

(2016) 01 KAR CK 0132

In the Karnataka High Court

Case No : Writ Petition No. 52475/2015 (GM-RES)

Computer Access (P) Ltd.

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

Date of Decision : 21-01-2016

Acts Referred:

Constitution of India, 1950 — Article 300-A
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13, Section 13(2), Section 13(4), Section 14
Transfer of Property Act

Citation : (2016) 01 KAR CK 0132

Hon'ble Judges : Anand Byrareddy, J.

Bench : Single Bench

Advocate : Sandesh J. Chouta, Advocate, for the Appellant; Dhyan Chinnappa,
Senior Counsel for B.N. Tulsi Kumar, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Anand Byrareddy, J.—1. Heard the learned counsel for the petitioner and the learned Senior Advocate, Shri Dhyan Chinnappa, appearing for the counsel for the 1st respondent - Bank.

2. In the present case on hand, initially, a notice was issued regarding rule and the petitioner was permitted to take out hand summons to respondent Nos. 1 and 2. Thereafter, when the 1st respondent entered appearance, by order dated 18.12.2015, the respondent - Bank was directed to restore the possession of the premises to the petitioner as it was admitted that the movables inside the premises belonged to the petitioner. The matter was adjourned to 22.12.2015. On that day, when the matter was again listed before the Court, it was reported that the 1st respondent had failed to deliver possession to the petitioner and it was particularly directed that the petitioner be put back in possession of the ground floor of the building, which consists of basement, ground floor, first floor and second floor with the terrace also being used for storing material and the Bank was directed to enable the petitioner to access the movables said to be

stored on the terrace of the building and the order was to be complied with forthwith.

3. The reason for the Bank not having complied with the earlier order of this Court was as per the excuse trotted out by the learned counsel for the bank, that he had not received a copy of the order passed on 18.12.2015 and that the Bank would comply with the order as soon as a copy was received. Therefore, the Registry was directed to issue a copy of the order forthwith and respondent - Bank was called upon to report compliance by 29.12.2015.

4. It transpires that on 28.12.2015, the Bank had chosen to file a writ appeal, W.A. No. 6052/2015, questioning the interim orders of this Court and therefore, learned vacation Bench Judge before whom the matter again came up on 29.12.2015, directed that the matter be listed on 31.12.2015 as it was possibly stated that the undersigned was sitting on the vacation Bench on 31.12.2015. On 31.12.2015, as it was stated that the interim orders granted had been challenged in appeal and the appeal was listed on the same day before the Division Bench and the interim order as prayed for therein was to be considered, the matter was directed to be called on the day of reopening.

5. The matter was again listed before the Court on 05.01.2016. On that day, the matter was directed to be listed on 06.01.2016. On 06.01.2016, the matter had come up before another learned single Judge, who had observed that the interim orders granted had been challenged in writ appeal No. 6052/2015 and the Division Bench had rejected the appeal with the observation that the 1st respondent may make an application for review before the single Judge (the undersigned), who had passed the orders and it was also directed that the matter be placed before the undersigned on 07.01.2016 after obtaining orders from the Hon"ble Chief Justice.

6. On 07.01.2016, the respondent- Bank was directed to put back the petitioner in possession of the entire premises and to report compliance. The matter was directed to be listed on 11.01.2016. On 11.01.2016, it was again reported that the Bank had failed to comply with the order, therefore, it was observed as follows:--

"There is total disobedience of the order of this court on the count that the order is specific in regard to the petitioner being in possession of the ground floor only. Therefore, the petitioner has been denied access to the first and second floor of the building and security personnel have been employed, who are preventing the petitioner's access to the first and second floor of the building.

This is unbecoming of the respondent.

The respondent is now directed to put the petitioner in possession of the entire building and withdraw the security personnel employed. He shall comply with the order within two days. Call on 14.01.2016.

A copy of this order shall be furnished to the counsel for the Bank, immediately."

7. Thereafter, an appeal appears to have been preferred by the respondent - Bank against the interim order dated 11.01.2016 passed in writ appeal No. 131/2016, wherein a Division Bench has passed the following order:

"Heard the learned counsel appearing for the parties.

2. Interim stay of the impugned order till 20.01.2016. In the meanwhile, it is open to the parties to sit across the table and work out a workable solution.

3. The possession delivered by the appellant to the respondents in so far as ground floor is concerned, it shall remain undisturbed and the appellant shall permit the respondents to use the basement floor only for parking.

4. Call on 20.01.2016."

8. In view of the interim orders granted by this Court having been modified by the Division Bench, since this Bench is faced with the question as to whether the Division Bench is possessed of any superior jurisdiction in so modifying the orders, which are passed on a prima facie view and it is also to be noticed that the Division Bench itself has passed the order aforesaid on a prima facie view. The matter being listed before this Court on this day, it was felt that this Bench is vested with the jurisdiction to decide the petition itself on merits, notwithstanding the modified order of the Division Bench so that the final order, if any, could be tested before the Division Bench, in the light of the opinion expressed by a Full Bench of this Court in the case of Town House Building Co-operative Society Ltd., v. Special Deputy Commissioner (1988(2) KLJ 510), as to the scope of the jurisdiction of a Division Bench over a single Judge. In other words, since the Division Bench would only be taking a relook at an order passed by a single Judge of this Court and in a pending petition, if on an interim order, the Division Bench should take a different view, it would be appropriate for the single Judge to decide the matter finally notwithstanding prima facie opinions being on record and leave it open for the Division Bench to reconsider if at all, the validity of an order passed on merits since the single Judge bench would not have to face the ignominy of being treated as a Bench with sub-ordinate jurisdiction when it is the law that the Division Bench does not have any superior jurisdiction, it would, however, be vested with the jurisdiction to pass a different order on merits varying the final opinion taken by the single Judge. Therefore, leaving the field open for the Division Bench to revisit the merits of the case. Hence, notwithstanding the order of the Division Bench passed in appeal, the matter is considered for final disposal.

9. The facts of the case are as follows:--

"The petitioner is said to be a Company incorporated under the Companies Act and is engaged in the manufacture and sale of networking equipments and provision of networking solutions. It claims to have a wide clientele and also claims to be a market leader for a decade and having a manpower strength of over 375 direct and another 300 indirect employees and has direct presence in

more than 200 cities spread across India. The petitioner is said to have entered into a lease agreement on 16.08.2013 with respondent No. 2 to take on lease, premises at No. 18/11B, Roopena Agrahara, Begur Hobli, Hosur Main Road, Madiwala, Bangalore. The said premises as already stated, consists of basement, ground floor, first floor and second floor with the usable terrace for storing material. The lease agreement was for a period of 11 months and it has apparently been extended subsequently, since the petitioner claims to have continued in possession after the expiry of the lease and claims to be a lawful tenant in possession and is conducting its business from the said location. It is alleged that the petitioner was suddenly dispossessed from the premises on 05.11.2015 at about 4 p.m. by 10 persons, claiming to be officers of respondent No. 1 - Bank, who had forcibly entered the premises and started evicting the petitioner's employees without even furnishing a copy of the order said to have been passed by the XIV Addl. Chief Metropolitan Magistrate, Bangalore, after putting the said premises under lock and seal. Thereafter, they are said to have brandished an order under which they were acting. However, the petitioner's case is that the order did not permit them to take forcible physical possession of the premises, which was done. The said 10 persons, who were said to be the officers of the respondent -Bank were also accompanied by 10 Police personnel from the Madiwala Police Station. There was no prior notice or intimation to the occupants of the premises, who were said to have been roughed up by the officers of the Bank and the Police. It is also contended by the petitioner that officers of respondent No. 1 - Bank did not permit the petitioner to take out the equipment belonging to the petitioner from the premises, which was locked and sealed. Thereafter, in hindsight, petitioner is said to have learnt that respondent No. 1 had initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act", for brevity) before the said Court seeking a direction to obtain physical possession of the premises belonging to the 2nd respondent without mention of the fact that it was tenanted by the present petitioner. It is in this background that the present petition was filed."

10. It is contended that though the petitioner has been put in partial possession by allowing the petitioner to occupy the ground floor of the premises, respondent No. 1 - Bank has posted security personnel, who strictly control the ingress and egress to the premises and do not permit the petitioner or its men to enter any other part of the building except the basement for parking their vehicles and even to enter the ground floor, it is only on request that the locks are opened by the security men present, thereby throwing out of gear the functioning of the petitioner from the premises. The petitioner's business has come to a standstill as a fall out. In view of the Division Bench having modified the earlier order of this Court, the first floor and second floor of the premises, where equipment are kept, continue to remain under the control of the security personnel, who are allowing the petitioner and its personnel only to enter the ground floor of the premises.

11. The learned counsel for the petitioner would submit that there is prima facie material produced in this petition to demonstrate that the petitioner was in occupation of the entire building and is a lawful tenant. Therefore, possession of a lawful tenant, who has been inducted even prior to the loan transaction by the borrower being declared as Non-Performing Asset (NPA) is protected in law as declared by the Supreme Court in the case of Harshad Govardhan Sondagar v. International Assets Reconstruction Company Limited and Others (, (2014) 6 Supreme Court Cases 1) and seeks that the petition be allowed and direct the 1st respondent to restore possession of the entire building to the petitioner pending consideration by the Magistrate as to the relief of continued occupation being considered in accordance with law.

12. The petition is opposed by the 1st respondent by filing statement of objections, which the learned senior Advocate would canvass to contend that the very lease deed is a disputed document. It is fraught with illegalities. In that, the judgment of the Supreme Court in Harshad Govardhan Sondagar's case (supra) contemplates protection to a person under a lease deed, which is lawful and which is not in violation of Section 65A of the Transfer of Property Act, 1882, (hereinafter referred to as the "TP Act", for brevity). He would point out that lease deed in the present case is a collusive document entered into between the borrower and the petitioner, who appear to be of the same group being engaged in the same business. This is evident even from the cause title of the petition, where the borrower is shown as respondent No. 2 and its address furnished is that of the very premises. This would straightaway disclose that there is no tenancy if the borrower himself is an occupant of the building. It is further pointed out that in terms of Section 65A of the TP Act, lease by a mortgagor though permissible, cannot be in violation of the said provision, which prohibits a lease deed with a clause for renewal of the lease. Nor can any advance rent be received. The duration of lease also cannot exceed three years, whereas the present lease deed indicates a renewal term of 7 years. The fact that advance rent of Rs. 14,50,000/- has been paid by the petitioner to the 2nd respondent renders it a compulsorily registrable document and since the lease agreement in the present case is not registered, the same cannot be considered at all. Viewed from any angle, on the face of it, when a document is available before this Court, the question of considering the petitioner's case for protection by the learned Magistrate would be redundant and the petition will have to be rejected at the threshold in the light of the petitioner claiming possession under such an unlawful document.

13. It is also pointed out by the learned senior Advocate for the 1st respondent - Bank that in terms of the procedure prescribed for the creditor taking possession of the "secured asset", once a notice is issued under Section 13(4) of the SARFAESI Act, it is such that if there is a tenant in possession, it is for him to appear before the authorized officer and disclose the circumstances and claim protection of his possession. This was never done by the petitioner though the procedure of issuing notice and the same having been proclaimed and brought to

the attention of the petitioner is undertaken by the 1st respondent. Therefore, the petitioner is precluded from seeking protection on the various pleas that its possession was taken without notice. Hence, on that ground petition would fail and would have to be rejected. Further, attention is drawn to Annexure "1R-6", which is filed by the Managing Director of respondent No. 2, who has not disclosed that the premises was in occupation of the petitioner, which was the first circumstance, which ought to have been demonstrated in order to hold that the possession of the property should not be taken when the tenant being in lawful possession of the premises. This not having been done, it would reveal the collusive conduct on the part of the petitioner and respondent No. 2 in creating such a lease deed of perpetuating illegal possession and hence, seeks dismissal of the writ petition.

14. Given the above facts and circumstances, the law as declared by the Supreme Court in Harshad Govardhan Sondagar's case (supra) is where the Court was considering a similar situation as to the protection that was available to a lawful tenant in respect of the premises, which may have been the subject matter of proceedings under the SARFAESI Act and in respect of which, there was an order directing delivery of possession to the creditors and the Supreme Court after recording the rival contentions, has addressed the question as to whether the provisions of the SARFAESI Act in any way affect the right of the lessee, who remain in possession of the "secured asset" during the period of lease. In answering this, the Apex Court has divided such tenants in possession under three categories: the first category of tenants, who had been put in possession much prior to the mortgage created on the secured asset; the second category of tenants, who are put in possession subsequent to creation of mortgage vide Section 65A of the TP Act but prior to receipt of notice under Section 13(2) of the SARFAESI Act by the borrower and the third category of tenants, who have been put in possession after creation of the mortgage, vide Section 65A of the TP Act but after receipt of notice under Section 13(2) of the SARFAESI Act by the borrower.

15. The petitioner claims that it falls under the second category and it was put in possession of the premises even before the loan borrowed by respondent No. 2 - borrower was declared as NPA and proceedings were sought to be taken against the borrower. The Apex Court has then addressed the nature of the right of a lessee and as to when the lease under the TP Act gets determined and with reference to Section 105 of the TP Act, has held that a lessee of an immovable property has a right to enjoy such property, for a certain time or in perpetuity when a lessor leases an immovable property transferring his right to enjoy such property for a certain time or in perpetuity. Section 111 of the TP Act provides the different modes by which a lease gets determined. Thus, so long as a lease of an immovable property does not get determined, the lessee has a right to enjoy the property and this right is a right to property and this right cannot be taken away without the authority of law as provided in Article 300-A of the Constitution and that there was no provision in Section 13 of the SARFAESI Act

that a lease in respect of a secured asset shall stand determined when the secured creditor decides to take the measures mentioned in Section 13 of the said Act. Without the determination of a valid lease, the possession of the lessee is lawful and such lawful possession of a lessee has to be protected by all courts and tribunals.

16. Thereafter, the Apex Court has considered the scope of Section 14 of the SARFAESI Act and has addressed the question whether it confers any power on the Chief Metropolitan Magistrate or District Magistrate to assist the secured creditor in taking possession of the secured asset which is in lawful possession of the lessee under a valid lease and has ultimately held that SARFAESI Act does not contemplate any remedy to the tenant and has ultimately, pronounced thus:

"25. The opening words of sub-section (1) of Section 14 of the SARFAESI Act make it clear that where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured assets is required to be sold or transferred by the secured creditor "under the provisions of the Act", the secured creditor 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 or other documents relating thereto may be situated or found, to take possession thereof. Thus, only if possession of the secured asset is required to be taken under the provisions of the SARFAESI Act, the secured creditor can move the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset. We have already held that Section 13 of the SARFAESI Act does not provide that the lease in respect of a secured asset will get determined when the secured creditor decides to take the measures in the said section. Hence, possession of the secured asset from a lessee in lawful possession under a valid lease is not required to be taken under the provisions of the SARFAESI Act and the Chief Metropolitan Magistrate or the District Magistrate, therefore, does not have any power under Section 14 of the SARFAESI Act to take possession of the secured asset from such a lessee and hand over the same to the secured creditor. When, therefore, a secured creditor moves the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset, he must state in the affidavit accompanying the application that the secured asset is not in possession of a lessee under the valid lease made prior to creation of the mortgage by the borrower or made in accordance with Section 65-A of the Transfer of Property Act prior to receipt of a notice under sub-section (2) of Section 13 of the SARFAESI Act by the borrower. We would like to clarify that even in such cases where the secured creditor is unable to take possession of the secured asset after expiry of the period 60 days of the notice to the borrower of the intention of the secured creditor to enforce the secured asset to realize the secured debt, the secured creditor will have the right to receive any money due or which may become due, including rent, from the lessee to the borrower. This will be clear from clause (d) of sub-section (4) of Section 13, which provides that in case the borrower fails to

discharge his liability in full within the notice period, the secured creditor may require, at any time by notice in writing, any person who has acquired any of the assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

26. The opening words of sub-section (1) of Section 14 of the SARFAESI Act also provides that if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of the Act, the secured creditor may take the assistance of the Chief Metropolitan Magistrate or the District Magistrate. Where, therefore, such a request is made by the secured creditor and the Chief Metropolitan Magistrate or the District Magistrate finds that the secured asset is in possession of a lessee but the lease under which the lessee claims to be in possession of the secured asset stands determined in accordance with Section 111 of the Transfer of Property Act, the Chief Metropolitan Magistrate or the District Magistrate may pass an order for delivery of possession of secured asset in favour of the secured creditor to enable the secured creditor to sell and transfer the same under the provisions of the SARFAESI Act. Sub-section (6) of Section 13 of the SARFAESI Act provides that any transfer of secured asset after taking possession of secured asset by the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset. In other words, the transferee of a secured asset will not acquire any right in a secured asset under sub-section (6) of Section 13 of the SARFAESI Act, unless it has been effected after the secured creditor has taken over possession of the secured asset. Thus, for the purpose of transferring the secured asset and for realizing the secured debt, the secured creditor will require the assistance of the Chief Metropolitan Magistrate or the District Magistrate for taking possession of a secured asset from the lessee where the lease stands determined by any of the modes mentioned in Section 111 of the Transfer of Property Act."

When the circumstance that the appellants in the case decided by the Apex Court had not produced any document to prove that they were bona fide lessees of the secured assets, the Court having found that the appellants had relied on the written instruments or rent receipts issued by the landlord to the tenant, has observed thus:

"Section 107 of the Transfer of Property Act provides that a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made "only by a registered instrument" and all other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Hence, if any of the appellants claim that they are entitled to possession of a secured asset for any term exceeding one year from the date of the lease made in his favour, he has to produce proof of execution of a registered instrument in his favour by the lessor. Where he does not produce proof of execution of a registered instrument in his

favour and instead relies on an unregistered instrument or oral agreement accompanied by delivery of possession, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, will have to come to the conclusion that he is not entitled to the possession of the secured asset for more than a year from the date of the instrument or from the date of delivery of possession in his favour by the landlord."

17. Therefore, in the present case on hand, it cannot be disputed that even according to the 1st respondent, the petitioner could at best claim possession of the ground floor of the premises. This is a vexed question, which would have to be addressed by permitting the parties to tender evidence in support of their respective claim. Though this Court is not denuded of power of recording evidence in a given case, it would not be conducive at the present with a large number of cases pending before this Court, to take on that exercise. Hence, without prejudice to the rival contentions and the so called infirmities in so far as the claim of the petitioner is concerned, the validity or invalidity of the documents that are relied upon, the 1st respondent - Bank would be obliged to deliver possession of the entire premises to the petitioner forthwith and withdraw its security personnel from the premises and the question as to the lawful tenancy or otherwise of the petitioner shall be determined by the concerned Magistrate.

Accordingly, the petition is allowed. The impugned order is quashed. The matter is remitted to the Magistrate for consideration of the rival contentions of the parties and to consider whether the petitioner would be entitled to protection of its possession during the currency of the lease that is claimed. The interim order granted earlier by this Court is made absolute. Though the petitioner has specifically sought that its possession should be protected at least till the end of 16.05.2016, it would be incumbent on the Magistrate to decide the question, which is required to be decided before that date.