

**BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI**

Present: Mr Justice Ashok Menon, Chairperson

Misc. Appeal No. 116/2023

Between

M/s Tajshree Enterprises, through its partner Ms
Khushita Prashant Bhute

... Appellant/s

V/s.

IDFC First Bank Ltd. & Anr.

... Respondent/s

Mohammed Qubbawala, Advocate for Appellant.

Mr Rajesh Nagory along with Ms Bhagyashree Lemble and Mr Vidhur Malhotra, i/b M/s Naik Naik & Co., Advocate for Respondent Bank.

-: Order dated: 21/09/2023:-

This is an application for stay of the order dated 08/08/2023 in I.A. No. 1687/2023 in the Securitisation Application (S.A.) filed by the Applicant before the Debts Recovery Tribunal, Nagpur (D.R.T.) seeking to challenge the Sarfaesi measures initiated by the Respondent bank under the provisions of the Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act', for short) against the 2nd Respondent borrower for recovery of debt.

2. The Appellant is a firm named "Tajshree Enterprises" represented by its partner Khushita Prashant Bhute which claims to be a tenant in the premises which is being proceeded against as a secured asset for recovery of debt by the 1st Respondent bank. The 2nd Respondent, a company named Tajshree Motors Pvt. Ltd. is the borrower represented by its director Rahul Bhute. I.A. No.

1687/2023's seeking protection from disposition was declined by the Ld. Presiding Officer in the impugned order. The Appellant is aggrieved and hence in appeal.

3. It is contended that the Appellant firm was constituted on 04/04/2018 with the secured asset as its place of functioning. The property belongs to the borrower company and was allegedly mortgaged to the 1st Respondent bank in connection with the debt availed on 27/12/2014. The borrower defaulted on payment of the debt and the account was classified as a Non-Performing Asset (NPA) and consequently, a demand notice under section 13 (2) of the SARFAESI Act was issued to the company on 13/04/2018. The Appellant firm states that a leave and license agreement was executed in its favour on 10/06/2021 and the document was registered. The Appellant claims to be totally ignorant about the mortgaging of the secured asset by the borrower company. The 1st Respondent bank got an order from the District Magistrate under section 14 of the SARFAESI Act to take physical possession of the secured asset. The Appellant claiming to be a tenant approached the D.R.T. with an application under section 17 of the SARFAESI Act seeking protection of the tenancy right under subsection 4A of section 17 of the SARFAESI Act.

4. It is contended that the D.R.T. passed a cryptic order dated 10/10/2023 and rejected the application without examining the requirements of section 17 (4A). Hence, the Appellant is aggrieved.

5. Heard the Ld. Counsel appearing for the Appellant and the Ld.

Counsel appearing for the 1st Respondent bank. Records perused.

6. The Ld. Counsel appearing for the Appellant submits that the D.R.T. ought to have examined the application of subsection 4 A of section 17 which was not done and hence, the impugned order is inherently defective and requires to be stayed.

7. The Ld. Counsel appearing for the 1st Respondent bank points out that the Appellant firm is represented by none other than the daughter of the director of the borrower company. It is also pointed out that the Appellant firm and the borrower company bear similar names, 'Tajshree', which indicates that the setting up of tenancy is only a collusive act to thwart the Sarfaesi measures initiated by the bank.

8. It is pertinent to note that even though the Appellant claims to have tenancy right over the secured asset, the registered document produced in support of the purported tenancy is a leave and license agreement executed only on 10/06/2021. The loan was taken on 27/12/2014 and the mortgage was created in favour of the Respondent bank. The borrower defaulted on payment and the demand notice was issued under section 13 (2) of the SARFAESI Act on 13/04/2018. The 'leave and license' agreement was admittedly executed only on 10/06/2021. The Ld. Counsel appearing for the Appellant points out that the firm was constituted on 04/04/2018, which is much prior to the issuance of the demand notice.

9. The Appellant firm is represented by the daughter of the borrower company's director and both the firm and company bear the

identical name “Tajshree” which would definitely indicate that both entities have close ties.

10. The firm was constituted on 04/04/2018, nine days before the demand notice under Sec. 13(2) of the SARFAESI Act was issued. It is true that the registration certificate of the firm shows the address of the firm as the secured asset. The leave and license agreement was, however, registered on 10.06.2021, long after the default of the loan and demand made by the creditor bank. It is surprising that the leave and license agreement does not state anything about a prior entrustment of the premises to the Appellant on lease as argued by the Ld. Counsel for the Appellant. There is no scintilla of evidence to indicate such an oral lease as indicated. Apart from mentioning the address of the premises in the registration of the firm, there is no evidence to indicate that any rent was paid by the firm to the borrower company. The balance sheet of the company would have indicated receipt of such income had there been any such oral lease entrustment. The mortgagor could not have created a lease or license in violation of the provisions of Sec. 13(13) of the SARFAESI Act which read thus:

“(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor”

11. The question that arises for consideration is whether the Appellant firm is entitled to protect its right if any over the secured asset to stall the Sarfaesi measures. Sub-Sec. (4A) of Sec. 17 indicates that any person, in an application under Sub-Sec.(1), claims any

tenancy or leasehold rights upon the secured assets, the Debts Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purpose of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy, -

- (a) has expired or stood determined; or
- (b) is contrary to Section 65A of the Transfer of Property Act, 1882 (4 of 1882); or
- (c) is contrary to terms of mortgage; or
- (d) is created after the issuance of notice of default and demand by the Bank under Sub-Section (2) of Section 13 of the Act.

12. In the instant case, there is no tenancy or leasehold right created in favour of the Appellant firm. What is created is a leave and license which is definitely not a tenancy. The said agreement has in clause No. 6 stated that no notices, including any notice for acquisition, requisition, adverse notice or set back by the Central Government or State Government or by any local, or public body or Authority in respect of the said building and/or the licensed premises or any part thereof have been issued to serve upon or received by the licensor or their agent or any person on their behalf. This is apparently untrue as the second Respondent company had already received a demand notice under Sec. 13(2) of the SARFAESI Act.

13. Sub-Sec. (4A) of Sec.17 also authorises the D.R.T. to examine whether the lease and tenancy is contrary to Sec. 65-A of the Transfer of Property Act. The present leave and license agreement (though not a lease) violates the aforesaid provisions insofar as the duration exceeds three years and it is not with the consent of the mortgagee.

14. The totality of the evidence that is available indicates that the leave and license agreement or even the constitution of the firm was with the purpose of defeating the mortgage.

15. Though the Ld. Presiding Officer has not discussed about examining the provisions of Sub Section (4A) of Section 17 in detail, the conclusion that the Appellant does not have a prima facie case to earn a protection order is perfectly justified.

I find no reason to grant any order of stay of the impugned order challenged in this Misc. Appeal. Hence, the stay application as well as Misc. Appeal are dismissed.

Sd/-
Chairperson

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DRAFT MUMBAI