16.10.2023
Item No.8
gd/ssd

CO/3462/2023
SUNIL KUMAR SAMANTA AND ORS.
VS
SMFG INDIA CREDIT COMPANY
LIMITED AND ANR.

Mr. Joydip Kar, ld. Senior Advocate,
Mr. Rohit Mukherjee,
Ms. Somali Bhattacharya
..for the petitioners.

Ms. Soni Ojha,
Ms. Sonia Nandy
..for the Respondents.

The order dated August 4, 2023 passed by the Chairperson of the learned Debts Recovery Appellate Tribunal, Kolkata (for short the "Appellate Tribunal") in Misc. Appeal No.2 of 2023 is under challenge in this application under Article 227 of the Constitution of India at the instance of the borrower.

Challenging the action of the financial institution under Section 13(2) read with Section 13(4) of the SARFAESI Act, the borrowers/petitioners filed an application under Section 17 of the SARFAESI Act, 2002 being SA 344 of 2022.

During the pendency of the said SARFAESI application an order under Section 14 of the said Act was passed by the concerned District Magistrate on 5th December, 2022 thereby directing the Authorised Officer to take possession of the secured assets.

Challenging the said order, the petitioners filed an interlocutory application being IA No.3385 of 2022 before the learned Debts Recovery Tribunal-III Kolkata, (for short "the tribunal").

The Tribunal by an order being No.5 dated January 20, 2033 passed the following orders:

> "(1) Ld. Respondent is directed to file affidavit in opposition to the IA within 2 week with copy to the applicant, who may file rejoinder within 1 week further with coy to the respondent.
>
> (2) Respondent F.I. shall wait for the decision of the Tribunal on the IA/3385/22 and
>
> (3) SA applicant is directed not to create any 3rd party interest/tenant on the ground floor and second floor of the secured property till decision of the Tribunal on the IA/3385/22."

Challenging the order dated January 20, 2023, the financial institution approached the learned Appellate Tribunal, in Misc. Appeal No.2 of 2023.

The Appellate Tribunal, by the order impugned, allowed the appeal in part thereby setting aside the direction to the financial institution to wait for the decision of the Tribunal on the interlocutory application.

Mr. Kar, learned senior counsel representing the borrower/petitioners herein submits that the order passed by the District Magistrate under Section 14 of the Act records that the property is not under lease/tenancy as per the affidavit filed by the financial institution in terms of the provisions of Section 14 of the SARFAESI Act. He further submits that the financial institution did not disclose the correct state of affairs in the said affidavit as would be evident from the submission made by learned senior counsel representing the financial institution before the learned Tribunal wherein it was submitted that on the first floor there is a bank functioning at the property in question. He also submits that before the learned Tribunal the financial institution prayed for taking possession of a portion of the property which is contrary to the order passed under Section 14 of the said Act.

Mr. Kar referred to a decision of the Hon'ble Supreme Court in the case of *Authorised Officer, Indian Bank v. D. Visalakshi and Another* reported in *(2019) 20 SCC 47*, in support of his contention that the authorised officer is not expected to adjudicate the contentious issues raised by the parties but has to verify only the compliances referred to in the first proviso of Section 14 before passing an order taking over of possession of the secured assets.

Mr. Kar submits that pending disposal of the interlocutory applications before the DRT the Appellate Tribunal ought not to have varied the interim order passed by the DRT.

The learned advocate appearing for the financial institution submits that the financial institution disclosed the requisite particulars as is required under clauses I to IX in the proviso to Section 14(1) of the said Act. She submits that the District Magistrate upon being satisfied that the statements contained in the said affidavit passed an order under Section 14 of the said Act. She further submits that since the order passed by the DRT was self-contradictory, the Appellate Tribunal was justified in modifying the order passed by the DRT.

Heard the learned advocates for the parties and perused the materials placed.

It is not in dispute that the learned Tribunal passed directions for exchange of affidavits. Therefore, it goes without saying that the DRT was satisfied that an arguable case has been made out by the petitioners in the interlocutory application for which affidavit was invited from the Financial Institution. It further appears from the order passed by the Tribunal on January 20, 2023 that the interest of the parties were protected. On one hand the borrower was restrained by an order of injunction from creating any third party interest in respect of the ground and second floor of the secured property till the decision of the Tribunal on IA No.3385 of 2022 and on the other hand the financial institution was directed to wait for its decision on the said interlocutory application. The Appellate Tribunal being swayed by the one line observation of the Debts Recovery Tribunal that the order passed under Section 14, prima facie, does not speak anything in contrary of Section 14 of the SARFAESI Act modified the interim order passed by the Tribunal. In the event the Appellate Tribunal was of the opinion that the order passed under Section 14 of the SARFAESI Act by the District Magistrate was perfectly justified, it ought to have passed an order to such effect instead of modifying the order of the learned Tribunal in part.

From the stand taken by the Financial Institution as recorded in the order of the learned Tribunal it prima facie appears to this court that the affidavit filed before the District Magistrate do not disclose the correct state of affairs.

This court is of the considered view that IA No.3385 of 2022 shall become infructuous unless an interim order is passed.

This court is, therefore, of the considered view that the Appellate Tribunal ought not to have modified the order passed by the DRT in part. Since the IA is pending before the DRT and the Appellate Tribunal also passed directions for expeditious disposal of the said application, the interest of justice would be subserved if the Debts Recovery Tribunal is requested to dispose of IA No.3385 of 2022 expeditiously without granting any unnecessary adjournments to either of the parties.

When this order was being dictated, Mr. Kar, upon instructions from his client, submits that the financial institution has in the meantime taken possession of the property in question pursuant to the order passed by the Appellate Tribunal.

In view thereof, this court directs the financial institution not to take any further steps pursuant to taking over possession of the secured assets till the disposal of IA No.3385 of 2022.

Mr. Kar draws the attention of the court to the statement made in paragraphs 36 and 37 of the Civil Revision Application and submits that the financial institution has locked the access to the underground water reservoir as well as other parts of the property which has prevented the petitioners from using the same. He further submits that the tenants who are in possession in respect of the property are also deprived of the basic amenities.

The aforesaid dispute being a subsequent event and requires an adjudication on facts, this court is not inclined to enter into such dispute at this stage.

However, the petitioners will be at liberty to approach the concerned Debts Recovery Tribunal, if they are so advised.

CO 3462 of 2023 is disposed of by giving liberty to the parties to mention before the concerned Debts Recovery Tribunal upon notice to each other for fixing an early date of hearing of the said IA. Upon such approach being made, the Tribunal is requested to fix an early date of hearing of such IA and to dispose of the IA as expeditiously as possible preferably within a period of one month from the next date fixed without granting any unnecessary adjournments to either of the parties.

There will be no order as to costs.

Urgent certified copy of this order, if applied for, be given to the learned advocates for the parties on usual formalities.

(HIRANMAY BHATTACHARYYA, J.)