(2012) 11 BOM CK 0145

In the Bombay High Court

Case No : Writ Petition No. 9158 of 2012

LKP Finance Ltd. APPELLANT

Vs

International Asset Reconstruction Co. Pvt. Ltd. RESPONDENT

Date of Decision : 21-11-2012

Acts Referred:

Companies Act, 1956 — Section 132
Transfer of Property Act, 1882 — Section 65A

Citation : (2013) 1 ALLMR 286 : (2013) 1 MhLj 743 : (2013) 1 RCR(Rent) 444

Hon'ble Judges : V.K. Tahilramani, J;D.D. Sinha, J

Bench : Division Bench

Advocate : Rishabh Shah with Mr. Sandeep Manubarwala and Mr. Rajesh Chaudhary instructed by M/s. PDS and Associates, for the Appellant; B.S. Colabawala instructed by . PKA Advs., for the Respondent

Final Decision : Dismissed

Judgement

D.D. Sinha, J.—Heard the learned counsel for the petitioner and the learned counsel for the respondent. Writ petition is directed against the order dated 15.5.2012 passed by the Debt Recovery Tribunal II, Mumbai whereby the Securitization Application No. 18 of 2012 filed by the petitioner came to be dismissed as well as judgment and order dated 7.8.2012 passed by the Debts Recovery Appellate Tribunal, Mumbai, whereby Appeal No. 114 of 2012 filed by the petitioner against the order of the DRT came to be dismissed.

2. The contention of the petitioner is that the petitioner was having a possessory lien over the premises in question i.e. Office premises No. 106, 1st floor, ''A'' Wing, 212, Dalamal Towers, Nariman Point, Mumbai 400021 and was in possession of the premises therefore the respondent could not have evicted the petitioner from the subject premises by invoking the provisions of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") for the default committed by the REPL Engineering Limited in repayment of dues of the bank.

3. The counsel for the petitioner has submitted that the Tribunal has erred in holding that the respondent had registered their charge with the Registrar of Companies. The Tribunal has failed to appreciate the documentary evidence filed by the parties and came to the erroneous conclusion. It is contended that only State Bank of India and not the Bank of Baroda or the other respondent had any charge over the subject premises. This fact is also established by the Certificate of Registration of Mortgage u/s 132 of the Companies Act. Therefore, the finding given by the Tribunal is bad in law and deserves to be quashed and set aside. Counsel for the petitioner has submitted that the petitioner claimed to be in possession and has a possessory lien over the premises in question. It is submitted that REPL Engineering Ltd. (owner of the premises) in 1993, in 1994 and in 1995 had taken loan for the power generation by wind power from the petitioner, however could not repay the lease rents. On or about 1.11.1997, the REPL expressed its inability to settle its due and offered the premises for the petitioner''s use on condition that the petitioner should credit monthly compensation and the outstanding dues apart from payment of society dues, charges etc. The petitioner claims to be in possession of the premises since 1.11.1997.

4. As against this, the counsel for the respondent supported the impugned order and contended that M/s. Heat Shrink Technologies Limited had availed certain credit facilities from the consortium consists of Bank of Baroda, State Bank of India, SBI Commercial and International Bank Limited, Bank International Indonesia and HDFC Bank. It is contended that Heat Shrink Technologies Limited at latter point of time was converted as RPEL Engineering Limited. The borrowing company secured the amount of credit facility extended by consortium bank, mortgaged its office premises No. 106, 1st floor, Dalamal Tower, Nariman Point, Mumbai 400021 (subject premises) in favour of the State Bank of India. Borrower on 9.3.1995 through its then Director had deposited the title deeds of the mortgaged property with State Bank of India. Memorandum of Entry dated 9.3.1995 was made in the record of the bank and the charge was registered with the Registrar of Companies (ROC) and ROC issued Certificate of Registration of Mortgage dated 13.10.1995. The said credit facility was extended by consortium bank and was renewed and enhanced in 1996. On 23.12.1996 the title deed in respect of the said mortgaged premises was deposited with the State Bank of India to create mortgage in favour of State Bank of India and the consortium bank. The Memorandum of Entry dated 23.12.1996 was made in the relevant record of the bank and the charge was registered by ROC in this regard on 31.1.1997 in favour of consortium. It is therefore contended that the contention canvassed by the counsel for the petitioner in this regard are wholly incorrect. It is contended that though the petitioner claims to have a possessory lien and claimed protection on the basis thereof cannot be sustained in law in view of Section 65-A of the Transfer of Property Act, 1982. In the present case the borrower has not created any lease or mortgaged assets in favour of the petitioner and therefore the petitioner has got no statutory right of possession

over the secured premises.

5. We have considered the contentions canvassed by the respective counsel. DRAT in paragraph 3 of its judgment has mentioned the facts which are not in dispute. It reads thus:

3. Few material facts are not in dispute between the parties. Undisputedly in the year 1993-1994, one M/s. Heat Shrink Technologies Ltd. (at present REPL) had availed certain credit facilities from the consortium banks i.e. Bank of Baroda, State Bank of India, SBI Commercial and International Bank Ltd., Bank International Indonesia and HDFC Bank Ltd. Heat Shrink Technologies Ltd. later on was converted as REPL Engineering Ltd. The borrower company to secure the amount of credit facilities extended by the consortium banks mortgaged its office premises No. 106, admeasuring 855 sq. feet situated on 1st floor, Dalamal Tower, Nariman Point, Mumbai 400021 (hereinafter referred to as "mortgaged premises") in favour of State Bank of India. The borrower had executed various necessary documents for availing the credit facilities as well as mortgaging its property referred to above. The borrower on 09.03.1995 through its then Director, Late Mr. B.S. Doctor had deposited the title deeds of the mortgaged premises with State Bank of India with intention to create mortgage in favour of State Bank of India and the consortium banks. In this respect, the Memorandum of Entry dated 09.03.1995 was made in the record of the bank and the charge was registered with the Registrar of Companies (hereinafter referred as "ROC"), Mumbai. The ROC issued Certificate of Registration of Mortgage dated 13.10.1995. The said credit facilities were further extended by consortium banks and were renewed and enhanced in the year 1996. Consequently, late Mr. S.B. Doctor again on 23.12.1996 deposited the title deeds in respect of the said mortgaged premises with State Bank of India with intention to create mortgage in favour of State Bank of India and the consortium banks. In this respect, the Memorandum of Entry dated 23.12.1996 was made in the relevant record of the bank. Consequently, the said charge was registered by the ROC on 31.01.1997.

6. In the instant case, the petitioner admittedly is neither a tenant nor a lessee of the mortgage premises and only claims to have right over the mortgaged premises on the basis of promissory lien. It is also not in dispute that the original borrower had created mortgage of secured premises in favour of the respondent bank (consortium) while the petitioner has been or was permitted by the original borrower to occupy the mortgage premises. The short question which arises for consideration is..........

Whether the mortgagor can permit the petitioner to occupy the mortgaged premises after creating mortgage in contravention of provisions of Section 65-A of the Transfer of Property Act?

It is brought to the notice of this Court that the said issue is considered by the Division Bench of Madras High Court in the case of Sree Lakshmi Products Vs. State Bank of India, in the backdrop of provisions of Section 65-A of the Transfer of Property Act. Relevant observations made in paragraph 8 of the said decision, reads thus:

8. In Shri Sanjeev Bansal Vs. Oman International Bank SAOG and Another, Delhi High Court, a similar contention was raised by the petitioner therein that he being a tenant and in physical possession of the mortgaged property is protected under the provisions of the Delhi Rent Control Act and cannot be dispossessed without taking recourse to the provisions of the Delhi Rent Control Act. Repelling this contention the Court held that the protection afforded by the Rent Control Act to a tenant is from the landlord of the premises and the landlord of the premises cannot recover possession from the tenant unless he takes recourse to any of the grounds as available to him under Rent Control Act and the right of the tenant is fully protected notwithstanding anything contrary contained in any other law or contract. This protection is however not available against the mortgagee who seeks to enforce his right under the SARFAESI Act against the principal borrower who had mortgaged the property in question by duly and validly executing the memorandum of mortgage in favour of the mortgagee. The Court further held that Section 65-A of the Transfer of Property Act clearly mandates that the duration of lease to be executed by the mortgagor cannot exceed 3 years. The Court therefore, concluded in paragraph 6 as follows:

Manifestly the said unregistered lease was created for the alleged unlimited period through unregistered lease deed in complete contravention of Section 65-A of the Transfer of Property Act as per the said provision of Section 65-A, the lessee can enjoy the protection if the lease is created by the mortgagor in conformity with the mandate of requirements laid down in Section 65-A of Transfer of Property Act and not otherwise. Neither the mortgagor nor the lessee can defeat the right of mortgagee and no lessee can claim any protection unless his tenancy is as per the requirements of Section 65-A of Transfer of Property Act.

7. In the present case, the claim of the respondent bank stands on a much better footing since the petitioner is neither a tenant nor lessee of the mortgaged premises and claims its right over the mortgaged premises on the basis of possessory lien. In view of the facts and circumstances involved in the present case it is evident that the mortgagor though in a given case can let out the mortgaged premises which will be binding on the mortgagee, however, it must be as per the mandate of Section 65-A of the Transfer of Property Act the duration of such lease cannot exceed three years and therefore the observations made in paragraph 8 of the decision makes it implicitly clear that neither the mortgagor nor the lessee can defeat the right of mortgagee and no lessee can claim any protection unless its tenancy is as per the requirement of Section 65-A of the Transfer of Property Act. In the instant case the original borrower has not let out the mortgaged premises to the petitioner nor the petitioner claims possession over the mortgaged premises on the basis of any lease deed but claims the promissory lien over the premises on the basis of the letter dated 1.11.2011 issued by the Authorised Signatory, without there being any document of lease

or tenancy created in its favour. Therefore, in view of requirement laid down in Section 65-A of the Transfer of Property Act, the petitioner cannot claim any protection only on the basis of promissory lien.

We answer the question in negative.

For the reasons stated herein above, petition suffers from lack of merits. Same is dismissed.