

Nirmal Lifestyle Limited v. Asset Reconstruction Company (India) Ltd

Nirmal Lifestyle Limited

...Appellant

Asset Reconstruction Company (India) Ltd & Anr

...Respondent

Case No: Appeal No. 128/2016

Date of Judgement: 17/03/2023

Judges:

Mr Justice Ashok Menon, Chairperson

For Appellant: Mr Rajesh Nagory, along with Mr Rishab Jain, i/b M/s/ MDP Partners, Advocate.

For Respondent: Mr Gaurang Kinkhabwala along with Mr Siddharth Ranande and P. Jain, i/b M/s. Trilegal, Mr Shriraj K., i/b M/s. Saraf & Partners, Advocate.

Download Court Copy [CLICK HERE](#)

Facts:

The appeal is filed by Nirmal Lifestyle Limited (Appellant) against the order dated 28/01/2016 in Securitisation Application (S.A.) No. 1 of 2014 passed by the Debts Recovery Tribunal-I, Mumbai (DRT). The Appellant company is engaged in the construction and development of real estate. It is neither a borrower nor a guarantor. The 2nd Respondent company, formerly known as Tulip Hospitality Services Ltd. and later renamed V Hotels Ltd., allegedly availed various credit facilities and financial assistance from a consortium of banks. The 1st Respondent, Asset Reconstruction Company (India) Ltd., acquired

the debts due to the banks by way of assignment. The 2nd Respondent is the owner of 'Tulip Star Hotel', originally known as Centaur Hotel and owned by the Union of India. The hotel was purchased by the 2nd Respondent under the Government of India's disinvestment policy. The Appellant company was approached by the 2nd Respondent for developing a shopping mall and supermarket on the hotel property. The parties entered into various agreements, including a heads of agreement on 29/03/2003, a supplementary heads of agreement on 31/03/2003, a memorandum of understanding on 11/06/2003, an agreement dated 21/06/2003, and a supplementary agreement dated 17/10/2003. As per the agreements, the Appellant was to pay ₹30 crores to the 2nd Respondent, subject to certain obligations to be complied with by the 2nd Respondent. The Appellant was entitled to 1,25,000 ft² built-up area in the proposed shopping mall and supermarket, and the 2nd Respondent was obligated to obtain a no-objection certificate (NOC) from the consortium of banks and financial institutions. The Appellant paid ₹30,60,00,000/- to the 2nd Respondent, but the 2nd Respondent failed to comply with its obligations to obtain the NOC and necessary building approvals. The Appellant initiated arbitration proceedings against the 2nd Respondent for specific performance of the contract. The arbitrator passed an award directing the 2nd Respondent to refund ₹19,60,00,000/- along with interest to the Appellant and declined specific performance. The award was set aside by the Hon'ble High Court of Bombay on 27/11/2013. Consequent to the 2nd Respondent's default in repaying the debt to the 1st Respondent, SARFAESI measures were initiated, and the entire hotel property belonging to the 2nd Respondent was intended to be put up for sale, affecting the Appellant's rights concerning the 2,50,000 ft² built-up area. The Appellant came across a public notice dated 07/12/2013 in the Times of India newspaper regarding the symbolic possession of the property taken by the 1st Respondent on 14/10/2013, consequent to the demand notice dated 10/07/2013 issued under Section 13(2) of the SARFAESI Act. The 1st Respondent filed S.A. No. 359/2013 under Section 14 of the SARFAESI Act before the Chief Metropolitan Magistrate for taking physical possession of the property. The 2nd Respondent filed S.A. No. 395/2013 before the DRT-II, Mumbai, seeking a restraining order against the 1st Respondent, which is still pending. The Appellant

filed the present S.A. challenging the SARFAESI measures concerning the extent of the building that is the subject matter of the agreement between the Appellant and the 2nd Respondent, seeking protection of its rights regarding the 2,50,000 ft² built-up area.

Arguments by the Appellant:

The Appellant is an “aggrieved person” as contemplated under Section 17(1) of the SARFAESI Act and is entitled to the reliefs prayed for in its application. The Appellant relied on the decision of the Hon’ble Supreme Court in Bar Council of Maharashtra vs. M.V. Dabholkar and Ors. (1975) 2 SCC 702 to substantiate its argument that it is an aggrieved person. The Appellant cited the decision of Murdga Mudaliar (Deceased) & Ors. vs Subba Reddiar 1950 SCC OnLine Mad 136 to argue that an unregistered agreement in writing may be used as evidence of the agreement in a suit for damages for its breach. The Appellant relied on the decision of the Madras High Court in Saraswamma vs. Paddayya & 3 Ors. 1922 SCC OnLine Mad 203 to argue that an unregistered deed of partition is admissible in evidence to prove the division of status.

Arguments by the Respondents:

The 1st Respondent contended that the Appellant company entered into the alleged development agreement with the 2nd Respondent with full knowledge of the debt incurred by the 2nd Respondent from the consortium of banks. The agreement itself provided for obtaining an NOC from the banks and financial institutions, which was never obtained. The Appellant proceeded to enter into the agreement with the 2nd Respondent at its own risk, knowing that the entire property was mortgaged and a secured asset. The 1st Respondent alleged that the Appellant is in collusion with the 2nd Respondent in thwarting the SARFAESI measures initiated by the 1st Respondent.

Court’s Elaborate Opinions:

The court observed that the Appellant has not succeeded in establishing any flaws in the SARFAESI measures initiated by the 1st Respondent. While the Appellant may be an aggrieved person because the

agreement with the 2nd Respondent may not be capable of being implemented, the 1st Respondent is not a party to that agreement and is, therefore, not bound by it. The Appellant entered into the agreement knowing full well that the property was mortgaged to a consortium of banks and financial institutions. There was a stipulation for obtaining an NOC from the banks, which was never obtained. An agreement for the development of the property does not create any proprietary right over the property, and there is no charge created unless there is a decree obtained by the Appellant with a charge over the property. The Appellant's right lies elsewhere, and merely because the Appellant has parted with money to the mortgagor for the development of the mortgaged property, it cannot prevent the secured creditor from proceeding against the secured asset for the realization of the mortgage debt. The Appellant's remedy against the 2nd Respondent lies elsewhere. The court found no infirmity in the impugned order calling for any interference.

Order:

The appeal was dismissed without costs.

Cases Cited:

Bar Council of Maharashtra vs. M.V. Dabholkar and Ors. (1975) 2 SCC 702

Relied upon by the Appellant to substantiate its argument that it is an "aggrieved person" as contemplated under Section 17(1) of the SARFAESI Act.

Murdga Mudaliar (Deceased) & Ors. vs Subba Reddiar 1950 SCC OnLine Mad 136

Cited by the Appellant to argue that an unregistered agreement in writing may be used as evidence of the agreement in a suit for damages for its breach.

Saraswamma vs. Paddayya & 3 Ors. 1922 SCC OnLine Mad 203

Relied upon by the Appellant to argue that an unregistered deed of

partition is admissible in evidence to prove the division of status.

Sections and Laws Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act)

Section 13(2) – Issuance of demand notice

Section 14 – Enforcement of security interest

Section 17(1) – Filing of securitization application by aggrieved persons