(2008) 01 KL CK 0053

In the High Court Of Kerala

Case No : Writ Petition (C) No. 25859 of 2007

The Kottakkal Co-op. Urban Bank Ltd. APPELLANT

Vs

T. Balakrishnan RESPONDENT

Date of Decision : 25-01-2008

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 13(6), 13(8), 14
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 4, 6

Citation : AIR 2008 Ker 179 : (2008) 4 BC 480 : (2008) 2 ILR (Ker) 355 : (2008) 2 KLJ 83 : (2008) 2 KLT 456

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : Devaprasanth P.J, for the Appellant; K. Narayanan and P.K. Ravikrishnan, GP, for the Respondent

Final Decision : Allowed

Judgement

Thottathil B. Radhakrishnan, J.—On account of the first respondent''s liability under a security agreement, in terms of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, hereinafter, the "Act", proceedings were initiated by the petitioner u/s 13(2) of that Act on 9-10-2005. On 15-2-2006, the petitioner, the secured creditor, took what can be called "symbolic possession" of the property leaving the first respondent in defacto physical possession. On 21-3-2006, notice of such action was published. On 27-7-2006, the property was brought to sale. It was bid by a third party. That sale was confirmed on 3-3-2007. Sale certificate was issued in favour of the auction purchaser on 2-4-2007. Thereafter, the petitioner, the secured creditor moved Ext. P1 petition on 9-5-2007 before the Chief Judicial Magistrate u/s 14(1) of the Act. The Chief Judicial Magistrate issued the impugned Ext. P2 order holding that, going by the recitals in Ext. P1, the secured creditor, the writ petitioner, had already taken possession of the secured asset under the provisions of the Act and had sold the same. Taking the view that the provisions contained in Section 14 of the Act only enables the secured creditor to seek assistance of the Court to take possession or control of the property for effecting sale it was held that such provision cannot be invoked after the petitioner had, going by its pleadings, taken possession, effected sale and issued sale certificate. It was concluded that there is, therefore, no need to take possession invoking the powers u/s 14 of the Act. However, it is also opined in the impugned Ext. P2 that, if the secured creditor had not obtained possession and only a symbolic sale was effected, it could seek the assistance of the Court u/s 14. Tying down the secured creditor, the writ petitioner, to the allegation in Ext. P2 petition that it had taken possession, the application u/s 14 was dismissed as not maintainable. Hence, this writ petition.

2. There is no controversy between the secured debtor and the secured creditor regarding the sequence of events narrated in the preceding paragraph. The fact that the secured debtor was not actually dispossessed and had continued to be in defacto possession even after the issuance of notice u/s 13(2), followed by publication in terms of Section 13(4)(a) read with Rule 4 of the Security Interest (Enforcement) Rules, 2002, is not disputed. The undisputed situation is that the first respondent continues to be in actual possession though publication has been made regarding dispossession. The question that arises for decision in this, context, is as to whether remedy by way of recourse to Section 14 of the Act is available to take actual possession of the secured asset from a secured debtor after completion of sale on the basis of symbolic possession taken on the basis of notice u/s 13(4) of the Act read with Rule 6 of the Rules.

3. In support of the writ petition, it is argued that the provision in Section 13(4)(a) is an enabling one and does not preclude symbolic possession being taken, to be followed by sale. It is pointed out that Section 13(8) provides that if the dues of the secured creditor are tendered at any time before the date fixed for sale or transfer, the secured assets shall not be sold or transferred by the secured creditor. It is further argued that the Scheme of the Rules and the Act does not preclude a sale before actual physical possession is taken. It is ultimately urged that it is only beneficial to the debtor that actual possession is permitted to continue with him even while proceedings are on, on the strength of constructive possession or symbolic possession in exercise of authority u/s 13(4) of the Act.

4. Per contra, it is argued for the first respondent that a plain reading of Section 13(4)(a) and (6) would show that a sale or transfer by the secured creditor with the benefit of the vesting provision contained in Sub-section (6) of Section 13 would come into play only after actual possession is taken. Accordingly, it is argued that in the case in hand, the possession having been taken and the sale completed, the ownership of the secured asset sold off in auction now rests with the third party auction purchaser in whose favour sale certificate has been issued and therefore the petitioner cannot be considered to hold any right to initiate action u/s 14(1) of the Act, which enjoins the aid of the Chief Metropolitan

Magistrate or the District Magistrate, as the case may be, for taking possession or control and such aid is unavailable after the sale is completed. In support of this contention, the learned Counsel attempted to point out that the decision of the Punjab and Haryana High Court in Kalyani Sales Company and Another Vs. Union of India (UOI) and Another, stands overruled by the Apex Court in Transcore Vs. Union of India (UOI) and Another, . He accordingly argued that going by the decision of the Apex Court in Transcore''s case (supra), the concept of symbolic possession qua actual possession have been found to be not available within the scheme of the Act. In support, decisions of this Court in Aboobacker Vs. Punjab National Bank, and Business India Builders & Developers Ltd. v. Union Bank of India 2007 (2) KLT 237 were referred.

5. At the outset, it has to be noticed that even according to the first respondent, the secured debtor, the secured debt was put, to sale and was bid by a third party auction purchaser. That sale was confirmed and sale certificate issued to the third party. This means that the sale, as such, is not under challenge. The first respondent also does not dispute the legality of that sale. Therefore, it may not be necessary to go into the question as to whether the sale is vitiated on account of failure to take actual possession before putting the security interest to sale. But, even if that has to be examined, it could be seen that what Section 13(4)(a) authorises is to take possession of the secured assets of the borrower, including the right to transfer by way of lease, assignment or sale, for releasing the secured asset. Going over to Section 13(6), any transfer of the secured asset by the secured creditor, after taking possession thereof u/s 13(4), shall vest in the transferee, all rights in, or in relation to, the secured asset so transferred as if the transfer has been made by the owner of such secured asset. Therefore, to complete a transfer by a secured creditor in favour of a third party, the necessary pre-condition is that possession is taken in terms of Section 13(4) of the Act. A close reading of Section 13(4)(a) would show that what is authorised thereby is the taking of possession of the secured asset, including the right to transfer. While taking over of possession is authorised and such taking over of possession includes the taking over of the right to transfer, there is no stipulation in Section 13 or elsewhere that the right to transfer can be exercised only after taking over the actual physical possession or that the exercise of taking over possession u/s 13(4) shall be of actual physical possession, resulting in complete dispossession of the secured debtor, defacto and dejure. It has also to be immediately considered as to what could be the policy of the Scheme contained in Section 13. The power is given to the secured creditor to take action without the intervention of the court, to reach at the secured assets, to liquidate the secured debt and satisfy itself, by recovery of the funds involved in the commercial transaction. The different provisions in the subsections u/s 13 would show that a vigilant and earnest secured debtor has good number of opportunities to recoup by liquidating the outstandings, including accrued incidentals, in terms of the statutory provisions, to save the property that would have been a secured asset from the clutches of statutory action, including auction. The predominant

purpose of the legislation in hand is to provide speedy recovery. It would always be well within the wisdom and freedom of the secured creditor as to whether in a given case it would, in exercise of authority u/s 13(4), take over dejure and defacto possession at one go, or whether it would let the secured debtor to continue to hold defacto possession after taking over only dejure possession, by publication in accordance with the Act and Rules, to aid the secured creditor to proceed with the sale u/s 13 of the Act. As already noticed, it is not the requirement of Section 13(6) or any of the other provisions of the Act that a transfer by a secured creditor after taking over possession could be only after taking over actual possession, defacto. The right to take possession invoking the provisions u/s 13(4)(a) is provided in such wide terms that it gives fair room for the secured creditor to decide as to whether it would first proceed only to take dejure possession. At any rate, a secured debtor, continuing to hold on defacto possession on the ground of not having been dispossessed, would only be one who would have been given the advantage to continue to hold on defacto possession for the time during which different steps would have followed, resulting in the confirmation of sale in favour of third party auction purchaser. In the absence of any jurisdictional requirement for defacto possession to make a transfer in terms of Section 13(6), there is no legal jurisdictional error in the sale being held by the secured creditor on the strength of dejure possession. Such a sale or transfer would have the complete support of Section 13(6).

6. The instant case would show that Section 13(2) notice issued on 19-10-2005 culminated in the issuance of sale certificate only on 3-2-2007. Therefore no injustice whatsoever is sustained by the secured debtor by having been in actual possession of the property.

7. While there is a vesting of right, exclusively with the transferee under a sale in terms of Section 13(6), such vesting of sale gives the transferee the right to demand the secured creditor for actual physical possession. Such vesting, by operation of Section 13(6), is in relation to the secured asset as if the transfer had been made by the owner of such secured asset. Such deemed vesting, by operation of law, gives the entitlement to the transferee in defacto possession by dispossessing the secured debtor who continues in defacto possession only by the choice of the secured creditor to take only dejure possession, leaving the secured debtor with actual possession. Therefore, the secured creditor, who has taken over dejure possession continue to be a secured creditor, duty bound to give the transferee defacto possession and such liability of the secured creditor gives sufficient standing to sustain the application for dispossession of the secured debtor, of defacto possession over the security interest, by recourse to Section 14 of the Act. On this count also, a secured creditor who has not taken defacto possession but has proceeded and completed transfers on the basis of dejure possession is entitled to apply for assistance of the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, for taking over actual physical possession from the Secured debtor.

8. The result of that proceedings would be that the secured debtor would be dispossessed of actual possession and defacto possession would be taken by the secured creditor, who would then, duty bound, as he is, transfer such defacto possession to the transferee of rights u/s 13(6) of the Act.

9. For the aforesaid reasons, the impugned order does not stand. The same is accordingly set aside and it is declared that the application of the writ petitioner (Ext. P1) is maintainable. The learned Chief Judicial Magistrate would accordingly take back Ext. P1 application and proceed with the same in accordance with law and in the light of what is stated herein. Writ petition is allowed. No costs.

