(2023) 12 CAL CK 0012

In the Calcutta High Court

Case No : W.P.A. No. 22120 Of 2023

Chhabi Kar Ray APPELLANT

Vs

State Bank Of India And Others RESPONDENT

Date of Decision : 07-12-2023

Acts Referred:

Security Interest (Enforcement) Rules, 2002 — Rule 8(6), 8(7)(a)
Code Of Civil Procedure, 1908 — Order 26 Rule 9
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 13(4), 14, 17, 17(1), 18

Citation : (2023) 12 CAL CK 0012

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Subhankar Nag, Dwaipayan Basu Mallick, Arkaprava Sen, Sayantan Kar, Sk. Md. Wasim Akram, Shashwat Nayak, Debasish Chakraborty

Final Decision : Disposed Of

Judgement

Sabyasachi Bhattacharyya, J

1. The petitioner claims to be the owner of 139 Sq. ft. car parking space at 75, Kali Kumar Mazumdar, Kolkata – 700 075. It is submitted that the respondent-Bank illegally took possession of the said property of the petitioner pursuant to an order under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "SARFAESI Act") although the petitioner is in no way connected with the loan and/or the borrower. Learned counsel places reliance on the title deeds annexed to the writ petition in support of such contention.

2. When the petitioner wrote to the Bank, the Bank gave a reply on August 23, 2023, annexed as Annexure P-8 at page 109 of the writ petition. Learned counsel points out that the Bank admitted that the Bank, as secured creditor, took physical possession of 148 Sq. ft. on the ground floor on the concerned building and that the property and deed of conveyance the petitioner referred to in her

notice is distinct from the secured assets of the bank and not the same property. It is, thus, argued that in view of such admission, the action of the Bank in taking possession of the petitioner”s property and putting the same to auction sale are palpably bad in law and de hors all norms of natural justice.

3. Learned counsel for the petitioner argues that the secured assets are required to be well-demarcated and defined. The affidavit in a proceeding under Section 14 of the SARFAESI Act is required to disclose the exact description of the property, including all demarcations. A partition cannot be effected by way of an order passed under the said provision.

4. Since an undemarcated garage space was the secured asset, the bank could not have taken possession of the property at all. In any event, in the garb of an admittedly different property, the petitioner”s property could not be taken over by the Bank.

5. Learned counsel submits that the provisions of Rule 8, sub-rules (6) and (7)(a) of the SARFAESI Rules, 2002 and Appendices IV and IVA were to be adhered to, which has not been done in the present case.

6. Learned counsel places reliance on a Division Bench judgment of this Court in Debashree Das Vs. State of West Bengal and others, reported at (2011) 1 CHN 10 where the court observed that where a citizen of India has been harassed and was dispossessed from his lawful property at the instance of a financial institution who had acquired no interest over the property so as to enable it to exercise power conferred under Section 13(4) of the SARFAESI Act, such citizen is not required to go to the alternative remedy provided under Section 17 of the Act.

7. Learned counsel next argues that no order can be passed under Section 14 of the SARFAESI Act, 2002 at the behest of the Bank/financial institution after the sale was effected. In the present case, admittedly the sale was effected in the year 2021 whereas the Bank obtained an order under Section 14 of the SARFAESI Act on December 7, 2022.

8. In support of the said proposition, learned counsel for the petitioner cites an unreported judgment of a co-Ordinate Bench of this Court in United Bank of India and another Vs. State of West Bengal and others. In the said judgment, the learned Single Judge held that on the execution and registration of the deed of conveyance, the title to the immovable properties stands transferred to and vested with the purchaser. There remains nothing more to be done by the secured creditor in respect of such immovable property. The secured creditor does not retain any right, title and interest over and in respect of the immovable property sold under the Act of 2002 or otherwise.

9. In reply, learned counsel for the respondent-Bank, by placing reliance on the provisions of Section 14 of the SARFAESI Act, 2002, argues that nothing in the said provision restricts the right to obtain an order of possession under Section

14 of the SARFAESI Act and obtain such possession at the instance of the bank even after the sale is effected.

10. Thus, learned counsel seeks this Court to distinguish the coordinate Bench judgment cited by the petitioner.

11. Learned counsel for the Bank also cites United Bank of India Vs. Satyavati Tondon and others, reported at (2020) 8 SCC 110. It was observed there that if a person had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, she could have availed remedy by filing an application under Section 17(1) of the SARFAESI Act. The expression "any person" used in Section 17(1) is of wide import and takes within its fold not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both the Tribunal and the Appellate Tribunal, it was held, are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time-schedule. It is, thus, evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

12. Insofar as the dispute sought to be raised by the petitioner is concerned, learned counsel for the Bank submits that nothing in the communication of the Bank dated August 23, 2023 vindicates the stand of the petitioner. It is submitted that the Bank, in due course of law under Section 14 of the SARFAESI Act, took possession of the 148 Sq. ft. space at the premises-in-question, which was the secured asset.

13. It is an admitted position that the said property differs from the property which is the subject-matter of the deed of conveyance relied on by the petitioner.

14. The petitioner seeks to make out a point that the Bank has taken possession of the petitioner"s property, which is distinct and different from the secured asset. Thus, the present dispute is whether the Bank took possession of the actual secured asset or some other property. Such question can only be decided either by the Tribunal or before a Civil Court, since a local inspection by an Advocate Commissioner is essential to ascertain such allegation. The same, it is argued, is entirely beyond the scope of a writ petition.

15. Heard both sides.

16. Certain facts of the case are undisputed. It is an admitted position that the property of which possession was taken by the Bank as secured asset was distinct and different from the property of the petitioner as depicted in the title deeds of the petitioner. Apart from the area of the two properties being different, the petitioner"s property being 139 Sq. ft. and the Bank"s secured asset 148 Sq. ft., the description of the two is also somewhat different.

17. Thus, this is not a case where the Bank admits to have taken possession of the petitioner"s property.

18. In the cited judgment of Debashree Das (supra), the Division Bench was dealing with a case where there was no lawful mortgage in respect of the property-in-question. The identity of the property regarding which the Bank had initiated proceedings under Section 13(4) of the SARFAESI Act was not in dispute as in the present case. In such circumstances, the Division Bench held that in the facts of the said case, where a citizen of India was harassed in the way as in the said case and was dispossessed from his lawful property at the instance of a financial institution who had acquired no interest over the property so as to enable it to exercise power under Section 13(4) of the Act, such a citizen is not required to go to the alternative remedy provided under Section 17 of the Act.

19. Section 17 of the SARFAESI Act provides that any person including the borrower, if aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, would be entitled to prefer a challenge thereunder. The petitioner admittedly does not claim the secured asset, which the Bank claims to have taken possession of. Thus, the petitioner"s grievance is not against the SARFAESI action taken by the bank in respect to secured asset of 148 Sq. ft. on the ground floor at Block-B of the concerned building. Hence, there arises no occasion for the petitioner to be relegated to Section 17 of the 2002 Act.

20. The issue here is the identity of the property which has been taken by the Bank. The Bank sticks to its stand that it took possession of the secured asset which is admittedly different from the property of the petitioner. The petitioner, however, claims not that the SARFAESI action of the Bank with regard to the 148 Sq. ft. secured asset was bad but that in the garb of taking possession of the same, the petitioner"s garage space of 139 Sq. ft., which is distinct and different, was taken over by the Bank.

21. Satyavati Tondon"s case, cited by the respondent-Bank, is based on the presumption that the challenger is aggrieved by a notice issued under Section 13(4) or action taken under Section 14 of the SARFAESI Act, which is not the present case. The quarrel of the petitioner is not with the order passed under Section 14 or any action done by the bank ?under the SARFAESI Act". The grievance is that the Bank exceeded its jurisdiction under the SARFAESI Act or the order under Section 14 (which was in respect of the secured asset) and took possession of the property of the petitioner erroneously.

22. Insofar as the petitioner"s argument regarding a Section 14 order not being maintainable after the title passes from the Bank to the purchaser in respect of the secured asset, the same is not germane here.

23. The action by which the petitioner is aggrieved is that her property was taken by the Bank not pursuant to the order passed under Section 14, which pertained to the secured asset and not the petitioner"s property, but beyond the same. Thus, the petitioner does not have locus standi to challenge the order passed under Section 14 of the SARFAESI Act and the proposition laid down in United

Bank of India (supra) is rendered academic for the present purpose.

24. A necessary corollary of the petitioner"s challenge, the sale conducted by the Bank with regard to the secured asset which the petitioner admits to be different from the petitioner"s property, is also not under challenge.

25. In the present case, the identity of the property taken possession of by the Bank is in dispute, which is beyond the domain of the writ court to ascertain.

26. The remedy of the petitioner here is to seek a declaration that the Bank acted de hors its powers and exceeded jurisdiction under Section 14 of the SARFAESI Act in illegally taking possession of the petitioner"s property. The petitioner also has to seek a further remedy of recovery of possession of her property which has been taken by the Bank illegally according to the petitioner. Thirdly, the petitioner may also seek a declaration that the sale conducted in respect of the secured asset by the Bank does not bind the petitioner in any manner.

27. However, all such reliefs can be granted only by a competent Civil Court having jurisdiction. The Civil Court has the mechanism under the Code of Civil Procedure to take detailed evidence on such issues and to decide the issues permanently, if necessary, granting interim relief as well.

28. As rightly pointed out by learned counsel for the Bank, the identity of the property which has been taken over by the Bank, with the petitioner"s property, has to be ascertained by a proper inspection. Such an exercise can only be conducted under Order XXVI Rule 9 of the Code of Civil Procedure, by appointment of an Advocate Commissioner duly trained to hold a local investigation to resolve the issue as to whether the petitioner"s property was taken over by the Bank. For so ascertaining, the identity of the petitioner"s property has to be ascertained on a comparison of the same in juxtaposition of the title deed of the petitioner on the one hand and the bank"s mortgage deeds or the borrower"s title deeds on the other.

29. Thus, the remedy of the petitioner lies neither before the writ court, with its limitations of taking evidence and granting declarations conclusively, nor the Debts Recovery Tribunal whose powers are limited within the precincts of the SARFAESI Act, 2002 but a properly constituted civil suit to be instituted before a competent Civil Court.

30. In such view of the matter, no interference is warranted in the present writ petition.

31. Accordingly, WPA No. 22120 of 2023 is disposed of by granting liberty to the petitioner to approach the competent Civil Court with the issues sought to be raised by the petitioner herein by way of a properly constituted suit. It is made clear that the allegations and counter-allegations of the parties have not been decided on merits by this Court and it will be open to the Civil Court, if approached, to decide all issues independently in accordance with law without

being influenced in any manner on the merits of the case by the observations made hereinabove.

32. There will be no order as to costs.

33. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

