(2020) 03 DRT CK 0006

In the Debts Recovery Tribunal

Case No : Securitisation Application No. 5 Of 2019

Md.Fasiudddin APPELLANT

Vs

State Bank Of India And Ors. RESPONDENT

Date of Decision : 17-03-2020

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 14, 17, 17(4A)
Transfer of Property Act, 1882 — Section 48, 65, 65A(2)(e)

Citation : (2020) 03 DRT CK 0006

Hon'ble Judges : R. Mallttkarjuna, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. The Applicant filed the present Securitisation Application u/s.17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act,2OO2 (SARFAESI Act, 2OO2) challenging the proceedings initiated by the Respondent bank to take possession of the schedule property under the warrant dated 16.11.2018 issued by Hon'ble CMM, Hyderabad in Crl.Mp.6937 of 2O18 including taking physical possession of the same by the Respondent bank and to declare the same as null and void.

2. The case of the Applicant, in brief, is that 3rd respondent is the owner of third floor of complex known as "Saba Plaza". The applicant is a business man having come to know that the schedule property is available on rent approached 3rd respondent in Jan. 2017 for running furniture business and 3rd respondent offered the entire floor for rent on a monthly rent of Rs.10,000/-. In pursuance of said offer rental agreement was reduced in writing and accordingly registered the rental agreement on 31.1.2017 for a period of 10 years. While matter stood thus on 02.01.2019 an Advocate commissioner by name Sri K. Srikanth visited the schedule and served a notice dated 02.01.2019 directing the applicant to vacate and handover the schedule property within 15 days by virtue of powers

conferred under Section 74 of SARPAESI Act issued warrant in Crl.MP.6937 /2018. It is submitted that respondent bank initiated proceedings under provisions of SARFAESI Act by classifying the account as NPA and issued demand notice on 4.05.2018 later issued possession notice on 18.7.2018 but no notice has been served/ issued to applicant. The applicant has legal and valid regd. rental agreement and he is registered tenant and without a proper procedure cannot be evicted from his occupation by the Hon'ble CMM, Hyderabad. The impugned action for taking possession aimed to dispose the applicant illegally, which is barred under the provisions of Transfer of property Act prevailing in the state of Telangana. The applicant relied on the Judgement of Hon'ble Apex court reported in (2014) 6 SCC and criminal Appeal No.52 of 2016 between Vishal N. Kalsaria Vs Bank of India and others. It is further submitted that the applicant is registered tenant and he accrued the rights and interest over schedule property and they could not evict other than the provisions of Transfer of property Act. Hence prayed to set aside the action taken by 1st respondent bank under warrant dated 16.11.2018 issued by Hon'ble CMM, Hyderabad.

3. The respondent bank no. 1 filed its reply and denied the averments made by applicant. It is submitted that the 2"d respondent is a proprietary concern, represented by its proprietrix Smt Rahamat Unnisa Begum, availed cash credit loan of Rs.175 lakhs and SME credit plus loan of Rs.25 lakhs, overall loan facilities of Rs.200 lakhs from Dabeerpura branch, Hyderabad after executing necessary security documents on 09.5.2014. The 3nd respondent and his father stood as guarantors for the said loan facilities. The 3rd respondent being the owner and possessor of application schedule property by virtue of Regd gift settlement deed document no.4761/2011 dated 30.12.2011 created registered mortgage over said property. The 2nd respondent-borrower hypothecated all stocks, current assets, book debts etc as security for due repayment of said loan facilities. Sri Mohd Gulam Jeelani, father of 3rd respondent also created and extended mortgage over his immovable property as Securicor for due repayment of loan facilities. After availing the above said loan, the 2nd respondent - borrower committed irregularities in operating the loan account and also failed to repay the outstanding loan amounts with interest. Therefore, the loan accounts were classified as NPA as per RBI guidelines. After transfer of loan account, the 1st respondent branch got issued legal notice dated 16.3.2018 upon respondents 2 & 3 and Sri Mohd Gulam Jeelani to repay the outstanding loan with interest and the said notice was served upon them. Even after issuance of said notice, respondents 2 & 3 and Sri Mohd Gulam Jeelani failed to repay the dues. Hence 1st respondent bank issued demand notice dated 04.05.2018 and possession notice dated 18.07.2018 to repay the outstanding loan of Rs.2,78,97,879/- together with interest and costs. The said possession notice was published in "Economic Times" & "Andhra Jyothi, daily newspapers dated 23.7.2018 and the same was also affixed at application schedule property. In spite of issuance of said notices, the respondents 2 &3 and Sri Mohd Gulam Jeelani failed to repay

the dues and also failed to deliver physical possession of property. Therefore 1st respondent bank proceeded further and obtained orders in Crl.Mp.6937/2018 under section 14 of SARFAESI Act, 2002 from Hon'ble CMM, Hyderabad appointing Sri Srikanth, Advocate as Commissioner for taking physical possession of property and issued warrant dated 16.11.2018. It is submitted that the applicant and 3rd respondent created and fabricated the said agreement in order to stall and delay the recovery proceedings initiated by 1st respondent bank. The alleged rental agreement is created and concocted for the purpose of filing present case. At no point of time, neither the applicant nor the 3rd respondent have obtained consent from 1st respondent bank for giving the premises on lease and therefore, the applicant has no locus-standi to file present SA. The alleged rental agreement dated 31.1.2017 is subsequent to creation of mortgage on 9.4.2012 and extension of mortgage on 19.4.2012 and extension of mortgage on 09.5.2014 by 3rd respondent in favour of 1st respondent bank. Therefore, the Applicant cannot get any legal and valid right, claim or interest over application schedule property, as the alleged rental agreement is subsequent to creation of mortgage in favour of 1st respondent bank. In this regard, section 48 of TP Act clearly says about priority of rights and said section is mentioned as under:

Priority of rights created by transfer: where a person purports to create by transfer at different times right in or over the same immovable property and such rights cannot all exist or be exercised to their full extent together, each later created right shall in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created".

In the light of above said provision, the Applicant cannot claim any right, claim or interest over the property. The alleged rental agreement is not binding on the 1st respondent bank, as the same does not confer any legal and valid right over the property in issue. The Applicant, who is claiming to be the alleged tenant subsequent to creation of mortgage has no legal right or locus standi to challenge the proceedings initiated by 1st respondent bank under the provisions of SARFAESI Act, 2002. The applicant and 3rd respondent have not obtained any consent from 1st respondent bank and the same is not binding and same is contrary to Section 65A of Transfer of Property Act, 1882. The said aspect was considered by Hon'ble Supreme Court of India in the case of Harshad Govardhan Sondagar Vs International Assets Reconstruction Co. Ltd & others reported in 2014 (6) SCC- 1. Hence it is submitted that the applicant cannot claim any legal and valid right as a tenant over the application schedule property. It is submitted that 3rd respondent being the mortgagor has not pointed out any violations and procedural irregularities on the part of 1st respondent bank and applicant, who is claiming to be alleged tenant has no right or locus standi to point out any violations on part of 1"t respondent bank. The Applicant has not made out any case and there are nobonafides on the part of applicant and in fact the applicant tried to mis-lead this Tribunal and as such the SA is liable to be dismissed.

4. The respondents No.2 & 3, in their reply statement, submits that the applicants are legal tenants of application schedule property, the rental agreement between applicant and respondent no.3 was executed on 3l.l.2017 and the same has been registered vide document no.1967 /2017 dated 03.05.2017 in the office of Sub-Registrar, Azampura, Hyderabad. It is further submitted that as per rental agreement, the applicant has deposited security amount of Rs.30,000/- and as agreed upon an amount of Rs.10,000/- is being paid every month from the date of execution of rental agreement i.e., 31.1.2017 . As respondent no.3 is the absolute owner of said schedule premises, it is the duty of respondent no.3 to safeguard the tenants as they have invested a lot in business. It is further submitted that the representative of respondent no.2 and respondent no.3 had approached respondent no.1 bank and trying to settle the matter and takes time to materialise the settlement.

5. This Tribunal, after hearing the submissions made by the respective Ld. Counsels, had dismissed the present SA vide orders dt.05.11.2019, the operative portion of which is extracted below:-

7. The contention of the applicant is that he is bonafide tenant of the SA schedule property by wag of lease deed regd vide document no. 1967 / 17 dated 03.5.2017 in the office of Sub Registrar, Azampura, Hyderabad. Hence the respondent bank could not evict other than by the provisions of the Transfer of property Act. The Applicant relied on Judgement of Hon'ble Apex court reported in (2014) 6 SCC and criminal Appeal No.52 of 2076 between Vishal N. Kalsaria Vs Bank of India and. others.

8. Per contra Respondent bank submitted that the impugned lease deed is created subsequent to creation of mortgage, hence the lease deed is violating the provisions of Section 65 A of Transfer of property Act. The respond.ent bank prays for dismissal of SA.

9. I have gone through the material placed on record_. The respondent No.3 is owner of the schedule property created mortgage in favour of respondent bank for the credit facilities extended to respondent no.2 on 09.05.2014. Subsequently the respondent no.3 entered into lease deed dated 31.1.2017 with the applicant and the same has been registered vide document no.1967/ 17 dated 03.5.2017 at SRO, Azampura, Hyderabad. Here, it is pertinent to extract the relevant provisions of SARFAESI Act specified under sub-section (4A) of Section 17

[(4A) where _

(i) Any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debts recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purpose of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy -

a) has expired or stood determined; or

b) is contrary to Section 65 A of the Transfer of Property Act, 1BB2 (4 of 1BB2); or

c) is contrary to terms of mortgage; or

d) is created after the issuance of notice of default and demand by the bank under sub-section (2) of Section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debts Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.

10. Since the lease is created subsequent to creation of mortgage and attracts provisions of Section 65A of Transfer of Property Act for better understanding. Section 65 A of TP Act is extracted below: " Mortgagor's power to lease:

(1) subject to the provisions of sub-section (2), a mortgagor, while laufully 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 loan 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 gears, and the lease shall contain a covenant for payment of tee rent and a 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."

11. Also the judgement in Vishal N. KalsaiaVs Bank of India and others is over-ruled in Judgement of Supreme Court of India in Crl. Appeal No.1371/ 19 in Bajrangshyam Agaru.tal Vs Central Bank of India.

12. From the above it is clear that the lease deed entered between the applicant and Respondent No.3 is violating the provisions of Section 65 of TP Act Hence it is liable to be set aside. Since the applicant is a third party he has no locus standi to question the SARFAESI measures of the respondent bank.

13. From the above discussions, facts and circumstances, I am of the considered opinion that the applicant failed to make out any valid grounds to assail the SARFAES/ proceedings of the respondent bank, as such the SA is liable to be dismissed.

14. In the result, SA.No.5/ 2019 is dismissed."

6. Aggrieved by the aforesaid dismissal orders dt.05.11.2019 passed by this Tribunal in the present SA.No.5/2019, the Applicant herein preferred WP.No.24920 of 2019 before the Hon'ble High court at Hyderabad, wherein the Hon'ble High Court vide orders dt.13.11 .2019 had set-aside the orders dt.05.11.2019 passed by this Tribunal in the present SA. No. 5/2019 and remitted back the matter for fresh consideration in order to record a finding as to how Sec.65A of the Transfer of Property Act, 1882 was violated by the petitioner (Applicant herein) and the 3rd respondent, by executing the lease deed dt.31.01.2017 between them. The relevant portion is extracted below:-

"10. In this view of the matter, the impugned order is set aside and the matter is remitted back to the Debts Recovery Tribunal-l at Hyderabad for fresh consideration in order to record a finding as to how, according to the Tribunal, Section 65A of the Transfer of Property Act, 1882 was violated by the petitioner and the 3rd respondent, by executing the lease deed dt.31.01.2017 between them.

11. Accordingly, the Wit Petition is allowed; order dt.05.11.2019 in S.A. No. 5 of 2019 of the Debts Recovery Tribunal-1 at Hyderabad is set aside; the said S.A. is remitted to the said Tribunal for fresh consideration to decide the above point as expeditiously as possible preferably within two months from the date of receipt of a copy of this order; and pending disposal of the matter by the Tribunal afresh, the petitioner shall not be dispossessed from the subject property."

7. In view of the aforesaid orders of the Hon'ble High Court, this Tribunal has heard the submissions made by the Ld. Counsels appearing for both sides, afresh.

8. Now, the point for consideration is whether the Lease Deed dt.03.05.2017, which is for 10 years, executed by 3rd respondent-guarantor-mortgagor, in favour of the Applicant is valid in terms of the provisions of Sec.65A of the Transfer of Property Act, 1882?

9. It is a matter of record that 3rd respondent-guarantor has mortgaged the application schedule property in favour of the 1st respondent bank on 09.05.2014 to secure the credit facilities availed by respondent No.2. It is also a matter of record that, 3rd respondent, after creation of mortgage, has leased out the application schedule property by executing a registered Lease Deed

dt.03.05.2017 in favour of the Applicant for a period of 10 years at monthly rentals of Rs.10,000/-, which is agreed to be enhanced by 15% after every 5 years.

10. Since the lease entered in between the 3rd respondent-mortgagor and the Applicant herein is after creation of mortgage over the subject property, it attracts the provisions u/s.65A of the Transfer of propert5r Act, 1882.

11. Section 65-A of the Transfer of Property Act deals with the power of mortgagor to lease. Sub-section (1) of Sec.65-A of the said Act states that the mortgagor has power to make lease of mortgaged property while he is in lawful possession of the same subject to the provisions of sub-section (2) of Sec.65-A of the said Act. Sec.65-A (2)(e) states that lease shall in no case exceed 3 years. Whereas, in the present case the lease is for a period of 10 years from 31.01.2017 and as such the said lease deed dt.31.10.2017 is contrary to the provision u/s.65-A (2)(e) of the Transfer of Property Act, 1882.

12. I have also perused the Memorandum of Deposit of Title Deeds dt.19.04.2002 and the Memorandum of Deposit of Title Deeds (Extension/Second Charge) dt. 09.05.2014, executed by 3rd respondent herein and his father Sri Mohd. Gulam Jeelani, copies of which have been filed by the 1st respondent Bank along with its material documents annexed to its Reply Statement. The 3rd respondent and his father having declared in the Memorandum of Deposit of Title Deeds and the said Extension Memorandum that, they are the absolute owners of the property, there are no encumbrances on the property and that the property is in their possession at the time of creation of mortgage, the 3rd respondent herein (mortgagor) has alienated the property by way of lease deed dt.03.05.2017 in favour of the Applicant herein, during the subsistence of mortgage. Neither the Applicant nor the 3rd respondent borrower has placed any material on record to show that they have obtained written consent from the 1st respondent bank-mortgagee before entering into such lease. The 1st respondent Bank has also categorically stated in its Reply Statement that the Bank has not given any consent for entering into the lease and as such the said lease is not binding on the 1st respondent bank. Under such circumstance, the Applicant is not entitled to challenge the action of the 1st respondent bank to proceed against the secured asset under the provisions of the SARFAESI Act, 2002, to recover its legitimate dues from its borrower.

13. In view of the above, I hold that the Applicants have failed to make out any valid grounds for grant of relief sought for in the present SA and accordingly the present SA is liable to be dismissed.

Point No.(ii):-

14. In the result, the present SA is dismissed. Consequently, the Interlocutory Applications pending if any, shall stand disposed of. No order as to costs.

15. Communicate a copy of this order to the parties concerned.

(Dictated to the Private Secretary, transcribed by him, corrected, signed and pronounced by me in the open court on this the 17th day of March, 2020).

