

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(Appellate Side)

MAT 1538 of 2022
With
CAN 1 of 2022
CAN 2 of 2022

Reserved on: 29.09.2022
Pronounced on: 01.11.2022

M/s. Mirador Commercial Private Limited

...Appellant

-Vs-

State Bank of India & Ors.

...Respondents

Present:-

Mr. Kishore Datta, Sr. Advocate
Mr. S. Banerjee,
Ms. Sumita Shaw,
Mr. Binay Kumar Jain,
Mr. Piyush Jain, Advocates

... for the appellant

Mr. Om Narayan Rai,
Ms. Deblina Lahiri, Advocates

... for the respondent no.1

Mr. Asish Kumar Guha,
Mr. Naren Ghosh Dastidar, Advocates

... for the State

Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ,
JUDGE

Prakash Shrivastava, CJ:

1. CAN 1 of 2022 has been filed by the appellant seeking leave to file appeal against the order of the learned Single Judge. It has been pointed out that the appellant was permitted to intervene in the matter though not formerly impleaded as respondent and heard at the time of

passing of the interim order and that the appellant is affected by the impugned order, hence CAN 2 of 2022 is allowed and leave is granted to file the appeal.

2. Heard finally with consent.

3. This appeal is directed against the order of the learned Single Judge dated 14.09.2022 passed in W.P.A. No. 19879 of 2022 disposing of petition with the direction to the police authorities to put up a padlock on the premises in question, seal the same, retain possession thereof with some further directions.

4. The State Bank of India (writ petitioner) respondent No. 1 herein had filed W.P.A. No. 19879 of 2022 with the plea that the respondent No. 6 herein had obtained certain credit facilities from the respondent No. 1 and that the respondent Nos. 7 and 8 had guaranteed the loan and the property in question was mortgaged with the bank. The respondent No. 6 had committed default in repayment of the loan amount, hence the proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'SARFAESI Act') were initiated and on the application of the respondent No. 1 bank, the Chief Metropolitan Magistrate (CMM), Calcutta had passed the order dated 12.12.2014 for the delivery of the physical possession of the mortgaged property in question. According to the petitioner, the said order could not be given effect to because SARFAESI Application being S.A. No. 89 of 2011 at the instance of the borrower/guarantor was pending before the DRT-I. The DRT-I had finally passed the order on 28.01.2020 dismissing the SA and holding that the respondent No. 1 bank had acted as per the statutory provisions. The respondent No. 1 bank again filed an

application before the CMM, Calcutta praying for direction to open the padlock and deliver physical possession. The prayer was allowed by the CMM vide order dated 21.09.2021 directing to break open the padlock in execution of the order dated 12.12.2014. On 29.07.2022, with police assistance, the possession of the property in question was delivered to the respondent No. 1 and the respondent No. 1 bank had deployed respondent No. 9, M/s. Universal Services, a security agency, to protect the property. On 26.08.2022, authorized officer of the respondent No. 1 while on visit to inspect the property in question had found that the padlock and seal applied to the said property was unauthorizedly replaced by new padlock. The authorized officer was also informed by the security agency that around 10 people had forcibly entered the property and threatened the security guard. In the said background, the respondent No. 1 had again approached police authorities for restoration of possession and thereafter he had filed the writ petition seeking a direction to the police authorities to register FIR and remove the miscreants who had illegally entered into the premises.

5. Learned Single Judge has noted the submission that the padlock of the respondent No. 1 bank was cut off and removed and another padlock was put in the premises by the appellant herein who had later claimed to be a tenant in the property. Learned Single Judge has also found that the appellant had taken possession of the premises without concurrence of the respondent No. 1 bank in derogation of the CMM's order dated 17th of August, 2022 and that in the facts of the case the police authorities ought to have taken action on the complaint of the bank. Considering the circumstances of the case, learned Single Judge has directed the police authorities to put up a padlock on the premises,

seal the same, retain its possession and also directed the DRT-II to decide S.A. No. 89 of 2011 filed by the appellant.

6. Submission of the learned Counsel for the appellant is that the order of the CMM dated 17.08.2022 in MISCS 35 of 2014 directing the bank to restore the possession of the appellant was not challenged, therefore, no relief could be granted to the respondent No. 1 bank. His further submission is that the appellant was inducted as tenant by one of the director in 2014 and that the appellant was not even a party in the writ petition whereas learned Single Judge has directed eviction of the appellant which is not permissible in exercise of the writ jurisdiction.

7. Learned Counsel for the respondent bank submits that the possession of the premises in question was delivered to the respondent bank through bailiff in compliance of the order of CMM and that the appellant had illegally broken open the padlock of the bank and entered into possession without authority. He further submits that the appellant had misled the learned Single Judge by submitting that S.A. No. 89 of 2011 at the instance of the appellant is pending before the DRT-II whereas no such application is pending. He further submits that the plea of the appellant that the bank had delivered possession to the appellant is false and the CMM had no power under the Act to direct for restoration of possession, therefore, such an order is non est and is not required to be challenged. He has further submitted that there is no registered lease of tenancy in favour of the appellant and that the appellant was inducted after creation of mortgage.

8. We have heard the learned Counsel for the parties and perused the records.

9. Undisputedly against the borrower and the guarantor, proceedings under SARFAESI Act were initiated on the application of the respondent bank to take possession of the property in question under Section 14 of the Act. The CMM, Calcutta had passed the order on 12th of December, 2014 under Section 14 of the Act for possession of the property in question, thereafter on the application by the bank, CMM, Calcutta had passed the order dated 21.09.2021 directing to break open the padlocks, if any, found in the premises and take possession. Thereafter in compliance of the order of the CMM, Calcutta dated 12.12.2014, physical possession of the property in question was delivered to the respondent bank on 29.07.2022 and bailiff had also duly intimated this fact to the police authorities vide communication dated 29.07.2022. No material has been pointed out to this Court to show that the respondent bank was ever intimated about induction of tenant in the premises.

10. The case of the appellants is based upon the order dated 17.08.2022 passed in MISCS 35 of 2014 by the CMM, Calcutta whereby on the application filed by the appellant, CMM had directed to restore premises in question to the appellant. Learned Counsel for the appellant has failed to point out under which provision this order was passed by the learned CMM. Hence, the submission of the Counsel for the appellant on the basis of the judgment of the Hon'ble Supreme Court in the matter of **Edukanti Kistamma (Dead) Through LRs. and Others vs. S. Venkatareddy (Dead) Through LRs. and Others** reported in **(2010) 1 SCC 756**, that without challenging the basic order the challenge to consequential order cannot be entertained, has no force. In this regard, learned Counsel for the respondent bank has rightly

placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Kiran Singh and Others vs. Chaman Paswan and Others** reported in **AIR 1954 SC 340** holding that the defect of jurisdiction strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by the consent of the parties. He has also rightly placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Union of India and Another vs. Association of Unified Telecom Service Providers of India and Others** reported in **(2011) 10 SCC 543** holding that an order passed without jurisdiction is a nullity and not binding. The Division Bench of the Bombay High Court in the matter of **Vivekanand Atmaram Chitale and another vs. Vidyavardhini Sabha and others** reported in **1985 Cri LJ 359** has also take the view that an order without jurisdiction is a nullity which can be ignored with impunity.

11. That apart, even assuming that the CMM had jurisdiction to pass the order of restoration of possession, then also appellant has failed to demonstrate that the padlock of the respondent bank was removed by following due process of law and the appellant was put in possession of the premises in question in compliance of the order of the CMM dated 17.08.2022. There is no document of delivery of possession by the respondent bank to the appellant, no report of the bailiff taking the possession from the bank or handing it over to the appellant and not even a document by the police authorities showing that the appellant was put in possession in pursuance of the order of the CMM.

12. Learned Counsel for the appellant placing reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Prasanna Kumar Roy Karmakar vs. State Bank of W.B. and others** reported

in **(1996) 3 SCC 403** has submitted that the order of eviction cannot be passed by the writ Court in a private dispute, but that was a case where the dispute was between the landlord and tenant whereas the present case relates to protection of possession of the bank which was delivered under Section 14 of the Act. He has also placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Aleque Padamsee and Others vs. Union of India and Others** reported in **(2007) 6 SCC 171** in support of his plea that if the police does not register a cognizable offence, then the remedy is to file a complaint under Section 190 read with Section 200 of the Cr.P.C. In the present case, no direction has been issued to the police to register the FIR. Hence, the said judgment is of no help to the appellant. So far as the submission of the learned Counsel for the appellant that the relief which was not claimed in the writ petition has been granted, we find in the writ petition the bank had prayed for removal of miscreants who had entered into the property under the possession of the bank. Even otherwise, the writ Court had power to mould the relief in view of the law settled by the Hon'ble Supreme Court in the matter of **Rajesh Kumar and Others vs. State of Bihar and Others** reported in **(2013) 4 SCC 690** and in the matter of **B.C. Chaturvedi vs. Union of India and Others** reported in **(1995) 6 SCC 749**.

13. Learned Counsel for the respondent has rightly placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Balkrishna Rama Tarle Dead Thr Lrs and Another vs. Phoenix ARC Private Limited and Others** reported in **2022 SCC OnLine SC 1299** wherein the Hon'ble Supreme Court has held that the power exercisable by CMM/DM under Section 14 of the SARFAESI Act are

ministerial act and Section 14 does not involve any adjudicatory process and that at that stage CMM/DM is not required to adjudicate the dispute between the borrower and the secured creditor and/or between any other third party. In view of this judgment, the appellant had remedy before the DRT.

14. The appellant could not have taken the law in his hand and forcibly entered into the premises when once the possession was duly given to the respondent bank in compliance of the order of the CMM.

15. Counsel for the appellant has placed reliance upon the one-sided communication dated 26.08.2022 sent by the appellant to the bank and 27.08.2022 sent to the police authorities stating that the bank had delivered the possession to the appellant. This clearly reflects the conduct of the appellant and cannot be trusted for want of any documentary proof of delivery of possession by the bank, by the bailiff, by the police authorities or by any person authorized by the CMM to the appellant.

16. Learned Counsel for the bank has exposed the conduct of the appellant by pointing out that vide communication dated 26.08.2022 appellant had allegedly made a request to the bank to restore the possession to the appellant in pursuance of the order of the CMM dated 17.08.2022. Referring to the postal receipt at the end of the letter he has pointed out that the letter dated 26.08.2022 could not have been posted on 25.08.2022. He has also pointed out that this letter was addressed to the State Bank of India, Overseas Branch, Block-A, Samriddhi Bhavan, 1, Strand Road, Kolkata-700001, whereas the branch which had taken action was State Bank of India, branch office at Stressed Assets Management Branch at “Nagaland House” 8th Floor, 11 & 13

Shakespeare Sarani, Kolkata-700071 which is reflected from the appellant's Application No. 35 of 2014 filed before the CMM. He has pointed out that the appellant was all along playing fraud.

17. Counsel for the respondent bank has also pointed out that before the learned Single Judge appellant had taken the stand that S.A. No. 89 of 2011 at the instance of the appellant is pending before the DRT-II, Calcutta. He has produced the reply received from DRT-II, Calcutta showing that S.A. No. 89 of 2011 pending before the DRT-II is at the instance of some other party namely Pravanjan Shikari and is not connected with the present matter.

18. Learned Counsel for the bank has also pointed out that S.A. No. 89 of 2011 was filed by the borrower one of the guarantor challenging the action under Section 13(2) and 13(4) of the SARFAESI Act and the said application was dismissed by the DRT-I by order dated 28.01.2020.

19. The aforesaid sequence of events clearly reveal that the appellant has broken open the padlock of the respondent bank illegally and had entered into the premises forcibly. Not only that, he had tried to mislead the Court by taking the plea that the possession of the premises was delivered to the appellant by the bank. He has also misled the Court by taking the stand that S.A. No. 89 of 2011 at his instance is pending before the DRT-II, Calcutta, and thereby persuaded the learned Single Judge to issue a direction to the DRT-II to take up the appellant's application being S.A. No. 89 of 2011 immediately and dispose of the same within a period three weeks, whereas no such SA was pending before DRT-II.

20. Hon'ble Supreme Court in the matter of **Dalip Singh vs. State of Uttar Pradesh and Others** reported in (2010) 2 SCC 114 while taking note of the earlier judgment in the matter of **Prestige Lights Ltd. vs. State Bank of India** reported in (2007) 8 SCC 449 has held that while exercising power under Article 226 of the Constitution of India, High Court is not just a court of law, it is also a Court of equity and a person who invokes the High Court's jurisdiction under Article 226 of the Constitution is duty-bound to place all the facts before the Court without any reservation. If there is suppression of material facts or twisted facts placed before the Court, then it will be fully justified in refusing to entertain the writ petition.

21. For the reasons assigned above, we are of the opinion that the appeal is devoid of any merit and is liable to be dismissed with cost. Accordingly, the appeal is dismissed with the cost of Rs. 25,000/-.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(RAJARSHI BHARADWAJ)
JUDGE

Kolkata
01.11.2022

PA(SS)

(A.F.R. / N.A.F.R.)