IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2569 OF 2017

Starlog Enterprises Ltd. ..Petitioner
Vs.
The State of Maharashtra & Ors. ..Respondents

Mr. Ghanshyam Upadhay with Mr. Kamalesh Mishra i/b. Law Juris for Petitioner.
Mrs. M. S. Bane – 'B' Panel Counsel for State - Respondent No. 1.
Mr. S. U. Kamdar, Senior Counsel with Mr. Kersi Dastoor i/b. Phoenix Legal for Respondent No. 2.

CORAM : S. C. DHARMADHIKARI AND
PRAKASH D. NAIK, JJ.
DATE : 3RD MAY, 2017

P.C. :

1] By this petition under Article 226 of the Constitution of India instituted on 23rd February 2017, the petitioner challenges the order passed by the learned Chief Metropolitan Magistrate at Esplanade, Mumbai dated 25th January 2017.

2] At the outset, we must clarify the circumstances in which we have taken up this petition out of turn.

3] This writ petition after its filing and institution was moved on 28th

February 2017. It was taken up out of turn and leave to amend was granted. After that the petition was stood over to 1st March 2017. Thereafter it appeared on 6th March 2017 and it was stood over to 10th March 2017. On 10th March 2017 it was simplicitor stood over to 14th March 2017. Then on 16th March 2017 once again it was taken out of turn but no order was passed by this Court.

4] The Division Bench taking up the assignment of judicial work particularly civil writ petitions arising out of the orders under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) on 21st March 2017 took up this matter and placed it on 31st March 2017. It directed issuance of notice to the 2nd respondent. Even Dasti / Hamdast was permitted.

5] Thereafter it appeared on 31st March 2017 but without any ad interim order stood over to 7th April 2017. It appeared before a Bench not assigned the above judicial work and erroneously on 7th April 2017. Therefore, that Bench declined to take it up. On 25th April 2017 this petition was moved before us by Mr. Upadhay, learned Advocate appearing for the petitioner. Upon hearing him, and finding that there was no urgency, we passed the following order :

> " Stand over to 07/06/2017. Liberty to mention before Vacation Judge."

6] However, Mr. Upadhay once again mentioned this matter before us on 2nd May 2017 by bringing to our notice a communication dated 17th April 2017 informing the four Companies, ABG Shipyard Limited, ABG International Limited, ABG Power Private Limited and Tirupati Landmark Private Limited, that the possession of the immovable property, namely, Unit No. 501, admeasuring 4121.50 sq. ft. together with its undivided interest in the common areas and facilities appurtenant thereto on 5th floor in the building known as Bhupati Chambers Condominium, earlier known as Mehta Chambers standing on a plot bearing 22 and 23 of Mathew Road, Girgaon, Mumbai, would be taken on 11th May 2017 at 11 a.m.

7] That is how the matter was mentioned today by Mr. Upadhay and on such a communication being brought to our notice, we heard him at sufficient length. We have also heard Mr. S. U. Kamdar, learned Senior Advocate appearing for the 2nd respondent.

8] Pertinently, the four respondents added on 3rd March 2017, namely, respondent nos. 3 to 6 have not moved any application.

9] At the further outset it was indicated to Mr. Upadhay that the petitioner has an alternate and equally efficacious remedy of approaching the Debt Recovery Tribunal under Section 17 (1) of SARFAESI Act. That section provides for making an application against measures to recover secured debts. Sub section 3 as it stood earlier was extensively substituted w.e.f. 1st September 2016 by Act 44 of 2016. Similarly sub section 4-A has been inserted by the same Act to the SARFAESI Act. Thus, the Amendment Act brought sweeping changes and now the Tribunal has wide powers to direct restoration of possession of the secured assets to the borrower or other aggrieved person even if said aggrieved person sets up a claim of tenancy or leasehold rights upon the secured assets. Sub section 4-A allows the Debt Recovery Tribunal to examine the facts of the case and evidence produced by parties in relation to said claims and for purposes of enforcement of the security interest, it has been conferred with jurisdiction to examine whether the alleged lease or tenancy comes within the purview of sub-clauses (a) to (d) of Clause (i) of sub section 4-A of Section 17. The order that it can pass is within the parameters laid down by clause (ii) of sub section 4-A. We put to Mr. Upadhay that there being a clear dispute regarding the claim of tenancy laid by the petitioner, it should approach this Tribunal and functional under the provisions of the SARFAESI Act, it can grant all the reliefs and as permissible in law. This suggestion was given by us after we examined carefully this petition and were inclined to uphold the objection of Mr. Kamdar to the maintainability of the present writ petition. This petition clearly involves disputed questions of fact.

10] We also indicated to Mr. Upadhay that the possession is going to be taken on 11th May 2017 and the petitioner therefore has sufficient time at its disposal to make an application to the Debt Recovery Tribunal. On taking instructions from the authorised official of the petitioner, present in Court, Mr. Upadhay submitted that the petitioner wants this Court to rule upon the application seeking urgent protection meaning thereby the request for ad interim injunction restraining the bank from taking possession of the secured asset. The petitioner has claimed tenancy rights in respect of this secured asset and as described above. Therefore, pending any application before the Tribunal, we must grant an ad interim protection was the request of Mr. Upadhay.

11] It is in that behalf that we have heard the parties.

12] Mr. Upadhay invited our attention to the pleadings in the writ petition. Mr. Upadhay would submit that the petitioner is a Limited Company incorporated under the Companies Act, 1956 and engaged in the business of providing on rent cranes, heavy earth moving machinery and other related equipments, heavy erection works, ports and terminal service etc. The petitioner is in physical possession and occupation of the immovable property, namely, 4th and 5th floor of the building Bhupendra Chambers. The petitioner states in this petition that it is a tenant and in lawful use, occupation so also possession of the premises since 1st April 1993 so far as 5th floor is concerned and since 24th February 2005 so far as 4th floor is concerned. The petitioner was earlier known as M/s. Onaway Engineering Limited / ABG Heavy Industries Ltd. The petitioner was initially incorporated in the name of M/s. Onaway Carriers Pvt. Ltd. and subsequently changed its name to M/s. Onaway Engineering Limited. Thereafter it changed its name to M/s. ABG Heavy Industries Pvt. Ltd. in the year 1994. It again changed its name as M/s. ABG Infralogistics Ltd. in the year 2007 and w.e.f. October 2015 it came to be named as M/s. Starlog Enterprises Limited.

13] However, according to Mr. Upadhay this has no relevance to the claim of tenancy for throughout the petitioner has been in lawful use, occupation and possession of the suit premises. The claim of tenancy dates back to the year 1993. Mr. Upadhay submits that there are various documents and copies of which are annexed to the petition itself which would evidence this fact. He invited our attention to a copy of the Form No. 18 filed with the Registrar of Companies. He would submit that a perusal thereof would indicate that the petitioner has been in possession as a tenant. Further the petitioner relies upon a copy of the assessment order Annexure 'D' to the petition which also indicates this address. The claim of tenancy has been proved by further fact, namely, a deposit of Rupees Two Crores with the landlord. The landlord may have borrowed monies from the 2nd respondent bank and purported to create a mortgage in respect of its immovable properties. However, that mortgage and in so far as the subject premises are concerned, is not binding on the petitioner. The petitioner's interest, right and title in the immovable property dates back to and is much prior to the creation of the so-called mortgage. Therefore, the tenancy rights are not affected. The petitioner has been paying lump sum amount and in advance but they are all evidencing payment as rent. There is no prohibition in law for payment of consolidated sum as rent. In such circumstances all ingredients of tenancy are satisfied. In these circumstances, we should grant an ad interim injunction restraining the bank from enforcing the order passed under section 14(1) of the SARFAESI Act dated 25th January 2017 is the request of Mr. Upadhay. Alternatively and without prejudice, Mr. Upadhay lays great emphasis on the newly enacted Insolvency and Bankruptcy Code 2016 particularly section 14 thereof to submit that the Mumbai Bench of the National Company Law Tribunal has passed an order on 17th February 2017 in the matter of this petitioner. The petitioner moved that Tribunal against ICICI Bank Ltd. The petitioner styled itself as a corporate debtor. However, Mr. Upadhay would submit that the operative directions in paragraph 9 of this order of the National Company Law Tribunal, Mumbai Bench, Mumbai, would indicate that now the action under the SARFAESI Act cannot proceed. It is *non est.* In such circumstances all the more we should grant this protection.

14] Mr. Kamdar in opposing this petition would submit that the petitioner's conduct is entirely blameworthy for it has suppressed very material and relevant facts from this Court. Even if one assumes there is no written agreement of tenancy required and the claim of tenancy can be established and proved with the aid of other materials, still, the petitioner's claim is *ex facie* bogus. The petitioner's claim is also got up and which is evidenced by a document, copy of which is annexed at page 78 of the paper book. Mr. Kamdar would submit that this is a letter addressed on 14th February 2017 to ABG Power Pvt. Ltd. According to Mr. Kamdar the petitioner is part of this ABG Group of Companies. This ABG Power Pvt. Ltd. is styled as a landlord. The rent is paid from 2011 to 2017. The material facts according to Mr. Kamdar are that this ABG Power Pvt. Ltd. (so-called landlord) having borrowed huge sums from the 2nd respondent bank defaulted in payment. A notice under section 13(2) of the SARFAESI Act was issued on 12th January 2016. The symbolic possession of the premises in question was taken on 31st March 2016. An order dated 25th January 2017 was passed under section 14 by the Chief Metropolitan Magistrate. This document of 14th February 2017 is therefore created much thereafter. The petitioner may rely on several documents to show that it was in physical possession of the property from 1st April 1993. However, mere possession and without anything more does not evidence a tenancy. Tenancy ought to be created and must be in force prior to the interest in favour of the 2nd respondent bank and this is what the requirement in law has been and throughout. This is evidently not satisfied in this case. Further, Mr. Kamdar would submit that the petitioner in this petition is not claiming that it is a corporate debtor or a borrower. It is claiming a tenancy. The petitioner has not been granted any financial assistance by the 2nd respondent bank and on its own showing. The order of the National Company Law Tribunal is passed at the instance of the petitioner when it created an interest in favour of the ICICI Bank Ltd. That order together with the operative direction therefore cannot have any effect or impact on the rights already created in favour of the 2nd respondent bank. It is in these circumstances that Mr. Kamdar would submit that no *prima facie* case is made out nor the balance of convenience is in favour of the petitioner. Mr. Kamdar submits that irreparable loss, injury and damage will be suffered by the 2nd respondent if such got up and bogus claims are upheld by this Court.

15] In a brief rejoinder, Mr. Upadhay would submit that the order of the National Company Law Tribunal mentions and makes reference to any property of the owner or lessor. Therefore, ABG Power Pvt. Ltd. also comes within the purview of this order. If ABG Power Pvt.

Ltd., the landlord of the premises cannot recover possession even lawfully from the present petitioner by a virtue of this moratorium then the 2nd respondent bank cannot act contrary to it.

16] With the assistance of both learned counsel, we have perused the petition and all annexures thereto. We must immediately indicate that our order and the reasons assigned in support thereof are only to dispose of the request of the petitioner for grant of urgent ad interim relief and protection.

17] We have before us a petitioner who claims that it is a lawful tenant in respect of the immovable property, namely, 5th floor, Unit No. 501. We are concerned with this Unit No. 501 together with the interest in the adjoining and appurtenant areas of which possession will be taken.

18] The petitioner as far as this Unit is concerned, states that the premises in its possession are 4th and 5th floors. The pleadings in relation to 5th floor premises are that the petitioner is a tenant and took over the premises on lease / rent basis in April 1993. The landlord then was M/s. B.F. Engineering Pvt. Ltd. M/s. B.F.

Engineering Pvt. Ltd. changed its name in February 2010 to M/s. Tirupati Landmark Pvt. Ltd. This Tirupati Landmark Pvt. Ltd. which is respondent no. 6 to this writ petition is stated to be the owner of the 5th floor premises. The petitioner obtained these premises on rent according to it for carrying on its own business activity. The petitioner relies upon a document styled as Certificate of Importer / Exporter Code (IEC) issued by the Additional Director General of Foreign Trade to the petitioner in 1993. This would show that the petitioner's possession of the premises dates back to this year. The said document appears on page 24 of the paper book. That says that it was issued from file number mentioned therein w.e.f. 16th February 2016. This certificate itself is issued on 17th February 2016. Prior thereto there is a request emanating from the petitioner to issue the certificate and the application in that behalf is acknowledged on 17th February 2016. Prior thereto are documents which would evidence that there is a change of name of the landlord company. Pertinently the Certificate of Incorporation pursuant to change of name in so far as the petitioner is concerned, is issued on 14th October 2015. That document, copy of which is at page 21 indicates that the petitioner has changed its name from ABG Infralogistics Limited to Starlog Enterprises Ltd, w.e.f. the date of this Certificate and that the

Company is limited by shares. Then the petitioner relies upon a copy of the assessment order dated 12th March 1997 and a copy of the demand notice dated 30th September 2016. The argument is that the Income Tax Department addressed these documents to the petitioner at the registered address mentioned in the cause title of this petition and equally in the order passed on 25th January 2017 impugned in this writ petition. The petitioner also relies upon the licence issued under the Bombay Shops and Establishment Act, 1948. It also relies upon Form No. 18 filed with the Registrar of Companies. While it is true that this document Annexure 'G' page 44 shows that the petitioner is in possession of this property from 1st April 1993, we are not called upon to decide a case of mere physical possession and occupation of the premises but a claim and proven one of tenancy. In that regard what we have before us are copies of the cheques along with electricity bills concerning the office premises which though stand in the name of the landlord / owner but the amount paid is paid by the petitioner allegedly. We have also before us copies of the telephone bills and which show the office address as above. Thus the claim is that these premises were in possession of the petitioner prior to they being mortgaged to the 2nd respondent bank.

19] We are not impressed by these documents for the simple reason that in paragraph 7 of this petition, the petitioner states that the 6th respondent who is the landlord may have mortgaged these premises with Standard Chartered Bank and the other Companies of the Group may have stood guarantors to the loan but the petitioner has an independent right, title and interest as a tenant. With the assistance of Mr. Upadhay, we have perused the entire petition and right up to paragraph 13. We do not find any reference to the date of commencement of the tenancy save and except reference to some of the above documents. From that at best and *prima facie* a physical occupation and possession is established and proved but not a claim of tenancy.

20] Mr. Kamdar therefore is right in relying upon some of the documents, copies of which are annexed and which would according to him show that the petitioner claims tenancy by payment of rent in a consolidated fashion. In that regard page 78 is relied upon. Pertinently the date of this letter is 14th February 2017. It says that the rent for 4th floor has been paid by a pay order for the period 2011 to 2017. In the present petition, we are concerned with the 5th floor. Secondly, the order of the learned Chief Metropolitan Magistrate, copy of which is annexed to this petition from pages 131 to 137 of the paper book records that Unit No. 501 admeasures as above and the bank has filed a written application, affidavit and produced documents. This revealed that it has sanctioned the loan facility of Rupees Two Hundred Crores to the respondents before us, namely, respondent nos. 3 to 6 by sanction letter dated 28th April 2012. The period was renewed from time to time and finally till 18th December 2012. The Working Capital Demand Loan Agreement was executed on 29th April 2012 and a Deed of Mortgage dated 19th December 2012 has been executed between the parties. The loan was thus secured by all this and a interest is created in favour of the bank. There was a default and the account was classified as Non Performing Asset as on 31st December 2012. The bank waited till 12th January 2016 on which date it issued a notice under section 13(2) of the SARFAESI Act which was duly served on 12th /13th January 2016 itself. The requisitions contained in the notice were not complied with and thus the default continues till the date of the order passed by the learned Chief Metropolitan Magistrate. The account and as crystallized on 31st March 2016 reflected that a sum of Rs.281,57,45,505.72 is due from the companies themselves. There is a specific statement in the affidavit filed before the Chief

Metropolitan Magistrate that no suit is pending against the bank restraining it from enforcing the security interest created upon the secured asset. No stay order has been passed by any Authority in respect thereof. Therefore there was no impediment in exercising the powers under sub section (1) of section 14 of the SARFAESI Act. This is how the Chief Metropolitan Magistrate has acted and thereafter issued the consequential directions.

21] To our mind, therefore, this is a clear case of the borrowers trying to defeat the claim of the 2nd respondent bank and by putting up the petitioner before us. *Prima facie*, the petitioner also is a defaulter. That is evident from its claim of bankruptcy filed with the National Company Law Tribunal, Mumbai Bench, Mumbai. The petitioner filed case of bankruptcy in the matter of ICICI Bank Ltd. The order passed on 17th February 2017 terms the petitioner as a corporate debtor and ICICI Bank Ltd. as the financial creditor. There are independent transactions with this bank and the petitioner. The moratorium was passed and *prima facie* relates to this transaction. We do not agree with Mr. Upadhay that the operative direction from paragraph 9(i) would assist or aid the petitioner. It is not a claim by any of the other respondents including Tirupati Landmark Pvt. Ltd. for possession against the petitioner. Secondly, it is not any security interest created by the petitioner in favour of the 2nd respondent but a distinct bank. Hence, no wider or larger question be examined. We do not think that the petitioner is entitled to any assistance or benefit of this order of the National Company Law Tribunal.

22] As a result of the above discussion, we are not inclined to grant any interim protection or relief to the petitioner. The writ petition is dismissed. No costs.

(PRAKASH D. NAIK, J.) **(S. C. DHARMADHIKARI, J.)**

Chandka