(2017) 02 RAJ CK 0099

In the Rajasthan High Court

Case No : 10503 of 2016

Alpha Beta Shiksha Samiti APPELLANT

Vs

State of Rajasthan & Anr. RESPONDENT

Date of Decision : 23-02-2017

Acts Referred:

Constitution of India, Article 226 - Power of High Courts to Issue certain writs

Transfer of Property Act, 1882, Section 65A - Mortgagors power to lease

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Citation : (2017) 02 RAJ CK 0099

Hon'ble Judges : Mohammad Rafiq

Bench : SINGLE BENCH

Advocate : Ashok Gaur, Ajay Choudhary, A.K. Sharma, Ajay Agarwal, Surya Pratap Singh

Final Decision : Disposed

Judgement

1. This writ petition has been filed by the M/s. Alpha Beta Shiksha Samiti inter alia with the prayer that action of the respondents in putting lock and key on the premises of petitioner''s school; namely-Alpha Beta School at A-64, Shanti Path, Tilak Nagar, Jaipur be declared as bad in law with further declaration that the petitioner''s school would not be entitled for being dispossessed on the basis of order passed under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(for short ''the SARFAESI Act'') and provisions of Rajasthan Rent Control Act, 2001 will prevail and allow the petitioner to run the school peacefully and the tenancy of the premises be directed to be treated as having been transferred to the respondents from the erstwhile landlords and accordingly order dated 17.07.2012 passed by District Collector, Jaipur under Section 14 of the SARFAESI Act be accordingly modified.

2. The petitioner is a registered society under the Cooperative Societies Act and

running a school namely Alpha Beta School at the premises situated at A-64, Shanti Path, Tilak Nagar, Jaipur. According to the petitioner, it took the said premise on rent from its owner Late Shri P.C. Sogani in the year 1986 and since then the petitioner-society is running the aforesaid school and continuously paying rent to Late Shri P.C.Sogani and after his death, to his legal heirs. School building on the aforesaid premises has also been constructed by the petitioner-society and another school-namely; Vimukti Girls School having strength of almost 600 girls belonging to poor background, is also being run in the disputed premises. It so happened that the land was hypothecated by the then owner Late Shri P.C. Sogani for a loan taken by a company namely Unicorp Indus Limited, which is now under liquidation. On an application filed by Respondent No. under Section 14 of the SARFAESI Act, District Collector, Jaipur vide order dated 17.07.2012 directed Respondent No. 2 to take possession of the premises. Thereafter, application under Section 17 of the SARFAESI Act was filed by the petitioner-society before the Debts Recovery Tribunal, New Delhi, which was transferred to Debts Recovery Tribunal, Jaipur. Said application was decided vide order dated 23.03.2012 whereby it was held that such application at the behest of a tenant is not maintainable and no remedy is available under Section 17 of the SARFAESI Act. Pursuant to order dated 17.07.2012, Respondent No. 2 put the possession notice on the wall of the school premises on 23.07.2016. In the meantime, the Recovery Officer, Debts Recovery Tribunal dismissed the objections (RC No. 03/2014) vide order dated 12.12.2014. Thereafter, vide order dated 24.06.2016 receiver was appointed for dispute premises. The petitioner filed Writ Petition No. 6171/2015 challenging the said order before the Delhi High Court. Said writ petition was dismissed as not pressed with liberty to the petitioner to seek appropriate remedy provided under Section 30 of the Debt Recovery Tribunal Act with direction that the receiver shall not take physical possession of the mortgage property for a period of one week. The petitioner then filed appeal before the Debts Recovery Tribunal, New Delhi, which vide order dated 02.07.2015 continued the interim protection granted by the Delhi High Court and the said appeal is still pending before the DRT, Delhi and interim order is continuing. However, in the meantime, the respondent No. 2 put its lock and sealed the disputed premises, therefore, the petitioner-society has

approached this Court by filing present writ petition. This Court while issuing notices of the writ petition vide order dated 02.08.2016 stayed dispossession notice dated 23.7.2016.

3. Mr. Ashok Gaur, learned Senior Counsel appearing on behalf of the petitioner argued that the petitioner-society has taken the premises in question on rent from the original owner Late Shri P.C. Sogani in the year 1986 and is continuously has been paying rent to Mr. P.C. Sogani and after his death to his legal heirs. It has been running a school in the name of Alpha Beta English Medium School having around 250 students and another school by name of Vimukti Girls School is also being run in the disputed premises, which has strength of almost 600 girls belonging to poor background. It is argued that in

spite of interim order passed by DRT, Delhi dated 02.07.2015, which is still continuing till date, Respondent No. 2 illegally issued dispossession notice dated 23.07.2016. Relying on the judgment of the Supreme court in Vishal N. Kalsaria Vs. Bank of India & Others, (2016) 3 SCC 762, learned Senior Counsel argued that SARFAESI Act operates in a different field and it cannot be used to dispossess a tenant from the mortgaged property and the rights of such tenant can only be determined by competent tribunal under the Rajasthan Rent Control Act, 2001. It has been held by the Supreme Court that the factum of non-registration of the deed executed between the tenant and the landlord is immaterial as such factum could even otherwise be established by the relationship of landlord and tenant and the regular payment of rent is sufficient proof to establish a tenant and landlord relationship. Learned Senior Counsel further argued that Respondent No. 2 neither before moving application before the District Collector, Jaipur, nor prior to taking possession vide possession notice dated 23.07.2016, had given any notice under Section 13(2) of the Act to the petitioner, nor any prior information was given to the petitioner-society. Impugned order has been, therefore, passed without opportunity of hearing to the petitioner. It is submitted that writ petition filed before this Court is maintainable against the dispossession notice dated 23.07.2016, as it is purported to have been issued in compliance of order of District Collector, Jaipur dated 17.07.2012. Learned Senior Counsel argued that Section 17(4A) has been incorporated in the SARFAESI Act through amendment dated 16.08.2016, which is prospective in nature whereas in the present case possession notice dated 23.07.2016 had already been issued by the respondent before aforesaid amendment. Application filed by the petitioner under Section 17 of the SARFAESI Act has already been dismissed on the ground that application on behest of a tenant under Section 17 is not maintainable. Therefore, even if now Section 17(4A) has provided certain rights to the tenants, tenancy rights of the petitioner-society cannot be decide by Debts Recovery Tribunal, Jaipur.

4. Mr. A.K. Shamra, learned Senior Counsel appearing on behalf of Respondent No. 2 and Mr. Surya Prakash, learned counsel appearing on behalf of Respondent No. 1-State opposed the writ petition and argued that in 1996, various credit facilities were granted by the Secured Creditor/Dena Bank(Assignor Bank

of Phoenix), as a part of State Bank of Bikaner and Jaipur Consortium, to Unicorp Industries Limited(a family controlled and managed company of Sogani''s). the said credit facilities were enhanced in the year 1997. State Bank of Bikaner and Jaipur, State Bank of Patiala and State Bank of Indore(Assignor Banks of Kotak Mahindra Bank Limited) also granted credit facilities. To secure the said credit facilities, amongst others, Shri P.C. Sogani and Mr. Arun Sogani created equitable mortgage over the properties (i) bearing No. A-64, Tilak Nagar, Jaipur and (ii) C-40, Lajpat Nagar, Jaipur by depositing the title deeds with the Lead Bank/State Bank of Bikaner and Jaipur for the benefit of inter-alia, Dena Bank also. On account of default, the loan was recalled in 1999 and thereafter on 24.12.1999, the Assignor Bank filed original application (No. 561/1999) for recovery of outstanding amounts. Similarly, other Banks also filed original applications for recovery of their dues from Sogani''s. Mr. A.K. Sharma, learned Senior Counsel argued that after Sogani''s successfully dragged the recovery proceedings before the Debts Recovery Tribunal for more than 13 years by indulging into multiple litigations, Respondent No. 2, Phoenix for itself and also on behalf of Kotak Mahindra Bank Limited was left with no option except to issue a notice under Section 13 (2) of the SARFAESI Act demanding a sum of Rs. 931,19,72,026.65. Secured creditor/Phoenix on 04.06.2012 filed an application under Section 14 of the SARFAESI Act before the District Magistrate, Jaipur for taking over the physical possession of the mortgaged property. Learned District Magistrate, Jaipur vide order dated 17.07.2012 allowed the application filed by the

Secured Creditor directing for taking over the physical possession of the mortgaged property.

5. Learned Senior Counsel argued that challenging the measures taken by Phoenix under SARFAESI Act, including order dated 17.07.2012 passed by the learned District Magistrate, Jaipur, Ms. Manisha Gautam (signatory of the petitioner before all forums including present petition) on 30.07.2012 prepared, signed and proceeded to prosecute a securitisation application under Section 17 of the SARFAESI Act before the Debts Recovery Tribunal, Delhi, which was later on transferred to Debts Recovery Tribunal, Jaipur. It is argued that for over 14 years, borrowers/Soganis lingered on the adjudication of original application filed by the secured creditor for recovery of outstanding dues by adopting various dilatory tactics. Finally, Presiding Officer, Debts Recovery Tribunal, Delhi on 06.01.2014 passed final order in the original application filed by the secured creditor, which remained unchallenged before any higher forum at the instance of borrowers/Soganis. Ms. Manisha Gautam is one of the Certificate Debtors in the proceedings before the Debts Recovery Tribunal, Delhi and this fact has also been suppressed by the petitioner from this Court. Recovery Certificate was drawn by the Debts Recovery Tribunal, Delhi in accordance with final order dated 06.01.2014 and recovery/execution proceedings were initiated against the borrowers including Ms. Manisha Gautam. Ms. Manisha Gautam filed objections before the Recovery Officer in Recovery Certificate No. 03/2014 on 03.11.2014. Objections filed by Ms. Manisha Gautam on behalf of the petitioner were duly

adjudicated upon and dismissed by Debts Recovery Tribunal, Delhi vide order dated 12.12.2014, while holding that the petitioner has failed to make out any case in support of the alleged tenancy. It is further argued that Presiding Officer, Debts Recovery Tribunal, Jaipur vide order dated 23.03.2015 dismissed Securitisation Application No. 75/2013 filed by Alpha Beta Shiksha Samiti. Thereafter, Ms. Manisha Gautam filed an application for recall of order dated 17.07.2012 passed by the District Magistrate, Jaipur for taking over the physical possession of the mortgaged property by the secured creditor. However, Phoenix took over the physical possession of the vacant property with police assistance. No school was found to be running in the said building as the same had already been shifted elsewhere long back.

6. Learned Senior Counsel argued that the petitioner has deliberately concealed various facts from this Court namely (i) present petition as well as (ii) objections filed in execution proceedings before the learned Debts Recovery Tribunal-II, Delhi; (iii) Securitisation Application No. 73/2013 filed by the petitioner and dismissed by learned Debts Recovery Tribunal, Jaipur vide order dated 23.03.2015 raising identical contentions, which have been prepared, signed and prosecuted by Ms. Manisha Gautam(who filed her affidavit in support of the present petition also). Ms. Manisha Gautam herself is judgment debtor/certificate debtor in R.C. No. 3/2014 before the DRT, Delhi in respect of the final order passed by learned Debts Recovery Tribunal, Delhi in favour of Phoenix in execution of which also the mortgaged property in question is being sold for recovery of decreetal

amount. Learned Senior Counsel argued that there exists an alternative efficacious remedy by way of a securitisation application under Section 17(4A) of the SARFAESI Act, which has been specifically introduced to deal with the contention of tenancy. In the present case, the petitioner filed present petition despite having exhausted the same remedy and failing to obtain any relief. After the securitisation application filed by the petitioner was dismissed by the Debts Recovery Tribunal, Jaipur vide order dated 23.03.2015, the petitioner did not file any appeal but waited for more than a year and then filed present petition before this Court, that too while concealing material facts and putting forward misguiding propositions. It is argued that conduct of Ms. Manisha Gautam(signatory of present petition), who also prepared, signed and proceeded to prosecute securitisation application before the Debts Recovery Tribunal, Jaipur, which was dismissed vide order dated 23.03.2015, is not appreciable and deserves to be condemned. Immediately after dismissal of said application, Ms. Manisha Gautam filed an application for recall of order dated 17.07.2012 passed by the District Magistrate, Jaipur. However, pending said application, Phoenix took physical possession of the property in question and the entire action was photographed and videographed. The disputed property was vacated much before 23.07.2016. Learned Senior Counsel appearing on behalf of the respondents relied upon the judgments in United Bank of India Vs. Satyawati Tondon & Others, (2010) 8 SCC 110 and Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited & Others, (2014) 6 SCC 1.

7. Even though this Court has taken note of the arguments advanced by both the sides at extenso, but, this Court is not inclined to enter into the same and decide the case on merits, as it is of the opinion that specific remedy has been provided to a tenant by insertion of sub-section (4A) vide Act no. 44 of 2016 w.e.f. 01.09.2016 and sub-section(i) of Section 17(4A) of the SARFAESI Act inter alia provides that any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in

relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether the lease or tenancy (a) has expired or stood determined; or (b) is contrary to Section 65A of the Transfer of Property Act, 1882; or (c) is contrary to terms of mortgage; or (d) is crated after the issuance of notice of default and demand by the Bank under sub-section (2) of Section 13 of the Act. Contention of learned Senior Counsel appearing on behalf of the petitioner that such remedy would not be available to the petitioner as aforesaid provision would apply prospectively only and pending cases would not be affected thereby is noted to be rejected. In the present case, dispossession notice has been issued on 23.07.2016 whereas amendment in Section 17 of the SARFAESI Act introducing Section 17(4A) came into force w.e.f. 01.09.2016, but there is no warrant on any of the said provisions to take a view that remedy is provided to a person, who in an application under sub-section (1) claims any tenancy or leasehold rights upon

the secured asset. In the present case, the petitioner is claiming tenancy rights and filed writ petition before this Court on 29.07.2016, at a time when the aforesaid remedy was not provided by the statute to the petitioner-tenant, but now when sub section (4A) has been inserted in Section 13 to specifically provide remedy to the persons, who claims any tenancy or leasehold rights upon the secured asset, the petitioner has to first approach the Debts Recovery Tribunal.

8. Similar argument was raised before Co-ordinate Bench of this Court in Samtel Color Ltd. Vs. State Bank of India & Ors.(S.B. Civil Writ Petition No. 11302/2016 decided on 17.10.2016) wherein it was observed that Section 17 of the SARFAESI Act, which at the relevant time provided for a ''right to appeal'' was amended on 01.09.2016. In its amended form, the misnomer of "Right to Appeal" under Section 17 of the SARFAESI ACT was corrected as that of a right to an application against measures to recover secured debts. Another amendment, to subsection (3) of Section 17 of the SARFAESI Act was also made empowering the Debt Recovery Tribunal to restore possession of secured assets also to any "aggrieved person", aside of the borrower in the event of Debt Recovery Tribunal finding that the possession of the secured asset had been taken over by secured creditor illegally or in contravention of the legal rights of the borrower or one in possession with legal rights protected under other statutes. Section 17(4A) of the Act was also inserted effective 01.09.2016 inter alia providing that where any person in an application under sub-section (1), claims any tenancy or

leasehold rights upon the secured asset, the Debt Recovery Tribunal after examining the facts of the case and evidences produced by the parties in relation to such claim shall for the purpose of enforcement of security interest have the jurisdiction to examine subsistence of the lease or tenancy including the question as to whether the lease is contrary to Section 65A of the Transfer of Property Act, 1882. The aforesaid amendments to Section 17 of the SARFAESI Act became effective 01.09.2016, which means that aside of the borrower, any person aggrieved of the action under Section 13(4) of the SARFAESI Act can approach the Debt Recovery Tribunal, which, on finding contravention of the SARFAESI Act by the secured creditor can restore possession of the secured asset to such aggrieved person safeguarding its/his rights in law de-hors the rights of the secured creditor qua the mortgaged property in issue. In the aforesaid case, writ petition was filed earlier than the amendment aforesaid and an objection was raised by the petitioner therein that right to appeal provided to "any aggrieved person" by insertion of Section 17(4A) into SARFAESI Act w.e.f. 01.09.2016 could not be retrospectively applied. Number of judgments of the Supreme Court were cited in that writ petition to contend that right to file statutory appeal is a substantive vested right, which cannot be retrospectively taken away and cannot similarly be retrospectively conferred. Repelling such argument, the Co-ordinate Bench of this Court in para 10 of the judgment held as under: "10. I am afraid, there is no force in the contention of Mr. Kamlakar Sharma. For one, resort to the jurisdiction of this court under its equitable

extraordinary jurisdiction under Article 226 of the Constitution of India cannot be equated with a right to appeal. In the aforesaid context, the mere laying of writ petition against public notice dated 11-7-2016, does not entitle the petitioner to claim that 11 the subsequent amendment to Section 17 of the Act of 2002 effective 1-9-2016 if operated against it would entail denial of a vested legal right. In the instant case in the event the petitioner company is required to avail the alternative remedy now obtaining under Section 17 of the Act of 2002 against the public notice dated 11-7- 2016 it would not thus entail denial of a vested right. The expansion of the jurisdiction of the Debt Recovery Tribunal jurisdiction by way of the amendments to Section 17 of the Act of 2002 effective 1-9- 2016 does not create any disability for the petitioner company nor burdens it with a new duty in respect of a transaction completed. Contrarily it confers a right to avail a statutory remedy removing a lacunae. Under Section 17 of the Act of 2002 as existing prior to 1- 9-2016 which even while the petitioner company aggrieved of the public notice dated 11-7-2016 could have taken proceedings under the then extant law as an aggrieved person, it could not have been granted the relief of being put back in possession even if the Dent Recovery Tribunal had theoretically found its rights unlawfully contravened by the secured creditors in dispossessing it from the land on sub lease with it. This was so held in the case of Harshad Goverdhan Sondagar Vs. International Assets Reconstruction Company Limited [(2014)6 SCC 1] observing that a person other than a borrower if aggrieved of being dispossessed by the secured creditor under the Act of 2002 could not be put back in possession 12 by the Debt Recovery Tribunal in view of the limitation of the language of Section 17(3) of the Act of 2002 then obtaining. The amendment to Section 17 of the Act of 2002 effective 1-9-2016 sought to overcome the said jurisdictional limitation of the Debt Recovery Tribunal. It is thus plainly curative in nature as would appear from the background facts hereinbelow detailed."

9. In view of above, writ petition is disposed off with liberty to the petitioner to

approach the Debts Recovery Tribunal within a period of 15 days, during which period interim order dated 02.08.2016 passed by this Court shall remain in force. It would be, thereafter, for the Debts Recovery Tribunal to validate, continue or otherwise pass interim order in its discretion. The petitioner may also file an application along with main application seeking appropriate interim relief. Debts Recovery Tribunal shall decide main application of the petitioner within a period of three months from the date of its filing. It is, however, made clear that anything observed by this Court hereinabove would not prejudice case of either of the parties and no arguments noted hereinabove has been decided on merits and all issues are kept open to be agitated before the Debts Recovery Tribunal. Stay application also stands disposed off.

