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WPO/1792/2023
IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

ANIMA SAMANTA
VS
HINDUJA LEYLAND FINANCE LIMITED AND ORS

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date: 24th January, 2024.

Appearance:
Mr. Arijit Bardhan, Adv.
. . .for the petitioner.

Mr. Subhankar Chakraborty, Adv.
Mr. Saptarshi Bhattacharjee, Adv.
Ms. Sayani Gupta, Adv.
Ms. Antara Dey, Adv.
. . .for the respondent.

Mr. Sarosij Dasgupta, Adv.
Ms. Sanchayita De, Adv.
. . .for the respondent nos. 3 to 6.

Mrs. Smita Saha, Special Officer.

The Court: The writ petition has been preferred against an alleged over-action by the respondent/financial institution on the allegation that the said respondent has taken possession of property which is not a part of the secured assets covered by the measures taken by it under Section 13(4) of the SARFAESI Act, 2002.

It is alleged that the petitioner is a tenant in respect of the second and third floors of the building which houses the ground and first floors as well, which are the only subject matter of the secured assets.

In the garb of taking possession of the ground and first floors, the respondent no.1, it is argued, has taken possession of the entire property, thereby excluding the petitioner from entering into the petitioner's tenanted portion of the property, that is, the second and third floors of the building.

Learned counsel appearing for the respondent takes several objections on the maintainability of the writ petition. First, it is argued that a writ petition is usually not maintainable against private entities who do not come within the purview of Article 12 of the Constitution of India.

Secondly, it is contended that anybody, including a borrower, aggrieved by any measure taken under Section 13(4) of the SARFAESI Act has a remedy which is equally efficacious, if not more, than a writ petition, by way of an application under Section 17 of the SARFAESI Act. There is a particular limitation period for invoking such provision which has been exceeded by the petitioner. As such, the writ petition is barred on the ground of limitation as well as availability of an equally efficacious alternative remedy under Section 17 of the SARFAESI Act. Thirdly, it is argued that no document whatsoever has been produced or disclosed by the petitioner to substantiate the petitioner's claim of tenancy. The said non-disclosure assumes particular importance according to learned counsel for the respondent in view of the introduction of sub-Section 4(A) of Section 17 of the SARFAESI Act. The said provision contemplates that where any person in an application under Section 17(1) claims any tenancy or leasehold rights upon the

secured assets, the Debts Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to the claims, shall examine the tests as stipulated therein, including whether the tenancy has expired, the same is in contrary to Section 65(A) of the Transfer of Property Act, contrary to the terms of the mortgage, etc. The petitioner, it is contended, seeks to bypass the said procedure by preferring the present writ petition.

The respondents also rely on their exception to the report of the learned Court-appointed Special Officer in arguing that the access to the second and third floors touches the secured asset, possession of which has been taken by the respondents. In the event independent access is to be given to the other floors than the ground and first floors, the rights of the Bank under the provisions of the SARFAESI Act with regard to the secured asset would be adversely affected.

Upon hearing learned counsel for the parties, certain facts are elicited from the materials on record and the arguments. First, in its exception, the respondents have not claimed that the common staircase, which is the way of access to the second and third floors as per the report of the learned Special Officer appointed by this Court, goes through or traverses the ground and first floors in such a manner that the ground and first floors cannot be put under lock and key if access is to be given to the second and third floors.

Secondly, it is an admitted position and evident from the documents annexed to the writ petition as well that only the ground and first floors of the building are part of the secured asset regarding which measures have been taken by the respondent under Section 13(4).

Thus, the second and third floors are not secured assets amenable to the jurisdiction of Section 13(4) of the SARFAESI Act. Consequentially, since Section 17 speaks about measures taken under Section 13(4) being amenable to its jurisdiction, the purview of jurisdiction of Section 17 of the Tribunal is not attracted in the present case at all, since the sole grievance of the petitioner is with regard to the second and third floors, which are not part of the secured assets and regarding which no measures have been taken at any point of time under Section 13(4) of the SARFAESI Act.

The judgment cited by the respondents on the issue of non-maintainability of the writ petition due to availability of alternative remedy is thus dealt with in terms of the above observations.

The other components covered by the said judgment, that is, *South Indian Bank Ltd. and Ors. versus Naveen Mathew Philip and Anr.* reported at 2023 SCC Online SC 435, is whether a writ is maintainable against a private entity. In the said judgment, the Supreme Court quoted *Federal Bank Ltd. Vs. Sagar Thomas*, reported at (2003) 10 SCC 733, for the proposition that a company registered under the Companies Act for the purposes of carrying on any trade or business is a private enterprise to earn livelihood and to make profits out of such activities. Banking is also a kind of profession and commercial activity, the primary motive behind which can well be said to earn returns and profits. The Supreme Court observed that there may well be companies in which majority of the share capital may be contributed out of the State funds and in that view of the matter there may be more participation or dominant participation of the State in managing the affairs of the company. But in the case dealt with by the Supreme Court, the

banking company had its own resources. Any company carrying on banking business with a capital of 5 lakhs, it was held, becomes a scheduled bank. Ultimately it was observed that mere carrying on banking business does not make a company a public entity.

The context of the said judgment, however, is crystallised in paragraph 18 of the same which is also quoted in *Naveen Mathew (supra)*. Certain yardsticks have been introduced in the said judgment to ascertain whether a writ petition under Section 226 of the Constitution of India is maintainable. The only two tests which may be relevant in the present context are that writ is maintainable against a private body discharging public duty or positive obligation of public nature and against a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function.

It would be a peculiar dichotomy if the respondent no. 1 here, who is a financial institution carrying on business at a large scale, is kept outside the purview of judicial review under the writ jurisdiction of this court and in the same breath it is permitted, on similar footing as public entities, having a higher standard of transparency, to take fullest advantage of the summary methods contemplated under Section 13(4) of the SARFAESI Act and consequentially under Section 14 of the said Act.

Seen in such context, it is found that the respondents are undoubtedly a private body discharging public duty or positive obligation of public nature in the field of finances and banking, which provides the economic backbone to the country. Not only that, the respondents are governed in their financial activities under the norms and regulations framed from time to time by the central

operator, that is, the Reserve Bank of India, which has been created under the Reserve Bank of India Act and is the banking regulator of the country, coming directly under the aegis of the Union of India. Hence, the respondent no. 1 comes within the purview of Article 12 of the Constitution of India for the present purpose and a writ petition is very much maintainable against the respondents on such count as well.

In any event, the action taken by the respondents is *de hors* the jurisdiction of the SARFAESI Act itself, since the portion of the action with which the petitioner is aggrieved is the bank taking *de facto* possession of the second and third floors of the building, which are beyond the secured assets regarding which measures were taken under Section 13(4) and 14 of the SARFAESI Act in the garb of taking possession of the ground and first floors, the latter being the only components of the secured assets.

Perusal of the Special Officer's report shows that there is indeed an available route, independent and irrespective of the ground and first floors, for having access to the upper floors.

Paragraph 2 of the said report states that there is only one common staircase to the suit property which leads ultimately to the first floor, second floor and the terrace.

It has been stated in paragraph 3 that there exists a common staircase which grants access to the whole building from both the entrances. Inspecting further, the learned Special Officer observed that there can be no doubt that if the main entrance is locked and even if all the rooms on the ground and first

floors are sealed, the petitioner could still get access to the second and third/terrace floor through the common staircase.

Thus, there is clear scope of the respondents taking complete possession of the ground and first floors by sealing the same as indicated in the report of the learned Special Officer by locking the main entrance, but leaving it open for the petitioner and others to have access to the second and third/terrace floor through the common staircase mentioned in the learned Special Officer's report, photographs of which have been annexed to the said report as well. Thus taking a comprehensive view of the matter and for the ends of justice, it would only be appropriate if the respondent is directed to leave open the access to the upper floors above the first floor of the premises, without affecting the respondents' rights to seal the ground and first floors.

Accordingly, WPO 1792 of 2023 is disposed of by directing the respondents to seal the entrance to the ground and first floor of the concerned building by leaving open the access to the upper floors above the same, that is, the second and third floors, through the common staircase as mentioned in the learned Special Officer's report which is made a part of the records in the present writ petition. The respondents shall remain restrained from preventing the access of the petitioner to the second and third floors of the building through the common staircase in any manner whatsoever. However, it would be open to the Respondents to keep the ground and first floors, which are the secured assets, sealed.

The exception to the Special Officer's report filed today by the respondent nos. 1 and 2 is kept on record.

Lastly, the court would be failing in its duty if the efficiency in holding the inspection and the precision of the report of the learned Special Officer is not appreciated, which I hereby do.

No order as to costs.

Urgent certified website copy of this order, if applied for, be made available to the parties subject to compliance with the requisite formalities.

(SABYASACHI BHATTACHARYYA, J.)

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