Validity of lease agreement and agreement to sale entered into by third party over mortgaged property after issuance of notice under Section 13(2) of SARFAESI Act: DRAT KOLKATA

M/s. Fortune Motors Pvt. Ltd.

…Appellant

State Bank of India

…Respondent

Case No: Appeal No. 103 of 2019

Date of Judgement: 16.09.2023

Judges:

Anil Kumar Srivastava, J- Chairperson

For Appellant: Mr. P. Pothina, Ms. Patrali Ganguly, Advocates.

For Respondent: Mr. Soudip Pal Chowdhury, Ms. S. Sikdar, Advocates.

Facts:

Appellant is the SARFAESI applicant who filed an application under Section 17 of the SARFAESI Act, 2002. Appellant is an authorized dealer of Honda Motors and Scooters. Respondent no. 4, claiming to be a Director of respondent no. 2 company, offered the scheduled property to the appellant for use as warehouse and godown. The property was mortgaged with respondent bank for the loan availed by respondent no. 3. Appellant intended to purchase the property for Rs. 3.91 crores.

Appellant was informed that bank was willing to release the mortgage once OTS is sanctioned. Appellant paid Rs. 25 lakhs as token advance and an agreement to sale was executed on 22.02.2016 between respondent no. 4 representing respondent no. 2 and the appellant. Lease deed was also executed on same day for a period of two years. Lease advance of Rs. 24 lakhs was paid. Rent was fixed at Rs. 2 lakhs for first year and Rs. 1.5 lakhs for second year. Improvements were made in the property by the appellant by investing around Rs. 25 lakhs. Lease deed was registered as document no. 2163 of 2016. Appellant claims it entered into the agreements after interacting with the DGM of the bank. A letter was sent by the appellant to the bank on 31.05.2016. Bank communicated the appellant on 12.05.2017 that notice u/s 13(2) was issued on 10.06.2013 to respondent no. 2. The lease was illegal without bank's consent. Appellant offered to pay withheld rent of Rs. 14.65 lakhs and balance sale consideration amount directly to the bank. Possession notice u/s 13(4) was served on 30.01.2019 and symbolic possession was taken. Appellant filed application u/s 17 claiming protection under Section 17(4)(d).

Elaborate Opinions by Tribunal:

Schedule property was mortgaged with bank for loan facilities availed by Respondent no. 3. Respondent no. 2 and 4-7 stood as guarantors. Default was committed in repayment. Account classified as NPA. Notice u/s 13(2) was issued on 10.06.2013 for outstanding amount. Proposal for OTS was made which failed. Possession notice dated 30.01.2019 was issued which was not challenged by Respondent 2-7. Appellant has put claim based on agreement to sale and lease deed dated 22.02.2016. The question is effect of these two documents. It is admitted fact that no consent of bank was taken. The Tribunal held that Appellant knew property was mortgaged. No valid title was with Appellant. The Tribunal held the transaction was hit by Section 13(13). The Tribunal directed refund of certain amounts deposited by Appellant. The Tribunal examined whether Appellant can take advantage of Section 13(4)(d) which protects right of a person who has acquired secured asset from borrower.

Arguments:

Appellant:

Appellant submitted Tribunal misinterpreted Section 13(4)(d) and relied on judgments in Central Inland Water and Bajrang Shyamsunder Agarwal case. It was submitted rights of Appellant as lessee are protected under Section 13(4)(d). Compliance was made of Tribunal's interim order dated 19.02.2019. It was submitted for invoking Section 13(4)(d), no question of acquiring title arises. Otherwise the provision would become redundant.

Respondent Bank:

Bank submitted there is no privity of contract between Appellant and bank. Notice u/s 13(2) was duly issued on default. Bank submitted Appellant knew property was mortgaged. No consent was taken. Transaction hit by Section 13(13). Borrower has repaid dues. Appeal liable to be dismissed.

Sections:

Section 13(2) of SARFAESI Act, 2002
Section 13(4)(d) of SARFAESI Act, 2002
Section 13(13) of SARFAESI Act, 2002
Section 17 of SARFAESI Act, 2002

Cases Referred:

Central Inland Water Transport Corp Ltd v State Bank of India
Bajrang Shyamsunder Agarwal v Central Bank of India
Harshad Govardhan Sondagar v International Assets Reconstruction Co Ltd
Vishal N Kalsaria v Bank of India

Laws Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
Transfer of Property Act, 1882
Rent Control Laws

Conclusion and Order by Tribunal:

The Tribunal held lease was created after mortgage and notice u/s 13(2). No valid tenancy can be created in mortgaged property. The

Tribunal relied on Bajrang Shyamsunder Agarwal case to hold that tenancy created after notice u/s 13(2) is hit by Section 13(13). The Tribunal held agreement to sale does not confer title. No consent of bank was taken. Appellant cannot take advantage of Section 13(4)(d). The Tribunal held no steps were taken for specific performance of agreement to sale. Plea of assurance by Bank's DGM is not proved. The Tribunal held Appellant's status is now of 'tenant in sufferance'. In view of discussions, no illegality in order of Debt Recovery Tribunal. Consequently appeal was dismissed and Debt Recovery Tribunal's order was confirmed.

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Full Text of Judgment:

1.Instant appeal has arisen against the judgment and order dated 16.10.2019 passed by learned DRT-I Hyderabad in S.A. No. 48 of 2019 [M/s. Fortune Motors Pvt. Ltd. Vs. State Bank of India & Ors.].

2. As per pleadings of the parties, appellant is the SARFAESI applicant who filed an application u/s 17 of the SARFAESI Act, 2002 (hereinafter referred to as 'the Act'). Appellant is an authorised dealer of Honda Motors and Scooters. Respondent no.4, Ranbeer Singh Gandhi, claiming to be a Director of the respondent no.2 company M/s. Jai Bhagwan Chemical Industries (P) Ltd., offered the schedule property to the appellant for use as warehouse and godown. It was also informed that the property is mortgaged with the respondent no.1 Bank for the loan availed by respondent no.3, M/s. Cache Furniture Ltd., as security. Negotiations are going on for release of the property under OTS. Appellant also intended to purchase the property for an amount of Rs.3,91,00,000/-. It is alleged that a meeting with the DGM of respondent no.1 Bank and the appellant was arranged wherein it was informed that bank is willing to release the mortgage of the property once the OTS is sanctioned by the competent authority of the respondent no.1 bank.

3. Appellant paid a sum of Rs.25.00 lakhs to respondent no.2 as a

token advance with an agreement to pay the remaining consideration of Rs.3.66 crore after obtaining the NOC from the bank. An agreement to sale was executed on 22.02.2016 between respondent no.4 representing the respondent no.2 and the appellant and one Sri Tukaram Bossa, being the director of respondent no.2. Lease deed was also executed on 22.02.2016, that is, on same day for a period of two years. Lease advance of Rs.24.00 lakhs was paid by the appellant. Rent for the first year was 02.00 lakh and for the second year it was Rs.1.50 lakh for the period from 01.03.2016 to 28.02.2018 with a clause for renewal. Improvements were made by the appellant in the scheduled property by investing around Rs.25.00 lakhs. Lease deed was registered as document no. 2163 of 2016. It is specifically stated that appellant entered into lease agreement as well as agreement to sale after interaction with the DGM of respondent no.1 bank. Appellant sent a communication to respondent no.1 bank on 31.05.2016.

4. On 12.05.2017 respondent no.1 bank communicated the appellant that a notice u/s 13(2) of the Act, which was issued on 10.06.2013, to the respondent no.2. Respondent no.1 bank came to know about the lease during their visit on 11.05.2017, which was without bank’s consent is illegal.

5. It is also came to the knowledge of the appellant that respondent no.2 had given an improved offer of Rs.1905.00 lakhs to the bank on 10.09.2017 which was deposited in no-lien account. Appellant also informed the respondent no.1 bank offering to pay the withheld monthly rent of Rs.14.65 lakhs and also informed that appellant is interested to pay the balance sale consideration as per sale agreement dated 22.02.2016 directly to the bank.

6. Possession notice u/s 13(4) of the Act was served upon the appellant on 30.01.2019 and symbolic possession was taken.

7. Feeling aggrieved appellant filed the application u/s 17 of the Act on the ground that Section 17(4)(d) of the Act protects the right of the appellant. Relief was sought for setting aside the possession notice issued u/s 13(4) of the Act.

8. Respondent no.1 bank opposed the prayer and submits that respondent no.3, represented through its Managing Director, availed the loan of Rs.43.01 crore from the bank after executing necessary security documents. Respondent no.2 and respondent no.4 to 7 stood as guarantors. Equitable mortgage was created in favour of the bank on 01.03.2011. Default was committed in repayment of loan, accordingly, account was classified as NPA. Notice u/s 13(2) of the Act was issued on 10.06.2013 calling upon respondent no.2 and 4 to 7 to repay the outstanding amount of Rs. 44,21,08,564/-. S.A. No. 551 of 2013; S.A. No. 588 of 2013; SA, No. 220 of 2016; S.A. No. 296 of 2016 and S.A. No. 206 of 2017 were filed by the respondent no.3 and all were disposed of.

9. Respondent no.3 approached respondent no.1 bank for OTS under SBI-OTS-2018 scheme and sanction letter was issued by the respondent no.1 bank on 11.10.2018 with certain terms and conditions. Being failed to comply with the terms and conditions OTS was cancelled. Possession notice was issued on 30.01.2009 taking symbolic possession which was also published in the newspapers on 04.02.2019 and affixed on the secured asset.

10. It is further stated that appellant was aware of the mortgage which was created over the scheduled property by respondent no.2 in favour of respondent no.1 bank. Lease deed as well as agreement to sale are subject to clearance of all dues and issuance of NOC by the bank. Respondent no.1 bank is neither party to the lease deed nor any consent was either given or obtained from the bank. Term of the lease expired on 28.02.2018. Legal notice was issued by respondent no.2 terminating the lease on 25.07.2018. Hence, S.A. is liable to be dismissed.

11. Learned DRT recorded a finding to the effect that appellant has not acquired the schedule property and no valid title was in its favour. Further, the application is barred by Section 13(13) of the Act. Consequently, S.A. was dismissed as the appellant has no locus standi to challenge the proceeding initiated by the respondent no.1 bank. Further, respondent no.1 bank was directed as under: The respondent bank is hereby directed to refund the following amounts to

the applicant company within 2 weeks from the date of vacating the application schedule property by the applicant :-
i) A sum of Rs.1,09,80,000/- deposited by the applicant co. with the respondent no.1 bank towards 30% of the sale consideration as per the sale agreement dated 22.02.2016, as per the directions of this Tribunal vide order dated 19.02.2016, with interest @ 6% p.a. from the date of deposit till the date of refund.
ii) Excess rental amounts @ Rs.50,000/- per month out of the rental amounts @ 2,00,000/- per month, deposited by the applicant co, as per the directions of this Tribunal vide order dated 19.02.2019, from 01.03.2017 till August 2019.
Respondent bank is at liberty to take steps to vacate the applicant co from the application schedule property in accordance with law and till such vacation of the property by the applicant co. the respondent no.1 shall be entitled to monthly rentals @ 1,50,000/- per month from the applicant co. which amount can be deducted by the respondent no.1 bank from out of the amounts to be refunded to the applicant co. as per i) (a) and (b) above.

12. Further, it was directed that bank would be at liberty to take steps for vacation of the schedule property from the possession of the appellant till the property is vacated bank would be entitled for monthly rent of Rs.1.50 lakh which could be deducted from the amount to be refunded to the appellant as referred to above.

13. Feeling aggrieved by the judgement and order appellant preferred the appeal. No appeal is filed ever by the bank or other respondents.

14. I have heard learned counsel for the parties as well as respondent no.1 bank and perused the records.

15. There are certain admitted facts in this appeal. Schedule property was mortgaged by the respondent no.2 in favour of the respondent no.1 bank for security of the loan facilities availed by the respondent no.3. Respondent no. 2 and 4 to 7 stood as guarantors to the loan amount. There was default in repayment of the loan amount. Loan account was classified as NPA. Notice u/s 13(2) of the Act issued by the bank on 10.06.2013 calling upon the appellant and guarantors

respondent no.2 to 7 to pay entire outstanding dues of Rs. 44,21,08,564/-. On their failure to make payment further notices were issued from time to time which were challenged by filing different applications u/s 17 of the Act and were disposed of. It is also not in dispute some proposal for OTS was made under SBI-OTS-2018 scheme by respondent no.3 wherein sanction letter was issued, upfront money was deposited under terms and conditions of the sanction letter, but those terms and conditions were not complied with, accordingly, OTS failed. Consequent thereto possession notice dated 30.01.2019 was issued u/s 13(4) of the Act which was not challenged by the respondent no.2 to 7.

16. Appellant is third party who has put his claim on the basis of an agreement to sale as well as lease deed. It is also not in dispute that lease deed is dated 22.02.2016 registered as document no.2163 of 2016 executed between respondent no.2 and appellant. Further, an agreement to sale dated 22.02.2016 for consideration of Rs. 3.91 lakhs was executed wherein an amount of Rs.25.00 lakhs was earnest money.

17. Here question arises as to what will be the effect of those two documents, that is, lease agreement as well as agreement to sale? It is also not in dispute that no written consent of respondent no.1 bank was obtained either by respondent no.2 representing through respondent no.4 or the appellant at the time of execution of lease deed and agreement to sale.

18. Learned DRT has recorded categorical finding that it is within the knowledge of the appellant while executing both the documents that the property is a mortgaged property. Further, no valid title possess in favour of the appellant and appellant company cannot take advantage of Section 13(4)(d) of the Act. It is further held that the transaction is also hit by the provision of Section 13(13) of the Act.

19. Learned counsel for the appellant would submit that learned DRT has erred in recording the finding and misinterpreting the provision of Section 13(4)(d). Reliance is placed upon the judgement of Hon’ble High Court at Calcutta in the case of Central Inland Water Transport Corp. Ltd. Vs. State Bank of India [2013 SCC OnLine Cal 14399] and Bajarang Shyamsunder Agarwal Vs. Central Bank of India & Anr. [(2019)

9 SCC 94]. On the strength of these two judgements learned counsel would submit that rights of the appellant, who is a lessee in the schedule property, is protected by Section 13(4)(d) of the Act. It is further submitted that in compliance of the interim order of DRT dated 19.02.2019, appellant complied the order and remitted an amount of Rs. 2,32,20,000/- in the nolien account of respondent no.1 bank. Learned counsel would submit that learned DRT while passing the impugned order has not considered the interim order passed by the learned DRT. Further, there is no question of acquiring any title by the appellant to invoke the provision of Section 13(4)(d) of the Act, if it is so, the said provision would become redundant.

20. It is further submitted that the appellant gave an offer to the bank for making payment of the remaining amount of the consideration money under agreement to sale, but the same was not considered by the learned DRT. Learned counsel for the appellant was also drawn attention towards the provision of Section 17(4A) of the Act and submitted that DRT should have crystalised the position of the appellant regarding the leasehold right.

21. Learned counsel for the respondent no.1 bank submits that there is no privity of contract between the appellant and the bank. Provisions of the Act was duly invoked by the bank on failure of respondent no.3 to make repayment of loan amount, accordingly, notice u/s 13(2) of the Act was issued on 10.06.2013. It is further submitted that it was well within the knowledge of the appellant at the time of entering into the agreement to sale and the lease deed that the property is mortgaged with the respondent no.1 bank. No consent was obtained from the respondent no.1 bank. It is specifically denied that any oral consent was ever given by DGM of the respondent no.1 bank. The case of the appellant is hit by the provision of Section 13(13) of the Act. It is further submitted that the borrower has repaid the entire dues of the bank and the loan account is closed. Nothing is due. Accordingly, appeal is liable to be dismissed.

22. Interim order dated 19.02.2019 passed by DRT-I Hyderabad reads as under : “Having regards to the facts and circumstances of the case and in the interest of justice, interim relief can be granted on certain

conditions. Accordingly, there shall be an interim stay of all further proceeding including taking physical possession of the schedule properties pursuant to the possession notice dated 30.01.2019, subject to the :

I) petitioners depositing 30% of the balance sale consideration of sale agreement dated 22.02.2016 as agreed i.e, Rs.3.66 crore in no-lien account with respondent bank, out of which 15% is directed to be deposited within two weeks from the date of order and the second instalment of 15% within two weeks thereafter;

II) To pay the arrears of rent upto 31.10.2018 i.e. Rs.14.65 lakhs as admitted in the S.A. with the respondent bank within one week from the date of this order to the credit of the loan account with the respondent bank.

III) To pay rental arrears of Rs.02.00 lakh net of taxes from 01.11.2018 to 31.01.2019 within one week from the date of this order with the respondent bank to the credit of the loan account and

IV) To pay further rent from 01.02.2019 @ Rs.02.00 lakh net of taxes as per lease deed dated 22.02.2016 with the respondent bank to the credit of the loan account till further orders In the event of failure of compliance of any of the aforesaid conditions by the petitioners, the interim stay shall stand vacated and respondent bank shall be at liberty to proceed further in accordance with law.

23. In the case of Bajarang Shyamsunder Agarwal (supra) Hon’ble Apex Court has held that once a notice u/s 13(2) is served upon the borrower he cannot enter into any contract to create any encumbrance on the property as per Section 13(13) of the Act. It also extinguishes right of the mortgagor to lease the property u/s 65A of the Transfer of Property Act. Hon’ble Apex Court also consider the case of Harshad Govardhan Sondagar Vs. International Assets Reconstruction Co. Ltd [(2014) 6 SCC 1] wherein it was held that if lawful possession of the secured asset is not with the borrower but if lessee is under a valid lease the secured creditor cannot take possession of the secured asset until the lawful possession of the lessee get determined and lease will not get determine if the secured creditor chooses to take any of the measures specified in Section 13 of the Act. But it will apply in a case where there exists a valid lease. It was further held that

SARFAESI Act has overriding provision over the Transfer of Property Act. Thereafter, the case of Vishal N. Kalsaria Vs. Bank of India [(2016) 3 SCC 762] was discussed and it was held by the Hon'ble Apex Court at Para 24 in Bajarang Shyamsunder Agarwal (supra) as under :

"24. In our view, the objective of SARFAESI Act, coupled with the T.P.Act and the Rent Act are required to be reconciled herein in the following manner:

24.1 – If a valid tenancy under law is in existence even prior to the creation of the mortgage, the tenant's possession cannot be disturbed by the secured creditor by taking possession of the property. The lease
has to be determined in accordance with Section 111 of the TP Act for determination of leases. As the existence of a prior existing lease inevitably affects the risk undertaken by the bank while providing the loan, it is expected of Banks/Creditors to have conducted a standard due diligence in this regard. Where the bank has proceeded to accept such a property as mortgage, it will be presumed that it has consented to the risk that comes as a consequence of the existing tenancy. In such a situation, the rights of a rightful tenant cannot be compromised under the SARFAESI Act proceedings.

24.2 – If a tenancy under law comes into existence after the creation of a mortgage, but prior to the issuance of notice under Section
13(2) of the SARFAESI Act, it has to satisfy the conditions of Section 65 Aof the T.P. Act.

24.3 – In any case, if any of the tenants claim that he is entitled to possession of a secured asset for a term of more than a year, it has to be supported by the execution of a registered instrument. In the absence of a registered instrument, if the tenant relies on an unregistered instrument or an oral agreement accompanied by delivery of possession, the tenant is not entitled to possession of the secured asset for more than the period prescribed under Section 107 of the T.P. Act."

24. Further, it was held that Section 13(13) of the Act bar entering into tenancy after issuance of notice u/s 13(2) of the Act. A person occupying the premises, when the tenancy has been determined, can only be treated as 'tenant in sufferance' 12 such tenants do not have any

legal right and are akin to trespassers. Provision of Rent Act cannot be extended to a 'tenant in sufferance' vis-à-vis the SARFAESI Act due to the operation of Section 13(2) read with Section 13(13) of the Act.

25. The determining factor as laid down by the Hon'ble Apex Court in Bajarang Shyamsunder Agarwal (supra) in Para 24 as referred to above would show that in the present case the lease deed was executed on 22.02.2016 which was admittedly after 10.06.2013, that is, date of issuance of notice u/s 13(2) of the Act. It is not in dispute rather admitted in the lease deed itself that appellant was in full knowledge that the property is a mortgaged property. Even then he had undertaken a risk to take the property on lease and also to get the agreement to sale executed. No valid tenancy can be created in a mortgaged property. In the present case tenancy was created after the mortgage as well as issuance of notice u/s 13(2) of the Act.

26. Now, I have to look into the issue as to whether appellant can take any advantage of the provision of Section 13(4)(d) of the Act. Section 13(4)(d) reads as under :
"13(4)(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt." Bare perusal of clause (d) of sub-section (4) of Section 13 of the Act will show that it would apply to a person who has acquired any of the secured asset from the borrower and from whom any money is due to pay to the secured creditor. Estimate of the money is sufficient to pay the secured debt. Same law is laid down by the Hon'ble Apex Court in the case of Bajarang Shyamsunder Agarwal (supra). Appellant is claiming his right on the basis of agreement to sale dated 22.02.2016 wherein consideration was Rs.3.91 crore and earnest money of Rs.25.00 lakh was paid by the appellant. As far as this agreement to sale is concerned law is settled. Agreement to sale does not confer any valid title upon the purchaser as has been held in Bajarang Shyamsunder Agarwal (supra)

27. Further, it is admitted fact that agreement to sale was executed between the appellant as well as respondent no.2. Respondent no.1 bank

was not a party to the agreement. No consent was obtained from the bank. Learned counsel for the appellant has drawn my attention towards the letter dated 31.05.2016 allegedly sent by the appellant to DGM of the respondent no.1 bank. Receipt of the letter was denied by the bank. No receipt is filed by the appellant to show or prove that this letter was ever received by the respondent no.1 bank. Hence, appellant cannot take advantage of this letter.

28. Further, no steps have been taken by the appellant for specific performance of the agreement, if it was not complied with. It shows that appellant cannot take any advantage and no advantage could be extended in favour of the appellant on the basis of the agreement to sale as per 13(4)(d) of the Act.

29. A plea is taken by the appellant that he met with the DGM of the respondent no.1 bank who assured him that secured property would be released after OTS is accepted. This fact is denied by the respondent no.1 bank. Nothing on record to show or prove that any such meeting was held or any assurance was given by the DGM of the respondent no.1 bank. Even if appellant acted on the basis of oral assurance, if any, which has not proved, he was at his own risk. According to the respondent no.1 bank no such meeting was ever held nor any such assurance was ever given by the DGM of the bank.

30. In the affidavit-in-opposition a specific plea is taken that borrower informed the bank that he has deposited the settled amount of Rs.22,38,81,000/- and no objection certificate of the mortgage property was also issued in his favour on 31.10.2019. Accordingly, there is no contract between the bank and the borrower. The appellant has no privity of contract with the bank. Accordingly, he cannot seek any relief against the bank.

31. Legal notice was issued by the respondent no.2 to the appellant on 25.07.2018 terminating the lease and for handing over the vacant possession of the secured property on the ground that term of the lease has expired. Thereafter, status of the appellant has become a ‘tenant in sufferance’ who is trespassers now.

32. On the basis of the discussion made above, I am of the view that learned DRT has not committed any illegality or irregularity in passing the impugned judgement and order. No interference is called for. Appeal lacks merit and is liable to be dismissed.

33. Appeal is dismissed. Impugned judgement and order dated 16.10.2019 passed by learned DRT-I Hyderabad in S.A. No. 48 of 2019 is confirmed. No order as to costs.
File be consigned to record room.
Copy of the order be supplied to the appellant and the respondents and a copy be also forwarded to the concerned DRT.
Copy of the judgement/Final Order be uploaded in the Tribunal’s website.
Order dictated, signed and pronounced by me in the open Court on this the 16th day of October, 2023.