Item No.5
29.08.2024
Court. No. 9
GB

W.P.A. 14552 of 2024

SMFG India Credit Company Limited & Anr.
Vs.
The State of West Bengal & Ors.

Mr. Debajyoti Basu,
Mr. Triptimoy Talukder,
Mr. Diptomoy Talukder,
Ms. Purbali Dutta
... for the Petitioners.
Mr. Anirban Ray,
Mr. Tanoy Chakraborty,
Mr. Saptak Sanyal
... for the State.
Mr. Kamalesh Bhattacharyya,
Mr. Dibyendu Ghosh,
Mr. Abhiraj Tarafdar
... for the Respondent Nos.4 & 5.
Mr. Siddhartha Lahiri,
Mr. Debraj Dutta
... for the Respondent No.6.

1. Affidavits-of-service filed in Court today, are taken on record.
2. The petitioners are the secured creditors. The respondent no. 3 was the borrower. The respondent nos.4 and 5 as the director of the company mortgaged the property, which is now the subject matter of a testamentary suit. The respondent no.6 claims to have a share in the property on the basis of the last Will and Testament of late Batuk Nath Bhattacharjee.
3. The respondent no.3 could not pay back the loan. Thus, the estate of the deceased, late Batuk Nath Bhattacharjee which was mortgaged to the bank by the respondent nos.4 and 5, was declared as a Non-Performing Asset. The bank initiated SARFAESI

proceedings. The respondent no.6 approached the Debts Recovery Tribunal challenging such proceedings. In the meantime, an order was passed by the District Magistrate, North 24 Parganas for delivery of possession of the secured asset in favour of the petitioners. It is alleged that the property had not been handed over to the petitioners.

4. Mr. Kamalesh Bhattacharyya, learned advocate for the respondent nos.4 and 5 submits that the fact that the property was mortgaged to the bank, is not in dispute. The fact that the property was a secured asset is not in dispute. The fact that the loan account was declared as a Non-Performing Asset is also not in dispute.

5. Mr. Basu, learned advocate for the petitioners submits that despite the order of the learned District Magistrate, the secured creditor has not yet been handed over possession. According to Mr. Basu, irrespective of the dispute between the parties, the SARFAESI proceedings will supersede any other proceeding and the secured creditor would have the first right of claim over the property in question.

6. Mr. Lahiri, learned advocate appearing on behalf of the respondent no.6 submits that the bank cannot take steps to sell the property in view of an order passed by a testamentary court, injuncting the parties from either encumbering or selling or creating third party interest in respect of the said property. The

learned the learned Single Judge passed the following order:-

> *"The stage for deciding the allegation of forgery finally is yet to arrive. The trial of the application for grant of Letters of Administration is yet to commence. The estate of the deceased requires protection in the interregnum. In such a case, it would be appropriate to restrain the applicant for the grant of Letters of Administration as well as the caveatrix from selling, encumbering and/or creating third party interest over and in respect of the estate of the deceased.*
>
> *So far as the application made at the behest of the caveatrix for having the Will of the deceased examined by a handwriting expert is concerned, in my view, it would be appropriate to allow such application. The Court is informed that, the caveatrix filed affidavit in support of the caveat. In such circumstances, the department is directed to register PLA No.81 of 2019 as a contentious cause. PLA No.81 of 2019 be treated as a Testamentary Suit.*
>
> *There will be a cross order for discovery of documents in the suit to be made within a fortnight from date. Plaintiff will prepare the Judges brief of documents immediately thereafter. Parties are at liberty to mention the Testamentary Suit for early hearing.*
>
> *The caveatrix is at liberty to appoint a handwriting expert to examine the original Will of the deceased as accompanying the application for grant of the Letters of Administration.*
>
> *The Registrar, Original Side is directed to allow the handwriting expert appointed by the caveatrix to examine the Will, in his presence. It is clarified that, parties are at liberty to lead evidence with regard to Will, the allegation of forgery and the report of the handwriting expert, if any, in accordance with law at the trial.* ***It is further clarified that, this order will not prevent the bank from proceeding against the estate of the deceased.****"*

7. Referring to the last part of the order, it is submitted by Mr. Lahiri that liberty granted to the Bank was

expunged by a Hon'ble Division Bench by the following order:-

> *"The court was hearing an application for grant of Letters of Administration with a copy of the Will annexed. It had jurisdiction to rule on the validity of the Will.*
>
> *The observation that the order would not prevent the bank from proceeding against the estate of the deceased was an observation in relation to a matter which is not connected to the proceeding at all.*
>
> *This, according to Mr. Saha, is having a very serious repercussion in the proceeding concerning the estate of the testator in the Debts Recovery Tribunal.*
>
> *As the point involved is very short, we have heard out the appeal dispensing with all formalities. The said part of the order, namely, "it is further clarified that, this order will not prevent the bank from proceeding against the estate of the deceased" is expunged. The rest of the order is affirmed."*

8. Thus, no further order should be passed in this writ petition, according to mr. Laheri

9. Upon reading the order of the Division Bench, it appears that the Division Bench was of the view that when the court was hearing an application for grant of Letters of Administration it had the jurisdiction to rule on the validity of the Will. The observation or the liberty granted to the bank was not connected to the testamentary proceeding. Thus, such observation should be expunged. Another aspect was taken into consideration by the Hon'ble Division Bench, that is, the submission of the appellant that the liberty was totally uncalled for in a testamentary proceeding qua the parties, and such observation would affect the merits of the SARFAESI proceedings initiated by the

respondent no.6 before the learned Debts Recovery Tribunal.

10. Thus, this Court finds that the ground for expunging the liberty granted to the bank, was lack of jurisdiction of the testamentary court to pass any order in favour of the bank, when the bank was neither a party to the proceeding, nor was the SARFAESI proceeding relevant in the testamentary suit. The decision of the Hon'ble Division Bench does not limit the right of the bank under the SARFAESI Act.

11. Under such circumstances, the bank must approach the District Magistrate immediately for necessary orders for handing over possession in accordance with law. However, this Court finds that the order of injunction also restrains creation of third party interest. Thus, even if the bank steps into the shoes of the owner of the property, the bank cannot deal with the property in any manner, even by issuing an auction notice.

12. Although, Mr. Basu submits very categorically that the bank's power under the SARFAESI proceeding is not curtailed in any way by the testamentary proceeding, yet in the teeth of the injunction, any step taken by the bank will create further complications and will also be in violation of the order passed by the testamentary court. Thus, the best course of action by the bank would be to approach the testamentary court for

modification and/or clarification of the injunction order.

13. If the bank approaches the District Magistrate with a server copy of this order, the District Magistrate shall take necessary steps in compliance of his earlier order dated October 30, 2018 read with November 10, 2020, by appointing an officer in this regard in terms of the provisions of law, for handing over possession to the petitioners. The District Magistrate shall take steps as expeditiously as possible, upon receipt of the petitioners' application along with server copy of this order.
14. Accordingly, the writ petition is disposed of.
15. Parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)