(2015) 07 MAD CK 0309

In the Madras High Court

Case No : Writ Petition No. 24475 of 2014 and M.P. Nos. 1 of 2014 & 1 of 2015

E. Ravindran APPELLANT

Vs

The Chief Metropolitan Magistrate, Egmore and Others RESPONDENT

Date of Decision : 21-07-2015

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 14
Transfer of Property Act, 1882 — Section 65-A

Citation : (2015) 07 MAD CK 0309

Hon'ble Judges : Satish K. Agnihotri, J;M. Venugopal, J

Bench : Division Bench

Advocate : V. Mohan, for the Appellant

Final Decision : Allowed

Judgement

Satish K. Agnihotri, J—Assailing the legality and validity of the order dated 10.10.2013 passed by the learned Chief Metropolitan Magistrate, Egmore, Chennai in Crl.M.P. No. 6326 of 2014, permitting the second respondent to take possession of the property in question and appointing an Advocate Commissioner to take possession of the property with the assistance of the Station House Officer, R4 Pondy Bazaar Police Station, Chennai, the petitioner has come up with this petition.

2. The brief facts relevant for adjudication of the dispute are as under:

"The third respondent obtained a loan for a sum of Rs. 1,81,00,000/- from the second respondent and the property at No. 32 (Old No. 47, Venkatanarayanan Road, T. Nagar, Chennai, was mortgaged by the third respondent-firm for obtaining the said loan. Respondents 4 to 11 are the partners of the third respondent-firm and the 10th respondent is the guarantor for the said loan. As the third respondent failed to make repayment, the second respondent issued a demand notice to the third respondent on 03.12.2012 under Section 13(2) of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act"), calling upon the third respondent to discharge the liability within sixty days. In default, a notice for taking symbolic possession of the property in question was issued. Thereafter, the second respondent-Bank took symbolic possession of the mortgaged property on 02.04.2013 under Section 13(4) of the SARFAESI Act. Subsequently, the second respondent moved the learned Chief Metropolitan Magistrate, Egmore, under Section 14 of the SARFAESI Act for taking possession of the secured assets. That petition was allowed by the impugned order dated 10.10.2013."

3. It is the case of the petitioner that the petitioner is the occupant of a portion of the property in question. A lease agreement, dated 08.05.2004 was executed for 11 months and it was renewed periodically and continued to be in force till 05.12.2013 when the possession of the premises was taken forcibly by the second respondent Bank. Earlier, the petitioner filed a suit in O.S. No. 4360 of 2009 against the landlord, and another suit in O.S. No. 5097 of 2009 against the respondents 4, 6, 8 and 10 for permanent injunction restraining them from evicting the petitioner and an order of injunction was granted in O.S. No. 4360 of 2009. The petitioner also filed a petition in RCOP No. 2298 of 2009 on the file of the XIV Judge, Court of Small Cause, for deposit of rent and the appeal in RCA No. 310 of 2013 is pending. In addition, the owners of the property filed a suit against the second respondent- Bank, respondents 3, 4, 6, 8 and 10 in O.S. No. 7859 of 2009 on the file of the IV Assistant Judge, City Civil Court, for declaration that the mortgage created in favour of the Bank is illegal and invalid along with other relief. No notice was issued to the petitioner before passing the impugned order by the learned Chief Metropolitan Magistrate, Egmore and he was not a party in the said proceedings. Therefore, the same has to be set aside.

4. According to the second respondent, the third respondent was granted ample opportunities to make payment, but no payment was made. Therefore, steps were taken under the SARFAESI Act to take possession of the mortgaged property. After the possession was taken, the possession notice dated 02.04.2013 was sent to the writ petitioner and the same was returned with a postal endorsement ''left'' and thereafter it was published in two Newspapers on 04.04.2013. But, the third respondent has not come forward to make payment.. Challenging the order of the Chief Metropolitan Magistrate, the petitioner has filed S.A. Sr. No. 7088 of 2013 before the Debts Recovery Tribunal-II, Chennai and the same was dismissed on the ground that the Tribunal has no jurisdiction to adjudicate the same. The writ petitioner has not produced any document to establish his tenancy. The alleged lease agreement dated 08.05.2004 was not registered and it was not extended further. The third respondent has set up the petitioner herein to file this writ petition.

5. Heard the learned counsel for the parties and perused the pleadings and documents appended thereto.

6. It is contended by the petitioner that he was not a party to the proceedings

before the Chief Metropolitan Magistrate. But the Chief Metropolitan Magistrate held that the second respondent is entitled to take possession of the property in question and assistance to secure the possession of the property was also granted. The learned counsel for the petitioner submits that without affording an opportunity of hearing, no order for taking possession of the property could have been passed and therefore, the order passed by the Chief Metropolitan Magistrate deserves to be set aside.

7. We have examined the facts very carefully. It is manifest that possession was taken over forcefully under the garb of the impugned order dated 10.10.2013 passed by the Chief Metropolitan Magistrate, without affording an opportunity of hearing to the petitioner, who was admittedly in occupation and possession of the property in question. In that event, the order is unsustainable in the eye of law and the same deserves to be set aside.

8. Section 14 of the SARFAESI Act enables secured creditor to make an application for possession of any secured asset before the Chief Metropolitan Magistrate or the District Magistrate, as the case may be. The first proviso to Section 14 prescribes that the application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor declaring as under :

"(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets:

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.]"

9. What is the requirement of such affidavit came into consideration in Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Ltd. and Others, (2014) 5 JT 75 : (2014) 3 RCR(Civil) 501 : (2014) 4 SCALE 484 : (2014) 6 SCC 1 , wherein the Supreme Court observed as under :

"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 of 60 days of the notice to the borrower of the intention of the secured creditor to enforce the secured asset to realise 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."

10. Thus, the secured creditor is obliged to state in the affidavit accompanying the application that the secured asset is not in possession of a lessee or tenant 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.

11. The right of the lessee created by the mortgagor under the mortgage deed has been discussed at length by the Supreme Court in Harshad Govardhan Sondagar (supra), as under :

"17. After the mortgage of an immovable property is created by the borrower in favour of a secured creditor, the right of the borrower to lease a mortgaged property is regulated by Section 65-A of the Transfer of Property Act. Section 65-A of the Transfer of Property Act is extracted hereinbelow:

"65-A. Mortgagor''s power to lease.-(1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2)(a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(c) No such lease shall contain a covenant for renewal.

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage deed; and the provisions of sub-section (2) may be varied or extended by the mortgage deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section."

Thus, sub-section (1) of Section 65-A of the Transfer of Property Act states that the mortgagor has the power to make lease of a mortgaged property while he is in lawful possession of the same subject to the provisions of sub-section (2) of Section 65-A of the Transfer of Property Act and such lease is binding on the mortgagee. Sub-section (3) of Section 65-A further provides that such a power is available with the mortgagor to make a lease of the mortgaged property only if and as far as a contrary intention is not expressed in the mortgage deed. Thus, so long as the mortgage deed does not prohibit a mortgagor from making a lease of the mortgaged property and so long as the lease satisfies the requirements of sub-section (2) of Section 65-A, a lease made by a borrower as a mortgagor will not only be valid but is also binding on the secured creditor as a mortgagee."

12. In such situation, it is a clear case of misrepresentation for obtaining an order concealing the relevant facts for proper adjudication. The issues as to whether the lease agreement was created under a registered document or otherwise, whether the same got terminated in the meantime and further, whether the possession and occupation of the petitioner is valid or not, are to be decided by the Chief Metropolitan Magistrate while considering the application under Section 14 of the SARFAESI Act.

13. As a sequel, we are of the opinion that the order dated 10.10.2013 passed by the Chief Metropolitan Magistrate, in exercise of powers under Section 14 of the SARFAESI Act, has been obtained on misrepresentation and misleading facts and as such, the same is a nullity. Accordingly, the impugned order dated 10.10.2013 is set aside and the matter is remitted back to the Chief Metropolitan Magistrate, Egmore, to consider the matter and pass appropriate orders in accordance with law laid down in Harshad Govardhan Sondagar and also any other law relevant in the case, after affording an opportunity of hearing to all parties concerned, including the petitioner, within a period of three months from the date of filing of a certified copy of this order by either party. We further make it clear that status quo in respect of possession of the property by the writ petitioner shall be maintained till then.

14. Resultantly, the writ petition is allowed. No costs. Consequently connected miscellaneous petition is closed.