IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No. 6184 of 2017 (O/M)
Date of decision : 18.1.2018

Shakti Trading Co. .... Petitioner

Versus

Kailashwanti and another .... Respondents

CORAM : HON'BLE MR. JUSTICE KULDIP SINGH

Present:- Mr. Aman Kashyap and Mr. Sahil Sharma, Advocates, for the petitioner.

1. Whether the Reporters of local newspaper may be allowed to see the judgment ? Yes.
2. To be referred to the Reporter or not. Yes.
3. Whether the judgment should be reported in the digest ? Yes.

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KULDIP SINGH J.

Heard, the learned counsel for petitioner.

The petitioner has impugned the order dated 15.7.2017, passed by the learned Civil Judge (Junior Division), Bathinda, vide which application filed by defendant-respondent No. 2 under Order 7 Rule 11 of Civil Procedure Code, 1908, for rejection of plaint, has been allowed. Also impugned is the order dated 24.11.2017, passed by the learned Additional District Judge, Bathinda, vide which appeal against said order, was dismissed.

It comes out that present petitioner Shakti Trading Company filed a suit for permanent injunction restraining defendants-respondents from dispossessing the plaintiff-petitioner from the disputed property without filing an eviction application on the premises that the plaintiff-petitioner is a tenant under defendant No. 1 in the said property. On appearance defendant-respondent No. 2, which is a finance company, filed an application under Order 7 Rule 11 CPC, 1908, for rejection of plaint on the ground that defendant No. 1 alongwith her husband had obtained a loan of Rs. 4,25,00,000/- on 31.7.2013. The loan was to be repaid with interest in 144 monthly installments of Rs. 5,84,216/-. Equitable mortgage was executed in favour of defendant-respondent No. 2. Since said loan became Non Performing Asset and was declared to be Non Performing Asset on 5.11.2015, defendant-respondent No. 2 initiated recovery proceedings against defendant No. 1 under the 'The Securitisation a Reconstruction of Financial Assets Enforcement of Security Interest Act, 2002, (in short 'SARFAESI Act, 2002') and issued a demand notice under Section 13 (2) of the SARFAESI Act, 2002, on 29.8.2016. Defendant-respondent No. 2 is exercising powers under Section 13 (2) of the SARFAESI Act, 2002, for enforcing the security interests. Defendant-respondent No. 2 exercising the powers under Section 13 (4) of the SARFAESI Act, 2002, authorized an officer of the defendant-respondent No. 2 company visited the premises to take possession of mortgaged properties bearing No. 3021 and 3020-B, Ajit Road, Bathinda. Defendant-respondent No. 1 resisted the delivery of physical possession. Therefore, symbolic possession was taken. Defendant-respondent No. 2 company filed an application under Section 13 (2) of SARFAESI Act, 2002, on 13.2.2017 before the learned District Magistrate, Bathinda, for taking over physical possession of mortgage properties and for providing police help as provided in Section 14 of the SARFAESI Act, 2002. The learned District Magistrate, Bathinda, after considering all the documents, wrote a letter to the Senior Superintendent of Police, Bathinda, on 2.5.2017, for providing police help and also appointed Naib Tehsildar-cum-Executive Magistrate, Bathinda, as Duty Magistrate for securing law and order situation.

Plaintiff-petitioner in the reply had taken the stand before the lower Court that the tenant can protect his tenancy rights by filing a civil suit. Section 34 of the SARFAESI Act, 2002, is not applicable in case of tenancy because this is against the provisions of Rent Act. For the purpose of deciding application filed under Order 7 Rule 11 CPC, 1908, only averments in the plaint are to be seen. It is contended that plaintiff-petitioner being tenant cannot be evicted, except by filing a petition of eviction under East Punjab Urban Rent Restricting Act, 1949.

The trial Curt has taken the view that under Section 34 of the SARFAESI Act, 2002, the jurisdiction of Civil Court is barred. The view was reiterated by the lower appellate Court.

The learned counsel for petitioner has vehemently argued that in this case, the loan was taken on 31.8.2013, the tenancy was created in the year 2007 and the notice under Section 13 (4) of SARFAESI Act, 2002, was issued on 29.8.2016, therefore, tenancy existed much before the grant of loan by defendant-respondent No. 2 to defendant-respondent No. 1.

The learned counsel for petitioner has referred to the Rent Note (Annexure-A-1) and also referred to the judgment of Gujarat High Court at Ahmedabad in *Mahendra Kanjibhai Vagadiya Versus Axis Bank Limited and 6*, (Annexure-A-5), arising out of Special Civil Application No. 17206 of 2017, decided on 3.10.2017. It is asserted that the Debts Recovery Tribunal can only see the four clauses mentioned in Section 17 (4-A) of the SARFAESI Act, 2002, and that a tenant can maintain a suit for permanent injunction.

Section 34 of SARFAESI Act, 2002, is reproduced as under :-

"**S. 34. Civil Court not to have jurisdiction.** - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)."

The perusal of said section shows that the jurisdiction of civil court is barred in respect of any matter which a Debts Recovery Tribunal or the appellate Tribunal is empowered to determine and no injunction is to be granted by civil court.

Now, the question is whether the Debts Recovery Tribunal is competent to entertain the application of the tenant to decide upon his right of tenancy being in existence prior to the advancement of loan and prior to initiation of proceedings under the SARFAESI Act, 2002 ?

Section 17 (1) to (4) of SARFAESI Act, 2002, lays down as under :-

"**S. 17. [Application against measures to recover secured debts].**- (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, [may make an application alongwith such fee, as may be prescribed,] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]

[Explanation:- For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.]

[(1-A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction -

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located ; or

(c) the branch or any other office of a bank or financial institution maintaining an account in which debt claimed is outstanding for the time being.]

[(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

[(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,-

(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid ; and

(b) restore the possession of the secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be ; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.]

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt."

Newly added Section 17 (4-A) of SARFAESI Act, 2002, provides as under :-

"[(4-A) Where-

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured assets, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes 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 65-A 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 ; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.]”

Just the perusal of Section 17 of SARFAESI Act, 2002, shows that 'any person' including borrower aggrieved by any of the measures referred to in sub section (4) of Section 13 of SARFAESI Act, 2002, can move to the Debts Recovery Tribunal. 'Any person' has very wide meaning which includes any person who claims rights to the property, which may as a pre existing tenant. Therefore, Debts Recovery Tribunal is competent to act upon the claim of a person that he is tenant in the property prior to mortgage and his rights are to be protected.

The plea of learned counsel for petitioner to the extent that as per newly added sub-section i.e. sub-section (4-A) of Section 17 of SARFAESI Act, 2002, only four clauses mentioned in the said sub-section can be examined by the Debts Recovery Tribunal, is without any force. Section 17 (4-A) of SARFAESI Act, 2002, specifically provides for claim regarding tenancy or leasehold rights wherein Debts Recovery Tribunal can examine such claims. The bare reading of Section 17 of SARFAESI Act, 2002, as a whole, shows that the Debts Recovery Tribunal is not debarred from examining that the tenancy existed before the creation of loan or initiation of proceedings under the SARFAESI Act, 2002, and that rights of tenancy are to be protected.

The learned counsel for petitioner has also referred to authorities of Apex Court in *Indian Bank Versus Nippon Enterprises South and others*, (2016) 15 Supreme Court Cases 79 and *Vishal N. Kalsaria Versus Bank of India and others*, (2016) 3 Supreme Court Cases 762. However, all these points are to be examined by Debts Recovery Tribunal and not by the Civil Court.

It being so, both the Courts below have rightly held that the jurisdiction of Civil Court is barred and consequently, the application filed by defendant-respondent No. 2 under Order 7 Rule 11 CPC, 1908, was rightly allowed and plaint was rightly ordered to be rejected. There is no ground to interfere in the impugned orders. Therefore, instant appeal is dismissed.

(KULDIP SINGH)
JUDGE

18.1.2018
sjks

Whether speaking / reasoned : Yes

Whether Reportable : Yes