AD-11
Ct No.09
17.08.2022
TN

WPA No. 18376 of 2022

Uday Sankar Roy Choudhury
Vs.
Authorized Officer, Bajaj Housing Finance Limited and others

Mr. Anindya Bose,
Mr. Shubradip Roy
.... for the petitioner

Mr. Kaushik Chatterjee,
Mr. Tirthankar Dey
.... for the respondent nos. 1 and 2

Mr. Rabindra Narayan Dutta,
Mr. Suprabhat Bhattacharya
.... for the State

Affidavit-of-service filed in court today be kept on record.

Heard learned counsel for the parties.

The scope of challenge of the writ petition is that an order has been passed under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act") by the District Magistrate, South 24 Parganas, for possession in respect of a premises, on two floors of which the petitioner is allegedly a tenant.

It is submitted by learned counsel for the petitioner that in the impugned order, the Magistrate categorically observed that the property is not under lease and tenancy as per affidavit, deeds, records or all other relevant documents as submitted by the Authorized Officer in his affidavit.

However, learned counsel for the petitioner submits that the petitioner was all along a tenant in respect of the suit premises, initially from the year 1982 and thereafter upon another deed of lease being executed in the year 2013. Since the petitioner is a pre-existing tenant in respect of the property, it is submitted that the premise on which the Section 14 order was passed, was palpably perverse.

The police report filed by learned counsel for the State be kept on record.

In support of his contention, learned counsel appearing for the Financial Institution submits by placing reliance on *(2019) 9 SCC 94 (Bajarang Shyamsunder Agarwal vs. Central Bank of India and another)* that 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 Transfer of Property Act.

Learned counsel for the Financial Institution further places reliance on an unreported judgment dated July 25, 2022 rendered by a coordinate Bench of this court in *WPA 16454 of 2022 [Aniruddha Mukherjee & Anr. Vs. The Authorised Officer, Cholamandalam Investment & Finance Company Limited & Ors.)*, wherein it was held, *inter alia,* that the petitioners therein having not challenged the notices under Sections 13(2) and 13(4) of the SARFAESI Act, which was also noted by the District Magistrate in the order impugned therein, the petitioners could not maintain an application under Section 17 of the SARFAESI Act against a notice of possession under Section 14 of the Act.

It was further recorded that the earlier Section 17 application challenging two other notices had become infructuous.

It is, thus, contended that in the absence of a challenge against the parent orders under Sections 13(2) and 13(4) of the SARFAESI Act, the present challenge is not maintainable at the behest of the writ petitioner.

Learned counsel for the petitioner places reliance on a Division Bench judgment of this court reported at *AIR 2016 CAL 176 (State Bank of India and another vs. Vivek Kumar Kejriwal)*, for the proposition that a *bona fide* pre-existing tenant in the secured asset is entitled to assail measures taken by the secured creditor to take possession of the secured property under Section 13(4) of the Act as well as steps taken by the secured creditor under Section 14 of the Act before the Tribunal or the learned Magistrate as the case may be.

Learned counsel for the Financial Institution/respondent contends that it will be evident from the Division Bench judgment itself that Section 35 of the SARFAESI Act provides that in case of inconsistency, the said Act shall prevail over other laws for the time being in force. Hence, it is argued that in the absence of a challenge to the orders under Sections 13(2) and 13(4), the provisions of the SARFAESI Act would prevail and override the provisions of the Rent Control Act.

At the outset, it is to be noticed that the Financial Institution has placed reliance on an undertaking filed by the petitioner, indicating that the petitioner would vacate the entire premises within a limited period, which belies the premise of the present challenge. After having so undertaken, in normal circumstances, it would not lie in the mouth of the petitioner to resile from the said position.

However, in the peculiar facts of the case, it has also been counter-alleged by the writ petitioner that by a subsequent communication, the writ petitioner denied that the undertaking was given by the petitioner of his own volition. It was alleged that the petitioner had given the same under compulsion and force.

Be that as it may, the Writ Court, particularly sitting in a challenge with regard to an order passed under Section 14 of the SARFAESI Act, need not go into the nitty-gritties of such factual context.

It appears from paragraph no. 24.3 of *Bajarang Shyamsunder Agarwal* (supra), cited by the Financial Institution, that the said judgment was delivered in the context of the Transfer of Property Act, vis-à-vis the provisions of the SARFAESI Act. It was specifically stipulated by taking note of Section 107 of the Transfer of Property Act and other provisions thereof that if the tenants claim entitlement 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, as contemplated in the Transfer of Property Act.

However, since the present petitioner claims to be a tenant under the Rent Control Act, that is, the West Bengal Premises Tenancy Act, 1997, the said principle is not applicable. *Prima facie* case of tenancy has been made out by the petitioner by annexing certain rent receipts allegedly issued in favour of the petitioner.

Hence, the ratio of the said judgment is not applicable to the present case.

On a harmonious construction of the Division Bench judgment rendered in *Vivek Kumar Kejriwal* (supra) and the coordinate Bench judgment in the unreported case of *Aniruddha Mukherjee* (supra), it can be elucidated that a *bona fide* pre-existing tenant in a secured asset is entitled to assail measures taken by the secured creditor to take possession not merely under Section 13(4) of the Act but also against steps taken under Section 14 of the SARFAESI Act before the Tribunal.

In the present case, the said ratio is squarely applicable since the petitioner claims to be a pre-existing tenant in the secured asset, that is, the disputed property and has challenged the order passed under Section 14 of the SARFAESI Act.

Inasmuch as the ratio of *Aniruddha Mukherjee* (supra) is concerned, in the said case, it is not clear as to whether the borrower or a tenant had approached this court.

Since nothing appears from the said order to indicate that a tenant had challenged the order under Section 14 of the SARFAESI Act but from the apparent tenor of the order it transpires that it was the borrowers who had moved this court, the ratio laid down therein in respect of non-maintainability of a challenge to the order under Section 14 in the absence of a challenge to the prior orders under Sections 13(2) and 13(4) of the SARFAESI Act cannot hold good.

Reconciling and reading in conjunction the two judgments, of the Division Bench and the coordinate Bench, the principle which can be culled out is that although a borrower may have certain restrictions in challenging an order under Section 14 in isolation in the absence of a challenge to the prior orders under Sections 13(2) and 13(4) of the SARFAESI Act, no such fetter is applicable to a pre-existing tenant who, according to the Division Bench judgment, has a right to challenge independently even an order under Section 14 of the said Act.

Moreover, in the instant case, as rightly pointed out by the writ petitioner, it was erroneously recorded in the impugned order under Section 14 that the property is not under lease and tenancy, apparently on the strength of the affidavit, deeds, records and other documents submitted by the Authorized Officer in his affidavit.

As such, there is no whisper in the impugned order with regard to the tenancy claimed by the petitioner in respect of the self-same property, as is apparent from the impugned order, which fact was suppressed altogether by the Authorized Officer in his affidavit. Even if the question of tenancy is disputed, such dispute has never been raised at any point of time at least by the Financial Institution. As such, adopting a comprehensive view with regard to the cited judgments, the impugned order under Section 14 of the SARFAESI Act was bad in the eye of law and perverse inasmuch as the same did not take notice of the alleged pre-existing tenancy of the petitioner in respect of the premises.

Hence, even in the absence of a challenge by the petitioner/tenant against the prior orders under Sections 13(2) and 13(4) of the SARFAESI Act, the present challenge to the order under Section 14 thereof is wholly tenable in the eye of law and is, thus, allowed.

Accordingly, WPA No. 18376 of 2022 is allowed, thereby setting aside the impugned order under Section 14 of the SARFAESI Act, 2002, dated April 11, 2022 passed in Case No. 550/SARFAESI by the District Magistrate, South 24 Parganas.

Liberty is given to the petitioner to challenge the parent orders under Sections 13(2) and 13(4) of the SARFAESI Act as well. If such a challenge is preferred at the behest of the petitioner, nothing in this order shall prejudice the rights and contentions of any of the parties herein either way and it will be open to the appropriate authority to decide such challenge independently in accordance with law without being influenced in any manner by any of the observations made herein.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)