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In the Delhi High Court

Case No : Writ Petition (C) No. 5930 of 2012

Harsh Vardhan Land Limited APPELLANT

Vs

Kotak Mahindra Bank Limited and Others RESPONDENT

Date of Decision : 21-09-2012

Acts Referred:

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 14, 17
Transfer of Property Act, 1882 — Section 65A

Citation : (2012) 8 AD 97 : (2012) 6 ILR Delhi 413

Hon'ble Judges : Vipin Sanghi, J;Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Hashmat Nabi, for the Appellant; Ashwini Kumar Mata, with Mr. Suresh Dobhal and Mr. Rahul Tyagi, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Vipin Sanghi, J.

C.M. No. 12221/2012 (Exemption)

Exemption allowed, subject to just exceptions

Caveat No. 960/2012

Caveator/respondent no. 1 has entered appearance. The caveat is, accordingly, discharged.

W.P. (C) No. 5930/2012

1. The petitioner assails the order dated 30.07.2012 passed by the Debts Recovery Appellate Tribunal, Delhi (DRAT) in I.A. No. 475/2012 preferred by the petitioner in Appeal No. 113/2012, rejecting the said application seeking interim protection against the taking over of the possession of the commercial property in question admeasuring 3650 sq. ft. situated on the 9th floor of Gopaldass

Bhawan, 28 Barakhamba Road, New Delhi, wherein the petitioner claims itself to be a tenant on a monthly rent of Rs. 2 lacs under a registered lease deed dated 19.08.2009 for a tenure of three years. Respondent Nos. 2 to 6 herein (hereinafter referred to as the ''borrowers'') availed of loans/facilities from ICICI Bank by creating equitable mortgage of the property in question, as well as other immovable properties, and also the hypothecation of their movable assets. The property in question is owned by respondent No. 6 i.e. R.L. Varma & Sons (HUF) (hereinafter referred to as the ''HUF'')

2. Since the borrowers failed to repay the said loan/facility, ICICI Bank approached the Debt Recovery Tribunal (DRT), by filing two separate Original Applications being O.A. No. 34/2003 and O.A. No. 36/2003 u/s 19(1) of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the RDDBFI Act). The DRT vide order dated 02.05.2003 restrained respondent No. 6 from selling, alienating, disposing off, transferring or parting with the possession in any manner or creating third party interest in respect of the mortgaged properties. Later, ICICI assigned the aforesaid debt and the incidental rights together with the Security interest held by it to respondent No. 1 Bank i.e., M/s. Kotak Mahindra Bank Limited.

3. Respondent No. 1 Bank initiated proceedings for recovery by issuing notice u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). The HUF filed Securitization Appeal No. 80/2008 before the DRT u/s 17 of SARFAESI Act. While the said Securitization Appeal was pending, the HUF and the petitioner, despite restrain order dated 2.5.2003, entered into the aforesaid registered lease deed.

4. Though the rent of the said commercial property was shown as Rs. 2 lacs per month, it is clear that the real transaction was worth much more. On the same day, the parties executed two other instruments, namely, a loan agreement and a special power of attorney in favour of the petitioner. Under the loan agreement, a loan of Rs. 4.5 crores was advanced by the petitioner/lessee to the Lessor i.e. the HUF with interest at the rate of 2.92% per month. The special power of attorney vested comprehensive rights in favour of the petitioner to deal with the said property.

5. From the said three instruments, as also the fact that the possession of the said property was parted with by the HUF in favour of the petitioner, it is clear that it was not a plain and simple lease agreement executed between the parties at arm''s length. It is clear that the rent was deliberately suppressed at Rs. 2 lacs per month, whereas the consideration that was passing from the petitioner to the HUF, for grant of the lease was much more.

6. The said Securitization Appeal No. 80/2008 came to be dismissed by the DRT, against which the HUF filed an appeal before the DRAT. In the meantime, Respondent No. 1 Bank and the Borrowers entered into a compromise and, accordingly, moved an application before the DRT in the pending O.A. No.

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34/2003 and O.A. No. 36/2003. The DRT in terms of the joint compromise passed a consent decree vide order dated 3.2.2011.

7. Alleging default in payment by the borrowers, in terms of the aforesaid compromise, respondent No. 1 Bank moved an application u/s 14 of the SARFAESI Act before the DRT for seeking assistance in taking possession of the mortgaged properties.

8. It appears that the borrowers filed Securitization Appeal against the same before the DRT. However, the learned DRT declined to grant interim relief. Subsequently, WP(C) No. 7653/2011 was filed before this Court, wherein, it appears, the borrowers offered to liquidate their dues by bringing in purchasers. However, the borrowers did not live up to their representations. This Court vide order dated 10.2.2012 dismissed the application filed by the borrowers in the aforesaid writ petition, seeking extension of time to sell the property. It was observed that the borrowers have not only cheated and mislead the respondent No. 1 Bank, but have even tried to overreach this Court by not disclosing to this court that they had created third party interest in respect of various portions of mortgaged properties.

9. At this stage, we may note that the aforesaid facts have not been pleaded and disclosed in the present writ petition. The petitioner has merely filed some documents from which we have been able to gather the same.

10. In the meantime, upon motion by respondent No. 1 Bank, learned ACMM (Special Acts) Central, Tis Hazari Court, Delhi, vide order dated 20.1.2012 appointed a court receiver to take possession of the mortgaged properties which included the property in question. Accordingly, a notice in respect of taking physical possession of the secured asset was served upon the borrowers by the Court appointed receiver on 13.3.2012.

11. The petitioner herein, while being in possession of the property in question, filed Securitization Appeal being 15/2012, u/s 17 of the SARFAESI Act impugning the aforesaid notice. The same came to be dismissed by the DRT vide order dated 30.3.2012. Against the said dismissal, the petitioner filed an appeal being No. 113/2012 before the DRAT along with an application being I.A. No. 475/2012 seeking interim protection against the taking of possession of the property in question by the court receiver. The DRAT vide the impugned order dated 30.7.2012 declined interim protection and dismissed the application on the following grounds:

(a) Property in question was leased out to the petitioner in violation of the DRT restraint order dated 2.5.2003;

(b) The alleged tenancy of the petitioner does not appear to be in conformity with the provisions of Section 65A of the Transfer of Property Act, 1882 (T.P. Act);

(c) The borrowers, in terms of the compromise entered into with the respondent No. 1 Bank - had agreed that the bank could take physical possession of the

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mortgaged properties, including the property in question.

12. Against the aforesaid dismissal, the petitioner has preferred the present writ petition.

13. The primary submission of the learned counsel for the petitioner is that the joint application filed before the DRT itself recorded that the respondent no. 1 bank would be entitled to receive lease rental arising out the property in question. Having so consented, the respondent no. 1 bank cannot now take a plea that the tenancy in question was in violation of the restraint order dated 02.05.2003. It is further submitted that the said tenancy had been entered into on 19.08.2009, much prior to the compromise application dated 12.01.2011 moved by the respondent no. 1 bank and the borrowers, and as such the respondent no. 1 bank was aware of the same and had, accordingly, accorded its consent and acceptance. He argues that the only right of the respondent No. 1 Bank is to receive the rent towards satisfaction of the outstands of the borrowers.

14. The learned counsel for the petitioner further submits that the aforesaid tenancy had been executed in the ordinary course of management, vide a registered lease deed, at a monthly rental of Rs. 2 Lacs. The amount of Rs. 4.5 Crores referred to as security deposit in lease deed had actually been advanced to the HUF as a loan, vide a separate agreement, which had to be repaid on the expiry of the terms of 36 months. The said loan amount carried an interest of 2.92% to be paid monthly. The same, therefore, was not in the nature of a premium and as such the tenancy was not in violation Section 65A of the T.P. Act.

15. Learned counsel also submits that this court itself vide order dated 09.08.2010 in C.S. (OS) 1690/2010, filed by the petitioner herein seeking permanent injunction against the borrowers from dispossessing the petitioner from the property in question, was pleased to grant interim protection to the petitioner.

16. Per contra, learned senior counsel for the respondent no. 1 Bank, Mr. Matta, vehemently opposes the present petition and submits that the same deserves to be dismissed at the very threshold. He submits that the said tenancy, relied upon by the petitioner, is in utter violation of the restrain order dated 02.05.2003 of the DRT. The same has been entered into between the petitioner and the HUF in collusion, with a clear fraudulent intent to avoid/defeat the right of the respondent no. 1 bank and siphon the mortgaged property in question, which was also taken note of by this Court in its order dated 10.02.2012 in W.P.(C) No. 7653/2011.

17. It is further submitted that the tenancy in question was not made in the ordinary course of management of the property, as provided for in Section 65A of the T.P. Act. Considering the terms and conditions of the agreements executed between the petitioner and the HUF, the transaction of Rs. 4.5 Crores, though nomenclatures as a loan, was in the true sense- a premium paid in respect of the property in question and, thus, the protection of Section 65A is not available to

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the petitioner.

18. Even otherwise, it is submitted by the learned senior counsel that, in terms of the joint compromise entered into between respondent no. 1 bank and the borrowers, the symbolic possession of the mortgaged properties already vested with the respondent no. 1 bank and the physical possession of the same could be taken by it as per its own discretion and as and when it deemed so fit. The tenancy of the premises having expired on 18.09.2012, and the possession being taken over by the respondent no. 1 bank after the passing of the impugned order, the petitioner herein has no legs to seek any interim protection in respect of the property in question.

19. Having heard the counsels for the parties and perused the record, we find no merit whatsoever in the present petition and are inclined to dismiss the same.

20. As noted hereinabove, the DRT vide order dated 02.05.2003 had in clear terms restrained the borrowers from creating any third party interest in the mortgaged properties, including the property in question. The said order was never modified or set aside in any proceedings thereafter. However, despite the same, tenancy with respect to the property in question came to be entered into between the petitioner herein and the HUF. This clearly demonstrates the fraudulent conduct, not only of the borrowers, but also of the petitioner who colluded with the borrowers. The collusion becomes even more evident from the nature of transaction entered into by the petitioner with the HUF. It is evident that the said transaction is not transaction at arm''s length. The tenancy agreement cannot be looked at in isolation from the loan transaction and the Special Power of Attorney which, inter alia, permits the petitioner/lessee to deal with the property in question and seeks to perpetuate its occupation of the property in question even beyond the tenancy period.

21. The said tenancy was not only in utter disregard of the DRT order but was also in the teeth of the provisions of Section 65A of the T.P. Act. Section 65A of the T.P. Act provides for the mortgagor''s power to lease mortgaged property, which is in its lawful possession. The said lease should be such as is in made in the ordinary course of management of the property concerned and in accordance with any local law, custom or usage. While the lease shall reserve the best rent that it can reasonably obtain, no premium shall be paid or promised and no rent shall be payable in advance under it. The tenancy in question, however, was not on such lines. A perusal of the same, as noted hereinabove, reveals a flow of consideration of Rs. 4.5 Crores, under the guise and garb of a loan and security deposit, which was much more than the otherwise agreed rental amount. As per the terms of the tenancy and the loan agreement, not only would the said amount fetch a monthly interest of 2.92% to the petitioner but in the event of default of the payment of the same, the petitioner would have the right to dispose of the leased premises through a public auction and recover the amount. Considering the conduct and inability of the borrowers to pay of its principal loans/facilities as noted hereinabove, the terms and conditions of the said lease

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and loan agreement, were in effect that of a virtual sale. The said amount was nothing but a premium paid in respect of the said property and as such violative of Section 65A of the T.P. Act. Therefore, the protection of the said provision would not be available to the tenancy in question.

22. The next submission of the petitioner that the compromise entered into between the borrowers and the respondent bank no. 1 provided for a deemed approval to the factum of the tenancy in question and as such cannot be overridden by the mortgage created in favour of the respondent no. 1 bank, also has no merit whatsoever. The said compromise, as noted hereinabove, also gave symbolic possession of the mortgaged properties to respondent no. 1 bank, with the discretionary right to the take possession as and when it deemed fit. Even if one were to accept the plea of the petitioner, that the compromise (decreed by the DRT) accorded a deemed approval to the tenancy in question and in effect over-rid the earlier restrain order of the DRT, the same would have to be subject and conditional to the aforesaid possessor rights of the respondent no. 1 bank''s, which formed a part of the same compromise. The terms of the said compromise have to be read in harmony with each other and not in contra-distinction. For this reason as well, the said submission of the petitioner also stands rejected.

23. Moreover, the tenancy in question also stands extinguished and possession restored to the respondent no. 1 bank. In view of the same, nothing survives in the present petition. Grievances, if any, that the petitioner may have, in view of recovery of possession by the respondent no. 1 bank before the expiry of the tenancy in question, are matters which are to be raised in independent appropriate proceedings and can only be against the HUF. Since the respondent No. 1 Bank has no privity of contract with the petitioner, the petitioner cannot claim any relief against the respondent No. 1 Bank. In view of the aforesaid, the present petition is dismissed with costs, being the fee incurred by respondent no. 1 bank in engaging of the learned senior counsel along with the counsels on record. The same should be paid within one week of the memos of fees being filed on record with copies to the petitioner.

C.M. No. 12220/2012 (For Stay)

In view of the aforesaid, no orders are called for in this application and the same is accordingly dismissed.

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