

(2008) 05 DEL CK 0117

In the Delhi High Court

Case No : Writ Petition (C) 3452 of 2008 and C.M. 6599 of 2008

Jammu and Kashmir Bank Ltd.

APPELLANT

Vs

Gold Line Impex Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 26-05-2008

Acts Referred:

Delhi Rent Control Act, 1958 — Section 14
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 14, 17

Citation : (2008) 154 DLT 531

Hon'ble Judges : V.K. Shali, J; Mukul Mudgal, J

Bench : Division Bench

Advocate : Tanveer Ahmed Mir, for the Appellant; Valmiki Mehta and Hasmat Nabi, for the Respondent

Final Decision : Allowed

Judgement

V.K. Shali, J.—This is a writ petition filed by the Jammu and Kashmir Bank Ltd. (hereinafter referred as the creditor Bank) against the Order dated 31st March, 2008 passed by the Hon"ble Debts Recovery Appellate Tribunal, Delhi by virtue of which, the Learned Appellate Tribunal has stayed the dispossession of the respondent No. 1/appellant before the Tribunal M/s Gold Line Impel Pvt. Ltd. during the pendency of their application filed u/s 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as SARFAESI Act).

2. That briefly stated the admitted facts of the case are that the respondent No. 2, M/s Priyanka Overseas Private Ltd. was a borrower having availed of certain credit facilities from the petitioner bank (hereinafter referred as the borrower). The borrower had given equitable mortgage of certain agricultural land and a residential property in question bearing No. A-1/131, Safdarjung Enclave, New Delhi-29, which the property in question with the creditor bank to secure the repayment of the loan. The borrower committed default and its account was

categorized as a Non Performing Asset. A notice u/s 13(2) of the SARFAESI Act was issued by the creditor bank to the borrower on 19th July, 2007. The borrower filed its reply to the said notice and pointed out for the first time to the creditor bank that the property in question had been leased out by the borrower to the respondent No. 1, M/s Gold Line Impex. The bank approached the Chief Metropolitan Magistrate u/s 14 of the SARFAESI Act for assistance to have the physical possession of the property in question. The Learned Chief Metropolitan Magistrate, Delhi passed an order on 15th October, 2007 and appointed one Mr. Satish Kumar, Advocate as the receiver who is the respondent No. 3 in the present petition with the direction to take physical possession of the property in question. The receiver, respondent No. 3 initiated the process of taking the possession by giving a notice dated 30th October 2007 to the respondent No. 1, M/s Gold Line Impex Pvt. Ltd. It was stated in the notice that the possession will be taken on 10th November, 2007. When this notice was given to the respondent No. 1, M/s Gold Line Impex Pvt. Ltd., they filed an application u/s 17 of the SARFAESI Act before the DRT on 2nd November, 2007 praying therein for setting aside the notice dated 30th October, 2007 issued by the receiver and restraining the creditor bank from taking the possession of the property in question. It was urged by the respondent No. 1, M/s Gold Line Impex Pvt. Ltd. that the creditor bank could only take symbolic possession of the property in question as the said property was under its tenancy. Along with the main petition, an application seeking interim relief against the dispossession was also prayed for, which was rejected by the DRT.

3. Feeling aggrieved by the rejection of the said application for grant of interim relief against the dispossession, respondent No. 1 M/s Gold Line Impex Pvt. Ltd. filed an appeal bearing No. M.A 343/07 and M.A 234/07 before the DRAT. The said appeal came to be decided by the Appellate Tribunal by staying the dispossession of the appellant/respondent No. 1 herein from the property in question by the creditor bank through the respondent No. 3 (receiver), during the pendency of his application u/s 17 of the SARFAESI Act. The DRAT has also formulated as many as 9 questions to be considered and focused on by the DRT while adjudicating upon the appeal of the respondent No. 1.

4. Keeping in view the aforesaid order, the creditor bank felt aggrieved in as much as, a spoke was put in its efforts to bring the processes of law into action and have its loan amount realized and accordingly, it preferred the present writ petition for setting-aside the impugned order, passed by the Learned Appellate Tribunal, as it restrained the creditor bank or its (receiver) respondent No. 3 from taking the possession of the property in question.

5. We have heard Mr. Tanveer Ahmed Mir for the creditor bank as well as Mr. Valmiki Mehta, Learned Senior Counsel for the respondent No. 1. We have also gone through the reply filed by the respondent No. 1 to the writ petition.

6. At the outset, Sh. Mehta learned senior counsel has very fairly conceded that so far as, the disposal of the property in question and taking of symbolic

possession thereof is concerned, he does not have any grievance and nor can he raise any. His contention was to the effect that the respondent No. 2, M/s Priyanka Overseas Pvt. Ltd. the borrower had bonafide created a tenancy in favour of the respondent No. 1, M/s Gold Line Impex Pvt. Ltd. and therefore, the possession of the premises in question could be taken only in accordance with law. Moreover, by not staying the dispossession of the respondent No. 1, the latter would have suffered a grave and irreparable loss and in as much as, the appeal filed by the respondent No. 1 would have become infructuous. It was also contended by the learned senior Counsel that nothing was placed on record by the petitioner herein before the Learned Appellate Tribunal, which would in fact make any reasonable person to draw an inference to the effect that the tenancy dated 2nd January, 2007 which is purported to have been created by the respondent No. 2, M/s Priyanka Overseas Pvt. Ltd. in favour of the respondent No. 1, M/s Gold Line Impex Pvt. Ltd. was a sham transaction.

7. As against this Mr. Tanveer Ahmed Mir, the learned Counsel the creditor bank has contended before us that the tenancy, which is being purported to have been created by the respondent No. 2 in favour of the respondent No. 1 is nothing, but a sham transaction and has been entered into only with a view to obstruct the recovery of the loan amount by the creditor Bank. It has also been stated by the learned Counsel for the creditor bank that the very fact, the tenancy is purported to have been created only on 2nd January, 2007 just six months before the issue of notice on 19th July, 2007 u/s 13(2) of the Act would clearly show that the tenancy was created only with a view to defeat the processes of law. The proximity of time in creating of tenancy showed it was a fictitious tenancy created by the borrower, a sister concern of the respondent No. 1 which gets further fortified by the fact that the factum of tenancy having been created is not disclosed either in the earlier round of litigation before the High Court or even thereafter by the respondent No. 2.

8. We are satisfied that the Learned Appellate Tribunal has arrived at findings regarding the genuineness of the tenancy and formulated the questions for the consideration of the DRT, which have a clear effect of delaying the determination of the crucial question as to the bonafides of the tenancy created in favour of the Petitioner Co. by its sister concern M/s Priyanka Overseas. This is on account of the fact that it is not disputed before us by the learned Counsel for the respondent No. 1, that M/s Gold Line Impex Pvt. Ltd. and M/s Priyanka Overseas Pvt. Ltd. the borrower are sisters concerns. As a matter of fact, Mr. Raj Kumar Jain, was the Director of both the companies and the main kingpin at whose instance the entire credit facilities by Priyanka Overseas were availed of from the creditor bank. This will be further evident from the resolution dated 5th April, 1999 passed by M/s Gold Line Impex Pvt. Ltd., wherein, it has been revealed that the banking account of M/s Gold Line Impex Pvt. Ltd. having its registered Office at D-20, Cannaught Place, Delhi with the creditor bank in its Lajpat Nagar, Branch No. 1. Mr. Raj Kumar Jain was also the Director of the M/s Priyanka Overseas Pvt. Ltd. the borrower and was authorized to honour cheques, bills of

exchange and promissory notes, drawn and accepted for and on behalf of the said company. A letter dated 6th June, 2006 is also written to the Manager of the creditor bank by M/s Gold Line Impex Pvt. Ltd. by Mr. Raj Kumar Jain, wherein, it has been requested both on behalf of the M/s Gold Line Impex Pvt. Ltd as well as M/s Priyanka Overseas Pvt. Ltd. the borrower for negotiating the documents on behalf of both the companies. Therefore, it is beyond any pale of doubt that it is Mr. Raj Kumar Jain, who is the face behind these companies. Since, M/s Priyanka Overseas Pvt. Ltd. the borrower had availed of credit facility under different heads and had failed to adhere to the financial discipline, which resulted in filing of a recovery case against the said company, Mr. Raj Kumar Jain was evidently actuated by a malafide intention to defeat the realization of the said loan amount from M/s Priyanka Overseas Pvt. Ltd. from the properties, which were equitably mortgaged with the creditor bank, including the one in question. That M/s Gold Line Impex Pvt. Ltd. as a tenant was inducted in the said premises on 7th January, 2007 on a paltry sum of Rs.2,500/-. Merely on account of the fact that the said Lease Deed was said to be executed before the receipt of the notice u/s 13(2) of the SARFAESI Act does not colour the transaction, as legal.

9. We have absolutely no hesitation in holding that the Lease Deed purported to have been executed by the borrower, M/s Priyanka Overseas Pvt. Ltd. was a sham transaction which was entered into by the respondent No. 1 and the borrower only with a view to defeat the processes of law and to deplete the value of the property or to ensure that the property is either not purchased by any person or is purchased by a person selected by the borrower itself. This is on account of the fact that it is a common knowledge that the property in Safdarjung Development area especially the complete bungalow even if let out in the year January 2007 would fetch around a lac of rupees as a rent as against a paltry sum of Rs. 2,500/- which is purported to be shown as the rent between M/s Gold Line Impex Pvt. Ltd. and M/s Priyanka Overseas Pvt. Ltd. There is a definite purpose to show the low rent of Rs. 2,500/- in the transaction and that purpose was to ensure the eviction of M/s Gold Line Impex Pvt. Ltd. from the said property becomes long drawn out affair, almost next to impossible, because the tenancy would be protected under the Rent Control Act, 1958 and any prospective buyer would have to undergo a time consuming and arduous process to prove one of the grounds specified in Section 14 of the Delhi Rent Act, 1958 in order to get M/s Gold Line Impex Pvt. Ltd. evicted.

10. The conduct and the timing of the disclosure of the tenancy on the part of the borrower also becomes important, so as to, make the entire transaction, sham, suspicious and fictitious which has been entered only with a view to defeat the rightful claim of the creditor bank. This is on account of the fact that after entering into this transaction, the factum is not disclosed by the borrower in the writ petition, which it filed before a notice u/s 13(2) of the SARFAESI Act is given and the Learned Appellate Tribunal dismissed the issue of the non-disclosure of the said factum by the borrower by holding that the said non-discloser could not affect the right of the tenant, namely M/s Gold Line Impex Pvt. Ltd. In normal

circumstances the Tribunal would have been right in observing so, but in the facts of the present case where the proximity of time of execution of agreement the quantum of rent, so as to get protection of Rent Act, non disclosure of the factum of tenancy in the first round of litigation the relation of the two sister concerns, the person acting as a kingpin of both the concerns being the same person makes us draw an irresistible conclusion that the finding arrived at by the Appellate Tribunal was totally arbitrary and unreasonable which no reasonable person would arrived at.

11. On the contrary, the Learned Appellate Tribunal instead of arriving at a just and fair conclusion has formulated the following nine questions:

- (i) When was the appellant company formed and registered?
- (ii) Which place was shown as its Registered Office?
- (iii) Who were the promoters and directors of the appellant company?
- (iv) Who provided the seed capital for the information for this company?
- (v) Had there been a change in the directors of this company after its formation? If so, when and for what reasons, backed by relevant resolutions of the company?
- (vi) The object for which the company has been floated/formed as per its memorandum of association?
- (vii) What is the total area in metres of the property in question and what is the carpet area?
- (viii) How much carpet area has been allegedly tenanted to the appellant company?
- (ix) Whether the alleged agreed rent matches the prevailing market tenancy rates?

12. In our view most of these questions have absolutely no relevance to the transaction in question and the relevant question about the lack of bonafides of the transaction has been discussed in the preceding paragraph of the judgment. The determination of the above 9 questions in our view would defeat the ends of justice when the facts of the case demonstrated beyond doubt the malice in the conduct of the Respondent No. 1 and this will lay a ground for the borrower as well as the perspective tenant to ensure that the possession of the property in question is not recovered from M/s Gold Line Impex Pvt. Ltd. for decades to come. It is unfortunate that the laws of procedure, which are intended to further the interest of justice have been utilised with the help of the unwitting acts of omission on the part of the Learned Appellate Tribunal for perpetrating the gross illegality in favour of the borrower.

13. The Learned Appellate Tribunal while staying the dispossession of the respondent No. 1 has placed reliance in Krishan Singh Rana Vs. Haryana State Industrial Development Corporation Ltd., in order to support its proposition that

a tenant or a person claiming such a right could be only evicted in accordance with law by the owner now or owner who may subsequently come. With utmost respect the said Judgment has no application to the facts of the case. The said judgment is under a different statute. The Supreme Court has categorically held that Judgment cannot be applied like Theorems. The facts of the decided case must be correlated to the facts of the case being decided. No such examination or analysis has been done by the learned D.R.A.T. Reliance in this regard is placed on Haryana Financial Corporation Ltd. v. Jagdamba Oil Mills 2003 (2) SCC 496. In the instant case, the facts of the case as well as the attendant circumstances completely show that the transaction which has been entered into by the respondent No. 2, borrower with the respondent No. 1, its sister concern is nothing, but a sham transaction which has been entered into only with a view to defeat the processes of law so as to ensure that the possession of the property in question is never recovered and even if, it is not recovered at least the price of the property gets highly depressed so that nobody is able to purchase the same. The Supreme Court has laid down that a party who does not come to the court with clean hands cannot be given any relief and fraud vitiates everything. Reliance in this regard is placed on S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, In the instant case also, the ratio of the said case squarely covers facts and circumstances of the case, in as much as, the present transaction of creating a tenancy is nothing but a fraud on the processes of law so as to defeat the claim of the creditor bank. We have absolutely no hesitation in holding that the Learned Appellate Tribunal has fallen into a grave error and arrived at a conclusion, which no reasonable person could have arrived at and thus, the Judgment of the Learned Appellate Tribunal suffers from the arbitrariness, unreasonableness and we have no other option but to set aside the same and hold that the DRT was absolutely right by holding that the respondent No. 1 was not entitled to any interim relief and the possession of the property in question be recovered by the receiver from the respondent No. 1, so as to ensure the disposal of the same in accordance with law.

14. In view of the aforesaid facts and circumstances of the case, the order dated 31st March, 2008 passed by the DRAT is set-aside and the petitioner is allowed and the order of the Learned DRT is restored with the direction that the creditor bank will be well within its right to effectuate the orders of the Learned Chief Metropolitan Magistrate, Delhi and take the possession of the suit property in accordance with law. A cost which is quantified to Rs. 30,000/- to be paid by the respondent No. 1 to the creditor bank within 6 weeks.