28.02.2024
Sl. No.14(DL)
srm/CP

C.O. No. 3572 of 2023

Manoj Saha

Versus

PNB Housing Finance Limited & Ors.

Mr. Jayanta Mitra,
Mr. Sakya Sen,
Ms. Debjani Ghosh,
Mr. Bhaskar Mukherjee,
Mr. Debdutta Dutta
…for the Petitioner.

Mr. Arnab basu Mullick
…for the Opposite Party Nos.1 & 2.

1. The revisional application arises out of an order dated September 8, 2023 passed by the learned Presiding Officer, Debts Recovery Tribunal-III, in IA 2331 of 2023, filed by the petitioner in connection with SA 737 of 2023.
2. By the order impugned, the learned Tribunal rejected the application for restoration of possession of a space comprising of 450 sq.ft. on the first floor of the premises situated at 1, Allenby Road, Kolkata-700020. The petitioner is a cardiologist who claims to be running his chamber from the said tenanted premises. The petitioner claims that he was inducted

as a tenant/lessee in respect of the premises sometime in 1987. Since then, the petitioner claims to be running his chambers. The rent was Rs.450/- per month.

3. The petitioner was inducted as a tenant by Janapriya Finance and Industrial Investment (India) Private Limited (in short Janapriya). It appears from the records that Multicon Private Limited (in short Multicon) claimed to be the owner of the property. Janapriya was holding the property on the basis of an agreement with Multicon. Thereafter, Shree Venkateswara Realcon Pvt. Ltd. (Venkateswara) purchased the first floor from the Multicon. A letter of attornment dated March 4, 2008 was issued in favour of the petitioner, recognising the petitioner as a tenant under Janapriya. The letter of attornment was issued on the assertion that Venkateswara had become the landlord of the petitioner and rent should be paid to Venkateswara. It also appears that an Ejectment Suit No.20 of 2017 was filed by Venkateswara against the petitioner. The petitioner is contesting the suit and depositing the rent with the Rent Controller.

4. Venkateswara had taken a loan from PNB Housing Finance Limited. The entire first floor of premises No.1, Allenby Road, Kolkata-20, including 450 sq.ft. space of which the petitioner claims to be a tenant, was mortgaged in favour of the PNB Housing Finance Limited. The loan was not repaid and notices under Sections 13(2) and 13(4) of the SARFAESI Act were issued to Venkateswara. Possession notices were affixed for taking over physical possession. On August 2, 2023, physical possession was taken of the entire first floor and a padlock was affixed on the alleged tenanted portion of the petitioner. The tenant/petitioner approached the learned Debts Recovery Tribunal-III by SA 773 of 2023. In the said SA, it was alleged that the tenant was in occupation of the property since 1987 and ejectment suit of 2017 was pending. The secured asset was mortgaged in 2017. As such, tenancy was not created after the secured asset had been mortgaged with the PNB Housing Finance Limited.

5. According to the tenant, his induction was not a product of collusion with his landlord. Janapriya, in 1987, had put the petitioner in possession. Rather, it

is the case of the tenant that in collusion with the landlord/borrower, the PNB Housing Finance Limited had affixed the padlock on the tenanted portion.

6. Mr. Mitra, learned Senior Advocate appearing on behalf of the petitioner submits that the order suffers from perversity. First and foremost, the bank could take possession of the property in terms of the SARFAESI Act, along with the encumbrance. Affixing the padlock on the petitioner's chambers, amounted to forceful dispossession without following the due process of law. The petitioner approached the Tribunal for necessary interim reliefs and also prayed for restoration of possession, till his SA 737 of 2023 was adjudicated. Undoubtedly, the law had been amended and the issue of tenancy can also be decided by the learned Tribunal, but till such decision is taken, the tenant cannot be thrown out in the streets. More so, because the tenant was in occupation of the premises in question since January 2, 1987. The original agreement was for a period of five years. The rent receipts and the fact that an Ejectment suit is pending at the instance of

Venkateswara were also before the Tribunal. These documents were, *prima facie*, proof of occupation and tenancy. The law is well settled. Even a trespasser cannot be thrown out from the property without due process of law. According to Mr. Mitra, putting a padlock on the space used by the petitioner in his absence, amounted to unlawful dispossession.

7. Learned Advocate for the PNB Housing Finance Limited submits that the order is appealable. The petitioner ought to have preferred an appeal before the DRAT. If the prayer for restoration of possession is allowed, the final relief would be granted at the interim stage, without adjudication of the issue raised by the petitioner. It is further submitted that repeated notices were affixed with regard to taking over of physical possession of the premises in question and the tenant was well aware of such fact.

8. Heard the parties. When a Tribunal acts beyond jurisdiction or refuses to exercise jurisdiction vested upon it by law or passes orders on a misconception of law, the High Court in exercise of its superintending power can correct such errors, to

keep the Tribunal within the bounds of its powers or jurisdiction.

9. In my *prima facie* view, the Tribunal misconstrued the provisions of law and held that the unregistered tenancy agreement of the petitioner could not be recognised as valid tenancy. An unregistered tenancy agreement would not give rise to the conclusion that the occupation of the petitioner was unlawful. Unregistered tenancy is generally treated as tenancy month by month. Secondly, an Ejectment suit is pending against the petitioner at the instance of the borrower. The fact that the petitioner was inducted as a tenant in 1987 is available from the records. The borrower itself had given a letter of attornment in 2008 and claimed rents from the petitioner. These issues were required to be gone into in the SA before the Tribunal could decide that the tenancy was contrary to the provision of law.

10. The learned Tribunal relied on the decision of Harshad Govardhan Sondagar vs. International A.R.C. Ltd. & Ors. (Criminal Appeal No.736 of 2014 dated 03/04/2014), to hold that as the tenancy of the secured asset was created without permission from

the secured creditor, the tenancy could not be recognized in law. Restoration of possession could not be allowed.

11. In Harshad Govardhan (supra), the Hon'ble Apex Court held that a lease of secured asset made by the borrower, after he received notice under Sub-Section (2) of Section 13 from the secured creditor intending to enforce that secured asset, would not be a valid lease.

12. In this case, the tenancy was created in 1987 as per all the records before the learned Tribunal.

13. In Anthony vs. K. C. Ittoop & Sons & ors., reported in (2000) 6 SCC 394, the Hon'ble Apex Court held that when it was an admitted position that if a person was put in possession of the building by the owner thereof and the said person had been paying monthly rent, a jural relationship between the parties would be created as lessor and lessee or landlord and tenant. Even if the lease was void for want of registration, the tenant would continue to be protected under the relevant Rent Control Acts. Here, the petitioner claims to be a premises tenant governed by the West Bengal Premises Tenancy Act.

Paragraphs 11 to 14 of the said decision are quoted below:-

> "**11.** The resultant position is insurmountable that so far as the instrument of lease is concerned there is no scope for holding that the appellant is a lessee by virtue of the said instrument. The Court is disabled from using the instrument as evidence and hence it goes out of consideration in this case, hook, line and sinker (vide Shantabai v. State of Bombay , Satish Chand Makhan v. Govardhan Das Byas and Bajaj Auto Ltd. v. Behari Lal Kohli.
>
> **12.** But the above finding does not exhaust the scope of the issue whether the appellant is a lessee of the building. A lease of immovable property is defined in Section 105 of the TP Act. A transfer of a right to enjoy a property in consideration of a price paid or promised to be rendered periodically or on specified occasions is the basic fabric for a valid lease. The provision says that such a transfer can be made expressly or by implication. Once there is such a transfer of right to enjoy the property a lease stands created. What is mentioned in the three paragraphs of the first part of Section 107 of the TP Act are only the different modes of how leases are created. The first para has been extracted above and it deals with the mode of creating the particular kinds of leases mentioned therein. The third para can be read along with the above as it contains a condition to be complied with if the parties choose to create a lease as per a registered instrument mentioned therein. All other leases, if created, necessarily fall within the ambit of the second para. Thus, dehors the instrument parties can create a lease as envisaged in the second para of Section 107 which reads thus:

> "All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession."
>
> **13.**When lease is a transfer of a right to enjoy the property and such transfer can be made expressly or by implication, the mere fact that an unregistered instrument came into existence would not stand in the way of the court to determine whether there was in fact a lease otherwise than through such deed.
>
> **14.** When it is admitted by both sides that the appellant was inducted into the possession of the building by the owner thereof and that the appellant was paying monthly rent or had agreed to pay rent in respect of the building, the legal character of the appellant's possession has to be attributed to a jural relationship between the parties. Such a jural relationship, on the fact-situation of this case, cannot be placed anything different from that of lessor and lessee falling within the purview of the second para of Section 107 of the TP Act extracted above. From the pleadings of the parties there is no possibility for holding that the nature of possession of the appellant in respect of the building is anything other than as a lessee."

14. The learned tribunal took into account the provisions of Section 107 of the Transfer of Property Act and held that a lease of immovable property from year to year or for any term exceeding one year could only be made by a registered instrument and, in this case, as there was no registered instrument. There was no tenancy in the eye of law. Such decision was a

conclusion arrived at during consideration of the interim prayer for restoration of possession.

15. Under such circumstances, this court is of the view that the order impugned is amenable to the jurisdiction of this court for the errors apparent on the face of record and incorrect appreciation of law, without considering the facts.

16. In Harshad Govardhan (supra), which was relied upon by the learned tribunal, the power of the courts under Articles 226 and 227 of the Constitution of India has been upheld in and the relevant point in paragraph 29 of the said judgment is quoted below:-

> "... But this Court has repeatedly held that statutory provisions attaching finality to the decision of an authority excluding the power of any other authority or court to examine such a decision will not be a bar for the High Court or this Court to exercise jurisdiction vested by the Constitution because a statutory provision cannot take away a power vested by the Constitution. To quote, the observations of this Court in Columbia Sportswear Co. v. Director of Income Tax [(2012) 11 SCC 224] : (SCC p. 234, para 17)
>
> "17. Considering the settled position of law that the powers of this Court under Article 136 of the Constitution and the powers of the High Court under Articles 226 and 227 of the Constitution could not be affected by the provisions made in a statute by the legislature making the decision of the tribunal final or conclusive, we hold that sub-section (1) of Section 245-S of the Act insofar as it makes the advance ruling of the authority binding on the

> applicant, in respect of the transaction and on the Commissioner and Income Tax Authorities subordinate to him, does not bar the jurisdiction of this Court under Article 136 of the Constitution or the jurisdiction of the High Court under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling of the authority."

17. Thus, the contention of the bank that there is an alternative remedy of appeal is not accepted by this court in the peculiar facts and circumstances of this case. By the order impugned, the right of the petitioner as canvassed in his SA, has been finally decided. A doctor who was in occupation of the premises and running his chamber, in my, prima facie, view could not be thrown away without due process of law. The issue whether the doctor was inducted as a valid tenant and/or whether his possession was legal or not, are matters which will be decided in the SA, but the occupation cannot be doubted, as available from the records.
18. Under such circumstances, the interim prayer for use of the premises as a chamber ought to have been granted to the petitioner by the learned tribunal in lawful exercise of jurisdiction vested upon it, with certain conditions.
19. Accordingly, the revisional application is allowed.

20. It is directed as follows:-

    a) The authorized representative of the bank shall visit the site with notice to the petitioner and open the padlock within 4th March, 2024. One set of keys will be handed over to the petitioner. The other set of keys will be retained by the bank. The petitioner will use the premises exclusively as his chambers.

    b) The bank may periodically inspect the secured asset, which the petitioner will not resist. However, the petitioner will not be disturbed.

    c) The petitioner will not use the premises for any other purpose other than his chambers, on the schedule dates and time. The petitioner will not change the nature and character of the property in any way by alienation, or by creating any third party rights or by subletting etc.

    d) The bank may affix a Board indicating that the first floor of the premises is in the physical possession of the bank.

21. This order is being passed as a stop gap arrangement to enable the doctor to continue his chambers for professional consideration and also for the benefit of

the patients. This order is subject to the final decision in the SA. The status, nature of occupation and the tenancy rights are not decided.

22. The observations here are all tentative and the learned tribunal will proceed in accordance with law.

23. Accordingly, the revisional application is disposed of.

24. There shall be no order as to costs.

25. Parties are to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)