(2015) 09 MAD CK 0195

In the Madras High Court

Case No : Review Application No. 182 of 2013

Esteem Polymer Products Private Limited APPELLANT

Vs

International Asset Reconstruction Company Private Limited and Others RESPONDENT

Date of Decision : 22-09-2015

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(13), 13(2), 13(4), 14
Transfer of Property Act, 1882 — Section 65-A, 65-A(1)

Citation : (2015) 09 MAD CK 0195

Hon'ble Judges : V. Ramasubramanian, J;M. Duraiswamy, J

Bench : Division Bench

Advocate : Sriram Panchu, S.C. for Arun Anbumani, for the Appellant; N.R. Chandran, S.C. for V.V. Sivakumar, Advocates for the Respondent

Final Decision : Dismissed

Judgement

V. Ramasubramanian, J—The petitioner, whose writ petition challenging a possession notice issued by the first respondent under Section 13(4) of the SARFAESI Act was allowed by this Court, has come up with the above application seeking a review of one finding recorded by this Court while allowing the writ petition in their favour.

2. We have heard Mr. Sriram Panchu, learned senior counsel for the review applicant, Mr.N.R. Chandran, learned senior counsel appearing for the first respondent, Ms.L.Poompavai, learned counsel for the second respondent, Mrs.A.Srijayanthi, learned Special Government Pleader appearing for the third respondent and Mr.J.Thilagaraj, learned counsel for the fourth respondent.

3. A group of three companies by name Peninsula Food Products Private Limited, Pen Food Private Limited and Taj Mahal Agro Industries Private Limited (which is the fourth respondent herein) availed certain credit facilities from Axis Bank Limited and committed default in re-payment. The debt due to Axis Bank Limited

by these companies was assigned by them in favour of the International Asset Re-construction Company Private Limited, which is the first respondent herein, under a deed of Assignment dated 10.02.2011.

4. The fourth respondent herein appears to have approached the first respondent with a proposal for a One Time Settlement, during the period from April-May 2011. Though the last of such offers made on 31.5.2011 was accepted by the first respondent by a letter dated 11.6.2011, the fourth respondent failed to honour its commitment under the proposal.

5. Therefore, a notice under Section 13(2) of the SARFAESI Act was issued sometime in September 2011 and a possession notice under Section 13(4) was issued on 07.4.2012.

6. Challenging the possession notice issued under Section 13(4) on 07.4.2012, the review applicant herein filed a writ petition in W.P. No. 10199 of 2012 on the file of this Court. The primary contention of the review applicant in their writ petition was that they are the lawful tenant of one of the secured assets namely a portion of the land in No. 33-C, Palanjur Road, Chembarabakkam, Chennai 602 103 and that therefore, they cannot be evicted otherwise than in accordance with the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960.

7. By a final order dated 07.8.2013, the writ petition was allowed and the possession notice quashed, on the short ground that the first respondent ought not to have taken possession of the property forcibly, without taking recourse to the provisions of Section 14 of the SARFAESI Act. However, this Court gave liberty to the first respondent to issue a fresh possession notice and take steps in accordance with the provisions of Section 14 of the SARFAESI Act.

8. Despite the fact that the review applicant has thus succeeded in the writ petition, they have come up with the above review application on the short ground that in paragraph 26 of the judgment, this Court had recorded a finding that the petitioner, having taken the property on lease subsequent to the mortgage, cannot be taken to be a bona fide tenant. The apprehension of the petitioner is that this finding that they are not a bona fide tenant would stand in their way while defending an action under Section 14 of the Act. Therefore, what the review applicant wants is just a re-call of the finding recorded in paragraph 26 that they cannot be termed as a bona fide tenant.

9. Briefly stated, the contention of Mr. Sriram Panchu, learned senior counsel for the review applicant, is that the right of a mortgagor to lease the mortgaged property, recognised under Section 65-A of the Transfer of Property Act, 1882, is not taken away by the SARFAESI Act, 2002 and that the only prohibition under section 13(13) of the SARFAESI Act is that after the issue of a notice under Section 13(2), the mortgagor is not entitled to transfer his rights or part with possession of the property. Therefore, it is his contention that when there was no violation of Section 13(13) of the SARFAESI Act, a finding that the review applicant is not a bona fide tenant, merely on account of the fact that the

tenancy was created after the mortgage, is an error of law apparent on the face of the record.

10. In order to test the correctness of the above contention, it is necessary to extract the relevant portion of the order of the Division Bench, which has led to the present review application. It reads as follows:

"Now, the petitioner''s grievance before this Court is with regard to possession notice dated 07.04.2012 issued by the first respondent. As per the documents filed by the petitioner before this Court, as on 07.04.2012, the petitioner cannot be termed as a bona fide tenant for the reason that, even as per the stand of the petitioner, the first lease agreement is dated 28.10.2009 and it is the stand of the respondents 1 and 2 that the mortgage was created on 30.12.2005, 24.06.2009 and 07.09.2009. Consequently, it has to be held that tenancy is subsequent to the mortgage. Hence, the argument of the learned senior counsel appearing for the first respondent that the petitioner is not a bona fide tenant has to be accepted."

11. A careful perusal of what is extracted above would show that there are two portions to the finding recorded by this Court in paragraph 26. The first portion is a statement of fact, namely that the earliest lease agreement was dated 28.10.2009 and that it was entered into only after the mortgage was created by the fourth respondent in favour of Axis Bank Limited. The second portion of the findings recorded in paragraph 26 relate to the question whether the review applicant was a bona fide tenant or not.

12. There is no dispute even now about the fact that the tenancy was created after the mortgage. There can never be a dispute, in law, about the power of the mortgagor to lease his property, if he is lawfully in possession of the same. Section 65-A of the Transfer of Property Act recognises this power very specifically provided such a lease had been made in the ordinary course of management of the property concerned and in accordance with any local law, custom or usage.

13. But, a careful look at Section 65-A of the Transfer of Property Act would show that the power recognised therein, is not an absolute, unfettered power as available to an ordinary owner of a property who has not mortgaged the asset. It will be useful to extract Section 65-A:

" 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 a condition of re-entry on the rent not being paid with 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."

14. The SARFAESI Act, 2002 as rightly contended by Mr. Sriram Panchu, learned counsel for the review applicant creates a bar for any transfer of any right in or possession of the property, under Section 13(13) only after the issue of a notice under Section 13(2). Therefore, the right conferred under Section 65-A of the Transfer of Property Act is not taken away by the SARFAESI Act, 2002. To this extent, the review applicant is right.

15. But the order of the Division Bench under review does not say in paragraph 26 that every tenancy created subsequent to the mortgage is not a bona fide tenancy. We do not find such an obviously wrong statement of law made in paragraph 26.

16. In any case, every wrong finding either of fact or of law, is not liable to be corrected in a review. It is only an error which is apparent on the face of the record that is liable to be corrected.

17. However, relying upon the decisions of the Supreme Court in (i) Commissioner of Sales Tax, J and K and Others Vs. Pine Chemicals Ltd. and Others, (1994) 7 JT 206 : (1994) 4 SCALE 711 : (1995) 1 SCC 58 : (1995) 5 SCR 123 Supp : (1995) 96 STC 355 , (ii) M.M. Thomas Vs. State of Kerala and Another, AIR 2000 SC 540 : (2000) 1 JT 26 : (2000) 1 SCALE 14 : (2000) 1 SCC 666 : (2000) 1 SCR 33 : (2000) AIRSCW 73 : (2000) 1 Supreme 1 , and (iii) Lily Thomas, Vs. Union of India and Others, AIR 2000 SC 1650 : (2000) CriLJ 2433 : (2000) 2 DMC 1 : (2000) 5 JT 617 : (2000) 4 SCALE 176 : (2000) 6 SCC 224 : (2000) 2 UJ 1113 : (2000) AIRSCW 1760 : (2000) 3 Supreme 601 , it is contended by Mr. Sriram Panchu, learned senior counsel for the review applicant that where the error in law is so striking, the High Court is not powerless to correct the same. According to the learned senior counsel, the finding in

paragraph 26 that the applicant is not a bona fide tenant since the tenancy was subsequent to the mortgage, is an error which is so striking that the same can be corrected in a review application.

18. But, we do not agree. This Court has not recorded in paragraph 26 that every tenancy created subsequent to a mortgage is not a bona fide tenancy. As we have indicated earlier, the power under Section 65-A of the Transfer of Property Act is not absolute and unfettered. The benefit of Section 65-A(1) is available only if the conditions stipulated in clauses (a) to (e) of Sub-section (2) of Section 65-A are satisfied. In other words, the lease should have been created in the ordinary course of management of the property and it should have been created in accordance with the local law or custom or usage. No premium should have been paid for the creation of the lease and the lease should not contain a covenant for renewal. In this case, the lease agreements dated 28.10.2009 and 01.10.2010, are unregistered and are stamped on non judicial stamp papers of the value of Rs. 100/- and Rs. 10/- respectively though the tenancy has been created for a period of more than two years and there is also a clause for renewal. Therefore, it is not possible to conclude that the finding recorded in para 26 is an error that can be corrected in a review. At the most it could be corrected by an appellate court, if the appellate court is satisfied that in terms of sub-section (2) of Section 65-A, the applicant is a bonafide tenant.

19. In such circumstances, we do not think that the order dated 07.8.2013 warrants any review. Hence, this review application is dismissed. No costs.

