IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.09.2019

CORAM

THE HONOURABLE MR. JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.P.NO.40794 OF 2016
AND WMP NO.34762 OF 2016

Sri Ramani Resorts and Hotels Pvt. Ltd.,
Represented by its Managing Director
"Sri Ramani Residency"
No.8/42, Maharaja Surya Road,
Alwarpet, Chennai - 600 018. .. Petitioner

VS.

The Authorised Officer
State Bank of Travancore
Alwarpet Branch
No.4/1, Eldams Road,
Bala Vinayakar Building,
Teynampet, Chennai - 600 018. .. Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Mandamus, directing the respondent to forthwith handover the physical possession of the property comprised at Survey Nos.202/2, 205/5A, 202/7A1B in Suchindram Village, Agateeswaram Taluk, Kanyakumari District for doing construction activities and proceed in accordance with law.

For Petitioner : Mr.S.Ramesh

For Respondent : Mr.F.B.Benjamin George

O R D E R
(ORDER OF THE COURT WAS MADE BY M.GOVINDARAJ, J.)

The writ petitioner has preferred the present writ petition for a mandamus directing the respondent to forthwith handover the physical possession of the property comprised at Survey Nos.202/2, 205/5A, 202/7A1B in Suchindram Village, Agateeswaram Taluk, Kanyakumari District for doing construction activities and to proceed in accordance with law.

2. The writ petitioner has borrowed a sum of Rs.15 Crores for the purpose of establishing a 4 Star Hotel in the above said place. The respondent Bank has sanctioned the said sum vide Ref.No.AGM II / CHE / 11 dated 07.04.2014. Clause 8 of the terms of sanction, 12 months moratorium period was granted for completion of the project. Under Clause 6, the tentative date for commencing the commercial operation was fixed as 11.04.2015. As per the direction of the respondent, the writ petitioner has paid a sum of Rs.11.25 Lakhs towards upfront fee and also towards tax and cess. Besides this, the writ petitioner brought in promoters to infuse the capital to the tune of Rs.21 Crores in the project. After obtaining proper permission, construction was also commenced. But there were several issues relating to completion of the project and therefore, the writ petitioner had approached the respondent for revising the date of commercial operation and the respondent vide letter dated 12.03.2015 had agreed to revise the date from 01.04.2015 to 01.01.2016. The respondent Bank though has released 75% of the loan amount, did not disburse the remaining 25%. Thereafter, there were several issues with regard to the planning permission and litigations are still pending before the Madurai Bench of this Court.

3. While the matter stood thus, the respondent issued letters dated 26.10.2015 and 10.02.2015 demanding repayment of the loan prematurely. The writ petitioner has replied to the same on 27.12.2015. Despite the reply, there was an eminent threat of mutual contract and terms and conditions by the respondent. The writ petitioner has preferred a suit in C.S.No.988 of 2015 for permanent injunction restraining the respondent from acting contrary to the terms of the sanction letter dated 07.04.2014 and sought repayment of the loan amount during moratorium period. This Court has granted ad-interim injunction on 29.12.2015 and on the basis of the counter filed by the respondent, the interim order was clarified on 18.04.2016.

4. The respondent interpreting the order of this Court has issued a demand notice under Section 13(2) of the SARFAESI Act on 12.08.2016, to which, the petitioner has made detailed reply on 21.09.2016. In turn, the respondent sent a reply under Section 13(3)(A) of the SARFAESI Act rejecting the same on 03.10.2016. Thereafter, on 17.10.2016, the petitioner has sent a notice clarifying the legal position pursuant to the order of interim injunction granted by this Court. However, on 04.11.2016, the officials of the respondent Bank came to the Hotel property and affixed the possession notice. The officials of the respondent transgressed their limits and evicted the petitioner's labourers and sealed the premises by stopping the on-going construction activities. They have evicted the Watchman

of the petitioner company and employed their own man as Watchman. The petitioner is contemplating to challenge the same in accordance with the provisions under Section 17 of the SARFAESI Act, but preferred the present writ petition with the restricted issue of unauthorised, illegal, high handed action of the respondent in taking physical possession and removing the Watchman by undue process of law.

5. There is difference between taking actual possession and symbolic possession. Without issuing notice and contrary to the due procedures, the respondent has taken over possession of the demised property and locked the premises. The respondent has acted in extra judicial manner and threatened the petitioner's contractor. Therefore, a complaint was lodged on 11.07.2016 with the office of the banking ombudsman and the same is also pending. Without prejudice to the rights of appeal under Section 17 of the SARFAESI Act questioning the illegal action of the respondent on taking physical possession during the moratorium period, the writ petitioner prefers the above writ petition for a mandamus directing the respondent to hand over the physical possession.

6. The respondent Bank has filed a counter affidavit controverting the various allegations raised by the writ petitioner.

7. It is an admitted fact that the respondent has sanctioned the term loan to the tune of Rs.15 Crores and the effective rate of interest is 14% per annum with monthly rests. While sanctioning the loan, the respondent has the right to amend any terms and conditions including reducing or cancelling any financial assistance at its sole discretion. The amount sanctioned by the respondent should be used by the petitioner solely for the purpose for which it was sanctioned and it shall not be used for any other kind of investment including in the associates, subsidiaries and sister concerns of the petitioner. Initially, the commercial operation date was agreed as 01.04.2015 and it was extended till 01.01.2016, vide correspondence of the respondent dated 01.04.2015. The 12 months moratorium period shall be counted from the actual date of first disbursal of the loan amount and the moratorium period was agreed by the petitioner at 24 quarterly instalments. In the event of default, the petitioner has agreed to pay penal interest at 2% per annum on the entire outstanding. The condition precedent was that the petitioner must obtain all clearances and approvals as required for the commencement of the construction of the project and that the Chartered Engineers should certify the physical progress of the project on a quarterly basis.

8. The main issue to be noted is that the sanction letter was issued stating that 50% of the project equity should be brought up-front by the petitioner, besides upfront fee fixed. It was also agreed that 25% of the term loan would be released only after obtaining and submission of DTCP approval from the Directorate of Town and Country Planning, Government of Tamil Nadu. There are additional conditions imposed with regard to the registration of lease agreement between the Company and the Managing Director of the petitioner company and the lease hold rights of the lease should be mortgaged to the respondent Bank. Accordingly, it was registered in favour of the respondent Bank and a charge was created on the term loan with the Registrar of Companies on 07.07.2014. A sum of Rs.10.28 Crores was released. However, no progress was made in the Hotel.

9. The petitioner has diverted a part of the loan amount received from the respondent Bank to its sister concerns for unknown purpose, which is contrary to Clause 8 of the sanction letter dated 07.04.2014. The petitioner has also failed to apply and obtain necessary building approvals for construction from the statutory authorities, such as DTCP, till date. So also, the petitioner did not repay even a single penny towards interest or penal interest as stipulated in the sanction letter till date.

10. While so, CB CID, Chennai called upon the respondent to submit the details of the loans borrowed by the petitioner on the basis of the complaint made by the AXIS Bank. The time granted to the petitioner has also lapsed and therefore, the respondent was constrained to write a letter dated 26.10.2015 intimating the petitioner the non-payment of interest on the loan account and also the outstanding amount of Rs.12.49 Crores.

11. The petitioner met the officials of the respondent Bank and promised that he will remit the interest portion on or before 15.11.2015. Contrary to the promise, the petitioner has never approached them and not paid any money. The petitioner for the reasons best known to it, failed to reply to the letter of the respondent, which forced the respondent to issue another letter dated 10.12.2015 calling upon the petitioner to submit the documents pertaining to the progress of the project and also to remit the interest of Rs.2.21 Crores on or before 31.12.2015. The petitioner has issued a vague reply on 27.12.2015.

12. While so, the petitioner has approached this Court by way of a Civil Suit in C.S.No.988 of 2015. The respondent is completely justified in making the demand by letters dated 26.10.2015 and 10.12.2015. The interest was not serviced during the moratorium period and there were diversion of funds widening the gap between the value of the security when compared to the liability. As the petitioner has defaulted and failed to keep up

his promise, a demand notice was issued to him, for which, the petitioner has raised objection on 21.09.2016. The respondent has rejected the same on 03.10.2016 and thereafter, possession of the secured assets were taken on 03.11.2016 by adopting the procedures contemplated under the SARFAESI Act and the rules framed thereunder.

13. The possession notice was served on the borrower / petitioner by registered post on 04.11.2016 and by way of paper publication on 09.11.2016. The secured property was virtually abandoned by only one aged person as security guard. He did not raise any objection while possession was taken over by the respondent Bank officials. In the inventory of assets, the said Watchman Mr.Thirumalaiappan has also signed. In the meanwhile, one Mr.Davidson came to the site and claimed that he was the owner and questioned the officials of the respondent Bank as to how they have taken possession of the property. According to the respondent, possession was taken following the due process of law and there is no illegality in the same.

14. It is settled law that there is no dichotomy between symbolic possession and actual possession. The outstanding loan amount of the petitioner is Rs.14.65 Crores, whereas the value of the secured asset is only Rs.6.5 Crores. Therefore, the writ petition does not merit consideration and therefore, the respondent Bank has prayed for dismissal of the writ petition as it is not maintainable.

15. The learned counsel appearing for the petitioner would submit that the sanction letter dated 07.04.2014 clearly set out the moratorium period of 12 months as from the date of agreement till completion of the project and for repayment of loan. The completion of the project was extended till 01.01.2016. But the same could not be completed on various grounds. The petitioner has promptly replied to the demand notice issued by the respondent and also filed rejoinder pursuant to the rejection of the petitioner's representation.

16. The learned counsel would further contend that the possession has to be taken as per Rule 8 of the Security Interest (Enforcement) Rules 2002. The delivery of possession shall be taken only after issuing possession notice and not by affixing the same at the outer door. The respondent Bank has not followed the procedures laid down for taking over possession and not even given any single notice. The respondent Bank has failed to act in a fair and transparent manner.

17. The learned counsel for the petitioner would further contend that the respondent Bank has taken physical possession of the premises on 03.11.2016 and issued possession notice two

days thereafter. Therefore, Rule 8(1) of the Security Interest (Enforcement) Rules 2002 and Section 13(4) of the SARFAESI Act were violated. The action of the respondent is in utter violation of principles of natural justice and contrary to the various judgments of the Hon'ble Supreme Court. Thus, the very object of the SARFAESI Act is defeated by the conduct of the respondent Bank.

18. Per contra, the learned counsel appearing for the respondent Bank would contend that the term loan of Rs.15 Crores was sanctioned on 07.04.2014. It was a taken over loan from another financial institution. As per the terms and conditions of the sanction order, the writ petitioner shall complete the construction within 12 months of the first disbursal and the expected commercial operation date was fixed as 01.04.2015 and repayment period was 24 instalments from the commercial operation date. However, interest shall be serviced during the moratorium period and the repayment period. On the request of the petitioner, commercial operation date (COD) was extended upto 01.01.2016. Even though the moratorium period was fixed as 12 months, the petitioner has not obtained necessary approval from the authorities concerned. The funds were diverted for other purposes rather than the cause for which it was sanctioned, and the same is in violation of terms and conditions of the sanction letter. The respondent called upon the petitioner to remit the interest portion. But to their shock, the petitioner has approached this Court in C.S.No.988 of 2015 and obtained an order of ad-interim injuntion on 29.12.2015, which was subsequently modified on 18.04.2016, permitting the respondent Bank to proceed in accordance with law, if any other terms are violated.

19. Pursuant to the clarification issued by this Court, the respondent Bank has issued a notice under Section 13(4) of the SARFAESI Act on 12.08.2016. On 03.11.2016, the officials of the respondent Bank visited the project site at Suchindram Village, Kanyakumari District. Nobody was present at the time of their visit and no construction activities were going on. The writ petitioner did not raise any objection and the Security person available at the site also did not object to the taking over of possession. Proper inventory of movables were taken in the presence of witnesses and also have taken physical possession of the building as per the provisions contemplated under the Act and Rules. Thereafter, an intimation was served on the petitioner by sending possession notice by registered post from Chennai on 04.11.2016.

20. The writ petitioner has approached the Debts Recovery Tribunal in S.A.No.131 of 2016 and obtained an order of status quo on 14.12.2016. The status quo order was passed on condition

to deposit a sum of Rs.1.5 Crores on or before 05.01.2017 and a sum of Rs.2 Crores on or before 16.01.2017. In default, the respondent was given free hand to proceed further. However, the writ petitioner has failed to comply with the conditional order and therefore, prayed for dismissal of the writ petition.

21. The respondent in support of their case has submitted that (i) there is no dichotomy between physical possession and symbolic possession and the object of the Act is to enforce the security interest by a non-adjudicatory process and to prevent creation of interest in favour of third party overnight; (ii) prior possession notice is not required to be sent before applying under Section 14 of the SARFAESI Act; (iii) possession can be restored only after finalisation of proceedings under Section 17 of the Act and there is no provision for interim restoration of possession; (iv) without exhausting the alternative remedy under Section 17 of the Act, the writ petition cannot be maintained; (v) the writ jurisdiction is a discretionary jurisdiction and even in cases of violation of law also, the Courts are not bound to exercise the jurisdiction; (vi) it shall not be enforced for the purpose of interim orders; and (vii) even when an order under Section 14 of the Act was found without jurisdiction, the physical possession of the Bank shall not be disturbed.

22. We have heard the arguments advanced by the learned counsel appearing on either side and perused the materials available on record.

23. The learned counsel appearing for the writ petitioner would submit that the registered office of the petitioner company is situated in Chennai. The company is effectively functioning and there are transactions taken place between the petitioner company and the respondent Bank in respect of the loan transaction. A civil suit is also pending and therefore, the respondent is very much aware that the petitioner company is actively carrying on business and has a permanent address for communication. As per Section 13(4) of the SARFAESI Act, notice was affixed in its premises on 04.11.2016, after sending out the labourers working in the Hotel and also the Watchman. The action of affixing notice under Section 13(4) of the SARFAESI Act is to take only taking symbolic possession and it will not amount to taking over the physical possession.

24. The physical possession can be taken only by two ways viz., (a) by voluntary surrender; and (b) under Section 14 of the SARFAESI Act. In the instant case, the property was not surrendered by the petitioner company. The respondent has also not taken possession following the procedures laid down under Section 14.

25. As per Section 8(1) of the Security Interest (Enforcement) Rules 2002, where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property. The language employed in the provision is that possession shall be taken only after delivering possession notice and also by affixing the possession notice on the outer door. The notice should be served on the borrower. Therefore, the respondent Bank must have served notice before taking possession of the property and also affix possession notice on the outer door of the property mortgaged.

26. Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 also mandates that the authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5). The language employed by the makers of the statute clearly elicit that it is mandatory to serve notice to the borrower at every stage. Any action by the secured creditor without putting the borrower on notice is illegal and violative of principles of natural justice. In the instant case, the respondent has affixed notice on the Hotel site and admittedly, has sent a notice on the next day and thereafter, complied with the provisions of the Act.

27. From the reading of the provisions, it is categorically repeated that the possession of immovable properties can be taken by delivering a possession notice to the borrower. Serving notice under Section 13(4) of the SARFAESI Act for Watchman will not amount to proper service. Admittedly, in the present case, notice was sent to the borrower after affixing notice under Section 13(4) of the SARFAESI Act at the Hotel site. Therefore, the notice should be anterior for taking over possession and cannot be ratified by sending notice after taking possession of the property. The service of notice shall be on the competent person to receive the same and serving it on the Watchman, cannot be taken as a proper service and such an action by the respondent Bank shall not be validated, but has to be deprecated.

28. Even though there is an alternative remedy is available under Section 17 of the Act, discretionary jurisdiction under Article 226 of the Constitution of India can be exercised, in cases of flagrant violation of law or else, the object of the Act will be defeated and it will amount to illegal and forcible eviction using unlawful elements. Further, such acts will lead to Kangaroo Court and due process of law will take a back seat. Section 14 of the SARFAESI Act, in effect will

be redundant and the power to take over possession can easily be abused by the unscrupulous elements. Therefore, the process adopted by the respondent Bank is not legally valid.

29. The respondent Bank is directed to take over possession by due process of law, after giving notice in the manner contemplated in the Act and Rules and shall not indulge in deviate methods and taking shelter under the SARFAESI Act.

30. The writ petition is disposed of in the above terms. No costs. Consequently, connected miscellaneous petition is closed.

-s/d-
Assistant Registrar(CS-I)

True Copy

Sub-Assistant Registrar

TK
To

The Authorised Officer
State Bank of Travancore
Alwarpet Branch
No.4/1, Eldams Road,
Bala Vinayakar Building,
Teynampet, Chennai - 600 018.

+1 CC to M/s. F.B. Benjamin, Advocate sr 77480.

W.P.NO.40794 OF 2016

SAI(CO)
SP(21/11/2019)