

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP-19554-2018 (O&M)
Date of Decision: 10.07.2019

HDFC Bank Ltd.

..... Petitioner

Vs.

District Magistrate and others

..... Respondents

CORAM: HON'BLE MR.JUSTICE RAKESH KUMAR JAIN
HON'BLE MR.JUSTICE ARUN KUMAR TYAGI

Present: - Mr.Manish Jain, Advocate, and
Ms.Divya Jain, Advocate,
for the petitioner.

Mr.Amit Mehta, Sr. DAG, Punjab.

Mr.Sanjay Sareen, Advocate, with
Mr.Sandeep Singh, Advocate,
for respondents No.2 to 4.

Mr.Sanjeev Sharma, Sr. Advocate, with
Ms.Aarushi Jain, Advocate,
for respondent No.6.

RAKESH KUMAR JAIN, J. (ORAL)

The petitioner has prayed for the issuance of a writ in the nature of mandamus seeking a direction to respondents No.1 to 5 to execute the order dated 12.1.2018 whereby the application filed by the petitioner under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [for short 'the Act'] has been allowed.

In brief, the facts narrated in the Court by the counsel for the parties are that respondent No.2 [hereinafter referred to as 'the Company'] secured a loan of ₹16 crore from the petitioner-bank by mortgaging a residential house. Before the mortgage was created, respondent No.3 had

sworn an affidavit on 14.5.2009 in which he categorically averred that the mortgaged property is free from all sorts of encumbrances and charges, there is no lien on it and there is no litigation pending in Court in regard to the mortgaged property. However, it transpires from the record that on 14.7.2009, possession of the mortgaged property was handed over by respondent No.3 to respondent No.6, who happens to be his brother-in-law (wife's brother), by way of a registered lease deed for a period of 15 years. Since there was a default in the payment of the amount of loan, therefore, the petitioner declared the account of the borrower as NPA on 27.02.2015 and by virtue of a notice issued under Section 13(2) of the Act recalled the loan amount of ₹4,52,26,700.50 providing them 60 days time. The borrower filed objections under Section 13(3-A) of the Act, which were decided by the petitioner on 04.06.2015 and issued possession notice under Section 13(4) of the Act on 07.07.2015. In between the borrower having an intuition that the property in dispute may not be repossessed by the petitioner by obtaining the order from the District Magistrate, Ludhiana, filed a caveat on 03.06.2015 in the Court of District Magistrate, Ludhiana. Notice in the caveat was issued on 27.1.2016 but the said caveat was dismissed by the District Magistrate on 12.4.2016. Aggrieved against the said order of dismissal, the borrower filed a review application on 05.09.2016. The application filed under Section 114 of the CPC was ultimately dismissed on 19.9.2017 but at the same time, the District Magistrate granted liberty to the secured creditors/petitioner to file a fresh application under Section 14(1) of the Act after rectifying grounds of rejection mentioned in the said order. While all these proceedings were going on, respondent No.6 filed a civil suit at Ludhiana on 23.11.2015 seeking a decree of permanent injunction against his landlord/borrower in which temporary injunction under Order 39 Rules 1

& 2 of the Code of Civil Procedure, 1908 [for short 'the CPC'] was granted on 24.11.2015. While the civil suit was pending, respondent No.6 filed another suit on 17.2.2017 seeking permanent injunction against the petitioner (secured creditor) which was however, withdrawn on 20.02.2017 even before the issuance of notice. Thus the net result was that there was no decree much less injunction of any Court obtained against the secured creditor either at the instance of the borrower or by the said lessee/tenant. The only injunction which was obtained in respect of the property in question was against the borrower in which the decree ultimately has been passed on 03.12.2018 as per which the borrower has been restrained from taking possession from the lessee/respondent No.6 otherwise than in due course of law.

It is also pertinent to mention that during the pendency of the aforesaid proceedings, the Act was amended and Sub-Section 4A was added in Section 17 of the Act by way of Act No.44 of 2016, Section 14(iv) w.e.f. 1.9.2016. Section 17(4A) of the Act is reproduced as under:-

“(4A) Where--

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, 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 65A 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;

(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 accordance with the provisions of this Act."

Since the petitioner was given permission by the District Magistrate vide its order date 19.7.2017 to approach again for the purpose of seeking possession under Section 14 of the Act, the Secured Creditor approached the District Magistrate by filing an application in November 2017 in which the District Magistrate passed the order on 12.1.2018 directing Tehsildar West, Ludhiana to take possession of the property in question. Aggrieved against the said order dated 12.1.2018, the borrower preferred a writ petition in this Court bearing CWP No.1857 of 2019 in which without issuance of any notice, this Court found that a remedy lies with the borrower/petitioner therein to approach the Debt Recovery Tribunal. The said writ petition was accordingly dismissed.

The present writ petition is basically contested by respondent No.6, *inter alia*, on the strength of his possession as a lessee. He has also filed applications bearing CM Nos.9852 & 9853 of 2019 for the purposes of placing on record the record of the proceedings before the District Magistrate. Notice in the applications was issued today. Learned counsel appearing on behalf of the non-applicant/petitioner has not raised any objection in allowing the applications and thus the same are hereby allowed. The documents attached with the applications are taken on record.

Respondent No.6 has contested the petition on the ground that the petitioner cannot be allowed to interfere in his possession by virtue of an order passed by the District Magistrate as he has been inducted as a lessee by a registered lease deed. In this regard, he has placed reliance upon two decisions of the Supreme Court rendered in the cases of ***“Harshad Goverdhan Sondagar Vs. International Assets Reconstruction company Limited and others”*** (2014) 6 Supreme Court Cases 1 and ***“Vishal N. Kalsaria Vs. Bank of India and others”*** (2016) 3 Supreme Court Cases 762 to contend that once a tenant is always a tenant and cannot be dispossessed otherwise in terms of the provisions of Rent Act.

At the same time, learned counsel appearing on behalf of borrowers/respondents No.2 to 4 has also submitted that though an amount of ₹16 crore was borrowed from the bank but the borrower has already paid ₹12 crore and at the time when the account of the petitioner was declared as NPA, the outstanding amount was only ₹4.5 crore. It is further submitted by him that when the notice under Section 13(2) of the Act was received for recalling of the entire amount of loan, the borrower made certain proposals for the purpose of settlement of the account and filed objections under Section 13(3-A) of the Act but the said objections/proposals were rejected

without giving any cogent reasons. It is further submitted by him that thereafter notice under Section 13(4) of the Act was issued for the purpose of possessing the mortgaged property. It is also submitted that the proposal made by the borrower has not been answered at all by the petitioner and as a result thereof, the borrower has to suffer pecuniary losses on account of the sale of the mortgaged property. He has thus made a prayer that the petitioner may be asked to settle the dispute by way of mediation.

Learned counsel for respondent No.6 has also submitted that no notice was given by the District Magistrate when impugned order was passed.

Learned counsel for the petitioner, while contesting the case set up by respondent No.6, has submitted that respondent No.6 does not deserve any leniency or mercy because respondents No.4 and 6 both are hand in glove as respondent No.6 happens to be the real brother-in-law of respondent No.4. It is further submitted that the judgments relied upon by learned counsel for respondent No.6 of the Hon'ble Supreme Court are not applicable to the facts and circumstances of the case because the registered lease deed has been created not only for 15 years but also by keeping the petitioner in dark. It is also submitted by him that since the tenancy has been created after the mortgage that too for a period of 15 years, it would attract Section 65(A) of the Transfer and Property Act, 1882 [for short 'the Act of 1882']. It is also submitted by him that the controversy in hand is squarely covered by a decision of this Court rendered in ***CWP No.6691 of 2015*** titled as ***"M/s Padam Motors Pvt. Ltd. Vs. District Magistrate-cum-Deputy Commissioner and others"*** decided on 28.4.2015.

Learned counsel for the petitioner has also submitted that the question of mediation with the borrower would not arise as the borrower has never come with clean hands because firstly the borrower has created a lease

on the mortgage property without intimation and permission of the secured creditor and has not made efforts to make the payment at any point of time. It is further submitted that if the borrower had any grievance of rejection of the objections without giving any reasons then the said order could have been challenged by him before the competent Court of law but he did not opt for the same. It is also submitted that the borrower tried his level best to wriggle out of the order passed by the District Magistrate, in the application filed under Section 14 of the Act because he had also filed CWP No.1857 of 2019 in which he remained unsuccessful. It is further submitted by him that the Secured Creditor has also filed OP NO.4832 of 2017 (Old OPA NO.256 of 2016) before the DRT, Chandigarh for the recovery of the remaining amount of loan which has been decreed on 14.02.2019. It is thus submitted that the stage of mediation has long been over and is not acceptable to the petitioner.

Learned counsel for the petitioner has thus framed the question for the purpose of giving an answer as to whether a tenant, who has been inducted after mortgage, without the knowledge of the mortgagee in an urban area for a period more than 3 years, can seek protection of law?

We have heard learned counsel for the parties and perused the record with their able assistance.

It is an admitted fact, as it transpires from the aforesaid narration, that respondent No.6 was inducted as a tenant after the mortgage, without knowledge of the mortgagee and has a close relation with the borrower. It is also an admitted fact that the said lease is for a period of 15 years. It is also not disputed that respondent No.6 had filed a suit for permanent injunction against his landlord in which the trial Court had passed

a decree that he should not be dispossessed otherwise than in due course of law but there is no such decree against the petitioner.

Thus, the question would be as to whether the order which has been passed by the District Magistrate, would be an exercise in accordance with law for the purpose of dispossessing respondent No.6 from the premises in dispute for the purpose of delivering the possession to the Secured Creditor of the secured asset?

When the mortgage was created, at that time, there was no such provision in the Act as to where a person, who is claiming tenancy over the secured asset, would go for the redressal for his grievance. The amendment has come into force in fact on 1.9.2016 by inserting Sub Section 4A in Section 17 of the Act by Act No.44 of 2016, Section 14(iv), wherein it is provided that any person, who claims himself as a tenant or a lessee of the secured asset would seek a remedy before the Debt Recovery Tribunal, who would pronounce, after taking into consideration evidence of the parties, about the status of such a person but before that the only remedy was available there to approach the Civil Court for the purpose of declaration, if there is a dispute about the tenancy rights.

In the present case, respondent No.6 has not filed a suit for declaration that he is a tenant. He only files a suit for permanent injunction as he was pretty sure that he is a tenant because of a registered lease deed. The suit for permanent injunction filed against the petitioner was withdrawn after two days. Whereas the suit filed against the mortgager/borrower was decreed because it appears to be collusive suit as mortgager was none else than the real brother-in-law (jija) of respondent No.6, who in any case wanted to protect his property from being taken over by the secured creditor/bank. It is pertinent to mention here that while the civil suit was

pending, the amendment came in the Act but respondent No.6 did not choose to withdraw the suit to file appropriate proceedings before the Debt Recovery Tribunal. In any case, the petitioner has not raised any dispute that respondent No.6 is not a tenant/lessee of the property in question, therefore, there is no question of permitting respondent No.6, at this stage, to approach the Debt Recovery Tribunal for the purpose of seeking a declaration about his status. Rather, the question is that even if respondent No.6 is a lessee in the property in question for 15 years whether the petitioner can take possession of the property in question by ignoring the tenancy rights?

In this regard, we are of the considered opinion that the present case is fully covered by the law laid down by this Court in the case of ***M/s Padam Motors Pvt. Ltd. (Supra)***, in which the tenant had approached this Court alleging that he has been inducted by way of a lease deed for a period of 5 years on 1.3.2011 and the secured asset is sought to be possessed by the secured creditor after throwing him out forcibly. Thus, this Court after making reference to a decision in the case of ***“M/s Delhi Punjab Goods Carrier Pvt. Ltd. Vs. Bank of Baroda” AIR 2008 Punjab and Haryana 107*** and ***“State Bank of Patiala Vs. The Debts Recovery Appellate Tribunal, New Delhi and others” 2013(2) RCR (Rent)*** came to a conclusion that if the lessee is inducted for a period of more than 3 years in an urban area then the tenant cannot be inducted without express consent of the mortgagee. The writ petition was thus dismissed.

In this case also there is no evidence brought on record by the mortgager or even by the lessee/respondent No.6 that the lease deed was registered or he was inducted as a tenant in the mortgaged property after seeking due permission of the secured creditor/mortgagee. Section 65A(e)

of the Act of 1882 much less the provision of Section 17(4-A) of the Act clearly comes to the rescue of the petitioner in this regard.

No other point has been raised.

In view of the aforesaid facts and circumstances, we are of the considered opinion that the tenancy claimed by respondent No.6 would not come in the way for the purpose of delivery of possession to the petitioner-bank by the District Magistrate and therefore, the District Magistrate, who is arrayed as respondent No.1, is hereby directed to deliver the possession after evicting respondent No.6 from the premises in dispute, within a period of three weeks from the date of receipt of certified copy of this order so that in the meantime respondent No.6 may seek rehabilitation somewhere else and deliver the possession of demise premises to the petitioner thereafter expeditiously. The writ petition is accordingly allowed. No costs.

(RAKESH KUMAR JAIN)
JUDGE

(ARUN KUMAR TYAGI)
JUDGE

10.07.2019

Vivek

Whether speaking /reasoned : *Yes/No*

Whether Reportable : *Yes/No*