
(2017) 08 KAR CK 0012
In the Karnataka High Court
Case No : 35597-35601 of 2017

REMO Software Pvt. Ltd & Ors.

APPELLANT

Vs

HDB Financial Services Ltd. & Ors.

RESPONDENT

Date of Decision : 08-08-2017

Acts Referred:

[Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002](#), [Section 14](#), [Section 14](#), [Section 13\(2\)](#), [Section 13\(2\)](#)

Citation : (2017) 08 KAR CK 0012

Hon'ble Judges : Vineet Kothari

Bench : SINGLE BENCH

Advocate : Srinatha R.K., V. Suresh

Judgement

1. These petitions have been filed by eight of the tenants/lessees of Respondent landlord/borrowers, Respondent No.2- Mr. Najmul Hassan, Respondent No.3-M/s. Imperium Constructions Pvt.Ltd., Respondent No.4 - Mr. Meer Mohammed Saleh and Respondent No.5 - Mrs. Sufia Begum, who took loans from R1 - HDB Financial Services Ltd.

2. The Respondent No.1 - HDB Financial Services Ltd. (hereinafter referred to as the "Financial Institution", for short) invoked the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter called "SARFAESI Act,2002",) against the landlords/borrowers and issued Notice under Section 13 (2) of the SARFAESI Act, 2002, on 10/11/2016, for recovery of their outstanding loans of Rs.7.26 crores approximately as given in the Notice under Section 13 (2) of the Act.

3. The Respondent No.1 - Financial Institution also approached the learned Magistrate under Section 14 of the SARFAESI Act, 2002, for taking over the possession of the Secured Asset in question namely the Building in which the present eight petitioners claim their tenancy or lease hold rights in the respective

portions of the said property under the various Lease Agreements entered into between 2003 and 2017, some of them being after the date of Notice under Section 13(2) of the SARFAESI Act, 2002, given to the borrowers on 10/11/2016.

4. The learned counsel for the petitioners, Mr. Srinatha R.K., relying upon the decisions of the Hon"ble Supreme Court in the case of Vishal N. Kalsaria Vs. Bank of India and others, decided on 20/01/2016 [(2016) 3 SCC 762] and in the case of Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited and others, decided on 03/04/2014 [/SC/0377/2014] = [(2014) 6 SCC 1], has submitted that the learned Magistrate has erred in passing the impugned order Annexure G on 20/05/2017, directing the physical possession of the said property in question to be handed over to the Respondent No.1 - Financial Institution for recovery of the loan amount in question.

5. He has submitted that the learned 9th Additional Chief Metropolitan Magistrate, Bangalore has grossly erred in observing in para.3 of the impugned order that in view of the Notice under Section 13(2) of the SARFAESI Act, 2002, to the borrowers and notice pasted on the property for General Public also, there was no separate notice required to be given to the present petitioners, who are lessees or tenants in the said premises under Section 14(2) of the SARFAESI Act, 2002.

6. He submitted that the learned Magistrate has erred in relying upon the Division Bench judgment of this Court in the case of Mrs. Sunanda Kumari and Another Vs. Standard Chartered Bank, decided on 23/03/2006 (ILR 2007 Kar.16), which was rendered much prior to the aforesaid two Supreme Court judgments.

7. On the other hand, the learned counsel appearing for the Respondent No.1 - Financial Institution, Mr.V. Suresh has brought to the notice of the Court the provisions of Section 17(4-A) inserted in the said SARFAESI Act, 2002, by Act No.44 of 2016 with effect from 01/09/2016 vide SO No.2831 (E dated 01/09/2016) which provides for an alternative remedy available to such tenants or lessees against the enforcement of Security Interest by the Bank or concerned Financial Institution by filing appropriate Application under Section 17 of the SARFAESI Act, 2002 before the Debt Recovery Tribunal having jurisdiction over the said Secured Assets.

8. The provisions of Section 17 with its changed heading from "Right to Appeal" to "Application against measures to recover secured debts" in particular Section 17(4-A) inserted with effect from 01/09/2016 reads as under:- Section 17: Application against measures to recover secured debts (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, [may make an application along with such fee, as may be prescribed] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

(1A).....

(2).....

(3).....

(4).....

(4-A) where-

(i) 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 lease or tenancy,-

(a) has expired or stood determined; or

(b) is contrary to section 65A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act; and (ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the subclause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.

9. The learned counsel for the Respondent - Financial Institution, therefore, has submitted that the petitioners/tenants should be directed to approach the Debt Recovery Tribunal in the matter.

10. He further submits that for a period of two weeks the Respondent - Financial Institution will not enforce the Security Interest by taking precipitative or other coercive measures to recover the physical possession, provided the petitioners/tenants not only approach the Debt Recovery Tribunal under Section 17(4-A) as extracted above, within the said period of two weeks from today, but also deposit the arrears of rentals as well as the current rentals payable by them to the Respondent landlords/borrowers with the Respondent Financial Institution - Bank.

11. To the aforesaid submission of the learned counsel for the Respondent - No.1, the learned counsel for the petitioners fairly agrees.

12. Before relegating the parties to the appropriate alternative Forum under Section 17(4-A) of the SARFAESI Act, 2002, namely Debt Recovery Tribunal, this Court would also like to observe for future cases to be dealt with by learned

Magistrates under Section 14 of the Act that the learned Magistrate while exercising his powers under Section 14 of the SARFAESI Act, 2002 has fallen into an error in observing that no Notice is required to be issued under Section 14 of the SARFAESI Act, 2002 to the tenants. Section 14 of the SARFAESI Act, 2002 does not exclude the compliance of principles of natural justice to this extent in any manner.

13. Therefore, irrespective of the previous notices issued under Section 13 (2) of the SARFAESI Act or subsequent measures taken by the concerned Bank or Financial Institution under Section 13(4) of the Act, the learned Magistrate invoking proceedings under Section 14 of the SARFAESI Act, 2002, is bound to issue Notice to the concerned borrower and the tenants or other occupants of the property, if it is brought to his notice that the Secured Asset or Building in question is a tenanted premises. Equally it is the duty of the landlord and borrower to place on record the facts and Date of Order 08-08-2017 W.P.Nos.35597-601/2017 & 35602-604/2017 M/s. REMO Software Pvt. Ltd. and others Vs. HDB Financial Services Ltd. and others evidence with regard to tenancy in the Secured Assets/premises before the Magistrate in proceedings under Section 14 of the Act.

14. The compliance with the principles of natural justice has to be made in all cases even by the concerned Magistrate under Section 14 of the SARFAESI Act, 2002.

15. This aspect of the matter was touched by the Hon"ble Supreme Court in the case of Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited and others, (supra) in the following terms in para.21 of the said judgment. The relevant paragraph 21 of the said judgment is quoted below for ready reference:-

.... When such an application is filed, the Chief Metropolitan Magistrate or the District Magistrate will have to give a notice and give an opportunity of hearing to the person claiming to be the lessee as well as to the secured creditor, consistent with the principles of natural justice, and then taken a decision. If the Chief Metropolitan Magistrate or District Magistrate is satisfied that there is a valid lease created before the mortgage or there is a valid lease created after the mortgage in accordance with the requirements of Section 65A of the Transfer of Property Act and that the lease has not been determined in accordance with the provisions of Section 111 of the Transfer of Property Act, he cannot pass an order for delivering possession of the secured asset to the secured creditor. But in case he comes to the conclusion that there is in fact no valid lease made either before creation of the mortgage or after creation of the mortgage satisfying the requirements of Section 65A of the Transfer of Property Act or that even though there was a valid lease, the lease stands determined in accordance with Section 111 of the Transfer of Property Act, he can pass an order for delivering possession of the secured asset to the secured creditor."

16. In a later judgment in Vishal N. Kalsaria Vs. Bank of India and others, decided on 20/01/2016 [(2016) 3 SCC 762], the Hon"ble Supreme Court held as follows. " 32. In view of the above legal position, if we accept the legal submissions made on behalf of the Banks to hold that the provisions of SARFAESI Act override the provisions of the various Rent Control Acts to allow a Bank to evict a tenant from the tenanted premise, which has become a secured asset of Bank after the default on loan by the landlord and dispense with the procedure laid down under the provisions of the various Rent Control Acts and the law laid down by this Court in catena of cases, then the legislative powers of the State legislatures are denuded which would amount to subverting the law enacted by the State Legislature. Surely, such a situation was not contemplated by the Parliament while enacting the SARFAESI Act and therefore the interpretation sought to be made by the learned Counsel appearing on behalf of the Banks cannot be accepted by this Court as the same is wholly untenable in law. 33. We are unable to agree with the contentions advanced by the learned Counsel appearing on behalf of the Respondent Banks.

34. In view of the foregoing, the impugned judgments and orders passed by the High Court/Chief Metropolitan Magistrate are set aside and the appeals are allowed. We further direct that the amounts which are in deposit pursuant to the conditional interim order of this Court towards rent either before the Chief Metropolitan Magistrate/Magistrate Court or with the concerned Banks, shall be adjusted by the concerned Banks towards the debt due from the debtors/landlords in respect of the Appellants in these appeals. The enhanced rent by way of conditional interim order shall be continued to be paid to the respective Banks, which amount shall also be adjusted towards debts of the debtors/landlords. All the pending applications are disposed of."

17. In the case of Sanjivkumar Surajprakash Aggarwal Vs. State Bank of India and others, decided on 30/06/2016 [(2016) 14 SCC 532] also, the Hon"ble Supreme Court directed for such an enquiry by Magistrate under Section 14 of the SARFAESI Act, 2002 in the following terms: " Leave granted. The dispute in this appeal is whether the tenancy created in favour of the appellant is a sham one or not. It is not in dispute that there is no adjudication on this aspect. Under Section 14 of the SARFAESI Act, this aspect can be adjudicated before the Chief Metropolitan Magistrate, Esplanade Court, Mumbai. 2. Mr. Amarendra Sharan, learned Senior Counsel appearing for the Bank, submits that the Magistrate, in fact, had gone into the aspect while deciding the intervention application.

3. We do not think that the same would be sufficient in adjudicating the issue regarding tenancy. In our opinion, an inquiry, with the participation of the appellant, would be in the fitness and fairness of the adjudication. Therefore, this appeal is disposed of, directing the Magistrate to conduct an inquiry with regard to the genuineness of the tenancy created by the third respondent with the appellant."

18. The learned Single Judge of Calcutta High Court in the case of M/s.

Swastyayan Agro Industries and Another Vs. Union of India and others, in W.P.No.379(W) of 2013 decided on 24/07/2014, held that under Section 14 of the SARFAESI Act, the District Magistrate cannot direct the Bank to directly take over the possession of Secured Asset with the Police aid as per Section 14(1)(a) and (b) of the Act. The learned Single Judge held as follows: " In my view, the District Magistrate acted in excess of jurisdiction vested upon him in law by Section 14 of the SARFAESI Act, 2002. Section 14 of the SARFAESI Act, 2002 before the introduction Sub-section (1A) thereto required the District Magistrate on a request of a secured creditor for assistance to:

(a) take possession of the secured assets and documents and

(b) forward such secured assets and documents to the secured creditor. In the instant case, the District Magistrate, Bankura did not do so. The District Magistrate took no steps to take possession of the secured assets and documents and, thereafter, forward such secured assets and documents to the secured creditor by himself. The entire proceedings of the District Magistrate culminating into the Memo bearing No.3019/1(9)/R.M. dated December 31, 2012 the District Magistrate proceeded to permit Branch Manager of the Bank to take possession with the assistance of the police and the Block Land and Land Reforms Officer, Patrasayer. This was again beyond the mandate of Section 14 of the SARFAESI Act, 2002.

Section 14 of the SARFAESI Act, 2002 permitted a District Magistrate to take possession of the secured assets and documents by himself. He could not, purporting to act under Section 14 of the SARFAESI Act, 2002 direct police assistance to the Branch Manager to take possession thereof. The memo was therefore, in excess of the powers vested in the District Magistrate under Section 14 of the SARFAESI Act, 2002." Section 14 of the SARFAESI Act, 2002, now reads as under: "Section 14: Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.-

(1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him -

(a) take possession of such asset and documents relating thereto; and

(b) forward such assets and documents to the secured creditor;

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorized officer of the secured creditor, declaring

that-

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause

(ii) above,

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made there under had been complied with;

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets [within a period of thirty days from the date of application:

Provided also that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days. Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceedings pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of

this Act.

(1A) The District Magistrate or the Chief Metropolitan Magistrate may authorize any officer subordinate to him,-

(i) to take possession of such assets and documents relating thereto; And

(ii) to forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate [any officer authorized by the Chief Metropolitan Magistrate or District Magistrate] done in pursuance of this section shall be called in question in any Court or before any authority."

19. Thus, as stated above, Section 14 does not exclude the principles of natural justice and therefore, Magistrate should hold an enquiry in the matter. The learned Magistrate cannot act simply on the basis of one sided Affidavit filed by the Bank/Financial Institution under Proviso to Section 14(1) of the Act. The borrowers have a right to controvert such Affidavit and the tenants in the premises also have a right to be heard in the matter. Secondly, the tenanted premises cannot be directly vacated by such orders under Section 14 of the Act. It is for DRT to decide about the bona fide of the tenancy or otherwise under Section 17(4A) of the Act. If tenancy is not bona fide and just "created" as a sham defence, such occupants can be evicted by an order under Section 17(4) of the Act by the DRT, but if the tenancy is long pre-existing before the issuance of notice under Section 13(2) of the Act and is found to be bona fide, such tenants and lessees cannot be evicted, without adopting the due process of law for eviction under State Rent Control Law, as held by Hon'ble Supreme Court in Vishal N. Kulsaria's case (supra). It would for the auction purchaser to adopt such due process of law, once he steps in the shoes of landlord/borrower proceeded against under SARFAESI Act 2002. However, the lessees/tenants cannot object to the initiation and proceedings undertaken and continued against the landlord or the defaulting borrower. The attainment of tenancy in favour of auction purchaser under SARFAESI Act would be automatic by legal fiction and DRT can direct payment of Rentals to the account of Bank directly.

20. Here, since the petitioners have an effective, alternative remedy under Section 17 (4A) of the SARFAESI Act, 2002 now available to them, where the Debt Recovery Tribunal can go into the question of validity of tenancy as per the said provisions, this Court would not make any observation on the merits of the contentions raised by the parties and the petitions are therefore disposed of with a liberty and direction to the petitioners to file their Applications before the concerned Debt Recovery Tribunal under Section 17 (4-A) of the SARFAESI Act,

2002, within a period of two weeks from today and for a period of four weeks only from today, without any extension of time further by this Court, it is directed that the Respondent - Financial Institution, in execution of the impugned order under Section 14 of the SARFAESI Act, 2002, dated 20/05/2017 shall not take coercive measures for seeking physical and vacant possession of the said tenanted portions of the premises from the petitioners provided further that the petitioners will give an Undertaking in writing to the Respondent No.1, Financial Institution/Bank that all arrears of rent and the current rentals due to be paid by them to the Respondent lessors/landlords will be made over to the respondent No.1 - Financial Institution within the aforesaid period of two weeks and they shall continue to deposit the rent with the Respondent No.1 - Financial Institution till they hold the possession of the said premises under their Lease/Rent Agreement. The operation of impugned order under Section 14 of the Act would abide by the orders to be passed by the DRT under Section 17(4A) of the Act.

21. The further course of action after four weeks from today, will be subject to the further orders to be passed by the Debt Recovery Tribunal as far as the petitioners tenants in the Secured Asset/ premises in question are concerned.

22. It is made clear that the present order will govern only the case of the present lessees/tenants in the said premises, for the time being and will not affect any other action of the Respondent No.1 - Financial Institution against the principal borrowers/landlords/Respondents in the present writ petitions.

23. Accordingly the writ petitions stand disposed of. No costs. Copy of this order be sent to the concerned parties and the learned Court below which passed the order under Section 14 of the SARFAESI Act, 2002 and the Debt Recovery Tribunal, Bengaluru, as also to the Chief Secretary and District Judge for bringing it to the notice of the concerned Chief Metropolitan Magistrates/District Magistrates, who exercise the jurisdiction under Section 14 of the Act.