
(2006) 11 P&H CK 0088
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 19298 of 2005

Prem Gupta @ Prem Kumar

APPELLANT

Vs

Bank of Maharashtra and ors.

RESPONDENT

Date of Decision : 07-11-2006

Acts Referred:

Citation : (2007) 1 PLR 57 : (2007) 2 RCR(Civil) 256

Hon'ble Judges : Hemant Gupta, J

Advocate : Mr. Vishal Aggarwal, Advocate.Mr. A.P. Jagga, Advocate., Advocates for appearing Parties

Judgement

Hemant Gupta, J. (Oral)

1. The petitioner has sought a writ of mandamus directing respondent No. 1 to put the petitioner back into possession of the shop, the possession of which has been taken over by the Bank in terms of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter to be referred as "the Act").

2. It is the case of the petitioner that he is a tenant on the ground floor of property bearing Municipal No. BII 1543/53 whereas the remaining four storied building is in possession of the present owners. It is the case of the petitioner that he was inducted as a tenant by Mohinder Singh on 19.11.1996 at a monthly rent of Rs. 600/ vide rent note, a copy of which has been appended as Annexure P1. By virtue of registered Will dated 27.06.1994, Shop No. 53 in possession of the petitioner as a tenant was bequeathed by Mohinder Singh in favour of his grand sons Vikas and Satwinder Singh. Said Mohinder Singh died on 22.06.1997. Thereafter, the petitioner started paying rent to Vikas. Photocopies of the receipts have been appended as Annexure P2. On 20.5.1998, Vikas and Satwinder Singh sold the property to Sat Pal Abhlish on the basis of agreement to sell dated 6.1.1998. The said agreement stipulates possession of the petitioner as tenant in the said shop. The offer of the petitioner to pay rent to Sat Pal Abhlish was not accepted. Therefore, the cheques sent to Sat Pal Abhlish and

refused by him are with the petitioner. Sat Pal Abhlish started hotel named as M/s Hotel Shampion. It has come on record that the property was mortgaged on 30.04.1999 when Memorandum of Record of Equitable Mortgage and Mortgagor's Letter of Confirmation of Equitable Mortgage were executed. Since the borrower failed to make the payment of the due amount, the bank had taken possession of shop portion from the petitioner on 2.6.2005 and sealed the same with lock and key. It is the case of the petitioner that no notice was given to the petitioner before possession was taken and that the petitioner was not even allowed to remove his goods which were worth more than Rs. 2,50,000/-. It is pointed out by the petitioner that although loan of Rs. 7 lacs had been taken by respondent No. 2 for running of the hotel but the officials of the bank had sealed only the shop of the petitioner as tenant and rest of the four storied building where respondent No. 2 is running hotel has not been touched.

3. Respondent No. 2 had filed written statement denying the tenancy of the petitioner over the shop in dispute and asserted that the petitioner is a tenant in Shop No. 5556. It is alleged that rent note is a forged and fabricated document. However, respondent No. 2 has not denied the agreement to sell dated 6.1.1998 or the fact that the petitioner was recorded as the person in possession as tenant in the shop in the said agreement. It has been pointed out that the bank has every right to exercise power as provided under section 13(4) of the Act and no notice was required to be served upon the person who had hypothecated the property. The assertion that the possession of four storied building where respondent No. 2 is running his hotel has not been taken over was simply stated to be wrong and denied.

4. In the written statement on behalf of the bank, it has been stated that no right of the petitioner is infringed and that the petitioner has not suffered any loss. Still further, the petitioner has a remedy under section 17 of the Act. Still further, it has been pointed out that the possession of the mortgaged property was taken over by the bank from respondent No. 2 only and that the petitioner has not produced any document in support of the tenancy at the time of taking over of possession nor the petitioner alleged at any time that he was in possession at that time. Still further, it was alleged that rent note Annexure P1, cannot be taken into consideration being unregistered document. On merits, it has been pleaded that Sat Pal Abhlish purchased the property vide sale deed dated 19.05.1998 and mortgaged the same on 30.04.1999. After the death of Satpal Abhlish on 2.1.2002, his legal representatives automatically became mortgagors. Still further, no objection was received even when notice under Sections 13(2) and 14(4) of the Act was published in the columns of newspaper "Ludhiana Newslines" supplement of Indian Express and "Dainik Tribune". It has been further pleaded that the conduct of the petitioner does not support his action as he has not filed any objection to the notice under Section 13(4) of the Act nor he approached the Debt Recovery Tribunal or this Court till the time the bank took possession in May, 2005.

5. The writ petition was admitted by a Division Bench of this Court on 23.09.2005 and an interim order was passed in view of the fact that since the bank has not chosen to take any action against the principal borrower, a good case for grant of interim relief was made out and, therefore, the possession of the shop in dispute was ordered to be restored back to the petitioner. The said order has been set aside by Hon''ble Supreme Court in India in Civil Appeal No. 1020 of 2006 titled Bank of Maharashtra v. Prem Gupta and another, decided on 6.02.2006, with the direction to the bank to prepare a joint inventory of the articles in question and hand over possession of the same to the present petitioner. Learned counsel for the petitioner has handed over a list of inventory dated 23.02.2006 and the goods as per inventory have been handed over to the petitioner.

6. Learned counsel for the petitioner has relied upon judgment of this Court in C.W.P. No. 2550 of 2005, titled as M/s Kalyani Sales Company and another v. Union of India and another, 2006(1) RCR(Civil) 557 (P&H) : (20061)142 P.L.R. 1 decided on 08.12.2005 and later Division Bench decision of this Court in C.W.P. No. 3298 of 2006 titled as Arun Kumar Arora and another v. Union of India and others, 2006(3) RCR(Civil) 259 (P&H) : (20063)144 P.L.R. 1 decided on 31.05.2006, to contend that actual physical possession of the premises in dispute could not have been taken over by the bank without issuing notice to the petitioner so as to permit the petitioner to avail his remedy. Still further, it is argued that the action of the bank in taking over possession of the shop portion and permitting the mortgagors to continue with the possession of the remaining building consisting of four stories shows a collusive act of the respondents to dispossess the petitioner and to deprive him of the tenancy rights. Though respondent No. 2 has filed a detailed written statement denying the relationship of landlord and tenant between the parties but keeping in view the rent note Exhibit P1, rent receipts Exhibit P2 and the averment in the agreement of sale executed by vendors in favour of Satpal Abhlish dated 6.1.1998 which recognizes the possession of the petitioner is not a tenant in the premises in dispute. Respondent No. 2 has not denied the execution of agreement of sale or averments therein that the petitioner is a tenant in the premises in dispute. Therefore, denial of relationship of landlord and tenant between the parties in the written statement is selfserving statement which cannot be believed. The stand taken by the bank in the written statement that rent note is not admissible in evidence is devoid of merit. The delivery of possession coupled with payment of rent is sufficient to create tenancy. Apart from the said fact, the petitioner has appended rent receipts to prove the payment of rent of the shop in dispute. Still further, inventory of goods prepared in pursuance of the order of Hon''ble Supreme Court and the fact that such goods have been given to the petitioner leaves no manner of doubt that it is the petitioner who was in possession of the shop in dispute when its possession was taken over by the bank.

7. Learned counsel for the respondent has relied upon Para 42 of the judgment in M/s Kalyani Sales Company''s case (supra) to contend that the notice appended

as Appendix IV in terms of Rule 8(1) of the rules framed under the Act, in fact, notice to the public in general is again misconceived.

8. In M/s Kalyani Sales Company's case (supra), question No. 5. framed was to the following effect :

"Whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the Act is the power to take actual physical possession of immovable property ?"

9. In response to the said question framed, it was held that the borrower or any other person in possession of the immovable property cannot be physically dispossessed at the time of issuing notice under Section 13(4) of the Act so as to defeat the adjudication of his representation or objection by the Debts Recovery Tribunal. The physical possession can be taken by the bank or the financial institution by following the procedure laid down in Section 14 of the Act or after the sale is confirmed. After notice under Section 13(2) of the Act is served upon a borrower, right is given to the borrower to make any representation or objection. The secured creditor has to communicate the reason for nonacceptance of representation or objection to the borrower. On the failure of the borrower to discharge his liability, the secured creditor is permitted to take possession. It has been held in M/s Kalyani Sales Company's case (supra) and Arun Kumar Arora's case (supra), actual physical possession cannot be taken under Section 13(4) of the Act so as to make remedy under section 17 of the Act as a purposeful remedy. Therefore, the possession notice given in Appendix IV is like an attachment notice but that does not entitle the bank to dispossess a person in possession of the mortgaged property.

10. Later, a Division Bench of this Court in Arun Kumar Arora's case (supra) held to the following effect :

"18. This Court in the case of M/s Kalyani Sales Company and another (supra) had taken note of the judgment of the Hon'ble Supreme Court in Mardia Chemicals Ltd.'s case, (2004)138 P.L.R. 271 (S.C.) (supra) and thereafter has come to the conclusion that the secured creditor is entitled to take the symbolic possession of the property under Section 13(4) of the Securitization Act, 2002, so that application under Section 17 of the Act, does not become illusory or meaningless. The judgment in M/s Kalyani Sales Company's case (supra) applies to the present case, as the right of the petitioners to have adjudication of the matter, is sought to be defeated by taking physical possession of the property. The learned Debt Recovery Tribunal was right in ordering that the possession be delivered back to the petitioners. During the pendency of the application under Section 17 of the Act, as the petitioners were admittedly in physical possession of the property and running their business from the said property. Section 14 of the Securitization Act, 2002 cannot be interpreted to defeat the rights granted to a party, who under Section 17 of the Act is entitled to have their objections adjudicated. A reading of Section 14 of the Securitization Act, 2002 itself makes

it clear that is only when the possession of asset is required to be taken by the secured creditor or the same is required to be sold or transferred by the secured creditor under the provisions of the Act, it is then that an application can be made. Section 14 of the Act has to be read with the provisions of Sections 34 and 17 of the Act and cannot be interpreted to defeat the right of the parties under Section 17 of the Act, as is sought to be done by the Bank and, therefore, we do not agree with the contention raised by the respondent Bank or with the findings recorded by the Debts Recovery Appellate Tribunal that the possession has been taken in consonance with the law laid down by this Court."

11. In view of aforesaid enunciation of principle of law, I am of the opinion that possession has been taken over by the bank in violation of the law laid down by the Division Bench of this court in M/s Kalyani Sales Company's case (supra) and Arun Kumar Arora's case (supra).

12. Consequently, the writ petition is allowed. The respondent bank is directed to restore the possession of the shop in question to the petitioner forthwith giving liberty to the petitioner to challenge the action of the bank by an appropriate application before the Debts Recovery Tribunal in terms of Section 17 of the Act.