 to ensure that the physical possession of the mortgaged property except the shop of respondent No.11 is taken on or before 16.10.2018. In case, respondent No.11 fails to vacate the shop on or before 30.11.2018, he would be burdened with cost of ₹2 lakhs to be deposited in Prime Minister Relief Fund. Further, respondent No.1 shall provide police assistance to respondents No.2 and 3 to take over the physical possession of the shop presently in possession of respondent No.11.

22. At this stage, learned counsel for the borrowers made a request that borrower will clear the outstanding dues of the petitioner. On clearance

of outstanding dues the petitioner be directed to restore the physical possession of the mortgaged property.

23. We are not expressing any opinion on the submissions made, however, it would be for the borrower to approach the petitioner for clearing the outstanding dues. It is clarified that in case the borrower clears the dues, the possession of the mortgaged property be restored to the borrowers, and in that eventuality the shop in which respondent No.11 is alleged to be tenant, would be restored to him.

24. The writ petition is disposed of accordingly.

(AJAY KUMAR MITTAL)
JUDGE

(AVNEESH JHINGAN)
JUDGE

October 09, 2018
anju

Whether speaking/reasoned: Yes
Whether reportable : Yes