B.D. Agarwal and anr. Vs. Official Assignee, High Court and anr.

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SooperKanoon Citation : sooperkanoon.com/912924

Court : Mumbai

Decided On : Mar-28-2011

Judge : Ranjana Desai; Ranjit More, Jj.

Acts : Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), 2002 - Sections 13(2), 13(4), 13(1), 17, 18; Presidency Towns Insolvency Act, 1909 - Section 17

Appeal No. : APPEAL NO.106 OF 2010 IN NOTICE OF MOTION NO.67 OF 2009 IN INSOLVENCY PETITION NO.46 OF 2002

Appellant : B.D. Agarwal and anr.

Respondent : Official Assignee, High Court and anr.

Advocate for Pet/Ap. : Mr. S.A. Tawate, Adv.

Judgement :
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1. Admit. The respondents waive service. By consent of the parties, taken up for hearing, forthwith.

2. The appellants have challenged in this appeal order dated 1/12/2009 passed by learned Single Judge of this court. By the impugned order, learned Single Judge has disposed of Notice of Motion No.67 of 2009, Notice of Motion No.68 of 2009 and Report No.8 of 2009 submitted by the Official Assignee. The present appeal

revolves around Flat No.305, Blase View 'A' Co-operative Housing Society Limited, Matherpada Road, Amboli, Andheri (West), Mumbai 400 058, (for short, "the said flat").

3. Notice of Motion No.67 of 2009 was taken out by the appellants - Krystal Stone Exports Limited, inter alia, praying that the Official Assignee be directed to restore the possession of the said flat to the appellants. In the affidavit in support of the notice of motion filed by one Popat Lal Kanadia, who claims to be the Director of the appellants, it is stated that the said flat is owned by Mrs. Sangeeta Agarwal; that it is mortgaged to Central Bank of India (for convenience, "Central Bank"), who is the secured creditor of the appellants; that the said flat is given to the appellants by Mrs. Sangeeta Agarwal on a lease agreement on 11/4/1996 for a period of 15 years and that the said agreement is in force upto 10/4/2011. It is further stated that, therefore, the Official Assignee had no reason to take physical possession of the said flat because it falls outside the purview of the Presidency Towns Insolvency Act, 1909. It is further stated that the said flat being a mortgaged property, cannot be sold or used by the Official Assignee for any reason whatsoever; that the secured creditor who is a bank has not relinquished its charge on the said flat which is mortgaged with the bank and, therefore, the Official Assignee has no right to take possession thereof. A categorical statement is made in the affidavit that the appellants were in lawful possession of the said flat and by putting its own lock on the said flat on 9/9/2009, the Official Assignee has disturbed the appellants' lawful possession.

4. Notice of Motion No.68 of 2009 was taken out by the Central Bank having its Branch Office at Jaipur, Rajasthan praying that the Official Assignee be directed to hand over the said flat to the Central Bank in order to sell the same under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, the SARFAESI Act"). It is also prayed that the Official Assignee may be restrained from selling, alienating, dealing with and creating any third party right in the said flat. In the affidavit in support of this notice of motion filed by one Narendra Khandelwal, Senior Manager, Central Bank, it is stated that Mrs. Sangeeta Agarwal and her husband Bansi Dhar Agarwal are declared as Insolvents pursuant to the order passed by this court and pursuant to the said

order, the Official Assignee has taken over possession of the said flat. It is further stated that the Central Bank has given credit facilities to the appellants and in order to secure the said credit facilities, the said flat has been mortgaged by Mrs. Sangeeta Agarwal in favour of Central Bank. It is further stated that the parties have not paid the outstanding dues and, their accounts have become Non Performing Assets (for short, "the NPA"). It is further stated that the Central Bank had filed original application in the Debts Recovery Tribunal (for short, "the DRT") against Insolvents at Jaipur being Original Application No.234 of 2002 to recover a sum of Rs.3,91,44,184.48 with further interest. The said original application was decreed on 31/3/2006. The Central Bank filed an execution petition and a demand notice came to be issued to the Judgment Debtors. Pursuant to the order passed by the Recovery Officer, the Central Bank is stated to have taken possession of the said flat from the Official Assignee. The Insolvents preferred an appeal before the Debt Recovery Appellate Tribunal (for short, "the DRAT"), Delhi, against the ex-parte decree and the DRAT set aside the ex-parte decree and directed the DRT to rehear the matter which is pending before the DRT, Jaipur. Pursuant to the order passed by the Recovery Officer dated 24/8/2009, the Central Bank returned the possession of the said flat to the Official Assignee. It is further stated that pending the DRT proceedings, the Central Bank initiated action under the SARFAESI Act. It issued notice under Section 13(2) of the SARFAESI Act, which was followed by notice under Section 13(4) thereof. Since, the said flat was in possession of the Official Assignee, the Central Bank informed the Official Assignee about the action taken under the SARFAESI Act and requested the Official Assignee to hand over possession of the said flat to the Central Bank in order to sell the same. However, the Official Assignee did not respond to the Central Bank's letter dated 19/9/2009 to the above effect. According to the Central Bank, as on 2/10/2009, when the affidavit was filed the outstanding dues of the Central Bank against the Insolvents are more than Rs.4 crores. Therefore, Notice of Motion No.68 of 2009 was taken out by the Central Bank praying that the Official Assignee be directed to hand over possession of the said flat to them.

5. In his report being Report No.8 of 2009, the Official Assignee has stated that Mrs. Sangeeta Agarwal and her husband Bansi Dhar Agarwal were adjudicated as Insolvents by order dated 3/6/2003 and, therefore, the Official Assignee took

symbolic possession of the said flat standing in the name of Mrs. Sangeeta Agarwal. On 10/1/2008, DRT, Jaipur in Original Application No.25 of 2006 filed by the Central Bank, directed that the symbolic possession of the said flat be handed over to the receiver of the DRT. Accordingly, the possession was handed over to the receiver of the DRT on 22/1/2008. By order dated 24/8/2008, DRT, Jaipur, again directed that the possession of the said flat be handed over to the Official Assignee. The Official Assignee has submitted that Lease Agreement dated 11/4/1996, purportedly entered into by and between the Insolvent Mrs. Sangeeta Agarwal and M/s. Krystal Stone Export Limited under which Mrs. Sangeeta Agarwal has leased out the said flat to the Appellants is not registered. The Official Assignee has stated that as per Clause 10 of the terms and conditions of the said Agreement, in case, the lessee does not perform and/or carry out the terms and conditions of the agreement or commits defaults in payment of rent, the lessor shall be entitled to terminate the agreement. The Official Assignee has further stated that as per the xerox copies of the Society's letter dated 10/1/2001 and 15/2/2001, the lessee has not paid the Society's dues and is in arrears. It is the Official Assignee's case that in view of the fact that the order of adjudication is passed by this court against the Insolvent Mrs. Sangeeta Agarwal, the Official Assignee has stepped into the shoes of the said Insolvent and as assignee of the assets and estates of the Insolvent Mrs. Sangeeta Agarwal, he has decided to terminate Lease Agreement dated 11/4/1996. The Official Assignee has, therefore, prayed that the court may pass an order authorizing the Official Assignee to terminate the said lease agreement. The Official Assignee has further prayed that he may be permitted to hold the possession of the said flat which is handed over to him by the receiver of the DRT, Jaipur.

6. By the impugned order, learned Single Judge has ordered the Official Assignee to hand over the said flat to the Central Bank because the Central Bank being a secured creditor, has initiated action under the SARFAESI Act and has issued notice under Section 13(2) of the SARFAESI Act and has also issued notice of possession dated 16/2/2009.

7. So far as the appellants' notice of motion is concerned, learned Single Judge has observed that the said lease agreement is entered into by Insolvent No.2 Mrs.

Sangeeta Agarwal, who is the wife of Insolvent No.1 Bansi Dhar Agarwal, the director of the company; that the lease agreement is not registered and that the lease rental is only Rs.1/- per month. It is further observed that since the Official Assignee has taken only symbolic possession of the said flat, if the appellants have any grievance, the appellants will have to take recourse according to law. Learned Single Judge has further observed that upon the order of adjudication, the property has vested in the Official Assignee. The Official Assignee was, therefore, granted permission to terminate the lease agreement.

8. Written arguments have been filed on behalf of the appellants. Mr. Tawate, counsel for the appellants has reiterated the submissions incorporated in the written arguments. He submitted that the Official Assignee's report dated 30/9/2009 states that he had merely taken symbolic possession of the said flat. Counsel submitted that learned Single Judge directed that possession of the said flat be handed over to the Central Bank by the Official Assignee. The Official Assignee though had stated in his report that he had taken symbolic possession of the said flat, he handed over physical possession thereof to the Central Bank by breaking open the lock of the said flat. Thus, the possession was handed over without following due process of law. Counsel submitted that by handing over possession of the said flat to the Central Bank, the Insolvency Court has virtually passed an eviction order which it could not have passed because only the Small Causes Court has exclusive jurisdiction to pass such an order. In this connection, counsel relied on the judgment of this court in Ramesh Kumar Jhamb & Anr. v. Official Assignee, High Court, Bombay & Ors. AIR 1993 Bom. 374. Counsel submitted that the Official Assignee has not filed any reply to Notice of Motion No.67 of 2009 taken out by the appellants and, therefore, the averments made by the appellants have been admitted. Counsel submitted that learned Single Judge dismissed Notice of Motion No.67 of 2009 without giving any valid reasons for the dismissal. Counsel submitted that the Central Bank has not produced any evidence to substantiate its contention that the said flat was mortgaged to it and, therefore, the finding of learned Single Judge that the bank is a secured creditor is not supported by any evidence and is patently erroneous. Counsel submitted that permission granted to terminate the lease agreement by learned Single Judge is illegal because whether the lease agreement is valid or not can only be decided by

the Small Causes Court. Counsel submitted that the Central Bank did not make the appellants party to Notice of Motion No.68 of 2009 though the appellants were lawful occupants of the said flat and, therefore, the said notice of motion ought to have been dismissed for misjoinder of the party. Counsel submitted that the impugned order passed by learned Single Judge who was the Insolvency Judge granting possession of the said flat to the Central Bank does not fall under the framework of insolvency proceedings and, therefore, learned Single Judge should not have entertained Notice of Motion No.68 of 2009 filed by a stranger to the insolvency proceedings. Counsel relied on the order passed by DRT, Jaipur dated 5/11/2009. Counsel submitted that the Central Bank cannot file two recovery proceedings one at DRT, Jaipur and another at Bombay. Counsel also relied on judgment of the Andhra Pradesh High Court in Khaja Atheequallah & Ors. v. Union Bank of India, AIR 2010 AP 65. Counsel submitted that in the circumstances, the impugned order be set aside.

9. We have permitted learned counsel Mr. Jain to appear for the Official Assignee and assist us. He has accordingly assisted us. Mr. Das, learned counsel for the Central Bank and Mr. Jain, learned counsel for the Official Assignee submitted that no interference is necessary with the impugned order because it is perfectly legal and justified. Written submissions have been filed by Mr. Jain.

We have carefully perused the same. Compilation of several orders passed in respect of the Insolvents have been produced by Mr. Jain as directed by this court. We have carefully perused these orders.

10. Admittedly, learned Single Judge of this court by his order dated 3/6/2003 adjudged B.D. Agarwal, Director of the appellants and his wife Sangeeta Agarwal Insolvents. As per provisions of Section 17 of the Presidency Towns Insolvency Act, 1909, all the assets and properties of the Insolvents vested in the Official Assignee on that day.

11. The affidavit filed on behalf of the Central Bank by its Senior Manager Mr. Khandelwal discloses that the appellants have availed of various credit facilities from the Central Bank, Tank Road Branch, Jaipur and the said flat has been mortgaged by Insolvent Mrs. Sangeeta Agarwal to the Central Bank. It must be

stated here that in the affidavit in support of the notice of motion taken out by the appellants, the appellants have admitted that the said flat is mortgaged to the Central Bank and the Central Bank is the secured creditor. Surprisingly, despite this clear averment made in the affidavit, a statement is made before us on behalf of the appellants that the Central Bank is not a secured creditor. We un-hesitantly reject this submission. Going back to the affidavit of Mr. Khandelwal, it is further stated in the affidavit that the appellants have not paid the outstanding dues of the Central Bank and, therefore, its account has become a NPA. Proceedings filed by the Central Bank for recovery of its dues are pending in DRT, Jaipur. Pending those proceedings, the Central Bank has initiated proceedings under the SARFAESI Act against the appellants and the Insolvents B.D. Agarwal and Mrs. Sangeeta Agarwal. It is asserted in the affidavit that the Central Bank has issued notice under Section 13(2) and Section 13(4) of the SARFAESI Act.

12. In Transcore v. Union of India & Anr. (2008) 1 SCC 125, the Supreme Court was inter alia considering the question whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the SARFAESI Act comprehends the power to take actual possession of the immoveable property. The Supreme Court considered the provisions of the SARFAESI Act and held that it deals with crystalized liabilities. The Supreme Court held that Section 13(2) proceeds on the basis that the borrower is under a liability; that the debt has become due and that the borrower's account in the books of account of the bank is classified as substandard. The Supreme Court observed that Sections 13(1) and 13(2) of the SARFAESI Act proceed on the basis that the security interest in the bank needs to be expeditiously enforced. The Supreme Court further held that there is no dichotomy between constructive possession and physical possession. In view of this, in our opinion, learned Single Judge was right in directing the Official Assignee to hand over the said flat to the Central Bank. Learned Single Judge has not determined any question, which the court of exclusive jurisdiction created under the Rent Act, can decide and, hence, Ramesh Kumar Jhamb's case has no application to this case. Learned Single Judge has rightly observed that if the appellant has any grievance against the Central Bank, it would be open to the appellant to take recourse according to law. In this connection, reference must be made to Section 17 of the SARFAESI Act which gives right to any person,

including borrower to file an appeal to the DRT if he is aggrieved by any measures taken under Section 13(4) of the SARFAESI Act. Section 18 provides for an appeal against the order passed by the DRT. Apart from Transcore, there are several other judgments of the Supreme Court in which the importance of the expeditious and effective nature of the remedies under Sections 17 and 18 of the SARFAESI Act is stressed. In this connection, we may usefully refer to Mardia Chemicals Ltd., etc. etc. v. Union of India & Ors., etc. etc. AIR 2004 SC 2371; United Bank of India v. Satyawati Tondon & Ors. AIR2010 SC 3413 and Kanaiyalal Lalchand Sachdev & Ors. v. State of Maharashtra & Ors. in Criminal Appeal Nos. 338-340 of 2011 dated 17/2/2011.

13. We must note that an incorrect statement is made by the appellants in the affidavit in support of the Notice of Motion No.67 of 2009 that on 9/9/2009, the appellants were in lawful possession of the said flat. In the order dated 1/8/2006 passed by learned Single Judge (Dr. D.Y. Chandrachud, J.) while dealing with Notice of Motion No.54 of 2006 taken out by the appellants for annulment of insolvency proceedings, it is observed that the Official Assignee was informed by the Co-operative Housing Society by letter dated 20/3/2006 that the 1st Insolvent i.e. B.D. Agarwal had attempted to forcibly break open the said flat and he was prevented by the Managing Committee from doing so. This conduct of B.D. Agarwal is not consistent with the appellants' claim of being in lawful possession of the said flat on 9/9/2009. So far as the Official Assignee's claim is concerned, in our opinion, Section 13(7) of the SARFAESI Act can take care of it.

14. Reliance placed by learned counsel on the judgment of the Andhra Pradesh High Court in Khaja Atheequllah is misplaced because, though in this judgment, the Andhra Pradesh High Court has considered the provisions of Sections 13 and 14 of the SARFAESI Act, attention of the court was not drawn to the judgment of the Supreme Court in Transcore which has discussed the provisions of the SARFAESI Act in depth and held that the SARFAESI Act deals with crystallized liability. Scope of remedy under Sections 17 and 18 of the SARFAESI Act is also not discussed by the Andhra Pradesh High Court. It is pertinent to note that in M/s. Trade Well & Anr. v. Indian Bank & Anr. 2007 (1) Bom.C.R. (Cri.) 783, a Division Bench of this court to which one of us (Smt. Ranjana Desai, J.) was a party, has

after referring to Transcore and Mardia Chemicals held that remedy provided under Section 17 is an efficacious alternative remedy available to the third party as well as to the borrower. Referring to the observations of the Supreme Court in Mardia Chemicals Limited, this court has observed that proceedings under Section 17 of the SARFAESI Act are in lieu of a suit and, therefore, all possible grievances can be raised before the DRT. This would obviously include grievance about jurisdiction.

15. So far as the grievance of the appellants that the lease agreement is wrongly terminated is concerned, we have already noted that after the adjudication order was passed, the property vested in the Official Assignee under Section 17 of the Presidency Towns Insolvency Act, 1909. Clause 10 of the said agreement entitles the owner to terminate the said agreement if there is breach of any of the terms and conditions of the said agreement. Since according to the Official Assignee, the appellants had failed to pay the Society charges, the Official Assignee rightly sought permission from learned Single Judge to terminate the said agreement. It is pertinent to note that what weighed with learned Single Judge is the fact that the lease agreement is entered into by Insolvent 2 Ms. Sangita Agarwal, who is or, in any event, was at the material time, wife of Insolvent 1, who was a director of the company; that the lease agreement which is for a period of 15 years has not been registered and that the lease rental is an amount of Rs.1/- per month. Learned Single Judge, therefore, cannot be faulted for having granted permission.

16. Admittedly, the applicants have filed a suit in the Small Causes Court at Bombay being RAD Suit No.939 of 2010 in which it is prayed that the appellants may be declared as tenant in respect of the said flat and that the termination of the lease agreement dated 11/4/1996 by the Official Assignee is illegal and valid and it be set aside. It is, therefore, not proper for us to express any opinion on this issue. Therefore, we do not want to say anything further on this issue.

17. In the ultimate analysis, we are of the opinion that there is no merit in the appeal and it will have to be dismissed. Before closing, we must mention that reckless allegations were made at the instance of the appellants by the counsel for the appellants against counsel for the Central Bank and counsel for the Official

Assignee. This compelled us to ask for various orders passed by this court against the Insolvents. We have gone through those orders. We find that reckless allegations were also made by the appellants against learned Single Judge of this court (V.C. Daga, J.) and counsel for the respondents that Insolvent B.D. Agarwal was forced to file undertaking by them. In subsequent orders, this court has adversely commented upon this conduct of Insolvents. Insolvent B.D. Agarwal was arrested and then released on bail. It is pertinent to note that by order dated 8/3/2011, a Division Bench presided over by Justice D.K. Deshmukh in two appeals being Appeal (L) No.521 of 2010 and Appeal (L) No.638 of 2010 has observed that both the appeals have been unnecessarily filed and they have resulted in abuse of process of the court. The appellants were directed to pay as and by way of costs of notice of motion and appeal Rs.25,000/- each to the Official Assignee in each of the appeal. We refrain from taking any such action against the appellants only with a hope that wiser counsel will prevail and the Insolvents would refrain from making such allegations in future.

18. The Official Assignee is permitted to pay the fees of advocate Mr. Jain from the estate of the insolvent.

19. Appeal is dismissed.