

Bench: D D Chandrachud, A V.Mohta

1 wp-8893-10.sxw

dgm

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8893 OF 2010

1 M/s.Clarity Gold Pvt.Ltd.

2 Mrs.Ganga Devi Gupta Petitioners vs

1 State Bank of India

2 Authorized Officer, State Bank of India

3 M/s.Adhikrut Jabti Evam Vasuli

4 Shiv Shankar Lal Gupta

5 Debts Recovery Tribunal No.II, Mumbai

6 Debts Recovery Appellate Tribunal,Mumbai Respondents Mr. Rajneesh Agarwal with Mr.Ashish Mehta i/by Ms.Saruchi Kasliwal, Ms.Fatima R. Lakdawala and Ms.Hetal Khimasia for the petitioners. Mr. Nitin Thakkar, Senior Advocate with Mr. Bergis Colabawalla and Mr. Vivek S. Sawant i/by Mr.Kusumkar Kaushik for respondents 1 and

2.

CORAM: DR.D.Y.CHANDRACHUD &

ANOOP V. MOHTA, JJ.

DATE : January 20, 2011

ORAL JUDGMENT (Per Dr. D.Y. Chandrachud,J.):

Rule. Counsel for the Respondents waive service. On the request of Counsel and by consent, the rule is heard finally at this stage.

2 wp-8893-10.sxw

2 This Petition under Article 226 of the Constitution of India is directed against an order passed by the Debts Recovery Appellate Tribunal on 6 October 2010. The order of the Appellate Tribunal was delivered in an Appeal filed by the Bank against an order by which the Tribunal had held that the Bank had unlawfully taken possession of a secured asset on 28 July 2010 under Section 13 (4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The Tribunal had directed redelivery of possession to the mortgagor, of the secured asset. The Appellate Tribunal came to the conclusion that service

of the notice under Section 13(2) had been validly effected and that the notice of possession under Section 13(4) was valid. However, the Appellate Tribunal came to the conclusion that the notice of sale was not validly issued. Hence, the Appellate Tribunal came to the conclusion that the action of the Bank upto the stage of the publication of the possession notice under Rule 8(2) was valid. The Bank has been permitted to proceed in the matter from the stage of Rule 8(5) of the Rules. The order passed by the Tribunal for the redelivery of possession of the secured asset to the mortgagor has been set aside.

3 wp-8893-10.sxw

3 In these proceedings the First Petitioner is a private limited company and is the borrower to whom credit facilities have been extended by the First Respondent. The Second Petitioner is a guarantor and mortgagor of a residential flat being Flat No.7A/8A, Suneeta Apartments, Ridge Road, Malabar Hill, Mumbai. On 17 May 2010 the Bank issued a notice under Section 13(2). The notice was issued in the name of a Director of the First Petitioner. The notice was acknowledged by the Second Petitioner. The acknowledgment also bore the rubber stamp of the First Petitioner. On 9 June 2010 the First Petitioner, as the borrower, replied to the notice. Following the reply, the Bank served a notice of possession dated 28 July 2010 under Section 13(4). The notice was served at the premises on Murugan Pillai, an employee of the First Petitioner, holding the designation of ManagerAccounts. Possession was taken by the Bank. 4 An application was filed by the Petitioners before the Debts Recovery Tribunal under Section 17. The Tribunal by its judgment dated 29 June 2010 allowed the application and, while setting aside the taking over of possession, directed that possession shall be re delivered to the Petitioners. The Tribunal held that the measure which has been adopted by the Bank under Section 13(4) was unlawful for 4 wp-8893-10.sxw

want of service of a notice of possession on the Second Petitioner and for failure to separately publish a possession and sale notice. The Tribunal also entered into a finding of fact that possession was unlawfully taken by the Bank in a forcible manner without seeking recourse to the remedy provided under Section 14 of moving the Chief Metropolitan Magistrate. However, the Tribunal clarified that the final decision did not rest on that ground since independently the Tribunal was of the view that the measure under Section 13(4) was flawed for want of service of a notice of possession. The order of the Tribunal has been confirmed in part by the Debts Recovery Appellate Tribunal in so far as the invalidity of the sale notice is concerned. The Appellate Tribunal held that (i) There was delivery and service of the possession notice under Rule 8(1) on the Second Petitioner. The finding of the Tribunal on this point was reversed.; (ii) The publication of the possession notice in the newspaper on 3 August 2010 under Rule 8(2) was lawful and the finding on that issue of the Tribunal was reversed; (iii) The finding of the Tribunal that the sale notice published on 3 August 2010 was unlawful was upheld. It is in that view of the matter that while setting aside the order of the Tribunal for the redelivery of possession, the Appellate Tribunal has permitted the Bank to proceed in accordance with law from the stage 5 wp-8893-10.sxw

under Rule 8(5) of the Rules.

5 These proceedings have been initiated before the Court by the borrower, the First Petitioner and by the guarantor and mortgagor, the Second Petitioner.

6 Counsel appearing for the Petitioners urged the following submissions:

(i) The notice under Section 13(2) was not validly served on the First Petitioner;

(ii)The reply to the representation filed by the Petitioners against the notice under Section 13(2) was not dealt with by the Bank within a period of one week as required by subsection (3A) of Section 13;

(iii)No notice of possession was validly served on the Second Petitioner who is the owner or on the First Petitioner who is the borrower. The service on the ManagerAccounts of the First Petitioner was neither valid

service upon the First Petitioner or the Second Petitioner;

(iv)The Bank had while taking possession acted contrary to law by taking forcible possession without moving the Chief 6 wp-8893-10.sxw

Metropolitan Magistrate under Section 14. Possession was not handed over voluntarily as is found by the Debts Recovery Tribunal in its judgment.

7 On the other hand, it has been urged on behalf of the First Respondents that;

(i) The finding of fact which has been recorded by the Appellate Tribunal is that there was valid service of the notice under Section 13(2) and of the possession notice under Section 13(4). The notice under Section 13(2) was served as contemplated by Rule 3(1), whereas the possession notice was delivered validly as contemplated by Rule 8(1);

(ii)The First Petitioner, it is an admitted position, is a closely held private limited company of which the Second Petitioner and her spouse are directors. Both the Second Petitioner as well as her spouse are guarantors. The Second Petitioner had filed a Petition in this Court in which there is a categorical admission of the circumstance that the person on whom notice was served was her employee. The person concerned is an employee of the First Petitioner upon whom other correspondence by the Bank 7 wp-8893-10.sxw

has also been served and acknowledged. In these circumstances, the pure finding of fact by the Debts Recovery Appellate Tribunal should not be interfered in proceedings under Article 226 of the Constitution;

(iii)The notice dated 17 May 2010 under Section 13(2) was, as a matter of fact, responded to and replied by the First Petitioner. In that view of the matter, the First Petitioner cannot be heard to challenge it on the ground of nonservice. Even though the reply to the representation made by the Petitioners to the notice under Section 13(2) was transmitted by the Bank beyond a period of one week, that period under Section 13 (3A) is directory and not mandatory;

(iv)As a matter of fact, possession was not forcibly taken by the Bank. No complaint was lodged on behalf of the Petitioners in regard to the allegation that possession was forcibly taken by the Bank at any stage until the Securitisation Application was filed before the Debts Recovery Tribunal. The mere fact that the Bank had addressed letters to the police authorities and sought police assistance does not give rise to the conclusion that possession was forcibly taken.

8 wp-8893-10.sxw

8 The rival submissions now fall for determination. 9 Subsection (2) of Section 13 contemplates a notice in writing by the secured creditor to a borrower to discharge his liabilities in full within sixty days of the notice failing which the secured creditor is entitled to exercise his rights under subsection (4). Subrule (1) of Rule 3 of the Security Interest (Enforcement) Rules, 2002 contemplates that the service of a demand notice under Section 13(2) shall be made by delivering or transmitting at the place where the borrower actually and voluntarily resides or carries on business or personally works for gain, by registered post with acknowledgment due, or by speed post or by courier or by any other means of transmission of documents like fax message or electronic mail. Sub rule (3) of Rule 3 requires that any other notice in writing to be served on the borrower or his agent by an authorised officer, shall be served in the same manner as provided in the rule. Where there is more than one borrower, the demand notice under subrule (4) has to be served on each borrower. Subrule (1) of Rule 8 requires that where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice conforming to Appendix IV to the borrower and by affixing the notice 9 wp-8893-10.sxw

on the property.

10 Now, in the present case, the notice under Section 13(2) was sent in the name of the director of the First Petitioner. The notice was acknowledged by the Second Petitioner and the acknowledgment also bears the rubber stamp of the company. The Company, as a matter of fact, replied to the notice. From these facts, it is abundantly clear that the notice was duly served on both the Company and on the Second Petitioner. The Second Petitioner is a director of the First Petitioner which is a closely held private limited company. From the material on record, it is evident that the Second Petitioner was an agent authorised to accept notice on behalf of the First Petitioner. In any event, the First Petitioner has also acknowledged service of the notice. There was, therefore, valid compliance with the requirement of Section 13(2) and the Rules in regard to the service of notice under Section 13(2).

11 The submission that the action that has been taken by the Bank under Section 13(4) is rendered invalid because the objections of the Petitioners to the notice under Section 13(2) were dealt with in a reply which was remitted beyond a period of one week of the receipt 10 wp-8893-10.sxw

of the representation is without any basis. Following the decision of the Supreme Court in *Mardia Chemicals Ltd. vs. Union of India & ors.*,¹ subsection (3A) was inserted by Amending Act 30 of 2004 so as to enable a borrower to make a representation or to raise an objection upon a notice under subsection (2). If the secured creditor comes to the conclusion that there is no basis in the objection, reasons have to be communicated within one week of the receipt of the representation. A Division Bench of the Gujarat High Court has, in *Bansal vs. DGM Small Industries Development Bank of India*,² held that the requirement that the secured creditor must communicate the reasons for nonacceptance of the representation within one week is directory in regard to the period.

12 The requirement that the secured creditor must communicate reasons to the borrower for the rejection of the objection is undoubtedly mandatory because the whole object and purpose of sub section (3A) is to enable the borrower to have some recourse upon a notice being issued under Section 13(2). However, the failure of the secured creditor to deal with the representation within a period of one week does not render the disposal of the representation invalid. The 1 AIR 2004 SC 2371

2 AIR 2009 Gujarat 100

11 wp-8893-10.sxw

secured creditor must of course deal with the representation on an expeditious basis particularly since under Section 13 a borrower, after receipt of a notice under subsection (2) is restrained from transferring the secured assets without the prior written consent of the secured creditor.

13 We are in respectful agreement with the judgment of the Gujarat High Court which holds that every prescription of a period within which an act has to be done does not constitute a prescription of a period of limitation, a failure of compliance with which would render the action invalid. The object of subsection (3A) is to provide an expeditious method for the disposal of objections in order to ensure that the action of the secured creditor is not held up for an unduly long period of time. The period of one week that is prescribed in sub section (3A) is clearly directory. That apart, the Petitioners have not established that any prejudice was caused to them by the delay on the part of the Bank in responding to the representation submitted to the notice under Section 13(2). That submission must therefore fail. 14 The next point that has been urged on behalf of the Petitioners is that notice of possession was not served on the Petitioners. Now, as 12 wp-8893-10.sxw

noted earlier, Rule 8(1) requires that the notice of possession has to be delivered to the borrower and has to be affixed upon the immovable property. There is no dispute about the fact that the notice was affixed as provided. As regards the issue of service, from the material on record, it has emerged that the notice was

acknowledged at the premises by the ManagerAccounts of the First Petitioner. As a matter of fact Murugan Pillai, who acknowledged the notice had also acknowledged the notice of the Bank dated 25 May 2010 to a director and guarantor of the First Petitioner which was remitted to the very same address. Counsel on behalf of the Petitioners has stated before the Court that the First Petitioner is a closely held company and it is not disputed that both the Second Petitioner and her spouse are directors of the company.

15 The Second Petitioner had instituted a writ proceeding before this Court under Article 226 of the Constitution in which the Second Petitioner made a categorical averment that the person on whom the notice was served, was an employee of the Second Petitioner. The relevant averment in that regard was as follows:

"On or about 28 July, 2010 at or around 3.00 pm in

the afternoon, officers of Respondent No.1 accompanied by about 20 persons and Assistant Police Inspector Shri 13 wp-8893-10.sxw

Machhinder, Head Constable Shri Patil and police Constable Shri Bhosale, attached to the Malabar Hill Police Station, Mumbai, barged into the said property and purport to hand over the possession letter dated 28.7.2010 to Petitioner's employee Mr Murugan Pillai, who was called by the domestic servants of the Petitioner, and obtained his signature on the copy of the possession letter. Petitioner's employee Mr. Pillai made enquiry with them about any order from court for taking possession of the premises but was informed that they had the necessary order to take possession, but did not produce the copy of any such order."

16 On the basis of the material on the record, the Debts Recovery Appellate Tribunal was justified in coming to the conclusion that the ManagerAccounts was duly authorised to accept notice and that there was valid service of the notice upon him, before possession was taken. While acknowledging the receipt of the notice, the Manager Accounts entered no caveat below his endorsement to the effect that he was not duly authorised to accept service of notice. The finding of fact which is rendered by the Appellate Tribunal is therefore borne out from the material on record and does not warrant interference in proceedings under Article 226 of the Constitution.

17 On behalf of the Petitioners, it has been urged that in the present case possession was taken unlawfully from the Petitioners and 14 wp-8893-10.sxw

forcibly without recourse to the provisions of Section 14. 18 On 23 July 2010 the Bank addressed a letter to the Commissioner of Police, Mumbai stating that under Section 13(4), its authorised officer was taking necessary action in an area falling under the jurisdiction of the Malabar Hill Police Station. A request was made in the letter to direct the Police Station to provide constables for the protection of the authorised officer of the Bank in discharging his official duties under the Act. This was followed by a letter dated 23 July 2010 to the officer incharge of the Malabar Hill Police Station. The letter also recorded that the Bank had authorised an enforcement agency to assist and take all necessary actions under the Act. At the foot of the letter, there is an endorsement to the effect that on 27 July 2010, police bandobast should be provided. After possession was taken, on 28 July 2010 a police complaint came to be lodged by the ManagerAccounts and by the employees of the Petitioners. The complaint was to the following effect:

"We hereby place on record that at 3 pm today some

nearly 20 people alongwith your API Mr.Machinder, Head Constable Mr.Patil and Constable Mr.Bhosle forcefully barged into the above mentioned address and started abusing and using the bad words. On enquiry they wee telling that the State Bank of Indore have Court order to take forceful possession of the flat. We told the persons 15 wp-8893-10.sxw

that the owner was not present and we have to take instructions. We also asked them to show the Court order to which they refused and then they started using bad language and started assaulting. Some of the unidentified person from Bank assaulted us, slapped us pushed us and they used the force and pushed us out of the house. The police was seeing this whole incident but they were standing still and did not take any action

When we came to the police station the duty inspector has refused to take our complaint of physical assault and forcefully taking the possession of flat without the due of process of law."

19 The Tribunal came to the conclusion that the Bank had taken forcible possession of the property without seeking recourse to an order of the Chief Metropolitan Magistrate under Section 14. Now, under Section 14, where the possession of any secured asset is required to be taken by the secured creditor, the secured creditor may make request in writing to the Chief Metropolitan Magistrate or the District Magistrate concerned to take possession. Thereupon, the Chief Metropolitan Magistrate or the District Magistrate is empowered to take possession of the asset and documents relating thereto and to forward them to the secured creditor. Under subsection (2) the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use or cause to be used such force as may in his opinion be necessary. Section 14 of the Act is an enabling 16 wp-8893-10.sxw

provision under which the secured creditor is empowered to seek recourse to the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate for the purpose of taking possession. Though Section 14 is an enabling provision, it will be wholly impermissible for a secured creditor, despite the provisions of Section 14, to take the law into his own hands and to forcibly evict a borrower from the secured asset. Our legal system is governed by the rule of law. If the borrower hands over possession voluntarily to the secured creditor in pursuance of a notice under Section 13(4), it would be open to the secured creditor to take possession. But, if possession is not voluntarily handed over, the secured creditor cannot take the law into his own hands and secure vacant possession by taking recourse to the police machinery. In such an event, the only remedy that is available is to seek an appropriate order from the Chief Metropolitan Magistrate, or as the case may be, the District Magistrate. Parliament has specifically authorised in subsection (2) those authorities to take or cause to be taken such steps and use or caused to be used such force as may be necessary. Authorisation of the use of force for taking possession is therefore a matter which lies in the jurisdiction and power of the authorities prescribed by Section 14. No secured creditor can by seeking assistance of police machinery unilaterally 17 wp-8893-10.sxw

carry out the eviction of the borrower and take over forcible possession of the secured asset.

20 Having said this, it is clear from the record, that the Debt Recovery Tribunal did, as a matter of fact enter a finding of fact that possession was forcibly taken over by a secured creditor in this case. However, the Tribunal clarified that it was not resting its decision on that finding, since quite independently the Tribunal had come to the conclusion that the notice of possession and the sale notice were invalid. When an Appeal was carried by the secured creditor, the Appellate Tribunal reversed the finding of fact of the Tribunal on issues pertaining to the service and delivery of the possession notice under Rule 8(1) and the publication of the possession notice in the newspaper under Rule 8(2). The Appellate Tribunal did not consider the correctness of the finding which was arrived at by the Tribunal that forcible possession was taken by the secured creditor. 21 Whether forcible possession was taken by the secured creditor is essentially a question of fact to be determined on the basis of the material on the record. We are of the view that having regard to the parameters of the jurisdiction under Article 226 of the Constitution, it 18 wp-8893-10.sxw

would only be appropriate and proper if that question is left to be decided by the Appellate Tribunal which has a fact finding jurisdiction. There being no finding of the Appellate Tribunal in that regard, we consider it appropriate and proper to remit the proceeding back to the Appellate Tribunal only on this aspect.

22 In consequence, we hold, while disposing of the proceeding that the finding of the Debts Recovery Appellate Tribunal that (i) there was valid delivery and service of the possession notice under Rule 8(1) and (ii) that there was a valid publication of the possession notice in the newspaper under Rule 8(2) is confirmed. Counsel appearing for the Bank has stated that the Bank has not challenged the finding of the Appellate Tribunal that the sale notice was not published in accordance with law. That part of the finding is therefore not disturbed. In the circumstances, we remit the proceeding back to the Debts Recovery Appellate Tribunal to decide the correctness of the finding of the Debts Recovery Tribunal that possession was taken from the Petitioners forcibly and without seeking recourse to the remedy under Section 14. We clarify that on this aspect of the matter, we leave it open to the Debts Recovery Appellate Tribunal to render a finding after hearing the parties on all aspects.

19 wp-8893-10.sxw

23 Counsel appearing on behalf of the secured creditor has stated before the Court that an inventory has been made of all movables found in the residential flat and it would be open to the Petitioners to remove the movables.

24 The Petition is accordingly allowed and the rule is made absolute to the aforesaid extent. There shall be no order as to costs. 25 In order to ensure an expeditious disposal, we request the Appellate Tribunal, subject to the exigencies of its work, to endeavour an early disposal preferably within a period of four weeks from the date of receipt of a copy of this order.

(ANOOP V. MOHTA, J.) (DR.D. Y. CHANDRACHUD,J.)