

HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

AND

HON'BLE SRI JUSTICE K. LAKSHMAN

WRIT PETITION No.32171 OF 2018

ORDER: (per Hon'ble Sri Justice K. Lakshman)

Feeling aggrieved by the order, dated 27.06.2018, in S.A. No.7 of 2010 passed by the Debts Recovery Tribunal - I, Hyderabad, the petitioners in S.A. No.7 of 2010 the petitioners herein filed the present writ petition.

2. It is the contention of the petitioners that petitioner No.1 was the absolute owner and possessor of property bearing Plot No.19, admeasuring 691 square yards, forming part of Layout of Kalyannagar Cooperative Society Limited. He has purchased the same under a registered sale deed bearing document No.2591 of 1973. Subsequently, petitioner No.2 purchased half of the said property from petitioner No.1 under a registered sale deed bearing document No.455 of 1987 dated 01.06.1987. Petitioner Nos.1 and 2 entered into an oral agreement with respondent No.3 - Builder in the year 2000 for development of the said property into residential flats. Pursuant to the same, respondent No.3 after obtaining permission from the competent authority for construction of residential apartment i.e., stilt + 5 floors, constructed the residential flats. For the said purpose, respondent No.3 availed loan as well as overdraft facility from respondent No.2 bank, for which petitioner Nos.1 and 2 stood as guarantors and

mortgaged their semi-finished flats under a registered mortgage deed dated 14.06.2002, details of which are as under:

“All that area in Flats on First Floor, Second Floor and Fifth Floor on Northern Side and Flat on Fifth floor on Southern side each admeasuring a total area of 1650 sq. ft., along with undivided share of land 276.4 Sq.Yds. out of total land admeasuring 691 Sq.Yds. situated in Sy.No.52, 138 & 139 of Yousufguda, Hyderabad and bounded by: in premises 8-3-167/D/19

North : Plot No.13
South : 40' Wide Road
East : Plot No.20
West : Plot No.18.”

According to the petitioners, each floor of the said building consists of two flats and the entire building is having 10 flats in all.

3. Since respondent No.3 failed to repay the entire loan and overdraft facility obtained by it, respondent No.2 bank initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short ‘the Act’) vide a notice, dated 25.04.2003, under Section 13 (2) of the Act demanding an amount of Rs.25,69,897/-. On receipt of the said notice, respondent No.3 paid a sum of Rs.10,00,000/- and accordingly respondent No.2 bank got redeemed the two flats i.e., northern side flat in first floor and southern side flat in fifth floor on 15.04.2004 as agreed. According to the petitioners, though amount was paid to redeem the third property, respondent No.2 bank did not release the same. ‘C’ Schedule property mentioned in the notice dated 25.04.2003 issued under Section 13 (2) of the Act contained no

mention of relevant details for identity of property, such as door, floor number etc., except mentioning as 'semi-finished property'.

4. It is further contended by the petitioners that respondent No.2 bank also issued a possession notice, dated 25.08.2004, under Section 13 (4) of the Act. Challenging the same, respondent No.3 filed an application under Section 17 of the Act vide S.A. No.85 of 2004, and vide order dated 05.10.2005 the Debts Recovery Tribunal, Hyderabad, set aside the same.

5. According to them, petitioner No.3 has been in continuous possession of the subject property herein as a tenant by paying monthly rent of Rs.12,000/- excluding maintenance charges since 2009 and the subject property was in a semi-finished stage right from the year 2002 till 2009 and the same was completed in 2009 and thereafter assessed to tax in 2009 itself. Pursuant to the order dated 15.12.2009 passed by the Chief Metropolitan Magistrate, Hyderabad in Criminal M.P.No.4589 of 2009, the Advocate Commissioner issued notice dated 06.01.2010 calling upon petitioners and respondent No.3 to hand over the vacant peaceful possession of the property under the provisions of the Act.

6. Challenging the said notice dated 06.01.2010 petitioner Nos.1 and 2 filed an application under Section 17 of the Act vide S.A. No.7 of 2010 contending that the very identity of the property which was sought to be taken over possession through Advocate

Commissioner is not correlated either to the mortgage deed or to the demand notice. S.A. No.85 of 2004 filed by respondent No.3 challenging the possession notice dated 25.08.2004 was allowed by the Tribunal by order dated 05.10.2005. Later, respondent No.3 filed W.P.No.6846 of 2007 wherein the petitioners herein were impleaded as respondent Nos.2 to 4 and this Court, while dismissing the said writ petition, rejected the grounds urged by the petitioners with regard to notice under Section 13 (4) before seeking indulgence of the Magistrate under Section 14 of the Act, but, however, observed that the petitioners were at liberty to pursue the alternative remedies available under law. It was further contended before the Tribunal that pursuant to the notice dated 06.01.2010, the Advocate Commissioner went to the Flat on fourth floor which is in possession of petitioner No.3. It is contended that respondent No.2 bank officials are fully aware that no property on fourth floor is mortgaged to them as a security for the loan obtained by respondent No.3 as was evident from the Schedule of the property in mortgage deed dated 14.06.2002.

7. It was also contended before the Tribunal that respondent No.2 bank has no right whatsoever on the property fully described in the schedule of the application as the same was not given as security to it and that respondent No.2 bank also failed to follow the procedure laid down under Sections 13 (2) and 13 (4) of the Act; that the notice dated 06.01.2010 issued by the Advocate Commissioner in respect of the Schedule property is illegal and contrary to the provisions of the

Act; and respondent No.2 bank failed to verify the details of property mortgaged in its favour and against which property they are initiating proceedings etc.

8. Respondent No.2 bank filed its counter in S.A. No.7 of 2010 contending about availing the loan and overdraft facility by respondent No.3 and petitioner Nos.1 and 2 standing as guarantors by mortgaging their semi finished flats in 'Murthy Mansion' as stated above. It is further contended that at the time of mortgage, flat numbers were not assigned as they were in semi-finished stage and, therefore, floor numbers were counted as stilt plus five upper floors as stated by the petitioners and respondent No.3. It was admitted that in the mortgage deed, that Mortgagee i.e., the Bank would release one flat on payment of 25% outstanding loan including interest and accordingly on payment of certain amounts, out of the four flats mortgaged, the flat on the northern side of the first floor and the flat on southern side of fifth floor (two flats) were released on 15.04.2004 and that the mortgage is still continuing against the flat on northern side of the first floor and the flat on the northern side of fifth floor.

9. It was further contended by respondent No.2 bank before the Tribunal that the petitioners herein and respondent No.3 are creating confusion in counting the floors of the building on which the mortgaged flats are located. During subsistence of the mortgage, the petitioners and respondent No.3 together sold one flat on northern side of the first floor to one Mr. S. Ravikanth suppressing the fact that

mortgage is still subsisting against the said flat. Since respondent No.3 failed to repay the loan amount and overdraft, respondent No.2 bank initiated measures under the Act and accordingly issued notice dated 25.04.2003 under Section 13 (2) of the Act, and thereafter possession notice dated 25.08.2004 under Section 13 (4) of the Act. Challenging the said possession notice, respondent No.3 filed an application vide S.A. No.85 of 2004 before the Tribunal and the Tribunal by order dated 05.10.2005 allowed the said application setting aside the said possession notice on the ground that the notice was not published in Newspapers as required under Rule 8 (2) of the Security Interest (Enforcement) Rules, 2002 (for short 'Rules'). It was further contended that the building consists of five floors, and by wrongly counting the floors, the petitioners and respondent No.3 are stating that flat is not located on fourth floor and thereby they are creating confusion; and the Advocate Commissioner has rightly identified the flat which is occupied by petitioner No.3 as they are mortgaged in favour of respondent No.2 bank.

10. The Tribunal, on consideration of entire material on record, dismissed the said S.A. No.7 of 2010 vide order dated 27.06.2018. Challenging the said order, dated 27.06.2018 passed by the Tribunal, the petitioners filed the present writ petition.

11. Respondent No.2 bank filed its counter almost reiterating its contentions raised before the Tribunal.

12. Heard Mr. A.P. Venugopal, learned counsel for the petitioners and Mr. Ravi Kondaveeti, learned counsel for respondent No.2 bank.

13. It is relevant to note that despite receiving notice, respondent No.3 did not file reply/counter in S.A. No.7 of 2010 and it was *set ex parte*.

14. The Tribunal on consideration of contentions of both parties observed that respondent No.3 obtained permission to construct stilt + five floors. Respondent No.3 - builder and petitioner Nos.1 and 2 mortgaged flats on first floor, second floor and fifth floor on northern side and southern side flat in fifth floor as security of the loan and overdraft facilities availed by respondent No.3. At the time of execution of the said mortgage deed, flats were under semi-finished condition and flat numbers were not allotted. After completion of the construction of the building, as per the assessment of GHMC, the flats numbers were given as Ground + four floors, which is evident from the material papers filed by the petitioners. It was further observed by the Tribunal in the impugned order that out of total flats constructed in the building, four flats were mortgaged in favour of respondent No.2 bank vide mortgage deed dated 14.06.2002 and that respondent No.3 constructed stilt + five floors. The same are numbered as ground + four floors. Hence, both flats on top floor i.e. fifth floor (if above stilt floor is called as first floor) or fourth floor (if stilt floor is called ground floor) are mortgaged in favour of respondent No.2 bank and

thus observed that the schedule property is situated in top floor i.e., fourth floor for the reason that the first floor is called ground floor and that the petitioners have not specifically questioned/pointed out any irregularity committed by respondent No.2 bank in invoking the measures under the Act against the schedule property.

15. Impugning the order, Mr. A.P. Venugopal, learned counsel for the petitioners would contend that the Tribunal failed to consider the contentions raised by the petitioners to the effect that respondent No.2 bank cannot initiate proceedings under Section 14 of the Act without issuing possession notice under Section 13 (4) of the Act which is *sine qua non*. He would further contend that the Tribunal, being first Forum of fact finding, did not advert to the legal grounds urged by the petitioners herein. The Tribunal erroneously came to a conclusion that there is no dispute of identity of the property, but confusion was created by petitioner Nos.1 and 2 to get over proceedings under the Act. The Tribunal failed to consider the effect of granting interim stay in I.A. No.58 of 2010 while admitting S.A. No.7 of 2010 and its subsistence till disposal of the said S.A.

16. It is further contended by the learned counsel for the petitioners that after dismissal of S.A. No.7 of 2010 on 27.06.2018 by the Tribunal, respondent No.2 bank issued notice dated 23.08.2018 under Section 13 (4) of the Act, and though there is an alternative remedy of appeal before the DRAT, Calcutta, due to non-availability

of the Chairman, they approached this Court by way of filing the present writ petition.

17. *Per contra*, Mr. Ravi Kondaveeti, learned counsel for respondent No.2 bank would contend that the writ petition itself is not maintainable in view of an alternative efficacious remedy available under Section 18 of the Act and that the petitioners have to file an appeal before the DRAT, Calcutta. He has relied upon a decision of the Apex Court in **Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd.**¹

18. We have perused the material available on record.

19. Though there is an alternative remedy of appeal available under Section 18 of the Act, there is no Chairman in the Appellate Tribunal at Calcutta since long time, and litigants are filing the appeals at Calcutta, but matters are being taken up for hearing at Lucknow Bench. Therefore, though it is an alternative remedy, but it is not an efficacious remedy. On the said ground, this Court has entertained several writ petitions. In view of the same, the contention of the learned counsel for respondent No.2 bank on the aspect of 'alternative remedy' is rejected.

20. From the record, the admitted facts are that petitioner Nos.1 and 2 being the absolute owners and possessors of Plot No.19, admeasuring 691 square yards, forming part of Layout of Kalyanagar

¹. (1997) 6 SCC 450

Cooperative Society Limited, entered into a development agreement with respondent No.3 for construction of residential flat. Respondent No.3 after obtaining necessary construction permission from the competent authority, constructed the residential flats. Respondent No.3 availed overdraft facility as well as loan and petitioner Nos.1 and 2 stood guarantors for the said loan by mortgaging flats as mentioned in the mortgage deed, dated 14.06.2002.

21. The main contention of the petitioners is that respondent No.2 bank without issuing possession notice under Section 13 (4) of the Act, initiated proceedings under Section 14 of the Act and, therefore, the notice dated 06.01.2010 issued by the Advocate Commissioner, without identifying the property, is illegal.

22. According to him, the schedule property mentioned in earlier possession notice, dated 25.08.2004 (which was set aside by the Tribunal vide order dated 05.10.2005 in S.A.No.85 of 2004) and subsequent possession notice dated 23.08.2018 wherein it is mentioned as *“Registered Mortgage of property bearing Flat No.502, “Murthy Mansion” D.No.8-3-167/D/19, Phase No.1, in Survey No.52, 138 & 139, Kalyan Nagar, Hyderabad mortgaged by M/s. Shilpa Homes and bounded by: North: Open to Sky; South: Corridor & Flat No.501, East: Open to Sky, West: Open to Sky”* is not the property mortgaged by petitioner Nos.1 and 2.

23. He contends that though there was no mortgage in respect of the said flat, respondent No.2 bank initiated the proceedings under the Act and the Advocate Commissioner's notice dated 06.01.2010 identifying the said flat is also illegal. Petitioner No.3 being tenant of the said flat is in possession of the property and respondent No.2 did not serve notice on him as per the provisions of the Act.

24. Admittedly, permission was obtained by respondent No.3 for construction of five floors from the competent authority. Petitioner Nos.1 and 2 and respondent No.3 executed a mortgage deed bearing document No.1980 of 2002, dated 14.06.2002 in favour of respondent No.2 bank in respect of semi-finished flats situated on the northern side of first floor, second floor and fifth floor and the flat situated on the southern side on the fifth floor each admeasuring a total area of 1650 square feet along with undivided share of land 276.4 square yards out of total land admeasuring 691 square yards in Sy.Nos.52, 138 and 139 of Yousufguda, Hyderabad in premises No.8-3-167/D/19 as security for the loan and over-draft facility availed by respondent No.3 - Builder.

25. At the time of mortgage, the flat numbers were not assigned as they were in semi-finished stage. Therefore, floor numbers were counted as stilt + five upper floors in the mortgage deed.

26. It was agreed that respondent No.2 would release one flat on payment of 25% of the loan including interest as on that date.

27. Accordingly, on payment of certain amounts, out of four flats mortgaged, flat on the northern side of first floor and flat on southern side of fifth floor were released on 15.04.2004.

28. Though there is specific contention of respondent No.2 bank that respondent No.3 sold Flat No.102 in second floor on northern side of 'Murthy Mansion', there is no denial of the same by the petitioners herein and also respondent No.3.

29. The mortgage is still continuing against flat on the northern side of the first floor (if the floors are counted as ground, first, second, third and fourth it is located on first floor, and if the floors are counted as first, second, third, fourth and fifth, it is located on second floor), and the flat on the northern side of the fifth floor (if the floors are counted as ground, first, second, third and fourth, it is located on fourth floor, and if the floors are counted as first, second, third, fourth and fifth, it is located on fifth floor). According to respondent No.2 bank, petitioners are creating confusion in counting the floor numbers by taking advantage of mentioning of semi-finished flats, floor numbers in the registered mortgage deed 14.06.2002.

30. On perusal of the material papers and pleadings in the present writ petition, it is clear that the flats which came to be completed during the years 2001 to 2009 were assessed to the tax and

the same were given the respective flats numbers as G1, G2 in Ground Floor, Flat Nos.101 and Flat No.102 in First Floor, Flat Nos.201, Flat No.202 in Second Floor, Flat No.301 and Flat No.302 in Third Floor, Flat No.401 and flat No.402 in Fourth Floor. The permission was granted for Stilt + Five Upper Floors. As contended by the learned counsel for respondent No.2 bank that if the floors are counted as Ground, First, Second, Third and Fourth, the schedule property mentioned in possession notice under Section 13 (4) of the Act dated 25.08.2004 and 23.08.2018, the schedule flat would be in the fourth floor, and if the floors are counted as first, second, third, fourth and fifth, it is located on fifth floor.

31. As discussed supra, the mortgage against two flats i.e., northern side of the first floor and southern side of fifth floor is still continuing after redemption of the mortgage in respect of other flats on receipt of payment of amount from respondent No.3. It is also admitted fact that due to failure to repay the loan amount and overdraft obtained by respondent No.3, respondent No.2 bank initiated the proceedings under the Act including Section 14. Accordingly, the Advocate Commissioner issued notice 06.01.2010 in respect of Flat No.502 of the said complex. Thus, the petitioners herein are creating confusion by counting the floor numbers. In fact, there is no confusion.

32. The permission is only for five floors and admittedly mortgage over flat in the northern side of fifth floor is still continuing

and, therefore, respondent No.2 rightly obtained proceedings under Section 14 of the Act. The Advocate Commissioner rightly identified Flat No.502 as specifically mentioned in the earlier possession notice dated 25.08.2004 and subsequent possession notice 23.08.2018. As already discussed above, the Tribunal has rightly held that respondent No.3 - Builder constructed ground + four floors and both flats on top floor i.e. fifth floor are mortgaged in favour of respondent No.2 bank.

33. It is the further contention of the petitioners that respondent No.2 bank cannot initiate proceedings under Section 14 of the Act without service of notice under Section 13 (4). In support of the same, they relied upon decisions of the Apex Court in **Standard Chartered Bank v. V. Noble Kumar**² and **M/s. Transcore v. Union of India**³. In **Standard Chartered Bank**². In the said decisions, the Apex Court, after considering several judgments, held that exhaustion of right to obtain possession of secured asset directly by Bank under Section 13 (4) prior to approaching Magistrate for taking possession of secured asset, is not mandatory. The Apex Court further held that there is no need of service of possession notice under Section 13 (4) and that the Bank can directly initiate proceedings under Section 14 of the Act without even serving possession notice under Section 13 (4).

34. Therefore, in the present case also, there is nothing wrong if respondent No.2 bank initiated the proceedings under Section 14 of

². (2013) 9 SCC 620

³. AIR 2007 SC 712

the Act without serving the possession notice under Section 13 (4) dated 25.08.2004 at the first instance.

35. Earlier S.A. No.85 of 2004 filed by respondent No.3 challenging the said possession notice dated 25.08.2004 was allowed by the Tribunal vide order 05.10.2005 setting aside the same on the ground that the said possession notice was not published in two leading Newspapers as required under law.

36. The Apex Court in **M/s. Transcore³**, by referring to taking possession of secured assets of borrower under Section 13 (4) held that dichotomy between symbolic and physical possession does not find place in the Scheme of the Act and Rules.

37. Therefore, we hold that there is no irregularity committed by respondent No.2 in initiating measures under Section 14 of the Act without even serving possession notice under Section 13 (4) of the Act as held by the Apex Court in the aforesaid decision. Thus, we are satisfied with the reasons given by the Tribunal while dismissing the S.A. No.7 of 2010.

38. It is relevant to note that now the Bank issued possession notice, dated 23.08.2018, again under Section 13 (4) (d) of the Act after dismissal of the said S.A. No.7 of 2010. Though the petitioners challenged the said notice dated 23.08.2018, they have not raised any valid or legal grounds or reasons or procedural irregularity in issuing the said notice.

39. In view of the above discussion, there is no error in the impugned order warranting interference by this Court in exercise of power under Article 226 of the Constitution of India.

40. In these facts and circumstances of the case, the writ petition fails and, accordingly the same is dismissed. However, there shall be no order as to costs.

As a sequel, miscellaneous petitions, if any, pending in the writ petition shall stand closed.

M.S. RAMACHANDRA RAO, J

K. LAKSHMAN, J

07th January, 2020
Mgr

