

(2008) 02 AP CK 0070
In the Andhra Pradesh High Court
Case No : Writ Petition No. 19559 of 2007

Morthala Chander Rao

APPELLANT

Vs

The Andhra Bank and Others

RESPONDENT

Date of Decision : 11-02-2008

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 13(8), 14
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 2, 4(5), 8(1), 8(3), 9(6)
State Financial Corporations Act, 1951 — Section 46B
Transfer of Property Act, 1882 — Section 106, 107, 69, 69A

Citation : (2008) 6 ALD 780

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : A. Prabhakar Rao, for the Appellant; K.Lashminarasimha, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—Heard Sri A. Prabhakar Rao, learned Counsel representing the writ petitioner and Dr.K.Lashminarasimha, learned Counsel representing the first respondent.

2. This Court ordered notice before admission on 14.09.2007 and granted an order of status quo for a limited period, which had been extended for further limited period.

3. W.V.M.P. No. 2763 of 2007 is filed to vacate the said interim order of status quo.

4. At the request of the learned Counsel on record, the writ petition itself is being disposed of finally.

5. The writ petition is filed for issuance of writ of mandamus declaring the notice,

dated 31.07.2007, in letter No. 679/11/272 issued by the first respondent seeking to take possession of the premises bearing Nos. 13-1-96 (old 13/78) and 12-1-14, situated at Papaiahpet Chaman, S.V.N.Road, Mattawada, Warangal District, dispossessing the petitioner from the said premises insofar as it relating to portions under his occupation, as illegal and arbitrary and consequently to direct the respondents to continue the petitioner in the aforesaid premises till he is legally evicted by the competent Court and to pass such other suitable orders.

6. Sri A. Prabhakar Rao, learned Counsel representing the writ petitioner had taken this Court through the contents of the affidavit filed in support of the writ petition and would maintain that it is not as though the building as such has no salable value and there is no necessity of disturbing the statutory tenants. Even if the object of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Act" for the purpose of convenience) to be kept in mind, since the aim is only to recovery the amount, the statutory benefits need not be disturbed. The learned Counsel also had made certain submissions in relation to the rent control legislation as well in this regard. Reliance was placed on *Hutchison Essar South Ltd. Vs. Union Bank of India and Aditya Automation*,

7. Per contra, Dr.Lakshminarasimha, learned Counsel representing the first respondent had taken this Court through the counter-affidavit and also had drawn attention of this Court to Sections 17 and 35 of the Act, in particular, and would maintain that in the light of the view expressed in W.P. No. 1382 of 2008 by the Division Bench of this Court and also the view expressed by the Apex Court in *Transcore Vs. Union of India (UOI)* and *Another*, , the writ petition is not maintainable and at the best the petition can be driven to invoke the effective alternative remedy available to the petitioner u/s 17 of the Act.

8. In the affidavit filed in support of the writ petition, it is stated that it appears from the impugned letter dated 31.07.2007 that the second respondent appears to have taken loan of Rs. 17,00,000/- by availing credit facility of cheque purchase for Rs. 20,00,000/- from Andhra Bank Branch at Srisailam vide CBP No. 2000/71 on fixed deposit of Rs. 20,00,000/- and the cheque which was purchased by the Bank was said to have been returned unpaid. The outstanding loan amount payable by the second respondent to the first respondent was Rs. 23,33,129/- as on 30.06.2002. Respondents 2 to 4 herein alleged to have mortgaged the premises bearing Nos. 13-1-96 (old 13/78) and 12-1-14 situated at papaiahpet Chaman, S.V.N.Road, Mattawada, by depositing title deeds. The first respondent by initiating proceedings under the provisions of the Act for recovery of the outstanding amount payable by the second respondent, issued the impugned notice u/s 13 of the Act read with Rule 4(5)(c)(iii) of the Rules, 2002.

9. It is further averred that the third and fourth respondents, who are the owners of the premises bearing Nos. 13-1-96 and 12-1-14 situated at Papaiahpet Chaman, Mettawada, Warangal District, leased out two portions from the

aforesaid premises in favour of the petitioner under lease deed dated 27.10.1995. According to the terms and conditions of the lease deed, the rent agreed to be paid by the petitioner to the third respondent was Rs. 500/- per month. The third respondent also received Rs. 50,000/- from him as an advance and the same was mentioned in the said lease deed. The petitioner has been residing in the aforesaid two portions from the date of taking them on lease peacefully without any interruption and paying the agreed rent to the third respondent.

10. It is also averred that Warangal Town, where the aforesaid premises located, is a Corporation and the provisions of Andhra Pradesh Building (Lease, Rent and Eviction) Control Act, 1960 (for short "the 1960 Act") are applicable to the residential and commercial buildings located within the limits of Warangal Municipal Corporation. Since the rent payable by the petitioner in respect of premises bearing Nos. 13-1-96(old 13/78) and 12-1-14 was Rs. 500/-per month, the lease granted in his favour is governed by the provisions of the 1960 Act. Thus he became a statutory tenant by virtue of the provisions of the 1960 Act. The petitioner, being a statutory tenant to the aforesaid premises, cannot be evicted without due process of law as enumerated in the 1960 Act.

11. It is further averred that the first respondent herein by exercising powers in the provisions of the Act is not entitled to take steps to take possession by evicting the petitioner from the aforesaid premises. The provisions of the Act are not applicable to the lease granted in his favour by operation of mandate contained in Section 31 of the Act. The petitioner is entitled to continue in the aforesaid premises till he is evicted by the competent authority in accordance with the 1960 Act. Therefore, the impugned notice dated 31.07.2007 issued by the first respondent is liable to be set aside. He further submit that he is in peaceful possession of the premises in question and that if he is dispossessed pursuant to the impugned notice, he will suffer irreparable loss and hardship.

12. In the counter-affidavit filed by the first respondent, preliminary objection had been raised relating to the maintainability of the writ petition and further specific stand had been taken that the petitioner has no locus standi to question the action of the Bank, which was taken strictly in accordance with the provisions of the Act. Further, the petitioner is not a borrower or in any way connected with the debt and hence he has no locus standi to file this writ petition. It is also stated that the so called alleged lease is not in existence at any point of time and it is now brought in with the collusion of the borrower only to defeat the rights of the Bank to recover the debt as per law. The allegations and contentions raised by the petitioner are concocted and to circumvent the law and hence on this ground also the writ petition is liable to be dismissed. Further, even assuming that such a lease do exist, but yet in view of Section 35 of the Act, this Act overrides all other Acts including the 1960 Act, as claimed by the petitioner. Hence, seen from any angle, the petitioner makes out no case and therefore, the writ petition deserves to be dismissed.

13. It is also stated that the first respondent does not admit relating to taking possession of the house premises. The ground portion of the house was taken possession by the Mandal Revenue Officer, Warangal as per the order of the District Collector, Warangal vide Ir.No:RC No. A7/5911/2005, dated 24.09.2005 on 15.09.2006 and he handed over the same to the first respondent on 15.09.2006. The Mandal Revenue Officer had not taken possession of the first floor of the mortgaged property as the same was occupied by the petitioner.

14. It is further stated that the second respondent had availed credit facility of cheque purchase for Rs. 20 lacs on 10.11.2000 from their Srisailam Branch vide CBP No. 2000/71 and deposited the amount in the bank as a fixed deposit for a period of 91 days. The second respondent has availed a deposit loan of Rs. 17 lacs against the deposit thus made with the Bank on the same day. The cheque purchased by the bank on 10.11.2000 was dishonoured by the drawee bank due to insufficient balance. After adjustment of the amount of the fixed deposit to the deposit loan and the CBP the outstanding liability was Rs. 23,33,129/- as on 30.06.2002. The above liability was secured by mortgage of the following properties:

a) Residential house bearing No. 13/78 (Door No. 13-1-85) situate at Papahpet Chaman, SVN Road, Warangal belonging to Sri A.Chandraiah, the third respondent herein and

b) Residential house bearing No. 12-1-14, situate at SVN Road, Warangal belonging to Smt.A.Saroja, the fourth respondent herein.

15. While so, the second respondent had defaulted in repayment of the amount due to the bank and the interest thereon. The account has been classified as NPA and respondents 2 to 4 are jointly and severally liable to pay Rs. 23,33,129/- as on 30.06.2002 with subsequent interest as per the agreement. Notices u/s 13(2) of the Act were given on 05.03.2003 to respondents 2 to 4 for repayment of the said amount. But, they did not give any response. Possession notice dated 01.09.2003 was also given to respondents 2 to 4 followed by newspapers publication dated 01.09.2003. The petitioner, if he is really the tenant, did not raise any objections at any point of time till date. At that point of time, the second and third respondents have filed W.P. No. 21889 of 2003 challenging the vires of the said Act and this Court vide order dated 17.10.2003 in W.P.M.P. No. 27319 of 2003 passed the following order:

pending the writ petition, the respondent bank may proceed pursuant to the impugned notices, but will not take any steps which have the effect of parting with the assets of the petitioners or creating any third party interest therein in any manner whatsoever.

In W.P. No. 21889 of 2003, the second and third respondents herein have never averred that the scheduled property was leased out to the petitioner herein nor the petitioner herein chose to implead in it. The bank has also filed a case before the Debts Recovery Tribunal, Hyderabad vide O.A. No. 73 of 2004 against

respondents 2 to 4. If at all the petitioner herein has got any grievance then he ought to have impleaded in the above O.A. before the Debts Recovery Tribunal and cannot straight away come before this Court by way of writ petition. The bank has also got published the notice in the news papers on 12.09.2003 u/s 13(2) read with Rule 2 of the Act. Further, W.P. No. 21889 of 2003 was dismissed by this Court vide order dated 22.06.2005 in view of the judgment of the Supreme court in Mardia Chemicals Ltd v. Union of India . The bank vide letter dated 08.08.2005 has requested the Collector, Warangal District to take possession of the schedule property and deliver the same u/s 14 of the Act. Consequently, notice dated 15.02.2006 was given to the second and third respondents to handover possession of the property. As per the District Collector's letter No:RC No:A7/5911/2005, dated 24.09.2005, the Mandal Revenue Officer, Warangal had taken possession of the ground floor portion of the house on 15.09.2006 and handed over the same to him on 15.09.2006. The Mandal Revenue Officer has not taken the possession of the first floor of the mortgaged property, as the petitioner occupied the same. On 31.07.2007, the bank officials went to the mortgaged property to take possession of the remaining portion along with the Mandal Revenue Officer and tenant notice dated 31.07.2007 served in registered post with acknowledgment due and pasted the same in front wall of the premises. From the above, it is clear that the petitioner is now trying to introduce a new facet, which was never there at any point of time. All this was done and is being done in collusion with respondents 2 to 4 only to avoid payment of debt and to circumvent the law. The petitioner's assertion that he is a tenant is false and is not borne out of any record and further this is proved by his prolonged silence during all these periods.

16. It is further stated that the contentions of the petitioner that he is a tenant and that he is entitled to continue in the said premises are not tenable in view of the over riding effect of the Act. In any case that contentions itself are false and are not borne out of any records. They were raised only for the purpose of avoiding payment of debt and the petitioner is being introduced by respondents 2 to 3 to circumvent the Act. The first respondent had made the account as Non Performing Account (NPA) as per RBI Prudential norms on 31.03.2001 and issued notice u/s 13(2) of the Act on 05.03.2003 for recovery of the due amount in the loan account and the same was acknowledged by the parties on 11.03.2003.

17. As submitted above, the notice, dated 31.07.2007, was addressed to respondents 2 to 4 and the petitioner has no locus standi to question the same. Respondents 2 to 4 have already questioned the act of the bank in taking recourse to the Act and they have lost and now the petitioner is being introduced only to circumvent the Act. Huge public money is locked up and it is not in the public interest to continue the stay. Further, the matter is already pending before the Debts Recovery Tribunal and the petitioner may as well raise all his objections before the said forum. Instead of doing that the petitioner has rushed to this Court with incorrect statement of facts. Hence, he prayed that the writ petition is liable to be dismissed.

18. Section 17 of the Act reads as hereunder:

17. Right to appeal: (1) Any person (including borrower), aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this Chapter, may prefer an appeal to the Debt Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken.

(2) Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal seventy-five percent of the amount claimed in the notice referred to in Sub-section (2) of Section 13: Provided that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

(3) Save or otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder.

19. Section 35 of the Act reads as hereunder:

The provisions of this Act to override other laws:- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

20. Further strong reliance was placed on Section 31(e) of the Act and the same reads as hereunder:

31. Provisions of this Act not to apply in certain cases:

(a) ...

(b) ...

(c) ...

(d) ...

(e) Any conditional sale, hire-purchase or lease or any other contract in which no security interest has been created;

(f) ...

(g) ...

(h) ...

(i) ...

21. Reliance was placed on the decision of the Division Bench of this Court in W.P. No. 1382 of 2008, wherein the Division Bench observed as hereunder:

In the circumstances, to protect the interest of the petitioner, it is appropriate to direct the petitioner to file an application within one week from today before the Bank and upon filing of such application, the Bank shall furnish a copy of the operative portion of the order within a period of one week so that the petitioner can avail the remedy of appeal. After receipt of copy of operative portion of the order from the Bank, the petitioner shall obtain appropriate order from the appellate authority within a period of one month. Till then, the petitioner shall not be disturbed. Subject to the above, the writ petition is dismissed. There shall be no order as to costs.

22. In TRANSCORE's case (2nd supra), the Supreme Court observed as hereunder:

50. The short question under this head is whether recourse to take possession of the secured assets of the borrower u/s 13(4) of the NPA Act comprehends the power to take actual possession of the immovable property.

51. Mr. N.C. Sahni and Mr. Pankaj Gupta, learned advocates appearing on behalf of the respective borrowers submitted that Section 13(4) of the NPA Act empowers the secured creditor to take possession of the secured immovable assets of the borrower on expiry of sixty days and notice served u/s 13(2) of that Act. It is pointed out that in many cases, the banks/FIs. have taken actual physical possession whereas in other cases they have taken only a symbolic possession. Learned advocates submitted that in Kalyani Sales Co., the High Court has rightly held that if physical possession is taken on expiry of sixty days, the remedy of application u/s 17 of the NPA Act by the borrower would become illusory and meaningless as the borrower or the person in possession would be dispossessed even before adjudication of the objections by the tribunal. Learned advocates further submitted that u/s 13(8), the bank/FI is prevented from selling the secured assets, if the dues of the secured creditor with all costs, charges and expenses are tendered to the secured creditor at any time before the date fixed for sale. Learned advocates pointed out that under Rule 8(1) of the 2002 Rules, a secured creditor is empowered to take possession as per notice appended in terms of Appendix IV. That notice cautions the borrower not to deal with the property. Learned advocates submitted that notice in terms of Rule 8(1) of the 2002 Rules operates as attachment. It contemplates a symbolic possession. Learned advocates submitted that actual physical possession of immovable assets can be taken under Rule 8(3), in cases where there is a vacant plot or a property which is lying unattended, but where the immovable property is in actual physical possession of any person, the person in possession cannot be dispossessed by virtue of a notice under Rule 8(1); that actual physical possession is to be delivered only after confirmation of sale under Rule 9(6) read with Appendix V under which the authorized officer is empowered to deliver the property to the purchaser free from all encumbrances in terms of Rule 9(9) of the 2002 Rules. Learned advocates, therefore, submitted that the High Court was right in holding that the borrower or any other person in possession of the

immovable property cannot be physically dispossessed at the time of issuing notice u/s 13(4) of the NPA Act so as to defeat the adjudication of his claim by the DRT u/s 17 of NPA Act, and that, physical possession can be taken only after the sale is confirmed in terms of Rule 9(9) of the 2002 Rules.

52. We do not find any merits on the above contentions for the following reasons. The word possession is a relative concept. It is not an absolute concept. The dichotomy between symbolic and physical possession does not find place in the Act. As stated above, there is a conceptual distinction between securities by which the creditor obtains ownership of or interest in the property concerned (mortgages) and securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt (charges). Basically, the NPA Act deals with the former type of securities under which the secured creditor, namely, the bank/FI obtains interest in the property concerned. It is for this reason that the NPA Act ousts the intervention of the courts/tribunals.

23. The learned Counsel for the respondents placed strong reliance on the decision of the Kerala High Court in *Business India Builders and Developers Ltd. Vs. Union Bank of India and Others*, wherein the Division Bench of the Kerala High Court observed as hereunder:

4. We may at the outset point out that respondents 1 and 2 have produced Annexure-R2 Declaration dated 20-1-1995 executed by the borrower in favour of the Bank. There is a specific clause in Annexure-R2 which reads as follows:

We hereby agree and undertake not to mortgage, charge, encumber, lease, dispose of or deal with the property mortgaged by me/us/the company to cover the guarantee during the continuance of the said facilities to M/s. Anupam by the bank.

Facts would indicate that contrary to the above mentioned stipulation in Annexure-R2 the petitioner was inducted as a tenant in the premises and now he has taken up the stand that he cannot be evicted under the provisions of the Securitisation Act but only under the provisions of the Kerala Buildings (Lease and Rent Control) Act. Supreme Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others* Etc. Etc., has upheld the validity of the Securitisation Act and the right to proceed against secured assets.

5. Sections 35 and 37 of the Securitisation Act in our view have got overriding effect over the Kerala Buildings (Lease and Rent Control) Act. The above mentioned provisions are extracted hereunder for easy reference:

35. The provisions of this Act to override other laws:- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

37. Application of other laws not barred:- The provisions of this Act or the rules

made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1958 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.

Section 35 specifically states that it would override other laws. Further Section 37 states that the provisions of the Securitisation Act shall be in addition to and not in derogation of certain acts mentioned therein. Laws which are not barred but in addition to the Securitisation Act has been enumerated in Section 37. A Division Bench of the Court in Shameem v. City Police Commissioner 2005 (4) KLT 70 wherein this Court has taken the view that the Securitisation Act has got overriding effect over other laws and tenant cannot claim possession over the mortgaged property. This Court has also had occasion to consider the question as to whether the provisions of the State Financial Corporation Act would prevail over the provisions of any other laws including the provisions of Kerala Buildings (Lease & Rent Control) Act. A Division Bench of this Court in M.O. Antony and Another Vs. Kerala Financial Corporation and Others, took the view that the provisions of the State Financial Corporation Act would prevail over the provisions of any other laws including the provisions of the Kerala Buildings (Lease and Rent Control) Act by virtue of Section 46-B of the State Financial Corporation Act, 1951. Section 46-B also operates in the same plane compared to Section 35 of the Securitisation Act. The principle laid down in the above mentioned decisions would apply to the facts of this case. We are therefore of the view that the Securitisation Act has got overriding effect over the Kerala Buildings (Lease and Rent Control) Act and parties are governed by the Securitistion Act and not by the Rent Control Act.

6. We are not impressed by the arguments of the counsel for the petitioner that the encumbrance enumerated in Rule 9(9) would not take in the occupation of the tenant. The word encumbrance cannot be given a restricted meaning "Encumbrance" means a liability which burdens the property, for example, lease, mortgage, easement, restriction, covenant, rent, charge etc. Encumbrance which can be carved out of ownership, generally are securities, leases, servitudes, trusts etc. It is generally a burden or charge upon the property. Lease is therefore an encumbrance over the property. In any view the borrower is bound by the terms and conditions stipulated in Annexure R2 dated 20.1.1995, by which he had undertaken that he would not lease out the property. Contrary to the said stipulation the tenant was put in possession and therefore by virtue of Securitistion Act there is no necessity of the Bank resorting to the provisions of the Rent Control Act for evicting the tenant. The authorized officer is to deliver the property to the purchaser free from encumbrances in terms of Rule 9(9). Occupants are not to be physically dispossessed at the time of issuing notice u/s 13. The physical possession can be taken by the Bank by following the procedure laid down in Section 14 or after the sale is confirmed. In this connection we may refer to the Bench decision of the Punjab and Haryana High Court in Kalyani

Sales Company and Another Vs. Union of India (UOI) and Another, . In view of the above mentioned circumstances we find no error in the judgment of the learned single Judge to be interfered by us in this appeal. Writ appeal therefore lacks merit and the same is dismissed.

24. In HUTCHISON ESSAR SOUTH LTD's case (1st supra), learned Judge of Karnataka High Court while dealing with Sections 13, 14, 17 and 35 of the Act and also Sections 69, 69A, 106 and 107 of the Transfer of Property Act, 1882 and certain provisions of the State Financial Corporation Act as well laid down that the banking institution can take only symbolic possession of the premises in question from a tenant.

25. The learned Counsel for respondents also placed reliance on Mehek Feed Industries Vs. Amrutlal Kataria and Others, , Trade Well, a Proprietorship firm and Mr. Suniel K. Mehta, Proprietor of Trade Well Vs. Indian Bank and The State of Maharashtra, AND Ms. Yukta Mookhey Vs. Bank of India and Others,

26. In the light of the view expressed by the Apex Court specified supra and also in the light of the view expressed by the Division Bench of this Court referred to above, this Court is of the considered opinion that these factual controversies cannot be effectively gone into in the present writ petition and hence liberty is given to the petitioner to invoke appropriate remedy as specified u/s 17 of the Act.

27. Accordingly, with the above observation, the writ petition is dismissed. There shall be no order as to costs.