Court No. 13

01.12.2021
(AD 11)
(S. Banerjee)

WPA 9786 of 2021

Omega Transmission Private Limited
Vs.
Canara Bank & Ors.

with

CAN 1 of 2021

(Via Video Conference)

Mr. Sudhasatva Banerjee
Mr. Pratik Gorai
Mr. Radheshyam Tiwari
Ms. Komal Toshniwal

… for the petitioner

Mr. Siddhartha Banerjee
Mr. Dipankar Das
Ms. Sanjana Nandi

… for the Canara Bank

Mr. Mahendra Prasad Gupta

… for the State

The writ petitioner is a lessee in respect of a property situated and lying at 60 and 61/1, Jaya Bibi Road, Ghusuri, P.S. Malipanch Ghora, Howrah.

The lessor is one Subhas Shaw who is the Director of the lessee/petitioner. The said lessor Subhas Shaw is also a coobligant along with the writ petitioner towards loans and advances obtained from bank. The said Subhas Shaw and the writ petitioner have jointly and severally mortgaged the said property and leasehold interest thereon to the Canara Bank

It would not be inappropriate to find that the Shaw family controls the entire shareholding of the writ petitioner and the writ petitioner is accustomed to act according to the wishes and dictates of Shaw family.

The principal borrower, Subhas Shaw defaulted in repayment of the loan. The secured asset being the said property was put up for sale under the provisions of SARFAESI Act.

The bank obtained orders from the District Magistrate, Howrah under Section 14 of the SARFAESI Act on 29th October, 2018. The lessors filed an application under Section 17 of the SARFAESI Act (S.A. No. 25 of 2018) before the DRT challenging the sale notice as well as the order of the District Magistrage dated 29th October, 2018.

The instant writ petition has been filed by the company as a leaseholder, against the order of the DM under Section 14 of the said Act. On the question of maintainability it is argued that the prayers in SA 25 of 2018 were in essence a challenge to the sale notice dated 12th November, 2020. The other reliefs as against the order of the District Magistrate dated 29th October, 2018 are merely ancillary and in aid of such main relief. It is, therefore, argued that a writ petition challenging the order of the District Magistrage under Section 14 of the said Act can be maintained, notwithstanding the said pending proceeding under Section 17 of the Act in SA 25 of 2018.

On the merits it is argued by Mr. Suddhasatwa Banerjee, learned counsel for the petitioner, that the petitioner is a lessee under a registered lease albeit from a coobligant principal borrower. It is submitted that the petitioner cannot be thrown out of the said premises in the light of the dicta of the Supreme Court in the case of ***Bajarang Shyamsunder Agarwal –Vs.- Central Bank of India***, reported in **(2019) 9 SCC 94**. Particular reference has been made to paragraph 17, 22.1, 24 and 24.1 thereof.

Counsel for the Bank has raised demurer and has submitted that the writ petition is not maintainable in view of the alternative remedy under Section 17 already having been availed by the petitioner in the form of SA 25 of 2020.

On merits, counsel for the bank would indicate that the lessor is the alter ego of the lessee are and, therefore, the benefit of the judgement of the Bajarang Shyamsunder Agarwal (supra) case cannot be taken in view of paragraph 25 thereof.

It is now a settled principle of law that the liability of the guarantor and/or mortgagor is coextensive with that of principal debtor.

The principal debtor as well as the mortgagor coobligant, could indeed be described as the same person if the principle of lifting of corporate veil is applied and is applied in the instant case.

The Supreme Court in the case of Shyamsunder Agarwal (supra) was dealing with situations where there was otherwise no relationship whatsoever between the lessor and the lessee tenant of the secured asset.

But for an artificial distinction, created by the borrower, by presenting a registered lease in favour of the writ petitioner, the principal borrower and mortgagor are one and the same person. Corporate personality indeed confers a distinct identity to a company vis a vis an individual. It is essentially for this reason that the doctrine of lifting of corporate veil is applied to prevent fraud and other impropriety or any illegal advantage being obtained under a corporate veil.

It is also necessary to note from the instrument of mortgage produced by the bank that six documents were submitted by the principal debtor, lessor and the writ petitioner to create the mortgage. The signature of Subhas Shaw and Nilima Shaw appear as mortgagors. The name of the petitioner no. 1, Omega Transmission Private Limited, is also mentioned as mortgagor. The said Subhas Shaw and Nilima Shaw are not described as directors but appear to have mortgaged the property in their individual capacity. The documents submitted are inter alia a sale deed dated 16th February, 2007, between the seller of the property in favour of Subhas Shaw. Deeds of declaration dated 28th November, 2009 and 27th April, 2011, a registered deed of lease dated 28th March, 2011, a sanctioned plan and a mutation certificate dated 23rd February, 2011.

It is, therefore, clear and evident that the principal borrower Subhas Shaw, has also separately and independently mortgaged the said property by depositing original sale deed dated 16th February, 2007 with the Canara Bank.

In the facts and circumstances of the case the dicta and benefit of the judgement of the Supreme

Court in the case of Shyamsunder Agarwal (supra) is not available to the petitioner.

This court has ventured to address the arguments of the counsel for the petitioner on merits on the question of mortgage without in any way diluting the argument of the respondent bank that the writ petition is otherwise barred for not availability of alternative remedy. Such remedy has already been availed by the principal debtor/mortgagor.

For the reasons as stated above, the writ petition fails and is hereby dismissed, however, without any order as to costs.

Let the instrument of lease dated 9th January, 2014 be kept with the record.

(Rajasekhar Mantha, J.)