IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7542 OF 2019

M/s. Savannah Lifestyle Pvt. Ltd. … Petitioner
V/s.
Special Recovery Officer C/o. Vasantdada Shetkari Sahakari Bank Ltd., & Ors. … Respondents

Mr. S. U. Kamdar, Senior Advocate, a/w. Mr. Vishal Kanade, Ms. Shruti Maniar and Ms. S. Sharma i/by Solomon & Co. for the Petitioner.

Mr. G. S. Godbole a/w. Kavsar Banatwala and Ms. Dipty Shah i/by Mr. Tushar Goradia for the Respondent No.3.

Mr. S. S. Patwardhan for the Respondent No.1 and 2.

CORAM : UJJAL BHUYAN, J.

DATE : JANUARY 17, 2020.

P.C.:-

1] Heard Mr. S. U. Kamdar, learned senior counsel a/w. Mr. Vishal Kanade, learned counsel for the Petitioner; Mr. Patwardhan, learned counsel for the Respondent Nos.1 and 2; and Mr. Godbole, a/w. Mr. Banatwala learned counsel for the Respondent No.3.

2] By filing this petition under Article 227 of the Constitution of India, petitioner seeks quashing of order dated 19th June 2019 passed by the Additional Chief Metropolitan Magistrate, 3rd Court Esplanade, Mumbai in C. C. No. 1052/MA/2019 filed by the petitioner.

2.1] By the said order passed below Exhibit-A, Additional Chief

Metropolitan Magistrate, 3rd Court Esplanade, Mumbai, rejected the application filed by the Petitioner for recall of order dated 22nd October 2018, concluding that Petitioner is not entitled to be heard at the time of taking over possession of the mortgaged property. It is stated that by the order dated 22nd October 2018 Additional Chief Metropolitan Magistrate, 3rd Court Esplanade, Mumbai had authorized the recovery officer to take over possession of the mortgaged property.

3] A brief recital of the facts is considered necessary.

4] It is stated that Respondent No.3 was running a recreational club from the subject property. On 18th May 2007, Respondent No.3 had entered into an agreement with the Petitioner styled as 'conducting agreement' whereby Petitioner was permitted to utilize the club premises on leave and licence basis for a period of 15½ years as per the terms and conditions mentioned in the agreement. The agreement was thereafter duly registered.

4.1] In the agreement it was also mentioned that Respondent No.3 had availed loans from Greater Bombay Co-operative Bank Ltd. and Vasantdada Shetkari Sahakari Bank Ltd., for which the club premises were mortgaged on 17th March 2006. The total outstanding loan liability of Respondent No.3 towards the said banks as on 18th May 2007 was about Rs.9,11,00,000.00 (Nine Crores Eleven Lacs).

5] Petitioner has stated that after taking over possession of the club premises it had invested a substantial amount of money in repairing and renovation work.

5.1] It appears that Respondent No.3 failed to repay the loan amount to Respondent No.2. For such default Respondent No.2 initiated proceedings under Section 101 of the Maharashtra Co-operative Societies Act, 1960, pursuant to which recovery certificate was issued on 23rd February 2012. Following issuance of the recovery certificate Respondent No.2 issued demand notice dated 3rd March 2012 to Respondent No.3 to discharge its liability. However, in spite of the recovery certificate and demand notice, Respondent No.3 failed to repay its dues to Respondent No.2.

6] Petitioner has alleged collusion between the Respondents with the objective of dispossessing the petitioner from the club premises through the mechanism of recovery proceeding. Though there are guarantors to the said loan, Respondent No.2 has not proceeded against the guarantors, but has focused entirely on the club premises of the Petitioner for allegedly realizing the amount covered by the recovery certificate.

7] Petitioner had also filed L.D. suit No. 106 of 2012 before the Small Causes Court, Bombay for declaration as the lawful licensee and that Respondent No.2 should be injuncted from dispossessing the Petitioner.

8] Respondent No.1 had issued a public notice on 22nd October, 2012 to the effect that the subject property and movables had been seized by Respondent No.1 on 4th September, 2012 and that movables would be auctioned from 07th November 2012 to 9th November 2012. However, following intervention of the departmental authority, the movable properties were excluded from auction sale.

9] On 6th April 2013 Respondent No.1 again issued a public notice this time for auction of the immovable subject property on 8th May 2013. However, it appears that nothing happened immediately thereafter but ultimately Respondent No.1 moved the Additional Chief Metropolitan Magistrate, 3rd Court Esplanade, Mumbai, under Rule 107 (11)(d-i)(vi) of the Maharashtra Co-operative Societies Rules, 1961. It was on that application, Additional Chief Metropolitan Magistrate, 3rd Court Esplanade, Mumbai passed the order dated 22nd October 2018 authorizing the recovery officer to take over possession of the subject property.

10] Petitioner approached this Court by filing Writ Petition No. 14517 of 2018, which was disposed of on 24th April 2019 by giving liberty to the petitioner to file an application before the Additional Chief Metropolitan Magistrate, 3rd Court Esplanade, Mumbai within two weeks seeking recall of the order dated 22nd October 2018 on the ground that Petitioner was not served with notice of the said proceeding and thereby deprived of opportunity of hearing. It was also clarified that in the event such an application was filed, the Additional Chief Metropolitan Magistrate, 3rd Court Esplanade, Mumbai should decide the said application on its own merit and in accordance with law, giving opportunity to all concerned.

11] Pursuant to such order, petitioner filed an application before the Additional Chief Metropolitan Magistrate, 3rd Court Esplanade, Mumbai for recall of order dated 22nd October 2018. As noted above, by the impugned order dated 19th June 2019, the said application was rejected.

12] Hence, the present petition.

13] This Court (Coram : M. S. Karnik, J.) by an order dated 12th July 2019 accepted the undertaking of the Petitioner that it would deposit an amount of Rs.2,00,00,000/- (Rupees Two crores) upfront; Rs.50,00,000/- (Rupees Fifty Lakhs) to be deposited on or before 15th July 2019 and the balance amount of Rs.1,50,00,000/- (Rupees One Crore and Fifty Lakhs) to be deposited within four weeks from 15th July 2019. In the course of hearing learned senior counsel appearing for the petitioner submitted that Petitioner has deposited the aforesaid amount with Respondent No.1

14] Basic contention of Mr. Kamdar, learned senior counsel for the Petitioner is that Petitioner ought to have been heard before passing the order dated 22nd October 2018 authorizing taking over of possession of the subject property by the recovery officer. He submits that provision of Rule 107 (11)(d-i)(vi) of the Maharashtra Co-operative Societies Rules, 1961 are identical to the provisions contained in Sections 13 and 14 of the Securitisation and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act"). Referring to the Judgments of the Supreme Court he submits that if tenancy is created before issuance of notice under Section 13(2) of the SARFAESI Act, then the tenant cannot be evicted by taking recourse to the provisions of the SARFAESI Act. Such a tenant can only be evicted by taking recourse to the provisions of the Rent Control Act. In such circumstances, impugned order cannot be sustained.

15] On the other hand Mr. Godbole, learned counsel for Respondent No.3 submits that the Petitioner is not a tenant. It is a licensee having no right in the property. Right from the inception Petitioner knew that the subject property was mortgaged to Respondent No.1 for availing loan facility. Therefore in such circumstances no benefit can accrue to the Petitioner on the strength of the conducting agreement which in any case does not confer the status of tenant on the petitioner. He submits that the suit filed by the Petitioner was dismissed for non-prosecution. There is no infirmity in the order passed by the Additional Chief Metropolitan Magistrate, 3rd Court Esplanade, Mumbai, declining to hear the petitioner.

In this connection he has placed reliance on the decision of this Court in **M/s. Trade Well, a Proprietorship Firm, Mumbai Vs. Indian Bank**. [1]

16] Mr. Patwardhan, representing Respondent Nos.1 and 2 has also referred to various provisions of the conducting agreement, more particularly clause 23 thereof which specifically provides that use of the subject premises by the conductor would not create or vest in the conductor any right, title, benefit or interest whether by way of tenancy, sub-tenancy etc. in favour of the conductor. He has also referred to Section 65A of Transfer of Property Act, 1882 and contends that at the most petitioner can claim to a “tenant-at-sufferance”. To support his contention, he has relied upon a decision of the Supreme Court in **Bajarang Shyamsunder Agarwal Vs. Central Bank of India** [2]

17] Submissions made by learned counsel for the parties have been considered. Also perused the materials on record.

18] From the above it is seen that facts are not in dispute. Petitioner and Respondent No.3 had entered into the conducting agreement on 18th May 2007. Prior to that the subject property was mortgaged by Respondent No.3 to Respondent No.1 on 17th March 2006 for availing loan. For failure to repay the loan, recovery certificate was issued on 23rd February 2012. First public notice for auction of property was issued on

1 (2007) SCC OnLine Bom 1232
2 (2019) 9 SCC 94

22nd October 2012 and after exclusion of movable property, second public notice was issued on 6th April 2013. Finally order was passed under Rule 107 (11)(d-i) of the Maharashtra Cooperative Societies Rules, 1961 (briefly "the Rules" hereinafter) on 22nd October 2018 authorizing recovery officer to take over possession of the subject property.

19] Rule 107 of the Rules lays down the procedure for attachment and sale or sale without attachment of immovable property, more particularly in clause (d-i) (ii) (iii) and (vi) of sub-rule 11. It is not in dispute that provisions of Rule 107 (11) of the Rules are identical to the provisions contained in Sections 13 and 14 of the SARFAESI Act.

20] In the case of **Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited,**[3] Supreme Court classified leases granted by borrowers/lessees into 3 classes. Class (1) leases created prior to mortgage which created the secured asset; Class (2) leases created after creation of the mortgage vide Section 65-A of the Transfer of Property Act, 1882 but prior to receipt of Section 13(2) SARFAESI Act notice by the borrower; and Class (3) leases created after creation of the mortgage vide Section 65-A of the Transfer of Property Act, 1882 and also after receipt of Section 13(2) SARFAESI Act notice by the borrower. It has been held that insofar leases falling in classes (1) and (2), such lessees cannot be evicted by the secured creditor or by the Chief Metropolitan Magistrate/District

3 (2014) 6 SCC 1.

Magistrate, unless and until the lease is validly terminated as per any of the modes specified in Section 111 of the Transfer of Property Act, 1882 including by surrender of lease by lessee to the secured creditor or Chief Metropolitan Magistrate/District Magistrate. Of course to retain possession under such a lease beyond a period of one year from the date on which such lease commenced as per mandate of Section 107 of the Transfer of Property Act, 1882, such lessee would have to produce proof of execution of a proper registered lease deed to the secured creditor or to the Chief Metropolitan Magistrate/District Magistrate. Regarding leases falling in class (3) it has been held that such leases are invalid. Therefore a lessee in possession of such lease can be immediately evicted by the secured creditor or by the Chief Metropolitan Magistrate/District Magistrate.

21] In the case of **Vishal N. Kalsaria Vs. Bank of India,**[4] Supreme Court held that it is the settled position in law that once a tenancy is created, the tenant can be evicted only after following the due process of law as prescribed under the Rent Control Act. A tenant cannot be arbitrarily evicted by using the provisions of SARFAESI Act as that would amount to stultifying the statutory rights of protection given to a tenant. As regards the non obstante clause in Section 35 of SARFAESI Act Supreme Court held that it can only extend to laws operating in the same field and cannot be extended to each and every law enacted by the Central and State

4 (2016) 3 SCC 762

Legislatures.

22] Again in the case of **Sanjivkumar Surajprakash Aggarwal Vs. State Bank of India,**[5] Supreme Court while considering the ambit of Section 14 of the SARFAESI Act opined that an inquiry under Section 14 of the SARFAESI Act would be justified to determine as to whether tenancy created by the borrower is a sham one or not. Therefore, in the facts of that case, the Magistrate was directed to conduct an inquiry with regard to genuineness of the tenancy.

23] In the case of M/s. Trade Well (Supra), a Division Bench of this Court examined the question as to whether while dealing with a written request made by a secured creditor under Section 14 of the SARFAESI Act, the Chief Judicial Magistrate or the District Magistrate was required to give notice to the borrower or any person who may be in possession of the secured asset and give him a hearing. This Court after an elaborate examination culled out several conclusions in paragraph (89) and as per conclusion No.2 it was held that the Chief Metropolitan Magistrate/District Magistrate acting under section 14 of the SARFAESI Act was not required to give notice either to the borrower or to the 3rd party.

24] This issue was examined by the Supreme Court in Harshad Govardhan Sondagar (supra) already referred to above. In addition to

5 (2016) 14 SCC 532

categorization of leases into three categories, it was also held that the decision of the Chief Metropolitan Magistrate/District Magistrate under Section 14(3) of the SARFAESI Act is amenable to challenge before the High Court under Articles 226 & 227 of the Constitution of India by any aggrieved party and if such a challenge is made, the same may be examined by the High Court. A party which is adversely affected by any steps initiated by the authority as a consequence of the default by the borrower would be an aggrieved party entitled to challenge the decision of the Chief Metropolitan Magistrate/District Magistrate under Section 14(3) of the SARFAESI Act in writ proceeding. In Harshad Govardhan Sondagar (supra) it was held that a tenant or a lessee covered by Clauses (1) and (2) would certainly come within the ambit of aggrieved party who can maintain such a challenge. Supreme Court after elaborate discussion held that the High Court in M/s. Trade Well (supra) failed to appreciate that provisions of Section 13 of the SARFAESI Act though overrides the provisions of 69 or 69(A) of the Transfer of Property Act, but does not override the provisions of the Transfer of Property Act relating to rights of a lessee under a lease created before receipt of the notice under sub-section (2) of Section-13 of the SARFAESI Act by the borrower. Therefore, it was held that the view taken by this Court in M/s. Trade Well (supra) vis-a-vis rights of the lessee in possession of the secured asset under authority of a lease made by the mortgagor prior to creation of the mortgage or after creation of mortgage in accordance with Section 65A of the Transfer of Property Act was not correct and was accordingly set aside.

25] Finally in Bajarang Shyamsunder Agarwal (supra) which was relied upon by Mr. Patwardhan in support of his contention that for tenancy rights created after the property is mortgaged to the bank, consent of the creditor needs to be taken even in case of tenancy under the Rent Control Act and that provisions of the Rent Control Act cannot be extended to a tenant in sufferance. Supreme Court held that the objectives of the SARFAESI Act, Transfer of Property Act and the Rent Control Act are required to be reconciled. It was held as under :

> "**24.1** If a valid tenancy under law is in existence even prior to the creation of the mortgage, the tenant's possession cannot be disturbed by the secured creditor by taking possession of the property. The lease has to be determined in accordance with Section 111 of the TP Act for determination of leases. As the existence of a prior existing lease inevitably affects the risk undertaken by the bank while providing the loan, it is expected of banks/creditors to have conducted a standard due diligence in this regard. Where the bank has proceeded to accept such a property as mortgage, it will be presumed that it has consented to the risk that comes as a consequence of the existing tenancy. In such a situation, the rights of a rightful tenant cannot be compromised under the SARFAESI Act proceedings.

> **24.2** If a tenancy under law comes into existence after the creation of a mortgage, but prior to the issuance of notice under Section 13(2) of the SARFAESI Act, it has to satisfy the conditions of Section 65-A of the TP Act.
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> **24.3** In any case, if any of the tenants claim that he is entitled to possession of a secured asset for a term of more than a year, it has to be supported by the execution of a registered instrument. In the absence of a registered instrument, if the tenant relies on an unregistered instrument or an oral agreement accompanied by delivery of possession, the tenant is not entitled to possession of the secured asset for more than the period prescribed under Section 107 of the TP Act."

25.1] Thus, it was held that if a tenancy under law comes into existence after creation of the mortgage but prior to issuance of notice under Section 13(2) of the SARFAESI Act, it has satisfied the conditions of Section 65A of the Transfer of Property Act.

26] At this stage Mr. Patwardhan submits that under clause (e) of Sub-section (2) of Section 65A of the Transfer of Property Act, the duration of lease shall in no case exceed three years. He submits that in the present case the period of three years has expired long back.

27] Adverting to the facts of the present case, what is under challenge is the decision of the Additional Chief Metropolitan Magistrate holding that the borrower or any third person will have no right to be heard before passing order under Rule 107(11)(d-i) of the Rules. Evidently, such a finding is contrary to the law laid down by the Supreme Court as discussed above. Not only petitioner has a right to be heard, the Additional Chief Metropolitan Magistrate may also have to examine and decide the rights of the petitioner vis-a-vis the conducting agreement entered into between Respondent No.3 and Petitioner on 18th May 2007.

28] Therefore, in the light of the discussions made above, order dated 19th June 2019 cannot be sustained and is accordingly set aside. Matter is remanded back to the Court of Additional Chief Metropolitan Magistrate, 3rd Court Esplanade, Mumbai for a fresh decision in accordance with law within a period of four weeks from the date of receipt of an authenticated copy of this order after giving due opportunity of hearing to the Petitioner.

29] Writ Petition is accordingly allowed but without any order as to costs.

(UJJAL BHUYAN, J.)