(2006) 03 BOM CK 0061

In the Bombay High Court

Case No : Writ Petition No. 2544 of 2005

Ms. Yukta Mookhey APPELLANT

Vs

Bank of India and Others RESPONDENT

Date of Decision : 20-03-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 60(1)
Income Tax Act, 1961 — Section 269UE(1)
Maharashtra Rent Control Act, 1999 — Section 14, 24
Registration Act, 1908 — Section 17
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(13), 13(2), 14, 14(3)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 8(1)

Citation : (2006) 2 ALLMR 737 : (2006) 3 BomCR 26 : (2006) 4 MhLj 61

Hon'ble Judges : S.R. Dongaonkar, J;H.L. Gokhale, J

Bench : Division Bench

Advocate : A.K. Abhyankar and Kapil Moley, instructed by Markand Gandhi and Co, for the Appellant; Virendra Tulzapurkar and D.A. Das and D.A. Dube, for the Respondent

Judgement

H.L. Gokhale, J.—One Harmonics Fabrics Fashions Ltd. is the defaulting borrower of respondent No. 1-Bank to the tune of Rs. 56 lakhs which amount, with interest, has risen to Rs. 88 lakhs. Respondent No. 2, Sanjivani Properties Pvt. Ltd., was the guarantor in respect of the said amount and had mortgaged their flat at 401, 2-A, Excellency Co-op. Housing Society Ltd., Lokhandwala Complex, Andheri (West), Mumbai--400 053, in favour of respondent No. 1-Bank by depositing the title deeds way back in the year 1995. Since the amount was not refunded, respondent No. 1-Bank sent a notice to both these companies u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "Securitisation Act") for selling the said flat for recovery of the dues. Respondent No. 1-Bank sent a notice to the petitioner on 25.1.2003 since she was in possession of the said flat.

2. Thereafter, on filing an application before the concerned Magistrate u/s 14 of the Securitisation Act, possession notice was issued under the prescribed form in Appendix IV under rule 8(1) of the Security Interest (Enforcement) Rules, 2002. The said notice was addressed to Sanjivani Properties Pvt. Ltd. and was pasted on the secured premises on 15.6.2004. Being aggrieved by that notice, the petitioner herein filed an appeal to the Debt Recovery Tribunal u/s 17 of the Securitisation Act. The appeal was dismissed and a further appeal was carried to the Appellate Tribunal u/s 18(1) of the Securitisation Act. The DRAT dismissed that appeal by observing that the petitioner was not in occupation of the flat under a valid leave and licence agreement and that the same had been revoked by herself, by her notice dated 18.8.2003 addressed to the licensor Sanjivani Properties Pvt. Ltd. It is this decision of the DRAT dated 11.7.2005 which is sought to be challenged in this Writ Petition.

3. Amongst other submissions, the petitioner contends that the Securitisation Act does not consider the position of a third party in possession of the secured premises and that sections 13 and 14(3) thereof are ultra vires the Constitution.

4. This petition was admitted on 8.8.2005 and was made returnable for interim relief. An interim order has not been passed as such, but the physical possession of the concerned flat has not been taken. Two other Writ Petitions filed by Standard Chartered Bank (Writ Petition (Lodging) No. 1972 of 2005) and MTV Networks India Private Limited (Writ Petition No. 2445 of 2005) raising similar challenge have also been admitted by the same Bench almost at the same time in August/September, 2005. An interim relief against taking possession has been granted in those two petitions. Mr. Abhyankar appearing for the petitioner submits that the present petition is similar to those two petitions and prays for an interim order. On the other hand, Dr.Tulzapurkar appearing for respondent No. 1 submits that the facts herein are different and that is why no interim relief had been granted in the present matter, though the petitioner''s possession had been protected in view of the statement made by the counsel for respondent No. 1-Bank. We have, therefore, to consider the prayer for interim relief.

5. The case of the petitioner is that she is in possession of the concerned flat by virtue of the licence created in her favour by respondent No. 2, Sanjivani Properties Pvt. Ltd., in January 2002. She has deposited an amount of Rs. 7.5 lakhs for that purpose as a refundable deposit. This licence has been extended for 33 months by further agreement dated 16.12.2002. This amount has not been returned by Sanjivani Properties Pvt. Ltd., the licensor of the petitioner and the guarantor for the loan of the first respondent Bank. The petitioner is, therefore, contending that she is entitled to hold over to the property until this amount of Rs. 7.5 lakhs is refunded to her.

6. Mr. Abhyankar, learned counsel for the petitioner, does not dispute that the licence in the premises has been created in favour of the petitioner much

subsequent to mortgaging the same to the first respondent Bank. He submits that constructive possession of this secured asset has been taken on 30.12.2003, in pursuance of the notice dated 27.12.2003, but physical possession has not been taken. According to him, the same cannot be taken, disregarding the petitioner''s rights, since the notice to her u/s 13(2) of the Act was given on 25.1.2003 and she is in possession prior thereto. According to Mr. Abhyankar, the date of notice u/s 13(2) i.e. 25.1.2003 is the material date. It may be that the loan was secured by creating a mortgage in the year 1995 and that the licence in her favour is subsequent thereto, but in any case, it is created prior to 25.1.2003. According to him, a distinction is made between the secured assets wherein a third party interest has been created prior to the notice u/s 13(2) and those wherein such interest is created thereafter. He relies upon section 13(13) of the Securitisation Act which provides as follows:-

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor." According to Mr. Abhyankar, if any such transfer is created subsequent to this notice, it may not have any validity, in view of this provision, but transfers effected prior thereto will have to be treated differently. In the instant case, the notice u/s 13(2) has been given on 25.1.2003 but the licence has been created in favour of the petitioner prior thereto, first in January 2002 and then on 16.12.2002.

7. Mr. Abhyankar, therefore, submits that a due procedure is necessary before the petitioner is evicted from the premises concerned. As far as pre-existing leases are concerned, they are undoubtedly protected u/s 31(g) of the Securitisation Act which excludes the properties not liable to attachment or sale under the first proviso to sub-section (1) of section 60 of the C.P.C. Sub-clause (kc) of this first proviso refers to leases in residential buildings protected by rent control laws. The petitioner is a licensee and even in the case of licensees, a procedure is created under the Maharashtra Rent Control Act, 1999 for affording them a hearing u/s 24, before the possession is recovered from them. The submission of Mr. Abhyankar is that either such a procedure ought to be followed or the petitioner ought to be heard in the proceedings u/s 14 of this Act. Inasmuch as she is in the premises concerned prior to the notice u/s 13(2), she cannot be evicted physically by any other method. In his submission, she has a right to continue in the premises until her deposit of Rs. 7.5 lakhs is returned by her licensor and in his submission, the procedure followed is not the due process of law.

8. Mr. Abhyankar further submitted that the petitioner has subsequently filed a suit for a declaration of her status as a tenant in the Court of Small Causes. He has, however, fairly accepted that she has not been granted any interim injunction, though she has filed an appeal therefrom to the Appellate Bench of the Court of Small Causes wherein no order has been passed so far. In his

submission, the Debt Recovery Appellate Tribunal was in error in holding: (i) that her appeal was beyond time; and (ii) that she was not entitled to protection since she was not in occupation under a valid leave and licence. In his submission, this finding was outside the jurisdiction of the Debt Recovery Appellate Tribunal. Mr. Abhyankar submitted that a secured creditor can take possession of the assets only subject to the encumbrances. He drew our attention to the judgment of the apex Court in C.B. Gautam Vs. Union of India and Others, . The provisions of Chapter XX-C on compulsory acquisition of certain properties in the event of under-valuation came up for consideration before the apex Court in that matter. The Constitution Bench has struck down the expression "free from all encumbrances" appearing in sub-section (1) of section 269-UE of the Income Tax Act.

9. Dr.Tulzapurkar appearing for respondent No. 1, on the other hand, submitted that as can be seen from the foregoing narration, the petitioner was claiming a right to exercise a lien on the basis of a contract created under a security deposit agreement. He drew our attention to a judgement of a single Judge of this Court, S.H. Kapadia, J. (as the Hon''ble Judge then was in this Court) in The Hongkong and Shanghai Banking Corporation Limited Vs. Diamant Borat India Private Ltd. and another, . A suit was filed by the Bank for recovery of an amount of over Rs. 1.18 crores. It came to be decreed by a consent decree. The Bank moved an execution application and attached a flat of the defendants. The applicant was in possession thereof under a leave and licence agreement with the defendants and moved a Chamber Summons to make the execution of the warrant of attachment, subject to the rights of the applicant under the agreement. The parties had also entered into a security deposit agreement and the licensee had deposited Rs. 2.5 crores by way of security deposit. It was further provided that if the licensor does not return the security deposit, the licensee was not bound to vacate the premises.

10. It was submitted on behalf of the Hongkong Bank that the leave and licence agreement read with the security deposit agreement were in the nature of personal privilege and it could not be compared with the contractual obligation in favour of the purchase of an immovable property under a contract of sale. It was submitted that the right of the licensor comes to an end by virtue of sale of the property pursuant to the consent decree and the right of the applicant also came to an end because the applicant had only a personal privilege. The applicant can certainly sue the judgement-debtor for damages, but cannot claim retention of the immovable property on the ground that the amount of Rs. 2.5 crores was not being refunded. It would almost amount to extending the protection of leave and licence until the judgement-debtor refunded the security deposit. It was also submitted that the right was not created in the property since the agreement had not been registered u/s 17 of the Registration Act.

11. The learned single Judge accepted this submission that leave and licence agreement did not create any such interest in the property nor was there any

statutory protection to the applicant. It was only a personal privilege. Since the security deposit agreement was not registered, it was not open to the applicant to claim a lien under it. Dr.Tulzapurkar pointed out that in the present case also, the agreement had not been registered and no right would flow therefrom on the same analogy.

12. That apart, he drew our attention to the notice dated 18.8.2003 sent by the petitioner''s Advocate to Sanjivani Properties Pvt. Ltd., whereby she terminated the agreement dated 16.12.2002 by giving that notice under clause 21 thereon. Her Advocate specifically averred therein as follows:-

There was no other alternative but to terminate the said Agreement dated 16.12.2002 by giving notice as per Clause 21 thereof. In fact, our client had already intimated your Mr. Mahendra Baid of her desire to hand over vacant and peaceful possession of the said Flat to you against your refunding the amount of Security Deposit ....

This notice was sent in view of the notice received by her u/s 13(2) of the Act from respondent No. 1-Bank. In para 10 of this Advocate''s notice, she sought interest at the rate of 24% from 3.4.2003 on Rs. 7.5 lakhs and in para 14 threatened an action of winding up under the Companies Act.

13. Dr.Tulzapurkar, therefore, submitted that the case of the petitioner was similar to the applicant in the earlier mentioned case of Honkong and Shanghai Banking Corporation where the applicant wanted to hold on to the premises until the licence amount was refunded to him. That was turned down by the learned single Judge who held that such a licensee may take necessary steps to recover the amount but cannot continue in the premises to extend the leave and licence agreement until the licence amount was refunded. In his submission, that cannot be done in the present case also, particularly since the petitioner had herself terminated her licence. In his submission, the licence in the present case could not be considered as an encumbrance on the property to be protected in any manner whatsoever.

14. We have considered the submissions of the learned counsel. In the facts of the present case, it is quite clear that the petitioner wants to hold on to the property until the amount of Rs. 7.5 lakhs is returned by her licensor. As held in the above referred to Hongkong and Shanghai Banking Corporation Ltd.''s case, it is only a privilege of the licensee to remain in the premises. In the present case, the licence has been determined by the licensee herself. That being so, continuing her in the premises until refund of Rs. 7.5 lakhs would amount to extending that very leave and licence agreement. Respondent No. 1-Bank has nothing to do with the licence. Respondent No. 1-Bank had given notice to the secured creditor u/s 13(2) and thereafter followed it up with the appropriate steps u/s 14 of the Act.

It is true that the petitioner was in the premises prior to the issuance of notice u/s 13(2) on 25.1.2003. However, she has herself determined her licence by her notice dated 18.8.2003. Therefore, on the date on which she was asked to hand over possession by the notice of the Metropolitan Magistrate dated 8.6.2004, she had no legal authority to continue in the premises.

15. Therefore, in the facts and circumstances of the present case, no interim order can be granted restraining respondent No. 1-Bank from taking possession and the prayer in that behalf is rejected. It will be open to the petitioner to take her remedies against Sanjivani Properties Pvt. Ltd. for recovery of the amount of Rs. 7.5 lakhs. Prayer for interim order is, therefore, rejected.

16. Mr. Moley appearing for the petitioner prays that possession of the concerned flat may not be taken for a further period of six weeks since the petitioner would like to test this order in the apex Court. Mr. Das appearing for respondent No. 1 objects to this request. Even so, considering that the petitioner is still continuing in possession of this flat, we direct that the respondents will not take possession of the said flat for a further period of six weeks hereafter.