

Validity of stay order granted by DRT without assigning reasons in favor of a tenant who is not a party to the SARFAESI proceedings: DRAT KOLKATA

PNB Housing Finance Limited

...Appellant

M/S Shree Venkateswara Realcon Pvt. Ltd. office

...Respondent

Case No: Company Appeal (AT) (Ins.) No. 576 OF 2021

Date of Judgement: 13th October, 2023

Judges:

Anil Kumar Srivastava, J- Chairperson

For Appellant: Mr. Arnab Basu Mullick, Advocate.

For Respondent: Mr. Dhiman Ray Mr. Pritam Modak, Advocates.

Facts:

PNB Housing Finance Ltd (Appellant) filed an appeal against the stay order dated August 8, 2023 passed by DRT-III Kolkata in a SARFAESI proceeding. Respondents 1-3 are the borrowers and guarantors. Respondent 4 (M/s Chaska Reloaded represented by its partner Sarwar Hossain) is a tenant in the secured asset. Respondent 4 filed an interim application I.A. No. 2011 of 2023 before DRT under Section 14 of SARFAESI Act seeking stay of District Magistrate's order allowing takeover of property by Appellant. DRT granted stay without giving

reasons and without allowing Appellant to file a counter. Appellant challenges this order in appeal before DRAT.

Arguments by Appellant:

Paragraph 5;

Respondent 4 is not a party in the SARFAESI proceedings and has also not moved any application for impleadment. Hence, without being impleaded as party, Respondent 4 cannot move application for interim relief. Registration certificate of partnership firm M/s Chaska Reloaded is not filed. As per Section 69 of Partnership Act, Respondent 4 being an unregistered partnership firm cannot file any suit. So the application itself is not maintainable. Notice was issued to borrowers and possession has already been taken by Appellant. So I.A. has become infructuous.

Paragraph 6;

The initial 5 year lease expired in 2020. The 2020 renewed 5 year lease is unregistered and requires consent of Appellant which was not taken. Respondent 4 cannot claim any rights in the mortgaged property without consent of Appellant.

Arguments by Respondent 4:

Paragraph 7;

Although possession has been taken, it is illegal. Section 12A of West Bengal Premises Tenancy Act, 1997 protects the rights of Respondent 4 and it will prevail over SARFAESI Act. Reliance is placed on Supreme Court decision in Vishal N Kalsaria v. Bank of India.

Court's Elaboration and Reasons:

Paragraph 8;

Respondent 4 is not a party in the SARFAESI Application filed by Respondents 1-3. No prayer has been made in I.A. 2011 of 2023 to implead Respondent 4 as party. If aggrieved, Respondent 4 should have either contested SARFAESI Application after getting impleaded or should have separately filed an application under Section 17. In absence of either, the application by Respondent 4 is itself not maintainable.

Paragraph 9;

The initial 5 year lease expired in 2020. The renewed 2020 lease was executed when loan was already given in 2017 and hence was subject to mortgage. Consent of Appellant as secured creditor was required before renewing lease in mortgaged property. The notice under Section 13(2) was also issued before 2020 renewed lease. But no consent of Appellant was obtained as required under Section 13(13).

Paragraph 10;

Facts show that initial lease was from 2015-2020 which expired. Renewed lease is 2020-2025. Notice under Section 13(2) was issued but no consent was obtained from Appellant.

Paragraph 11;

The Supreme Court decision in Bajrang Agarwal v. Central Bank of India has held that in case of lease arising after mortgage creation but before S.13(2) notice, it must follow S.65A of Transfer of Property Act. Further, lease beyond one year must be by way of registered instrument. In absence of registered instrument, tenant relying on oral lease is not entitled to possession beyond period under S.107 of T.P. Act.

Paragraph 12;

It is undisputed fact that possession has been taken by Appellant as secured creditor. In these facts, stay order by DRT without assigning reasons suffers from illegality and deserves to be set aside.

Referenced Sections and Cases:

Section 17 of SARFAESI Act: Application before DRT by any person including borrower

Section 13(2) of SARFAESI Act: Demand notice by secured creditor

Section 13(13) of SARFAESI Act: No lease of mortgaged property without consent of secured creditor

Section 69 of Partnership Act: Unregistered firms cannot file suits

Section 111 of Transfer of Property Act: Determination of leases

Section 65A of Transfer of Property Act: Leases in mortgaged property

Section 107 of Transfer of Property Act: Leases how determined

Vishal N Kalsaria v. Bank of India (Supreme Court): On priority of

Rent Act over SARFAESI Act

Bajrang Shyamsunder Agarwal v. Central Bank of India (Supreme Court): Reiterates conditions for leases in mortgaged property under SARFAESI Act

Conclusion/Order:

In paragraph 12, the DRAT set aside the stay order granted by DRT on the ground that it suffers from illegality as no reasons were given while granting stay in favour of a person who is not even a party in the SARFAESI proceedings. In paragraph 13, the court allowed the appeal and directed DRT to decide I.A. No 2011 of 2023 filed by Respondent 4 in accordance with law. The key takeaway is that while granting interim relief, courts have to assign cogent reasons. Persons who are not parties in the proceedings cannot be granted reliefs unless conditions for their impleadment are met. Also, tenants claiming rights over mortgaged secured assets have to satisfy conditions regarding registered instruments, consent from secured creditor etc.

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Court

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Full Text of Judgment:

1.Appellant, PNB Housing Finance Limited, preferred the appeal against an order dated 8th August, 2023 passed by Learned DRT-III, Kolkata in S.A. 139 of 2022.

2. As per the pleadings of the parties, Respondent No. 4, M/s. Chaska Reloaded, represented through its partner, namely, Mr. Sarwar Hossain, is neither a Borrower nor a Guarantor of the Appellant; rather Respondents No. 1, 2 and 3 are Borrowers and Guarantors of the Appellant.

3. Respondents No. 1 to 3 preferred an application under Section 17 of the SARFAESI Act, 2002 (hereinafter referred to as 'the Act') against the Appellant challenging the notice under Section 13 (2) of the Act and the Possession Notice dated 2nd December, 2021. Pending hearing of the SARFAESI Application, Respondent No. 4, M/s. Chaska Reloaded,

through one of its partners, namely Sarwar Hossain, moved an application before the Learned DRT being I.A. 2011 of 2023 for stay of operation of the order passed by District Magistrate, South 24 Parganas under Section 14 of the Act on the ground that the Respondent No. 4 is a tenant in the secured assets. Tenancy rights would prevail over the mortgaged property; this fact was within the knowledge of the Financial Institution at the time of sanctioning the loan. Sarwar Hossain, is carrying on business in the premises since 2015 on the basis of tenancy agreement and regularly paying rents. The Appellant had issued a notice on 19th July, 2023 that it will take possession of the secured assets on 2nd August, 2023.

4. Learned DRT vide impugned order allowed the time to file opposition to the Financial Institution, i.e. the Appellant, and stayed the proceedings till the next date of hearing. Feeling aggrieved Appellant preferred the appeal. I have heard the Learned Counsel for Appellant as well as Respondent No. 4 and perused the record.

5. Learned Counsel for Appellant would submit that Respondent No. 4 was not a party in the SARFAESI proceedings. Respondent No. 4 did not move any application for impleadment. Without being impleaded as party, he moved an application for interim relief which was granted without any ground. It is further submitted that Respondent No. 4 is represented as M/s. Chaska Reloaded through one of its partners, Sarwar Hussain, which shows it is a partnership firm. But the registration certificate is not filed nor any assertion is made regarding this fact. Accordingly, it shall be presumed that it is an unregistered partnership firm which cannot sue, as provided under Section 69 of the Partnership Act. It is further submitted that notice was given to the Borrower by the Appellant and possession is also taken by the Appellant. Hence the I.A. 2011 of 2023 has become infructuous.

6. It is further submitted that as per the tenancy agreement dated 4th December, 2015 it was a tenancy for five years but the lease agreement is unregistered this period expired in 2020. Thereafter fresh lease agreement was executed on 4th December, 2020 for a period of five years. It was well within the knowledge of the Respondent No. 4 that

the property is under mortgage but no consent of the Appellant was taken.

7. Per contra, Learned Counsel for Respondent opposed the appeal and submitted that although possession has been taken by the Appellant but it was taken illegally. Section 12A of the West Bengal Premises Tenancy Act, 1997 protects the rights of Respondent No. 4 wherein it precedes the provisions of the SARFAESI Act. Learned Counsel has placed reliance upon a judgment of the Hon'ble Apex Court in Vishal N. Kalsaria -vs- Bank of India & Others (2016 3 SCC 762).

8. Admittedly, SARFAESI Application under Section 17 of the Act was filed by Respondents No. 1, 2 and 3, who are Borrowers and Guarantors of the Appellant. Respondent No. 4 is not a party in the proceedings. No prayer for impleadment as Respondent is made in I.A. 2011 of 2023. If the Respondent No. 4 was aggrieved by any action of the Appellant then he could have contested the SARFAESI proceedings by getting him impleaded in the SARFAESI Application. Or if his rights are adversely affected, he should have filed an application under Section 17 of the Act, if law permits. But neither any application for impleadment was filed nor any application under Section 17 of the act is filed, hence the application filed by Respondent No. 4 itself is not maintainable.

9. Respondent No. 4 claims himself to be a tenant of the secured asset. He is claiming his right on the strength of the tenancy agreement dated 4th December, 2015 which was renewed on 4th December, 2020. As far as determination of rights of Respondent No. 4 are concerned, it is to be noted that initially the tenancy agreement dated 4th December, 2015 expired in 2020. Thereafter, a fresh agreement was executed. Loan was given in the year 2017. This fact was well within the knowledge of the Respondent No. 4. Respondents No. 1, 2 and 3 are party to the lease but no consent of the Financial Institution was obtained when the lease was renewed on 4th December, 2020.

10. It would appear from the dates that earlier the tenancy was with effect from 4th December, 2015 to 3rd December, 2020 and was renewed

from 4th December, 2020 to 3rd December, 2025. During this period, notice under Section 13 (2) of the Act was also issued but no written instruction from the Financial Institution, as required under Section 13 (13) of the Act, was obtained.

11. The Hon'ble Apex Court in *Bajarang Shyamsunder Agarwal -vs- Central Bank of India & Another* (2019) 9 SCC 94] in paragraph 24 held that:

"24. In our view, the objective of the SARFAESI Act, coupled with the TP 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-A of the TP 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 TP Act." Further in paragraph 32 it was held that:

"32. In any case, considering the counterfactual pleaded by the appellant tenant himself, that he was a tenant who had entered into an

oral agreement, such tenancy impliedly does not carry any covenant for renewal, as provided under Section 65-A of the TP Act. Therefore, in any case, Section 13(13), SARFAESI Act bars entering into such tenancy beyond January 2012. As the notice under Section 13(2), SARFAESI Act was issued on 30-4-2011, subsequent reckoning of the tenancy is barred. Such person occupying the premises, when the tenancy has been determined, can only be treated as a "tenant in sufferance". We should note that such tenants do not have any legal rights and are akin to trespassers."

12. This fact is not disputed that possession of the secured assets have been taken by the secured creditor as Appellant. Accordingly, I am of the considered opinion that the grant of stay by the Learned DRT without assigning any reason suffers from material illegality. Accordingly, appeal is liable to be set aside. Appeal deserves to be allowed.

Appeal is allowed. The impugned order dated 8th August, 2023 passed by Learned DRT-III, Kolkata in S.A. 139 of 2022, to an extent that stay is granted till the next date of hearing, is set aside.

I.A. 2011 of 2023 be decided by the Learned DRT in accordance with law.

Copy of the order be supplied to Appellant and the Respondents and a copy be also forwarded to the concerned DRT.

File be consigned to Record room.

Order dictated, signed and pronounced in open Court.

Copy of the Judgment/Final Order be uploaded in the Tribunal's Website.