(2020) 05 DRT CK 0001

In the Debts Recovery Tribunal

Case No : Securitisation Application No. 358 Of 2018

Abdul Bari And Anr. — APPELLANT

Vs

Authorized Officer, Canara Bank — RESPONDENT

Date of Decision : 29-05-2020

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 13(2), 14, 17, 31, 31(i)
Security Interest (Enforcement) Rules, 2002 — Rule 4(a), 8, 8(a)

Citation : (2020) 05 DRT CK 0001

Hon'ble Judges : S.V. Gowramma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. Present Securitisation Application (SA) is filed by the guarantors (referred to as 'applicants') under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act ('the Act' in short) challenging the notice dated 09.08.2018 issued by the Advocate Commissioner appointed by the CJM Court, Calicut in MC No.131/2018. The amount due to the respondent bank as per the possession notice dated 25.01.2018 is Rs.2,19,41,946.20.

2. The applicants are guarantors and the respondent is the Authorized Officer of the secured creditor bank.

3. According to the applicants, they stood as guarantors for availing an overdraft facility of Rs.2 crores by an unregistered and un-constituted firm by name M/s.Kailas Gold and Diamonds, XIV/534-A, Kakkathuruthy, Thrissur and deposited original title deeds of their agricultural lands shown as item Nos.1 and 2 in the possession notice owned by applicants 1 and 2 respectively as security for the loan amount. The bank initiated SARFAESI proceedings by issuing S.13(2) notice and thereafter issued Annexure-A1 possession notice dated 25.01.2018 for Rs.2,12,30,195/-.

4. Subsequently, the bank approached the Hon'ble CJM Court, Calicut under S.14 of the Act for taking physical possession of the property and the said Court appointed an Advocate Commissioner for taking physical possession of the property. The Advocate Commissioner served Annexure-A2 notice dated 09.08.2018 for taking physical possession of the property on 31.08.2018.

5. In the grounds of the SA, it is urged by the applicants that Annexures-A1 and A2 notices and proceedings initiated is incorrect and improper. Annexure-A1 possession notice was not affixed on the secured asset and not published in two leading newspapers as stipulated under R.8 of Security Interest (Enforcement) Rules. The secured properties are agricultural properties and hence exempted from the SARFAESI proceedings under S.31 of the Act. Item No.1 property in Annexure-A1 possession notice is cultivated with 50 numbers of coconuts of 15 to 20 years old, areca nuts of 65 numbers of same age, 8 high yielding jackfruit trees of about 20 - 22 years old, 4 nutmegs (one is 10 years old and another 3 are 2 years old), 7 high yielding mango trees, 15 yielding pepper wines and 35 plantains of good species by name 'njali poovan', 100 numbers of tapioca, 7 numbers of teak wood of 20 years old etc. Annexure-A3 is the photographs of the cultivation in the property and Annexure-A4 is the true copy of certificate dated 05.03.2018 issued by the Agricultural Officer, Thamarassery showing that pumpset installed in the property is for agricultural purpose. After availing the loan, the 1st applicant has constructed a house thereon.

6. It is the case of the applicants that item No.2 property in the possession notice is having an extent of 45 cents is cultivated with 35 high yielding coconut trees, 28 high yielding areca nut trees, plantain of 15 numbers, 10 numbers of 7 years old nutmegs, 30 numbers of pepper vines, 3 high yielding mango trees, 4 yielding jackfruit trees and 6 palm trees etc. Annexure-A5 is the original photographs of the cultivation in the property. A house is also situated in the property. There is no legal and valid mortgage of properties mentioned in Annexure-A1 possession notice.

7. The reliefs sought for in the SA is to pass appropriate orders quashing Annexures-A1 and A2 notices as without jurisdiction and unsustainable and pass appropriate orders declaring that item Nos.1 and 2 properties mentioned in AnnexureA1 possession notice being agricultural properties exempted under S.31 of the Act for proceeding against the same.

8. The respondent filed written statement contending inter alia that the applicants are the partners of the borrower firm M/s.Kailas Gold and Diamonds and are the guarantors to the loan facilities availed by the firm; Annexure-R1 is the copy of partnership deed dated 08.01.2016. On the basis of the request made by the partnership firm, the respondent bank sanctioned an amount of Rs.2 crores as OD facility towards working capital on 15.02.2016.

9. The credit facility was primarily secured by way of hypothecation of stocks and book debts as well as the personal guarantees of the applicants and managing

partner of the firm and further secured by way of equitable mortgage by deposit of title deeds by the applicants herein. The 1st applicant executed Annexure-R2 letter dated 16.02.2016 evidencing the deposit of title deed in favour of the respondent bank and mortgaged 72.25 cents of land with a residential building therein in Re-Sy.No.4/1 A1 of Kedavur Village, Thamarassery Taluk, Kozhikode District.

10. It is submitted by the respondent that the 2nd applicant executed Annexure-R3 letter dated 16.02.2016 evidencing deposit of title deed in favour of the respondent bank and mortgaged 42.25 cents of land and residential building in Re-Sy.No.11/2 A3 of Kedavur Village, Thamarassery Taluk, Kozhikode District. The latest valuation of the properties obtained by the bank on 27.01.2018 shows that residential buildings are situated in the secured assets and the properties are not agricultural lands. Annexure-R4 and R4(a) are the copies of valuation reports dated 27.01.2018. The account became irregular and was classified as NPA on 06.10.2017. Thereafter, notice dated 06.11.2017 under S.13(2) of the Act was issued to the borrowers. Annexures-R5 and R5(a) are the copy of S.13(2) notice along with acknowledgement cards. The respondent also made a newspaper publication of S.13(2) notice in Mathrubhumi and The New Indian Express dailies on 23.11.2017 vide Annexures-R6 and R6(a).

11. As the borrowers did not made any payment even though they received notice, the bank issued possession notice dated 25.01.2018 (Annexure-A1) to the borrowers. The possession notice was published in Mathrubhumi and The New Indian Express dailies dated 31.01.2018 vide Annexure-R7 and R7(a) and the said notice was also affixed on the secured assets vide Annexures-R8 and R9.

12. It is contended that the bank has issued the statutory notices and has complied with the procedural requirements with regard to service of such notices on the borrower/guarantor and hence the contrary averments raised are only to be rejected. None of the grounds raised in the application are legally sustainable. It is submitted by the respondent that in view of the valid mortgage created over the properties, they have got every right under law to proceed against the secured assets to realize the amount due to the bank and hence they prayed to dismiss the SA with costs.

13. Considering the submissions made by the Ld Counsels appeapering for their respective parties and on perused the records of the case, the admitted factual matrix in the present SA is the availment of credit facility and creation of security interest over the subject secured assets. Concededly, there is default in repayment of the amount demanded under S.13(2) of the Act.

14. The primary point arises for consideration of the Tribunal is as to whether the subject secured assets are agricultural lands exempted under S.31(i) of the Act as contended by the applicants.

15. The records would indicate that the applicants filed IA No.2222/2018 before the Tribunal seeking to appoint an Advocate Commissioner to report about the

nature, lie and location of item Nos.1 and 2 properties mentioned in Annexure-A1 possession notice and to report as to whether the properties are agricultural lands or not. The Tribunal allowed IA No.2222/2018 as per order dated 03.12.2018 and appointed an Advocate Commissioner for the said purpose.

16. The Advocate Commissioner so appointed has filed his report on 14.12.2018 stating that in item No.1 property (29.2396 Ares) set out in Annexure-A1 possession notice belonging to the 1st applicant, there is a residential building (ground floor + 1st floor) with 3495 sq.ft. plinth area as per the valuation report dated 27.01.2018 of the bank; whereas the 1st applicant intimated that area of the building is 3200 sq.ft. with building No.18/150B. The building and its court yard covers approximately 16 cents of land with direct road access on its northern side. There is also a 50 sq.ft. shed which according to the 1st applicant is used for storing wood.

17. It is reported that at the time of inspection of item No.1 property, there are 44 coconut bearing trees about 25 to 40 years old and another 4 non-bearing coconut trees below seven years old, 118 areca nut bearing - 15 to 25 years old, 24 areca nut non-bearing below seven years, 8 pepper wine bearing 10-15 years old, 7 jackfruit trees - 20 to 30 years old, 12 jackfruit trees below 7 years, one mango tree below 10 years, 2 banana bunched 2 year rotation, 7 coffee bearing 5 to 15 years old, one west Indian cherry - 30 to 40 years old, one sapota below 5 years, 9 tapioca - 1 month, 39 pineapple - 1 year old, one rose apple below 5 years, 8 mahogany below 7 years, 1 nutmeg - 10 to 15 years old, 4 teak - 10 to 15 years old and 5 palm - 10 to 40 years old.

18. It is reported by the Advocate Commissioner that he was informed by the 1st applicant that there is a motor shed in the land with a borewell for irrigation purpose and pump set is also given by the Krishibhavan, but the same is not installed and no electric connection for that, at the time of inspection. It is also reported that the respondent directed the Advocate Commissioner to report that west, north and southern sides of the properties are residential buildings.

19. With regard to item No.2 property (17.099 Ares) in Annexure-A1 possession notice belonging to the 2nd applicant is concerned, it is reported by the Advocate Commissioner that there exists a residential building (ground floor) with 2030 sq.ft. plinth area as per the valuation report dated 27.01.2018 of the bank, but the 2nd applicant informed that area of the building is 1200 sq.ft. with building No.TP 18/261A. The building and its courtyard cover approximately 7 cents of land with direct road access on the eastern side.

20. Further the Advocate Commissioner has reported that at the time of inspection, there are 16 coconut bearing trees - 25 to 40 years old and 11 non-bearing coconut trees below 7 years old, 36 areca nut bearing - 15 to 25 years old, 11 areca nut non- bearing below 7 years, 7 pepper vine bearing 10 to 15 years old, 6 jackfruit trees - 20 to 30 years old, one mango tree - 20 to 30 years old, one tamarind tree - 10 to 15 years old, one egg fruit tree below one year

and one sapota below 5 years in item No.2 property. It is stated by the Advocate Commissioner that the 2nd applicant requested him to note that for GAIL pipe project, acquisition was carried out in the property; and the respondent directed the Advocate Commissioner to note that there is a residential building in the northern side of the property.

21. Along with the report dated 13.12.2018, the Advocate Commissioner has filed photographs of the properties and certificates dated 12.12.2018 of the Agricultural Officer, Krishi Bhavan, Thamarassery, Kozhikode, wherein it is stated that item Nos.1 and 2 are genuinely agricultural lands and done homestead farming.

22. On perusal of the pleadings and evidence available on record, this Tribunal could find that the applicants are the partners of the borrower firm M/s.Kailas Gold and Diamonds and they stood as guarantors for the overdraft facility of Rs.2 crores availed by the said firm from the respondent bank towards working capital on 15.02.2016. As security for the aforesaid credit facility, 1st applicant had created security interest over 72.250 cents of land along with a building therein comprised in Re-Sy.No.4/1A1 of Kedavur Village, Thamarassery Taluk, Kozhikode District (item No.1 property in Annexure-A1 possession notice) by deposit of title deeds and executed Annexure-R2 letter dated 16.02.2016 confirming the deposit of title deeds relating to item No.1 property with the respondent bank on 15.02.2016 to secure repayment of the credit facility of Rs.2 crores availed by M/s.Kailas Gold and Diamonds; and the 2nd applicant had also created security interest over 17.099 Ares of land along with a building therein comprised in Re-Sy.No.11/2A3 of Kedavur Village, Thamarassery Taluk, Kozhikode District (item No.2 property in Annexure-A1 possession notice) and executed Annexure-R3 letter dated 16.02.2016 confirming the deposit of title deeds relating to item No.2 property with the respondent bank on 15.02.2016 to secure repayment of the credit facility of Rs.2 crores availed by M/s.Kailas Gold and Diamonds.

23. It could be seen that at the time of availing the loan, the applicants had no case that the properties mortgaged by them are agricultural lands and nothing on record to show that applicants had executed any document in favour of the respondent bank stating that they had created security interest over agricultural lands.

24. The records would indicate that the loan account became irregular and was classified as NPA on 06.10.2017. Consequently, demand notice under S.13(2) of the Act was issued to the borrowers on 06.11.2017 which admittedly was received by the applicants. However, they did not raise any objection to the same nor paid the amount as demanded in S.13(2) notice dated 06.11.2017, which resulted in taking of symbolic possession of the secured assets on 25.01.2018 by issuing Annexure-A1 possession notice dated 25.01.2018. Evidently, the applicants had received the possession notice and the said notice was published in The New Indian Express and Mathrubhumi dailies dated 31.01.2018 [Annexure-R7 & R7(a)] and affixed the said notice on the secured assets vide Annexure-R8

and R8(a).

25. While the respondent attempted to take physical possession of the secured assets through the process of CJM Court, Calicut, the applicants approached this Tribunal on 31.08.2018 challenging the notice dated 09.08.2018 issued by the Advocate Commissioner appointed by the CJM Court, Calicut in MC No.131/2018 intimating the applicants that possession of the properties would be taken on 31.08.2018.

26. On perusal of the relevant provisions of the Act, it is luculent that nature of the property at the time of creation of security interest is the relevant consideration for the purpose of application of the provisions of the Act. It could be seen from the copy of title deeds produced by the applicants that the properties are garden lands/dry lands. Moreover, the records would divulge the fact that there were buildings in both the items of properties while creating security interest over the same.

27. Even though the applicants had taken a contention that there was no building in item No.1 property at the time of creation of security interest, copy of building permit produced by the applicants would show that the 1st applicant had got permission from Thamarassery Grama Panchayat to construct a residential building in item No.1 property on 28.08.2010 and the period of permit was from 28.08.2010 to 27.08.2013 and the same was subsequently renewed upto 26.08.2016 in 2013. It is the case of the applicants that by the time the loan was availed, construction of the building was not completed; that is to say, there was a residential building in item No.1 property while availing the loan. Noticeably, item No.1 property is a dry land and if it was an agricultural land in the year 2010, the concerned authorities would not have given any permission to construct a residential building with 304.58 sq.metre (3278.50 sq.ft.) plinth area in the said property.

28. By relying on the judgment rendered by the Hon'ble High Court of Kerala in the case titled Narayanan Nair vs. Dr.Lokeshan Nair [2014 (2) KLT 868], learned counsel for the applicants submitted that mere presence of a residential house in agricultural land would not make it a non-agricultural land. However, this Tribunal is of the view that the said judgment would not come to the rescue of the applicants in the facts and circumstances of the present case as the aforesaid judgment is a decision rendered in a case deliberating Kerala Court Fees and Suit Valuation.

29. This Tribunal is conscious of the judgment rendered by the Division Bench of the Hon'ble High Court of Kerala in the case titled Rafeeque & another vs. Union of India [2013 (3) KLT 77], wherein it is held that "It is also admitted that the appellants had willingly and voluntarily created security interest in the property for satisfaction of the debt. The borrower cannot, at the stage of recovery, turn around and contend that a "homestead" is exempted from being proceeded against. Nor is there any exemption as such from proceeding against the

residential property."

30. During the hearing, learned counsel appearing for the applicants submitted that as regards the question of whether the parties treated the land as agricultural lands at the time of creation of security interest is a question of fact has to be evaluated from various aspects, as is the latest position in the ruling reported in 2018 (4) KHC 86 by the Hon'ble Supreme Court. It is also submitted by the learned counsel for the applicants that in the case of Dhanalaxmi Bank Ltd. & others vs. M/s.Sharada Flour Products Pvt. Ltd. [2018 KHC 4647], it is held by the Hon'ble High Court that character of the land depends on the purpose for which it is meant or set apart or used and it ought to be determined on the facts of each case. It is strenuously submitted by the learned counsel that from the above rulings and the facts and circumstances of the case mentioned above, it can be seen that the applicants are entitled for protection under S.31 of the Act being the secured assets are agricultural lands.

31. It is pertinent to mention here that at the time of creation of security interest over the subject secured assets, the applicants have no case that the properties mortgaged by them are agricultural land; neither the applicants had any case that they informed the respondent bank at any stage that the properties are agricultural lands; however, only when the respondent bank initiated proceedings against the secured assets to recover the dues of more than Rs.2.19 crores as on 25.01.2018, the applicants have come out with a contention that the properties mortgaged by them are agricultural lands exempted from the purview of the Act. Indeed, for the first time, the report of the Advocate Commissioner would indicate that the secured assets are agricultural lands. If the borrowers are permitted to derive pecuniary advantage and benefit under a valid mortgage and then turn around and contend that such mortgage cannot be enforced, the very purpose of the Act would be defeated. A salutary provision aimed at protecting poor farmers cannot aid corporate concerns camouflaged as agriculturists.

32. The Hon'ble Apex Court in its judgment rendered in the case titled ITC Limited vs. Blue Coast Hotels had categorically held that since no security interest can be created in respect of agricultural lands and yet it was so created, goes to show that the parties did not treat the land as agricultural land and that the debtor offered the land as security on this basis. It was also held by the Hon'ble Apex Court that S.31 of the Act intends to protect agricultural land held for agricultural purposes by agriculturists and that the exemption protects only agriculturists from losing their source of livelihood and income under the drastic provision of the Act. In the case on hand, admittedly, the overdraft facility of Rs.2 crores was availed by the firm M/s.Kailas Gold and Diamonds towards working capital and the applicants are partners of the said firm and they stood as guarantors to the said credit facility.

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33. The contention of the applicants that the properties are agricultural lands and hence stands outside the purview of the Act by virtue of S.31(i) of the Act does not appear to be palatable. Evidently, the secured assets are garden lands/dry lands planted with coconut trees, areca nut trees, pepper wines etc., which cannot be construed as an agricultural land, where raising of any crop is involved. The records would indicate that in item No.1 property there is a residential building with 3495 sq.ft. plinth area and the said building and its court yard covers 16 cents of land (approx.) with direct road access on its northern side. It is seen reported by the Advocate Commissioner that though there is a motor shed in item No.1 property with a borewell for irrigation purpose, pump set was not installed there and no electric connection for that. Similarly, in item No.2 property there exists a residential building with 2030 sq.ft. plinth area and the said building and its courtyard covers 7 cents of land (approx.) with direct road access on its eastern side.

34. The records would indicate that as per Annexures-R4 and R4(a) valuation reports dated 27.01.2018 obtained by the respondent bank from its approved valuer, value of item No.1 property along with the residential building therein (year of construction is mentioned as 2015) would come to Rs.1,98,74,000/- and value of item No.2 property along with the residential building therein (year of construction is mentioned as 2012) would come to Rs.1,03,82,000/-. On an overall analysis of the pleadings and evidence available on record, this Tribunal could come to a conclusion that the secured assets are garden lands/dry lands and the respondent has every right to proceed against the same to recover the dues of huge magnitude to the tune of more than Rs.2.19 crores due as on 25.01.2018.

35. The contentions raised by the applicants that there is no legal and valid mortgage of properties mentioned in AnnexureA1 possession notice and Annexure-A1 possession notice was not affixed on the secured assets and not published in two leading newspapers as stipulated under R.8 of Security Interest (Enforcement) Rules are refuted by the respondent by adducing material evidence. In the above circumstance, none of the contentions raised by the applicants are sustainable.

36. With these observations and for the foregoing reasons, I answer the points accordingly and proceed to pass the following.

O R D E R

SA No.358/2018 stands dismissed. Consequently, pending IAs are also dismissed. Interim order, if any, stands vacated. There is no order as to costs.

Registry is directed to communicate copy of the order to the parties concerned by Registered Post with AD.

(Dictated to PS, transcribed by her, corrected by me, typed fair and then pronounced by me in the open court on this the 29th day of May, 2020)

