(2016) 02 AP CK 0055

In the Andhra Pradesh High Court

Case No : Writ Petition No. 41006 of 2015

C. Malla Reddy APPELLANT

Vs

The Authorized Officer, IDBI Bank Limited and Others RESPONDENT

Date of Decision : 16-02-2016

Acts Referred:

Andhra Pradesh Rights in Land and Pattadar Pass Books Act, 1971 — Section 2, Section 3
Constitution of India, 1950 — Article 226
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 2
Securitisation and

Citation : (2016) 164 AIC 375 : (2016) 3 ALT 485 : (2016) 4 AndhLD 687 : (2016) 4 BC 369 : (2016) 3 DCR 691 : (2017) 1 DRTC 369 : (2017) 1 NIJ 754

Hon'ble Judges : Nooty Ramamohana Rao and Dr. B. Siva Sankara Rao, JJ.

Bench : Division Bench

Advocate : K. Gopala Krishna Murthy, for the Appellant;

Final Decision : Dismissed

Judgement

Nooty Ramamohana Rao, J.—1. This Petition under Article 226 of the Constitution of India seeks a writ of mandamus for declaring the action of Respondents 1 and 2 in taking possession of the residential house bearing D. No. 1-5-230 situated in Survey No. 51/AA, Alwal Village, Malkajgiri Mandal, Ranga Reddy District, as arbitrary, illegal and unconstitutional and hence, to direct Respondents 1 and 2 together with the 3rd respondent Advocate-Commissioner appointed in Crl.M.P. No. 654 of 2015 on the file of the Chief Metropolitan Magistrate, Ranga Reddy District at L.B. Nagar to forthwith restore the possession of the house property described supra to the petitioner and also to quash the proceedings initiated by Respondents 1 and 2 under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 against the agricultural properties in Survey No. 51/EE, Alwal Village, Malkajgiri Mandal, Ranga Reddy District and also to order for stay of all further proceedings initiated by Respondents 1 and 2 under the provisions of the aforementioned Act.

2. The 4th respondent is stated to be a public limited company carrying on business in software tracking including development of required embedded software and mobile shopping software and that it has availed certain financial assistance from the Industrial Development Bank of India, whose Deputy General Manager is impleaded as the 2nd respondent herein. The financial benefits availed comprised of two components; 1) a term loan limited to Rs. 4 crores; and 2) a cash credit loan limited to Rs. 3.70 crores in the year 2009. The writ petitioner, in paragraph 6 of the affidavit filed in support of this Writ Petition, would describe himself as a nominal participant in the business of the said company and since the bank has insisted, the petitioner has created an equitable mortgage and secured the loan advanced to the 4th respondent company. It is his specific case that he is an innocent 3rd party and that he has been induced by the 4th respondent into creating the security for the loan availed by it. It is not in dispute that a mortgage has been created by depositing the title deeds on 18.02.2009 for the land of an extent of Ac.1.03 guntas situated in Survey No. 51/ EE of Alwal Village, Malkajgiri Mandal, Ranga Reddy District.

3. Annexure-I to the deed of mortgage dealt with the security created by the petitioner herein and it reads as under:

"It is not in dispute that the credit facilities availed by the 4th respondent company have remained un-liquidated and consequently, the bank has declared the debt as a non-performing asset."

4. The Parliament, with a view to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith and incidental thereto, enacted The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (henceforth, for brevity referred to as the SARFAESI Act). The expression bank has been defined in Section 2(c) which includes a banking company or the State Bank of India or any subsidiary bank or a multi-state co-operative bank or such other bank which the Central Government may, by notification, specify for the purposes of this Act. It is hardly in doubt that the bank in the instant case answers this description as per the definition contained in Section 2(c) of the Act. Section 2(f) defined the expression borrower in the following terms:

"borrower means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and include a person who becomes borrower of a securitization company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance."

5. Thus, going by the above said definition, whoever has given any guarantee or created any mortgage or pledge as a security for the financial assistance granted by any bank or financial institution to another person also becomes a borrower.

As was noticed by us supra, the petitioner herein has created mortgage by depositing the title deed for the land comprising of Ac.1.03 guntas lying in Survey No. 51/EE of Alwal Village. Hence, he is liable to be treated as a borrower of the bank.

6. The expression debt has been defined in Section 2(ha) to carry the same meaning assigned to it in clause (g) of Section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. In that enactment, the said expression has been defined as under:

"debt means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application."

7. From the above definition, there is hardly any doubt that there exists a debt between the bank and the principal borrower, the 4th respondent company.

8. The expression default has been defined in Section 2(j) as meaning non-payment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured creditor. Therefore, the failure to liquidate the outstanding liability by the 4th respondent principal borrower amounted to committing a default.

9. The expression financial asset has been defined in Section 2(l) in the following words:

"financial asset means debt or receivables and includes

i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or

ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or

iii) a mortgage, charge, hypothecation or pledge of movable property; or

iv) any right or interest in the security, whether full or part underlying such debt or receivables; or

v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or

vi) any financial assistance."

10. Thus, any debt or receivables secured by mortgage of or charge on immovable property amounts to a financial asset. The expression non-performing asset is defined in section 2(o) as under:

"non-performing asset means an asset or account of a borrower, which has been classified by a bank or financial institution as substandard, doubtful or loss asset----

(a) in case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;

(b) in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank.

While the expression property is defined in Section 2(t) as under:

property means

(i) immovable property;

(ii) movable property;

(iii) any debt or any right to receive payment of money, whether secured or unsecured;

(iv) receivables, whether existing or future;

(v) intangible assets, being know-how, patent, copyright, trade mark, licence, franchise or any other business or commercial right of similar nature.

11. Section 13 is included in Chapter - III of the SARFAESI Act, which dealt with Enforcement of Security Interest. Section 13 would set out that any security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such creditor in accordance with the provisions of this Act. Thus, the SARFAESI Act is a special piece of legislation made by the Parliament for achieving a special objective of securing the enforcement of the security interest of the secured creditor. That is the reason why a special provision is created in sub-section (1) of Section 13 of the SARFAESI Act by making it clear that the security interest created in favour of any secured creditor can be got enforced without the intervention of the Court. The intention of the Parliament is so very clear that it wanted to address the malady of the defaults committed by the borrowers in repayment of the debt due by them, resulting in getting into the very vitals of the secured creditors and more particularly financial institutions including those in the banking sector. Under sub-section (2), the secured creditor, by delivering a notice, in writing, to any borrower whose liability remained unpaid, can call upon him to discharge in full such liabilities within 60 days. Even after receipt of such a notice delivered under sub-section (2) of Section 13, if the borrower does not honour the

commitment by discharging in full the liability and thus fails to do so, sub-section (4) empowered the secured creditor to take recourse to one or the other of the measures provided there under to recover his secured debt. Clause (a) thereof specified that the secured creditor may take possession of the secured asset of the borrower including right to transfer by way of lease, assignment or sale for realizing the secured asset. Thus, a secured creditor has been vested with a special power to take possession of the secured asset of the borrower and also liquidate it by way of sale for realizing the debt, but however, if a secured creditor, entirely on his own, attempts to take possession of any such secured asset, he might encounter with resistance and sometimes it can also lead to unpleasant situations, inasmuch as the actions of secured creditor can be misunderstood as lacking any legal sanction and authority. Therefore, with a view to address this area of concern, in Section 14, a separate mechanism has been contemplated and provided for. Sub-section (1) of Section 14 empowers that the secured creditor, who seeks to take possession of any secured asset, may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset may be situated, to take possession thereof. Whenever any such application is received by the Chief Metropolitan Magistrate or the District Magistrate, he is required to take possession of such asset and then forward such asset to the secured creditor. Thus, wherever possession of a secured asset is sought to be taken by the secured creditor, he is entitled to approach, in writing, the Chief Metropolitan Magistrate or the District Magistrate in whose jurisdiction the secured asset was lying.

12. In the instant case, the Chief Metropolitan Magistrate of Ranga Reddy District is the appropriate and competent authority to be approached by the bank, inasmuch as the secured asset in question was lying within the jurisdiction of the said Court. Hence, the bank appears to have approached the Chief Metropolitan Magistrate, Ranga Reddy District at L.B. Nagar and accordingly, the learned Chief Metropolitan Magistrate entertained Crl.M.P. No. 654 of 2015 and appointed the 3rd respondent Advocate as Commissioner and entrusted the said Commissioner with the task of executing the warrant for taking possession of the scheduled property. The schedule of property, which is drawn by the learned Chief Metropolitan Magistrate and entrusted for the purpose of taking possession of the property, is described as under:

"Schedule of Property All that piece and parcel of land admeasuring acres 1.03 guntas in Sy. No. 51/EE situated at Alwal Village, Malkajgiri Mandal, Ranga Reddy District and bounded by:

North : Neighbors Land

South :Road

East : Neighbors Land

West : Neighbors Land

13. This schedule is exactly tallying with that contained in Annexure-I to the mortgage created by the petitioner on 18.02.2009 in favour of the bank excepting to the following extent:

"together with all structures thereon and all the things attached to the earth or permanently fastened to anything attached to the earth."

14. The Chief Metropolitan Magistrate, in our considered opinion, has not committed any error in exercise of power and jurisdiction in rendering the necessary assistance under sub-section (1) of Section 14 to the secured creditor, namely the bank, for taking possession of the mortgaged property and then, entrusting the warrant for execution to the 3rd respondent. The provision contained under sub-section (1) of Section 14 clearly comprises of two different steps; the first step which is liable to be undertaken by the learned Chief Metropolitan Magistrate is to secure the possession of the secured asset. Then, the second step is to make over the possession of the secured asset to the secured creditor. For achieving the said objective, a Commissioner can be appointed. The Commissioner, in fact, discharges the functions of the Court itself, but however, he does it on its behalf as the Court itself need not travel to the place where the secured asset was lying. For this purpose, a warrant is liable to be drawn and issued, so that the Commissioner can demonstrate his lawful authority to take possession of the secured asset. By holding such a lawful authority, the Commissioner can also neutralize effectively any resistance, which can be offered in execution of the warrant entrusted by the Chief Metropolitan Magistrate or the District Magistrate, as the case may be. The warrant has got to be returned to the Court by way of submission of a report. For this purpose, the learned Chief Metropolitan Magistrate, in the instant case, directed the Commissioner to execute the warrant and return it along with the inventory list on or before 26.10.2015, when he passed the order in Crl.M.P. No. 654 of 2015 on 09.10.2015. By a separate order, dated 04.11.2015, the learned Magistrate extended the said time limit up to 29.12.2015. Accordingly, the Advocate-Commissioner appears to have taken possession of the secured asset on 26.11.2015. A necessary report in that regard was drawn by the learned Advocate-Commissioner on 01.12.2015 and filed it before the learned Chief Metropolitan Magistrate.

15. The grievance of the petitioner is that the Advocate-Commissioner, instead of strictly proceeding in terms of and in accordance with the warrant entrusted by the learned Chief Metropolitan Magistrate, has travelled beyond the scope of the said warrant and took possession of the house property of the petitioner bearing D. No. 1-5-230 situated in Survey No. 51/AA, Alwal Village, Malkajgiri Mandal, Ranga Reddy District. It is in that context and backdrop, the present Writ Petition with the prayers as noticed by us has been instituted.

16. Heard Sri K. Gopal Krishna Murthy, learned counsel for the petitioner and Sri Mujeeb, learned counsel representing the 3rd respondent Advocate-Commissioner. None appears for the respondent bank.

17. Sri Gopal Krishna Murthy, learned counsel for the petitioner would principally contend that the provisions of the SARFAESI Act could not have been invoked by the respondent bank, at the first instance, inasmuch as the secured asset is an agricultural land and hence, it is exempted from being proceeded against. Therefore, there was a fundamental error of jurisdiction committed in invoking Section 14 of the Act and consequently, the exercise of jurisdiction by the learned Chief Metropolitan Magistrate also lacks the necessary authority and sanction of law. In support of this contention, the learned counsel has drawn our pointed attention to Section 31 of the SARFAESI Act, which clearly spelt out that the provisions of the Act shall not apply to, amongst others, any security interest created in agricultural land. Therefore, the first and the foremost question, which we are now called upon to decide, is whether the security interest created in the instant case is the one created in agricultural land or merely in land.

18. We have already noticed that the petitioner is the one, who has created the security interest in land comprising of Ac.1.03 guntas in Survey No. 51/EE of Alwal Village, Malkajgiri Mandal, Ranga Reddy District by creating a mortgage and also by depositing the title deed thereof. There is no dispute on this score.

19. Annexure-I to the mortgage deed dated 18.02.2009 executed and signed by the petitioner herein, inter alia, describes, in detail, the security interest so created. The very opening words contained therein hold the key to the present question when they described as under:

"All that piece and parcel of land admeasuring Acre 1.03 guntas in Sy. No. 51/EE situated at Alwal Village, Malkajgiri Mandal, Ranga Reddy District in the State of Andhra Pradesh bounded as..

This document has clearly described the secured asset as land admeasuring Acre.1.03 guntas but not specified it as agricultural land admeasuring Ac.1.03 guntas. Nowhere, the land was described as agricultural land. This apart, immediately after the description of the extent of land, the following expressions are used in Annexure-I of the mortgage deed: together with all structures thereon and all the things attached to the earth.."

(Emphasis is placed now)

20. Therefore, the petitioner, while creating a security interest by way of creating a mortgage in favour of the bank, has himself gone on record that there are structures standing on this land of Ac.1.03 guntas lying in Survey No. 51/EE of Alwal Village and by his not describing the said land as agricultural land, he cannot now be permitted to turn round and contend to the contra that he has created security interest in agricultural land in contrast to mere land.

21. This apart, the learned counsel for the petitioner, in support of his plea that the land in question is agricultural land, but not non-agricultural land, pressed into service the revenue record in the form of Pahanis and other documents obtained for the relevant years. It is true that the Pahanis and other village

account has clearly brought out that the petitioner possesses land to the extent of Ac.1.03 guntas situated in Survey No. 51/EE, Alwal Village and also he possesses Ac.0.15 guntas of land in Survey No. 51/AA of the same village. When we look at the provisions of the Andhra Pradesh Rights in Land and Pattadar Passbooks Act, 1971, it emerges that the expression land which is defined in sub-section (4) of Section 2 of that enactment, brings out that land means land which is used or is capable of being used for the purpose of agriculture, including horticulture, but does not include land used exclusively for non-agricultural purposes. Thus, if the land is also capable of being used for agricultural purposes, but not necessarily being used for agricultural purposes as such, it also answers the description of the expression land found mentioned in the said Act. Therefore, the record is prepared under Section 3 of the said enactment of every land, which is merely capable of being used for agricultural or horticulture purposes, but not necessarily being used as it is for the said purpose. Therefore, we have no difficulty to reject the contention of the learned counsel for the petitioner that since revenue record maintained under the aforementioned 1971 Act has been produced by him, it has to be invariably inferred that the security interest created by the petitioner in favour of the bank is relating to agricultural land and hence, the provisions contained under Section 31 of the SARFAESI Act should come to his rescue. Only when a security interest is specifically created describing the security interest as agricultural land, then alone, the benefit of Section 31 of the SARFAESI Act will enure to such creator of interest, but not otherwise. This apart, as we have already noted supra, sub-section (1) of Section 14 of the SARFAESI Act has contained two separate limbs; one is taking possession of the secured asset and the next step is making over the said asset to the secured creditor.

22. At the stage of making over the possession of the secured interest to the secured creditor, any person, whose interests are adversely impacted in the process of taking possession by the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, acting on its own or acting though a Commissioner appointed for the said purpose, is entitled to file his objections for recording the fact of taking possession of the land (secured asset). When any such memorandum of objections has been drawn and presented before the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, the said Court is bound to consider the same and pass an appropriate order. In the instant case, no such memorandum of objections has been drawn by the petitioner or filed before the Chief Metropolitan Magistrate. Therefore, the statement made by the Advocate-Commissioner in her affidavit filed before us, clearly brings out, in paragraph 3, that she has identified the scheduled property and executed the warrant and further went on to assert that the petitioner, his servants, his wife and several others stated that the house bearing D. No. 1-5-230 situated in Survey No. 51/EE of Alwal Village, Malkajgiri Mandal, Ranga Reddy District belongs to the petitioner herein. We have to go by her statement of fact that the said house bearing D. No. 1-5-230 is, in fact, lying in Survey No.

51/EE, but not in Survey No. 51/AA. This apart, the learned Advocate-Commissioner has also recorded, in paragraph 3 of her affidavit, that the petitioner never filed any work order (memo) before her requiring her to execute the warrant by any method specified in the work memo. In the absence of any such material to the contra, the conduct of the Advocate-Commissioner in taking possession of the building bearing D. No. 1-5-230 cannot be objected to or found fault with.

23. Even otherwise, there is no credible material that was placed on record of this Court to show that the house bearing D. No. 1-5-230 is actually lying in Survey No. 51/AA, but is not lying in Survey No. 51/EE of Alwal Village. The fact that the house property has been assessed to property tax by the local municipality/corporation, does not necessarily reflect that the said house property is lying in Survey No. 51/AA, but not in Survey No. 51/EE. As was already noticed supra, the revenue record filed by the petitioner itself has brought out that he has land of an extent of Ac.1.03 guntas lying in Survey No. 51/EE and land of an extent of Ac.0.15 guntas lying in Survey No. 51/AA. In which parcel of these two extents of land did the petitioner construct the house bearing D. No. 1-5-230 is a matter left for guessing by us. In the absence of any credible material, we will not be justified in returning a finding of fact that house bearing D. No. 1-5-230 was, in fact, lying in Survey No. 51/AA, but not in Survey No. 51/EE. Even otherwise, that being a controversy of fact, which can only be determined upon collection of evidence, both oral and documentary, in exercise of jurisdiction under Article 226 of the Constitution, seldom such collection of evidence is resorted to, in that, this Court is not forbidden from collecting any such evidence, but was not indulged in routinely.

24. For the aforesaid reasons, we are not in a position to accede to the request made by the petitioner and consequently, we dismiss this Writ Petition, but however, without costs, leaving it to the petitioner to work out his remedies in accordance with law.

25. Consequently, the miscellaneous applications, if any shall also stand dismissed.