

(2017) 01 PAT CK 0025

In the Patna High Court

Case No : Letters Patent Appeal No. 2013 of 2016. (Arising out of Civil Writ Jurisdiction Case No. 12826 of 2016)

State Bank of India

APPELLANT

Vs

Rajesh Khetan

RESPONDENT

Date of Decision : 24-01-2017

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), Section 13(4), Section 35

Citation : (2017) 172 AIC 813

Hon'ble Judges : Hemant Gupta, ACJ. and Sudhir Singh, J.

Bench : Division Bench

Advocate : Mr. Kaushlendra Kumar Sinha and Mr. Sunil Kumar Singh, Advocates, for the Appellants; Mr. Gautam Kumar Kejriwal, Advocate, for the Private Respondent (writ petitioner); Mr. P.K. Verma, AAG-3, Mr. Dr. Mankeshwar Tiwari, A.C. to AAG-3, for the State

Final Decision : Dismissed

Judgement

Hemant gupta, A.C.J.—Re. : I.A. No. 8702 of 2016 :

The application is for condonation of delay of 8 days in filing the Letters Patent Appeal.

2. For the reasons mentioned in the Interlocutory Application, we are satisfied that the appellants have shown sufficient cause to seek condonation of delay of 8 days in filing the present Letters Patent Appeal.

3. Consequently, Interlocutory Application No. 8702 of 2016 is allowed and delay of 8 days in filing the Letters Patent Appeal is condoned.

Re.: L.P.A. No. 2013 of 2016 :

The present Letters Patent Appeal is directed against an order passed by the learned Single Bench of this Court on 31st of August, 2016 in C.W.J.C. No. 12826

of 2016 whereby, the writ application filed by Respondent No. 1 (hereinafter after referred to as "the writ applicant") was allowed and the action of the Bank, the appellants herein, for dispossessing the writ applicant from the premises in question was held to be contrary to law and the appellant Bank was directed to restore the physical possession of the premises in question to the writ applicant.

4. The writ applicant claims to be tenant under Respondent No. 5 herein, the borrower Company, vide Rent Agreement dated 2nd of January, 2012 (Annexure-1). The rent receipts for the month of February to July, 2016 have been appended with the writ application (Annexure-2) whereas the rent receipts from the month of January 2012 to September, 2012 have been appended with the counter affidavit in the present appeal. The writ applicant also relied upon a suit (Eviction Suit No. 12 of 2015) filed before the Sub Judge-I, Patna to the effect that he is a protected tenant who is sought to be dispossessed by the landlord i.e. the borrower Company. There is an order to maintain status quo. The writ applicant also relied upon a notice dated 24th June, 2015 (Annexure-5) issued by Sri Rajiv Kumar, Advocate, City Civil Court, Kolkata asserting that the writ applicant is a tenant prior to creation of mortgage and, hence, he cannot be evicted by the Bank.

5. In the counter affidavit, the Bank has pointed out that the Board of Directors of the Borrower Company passed a resolution on 19th of September, 2012 and has mortgaged the flats in question as collateral security when the loan amount was increased to Rs. 21 crores including all advance limits. It is also pointed out that the borrower Company handed over the original Title Deed dated 14th of July, 2011 to the Bank at the time of advancing additional loan. Since the borrower was a defaulter, a notice dated 16.12.2014 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "Act") was served demanding a sum of Rs. 16,92,11,943.59/-. The borrower did not file any objection to such notice. Thereafter a notice under Section 13(4) of the Act was issued on 28th of May, 2015 (Annexure-C). Thereafter, on the basis of request sent to the District Magistrate, Patna, the vacant possession of the premises was delivered to the Bank on 28th of July, 2016. It is thereafter, the auction notice of the property in question was published in various newspapers.

6. Learned Single Bench allowed the writ application relying upon Supreme Court judgment reported as Vishal N. Kalsaria v. Bank of India and others, (2016) 3 SCC 762 holding that the writ applicant has been able to show on the basis of a rent agreement that he is protected tenant and thus, cannot be evicted being an except in terms of Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982.

7. In the present appeal, learned counsel for the appellant Bank argued that the lease agreement propounded by the writ applicant is a sham transaction created to defeat the rights of the Bank and, thus, the writ applicant cannot claim protection under the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982.

8. After hearing learned counsel for the parties, we find that the contention of the appellant Bank is correct. It is so found on the basis of the following factors :-

(i) The Stamp paper of Rs. 100/- was purchased on 14th of December, 2011 from Kolkata and the rent agreement was executed at Kolkata on 2nd of January, 2012, whereas, the property in question is situated at Patna. The execution of the agreement at Kolkata, the place of which both parties are resident, is the first suspicious circumstance even though the parties had almost more than two weeks' time for execution of documents at Patna. It has not come on record as how and who delivered physical possession to the writ applicant.

(ii) The rent agreement reads as under :-

"WHEREAS the First Party/landlord intend to let out flats in the Building Abhisek Plaza, Exhibition Road, Patna, Bihar and the First Party agreed to a monthly rent of Rs. 15000/- pm. (Rupees Fifteen Thousand Only).

Whereas the Second Party/Tenant will provide an advance to the tune of Rs. 1,80,000/- (Rupees One Lac Eighty Thousand Only) And whereas both the parties are agreed the following terms and conditions.

1. That the First Party/landlord already handed over the peaceful premises of the said Place for the residential Purpose.
2. That the second Party will not store heavy quantity of k.oil, gas, diesel and petrol etc. and or any type of combustable articles inside the premises.
3. That the flat is in raw state and the second party would carry out necessary furnishing work at the expense of the first party."

(iii) The present rent agreement was required to be executed only by way of a registered instrument and when the parties had opportunity to get the agreement registered as the Stamp Paper was purchased on 14th of December, 2011 and the agreement was executed on 2nd of January, 2012.

Though the non-registration by itself may not be sufficient to doubt the genuineness of the document, but while considering the cumulative effect, it becomes a relevant factor.

(iv) The stipulation in rent agreement was to pay advance of Rs. 1,80,000/- but there is no assertion of the payment of such amount nor the manner of payment of such amount has been disclosed.

(v) There is no creditable proof of payment of rent as initially rent receipts for the month of February, March, April, May, June and July, 2016 i.e. after the notice under Section 13(2) of the Act was served upon the borrower were produced in the writ application but in terms of an order passed in the present appeal, additional receipts of payment of rent from the month of January 2012 to September 2012 have been produced but the payment of all such amount of rent is in cash, which is of doubtful nature as such receipts can be created and

manipulated any time. There is no payment of rent by cheque at any time.

(vi) The Bank has referred in the memo of appeal that the audited balance-sheets of the borrower as on 31st of March, 2013 does not show any rental income whereas, the audited balance-sheet as on 31st of March, 2014 shows rental income of Rs. 1.87 and the audited balance-sheet as on 31st of March, 2015 shows rental income of Rs. 46,800/-. There is no counter affidavit to such fact. It shows that the payment of rent of Rs.15,000/- p.m. in cash is false assertion. Thus, the assertion that the writ applicant is in possession of the property in question since the year 2012 as a protected tenant is not made out from the audited balance-sheets of the borrower.

(vii) The receipt of rent by the borrower is at Kolkata though the property is situated at Patna and the writ applicant is supposed to be in occupation of the flats at Patna.

(viii) The writ applicant has not produced any document to show that the signatories to the rent agreement on behalf of the Company were authorised to represent the Company. There is no assertion of any tenancy in the resolution of the Board of Directors passed at the time of availing additional financial limits from the Bank in September 2012.

(ix) The borrower has not filed objection in terms of Section 13(2) of the Act that the borrower has inducted a tenant prior to mortgage and, therefore, the physical possession of the property cannot be taken.

(x) The description of the flats is not disclosed in the rent agreement and that there is no period of commencement and expiry of the lease period.

(xi) The writ applicant has not produced any document of tenancy at the time of taking possession by the District Magistrate nor filed objections.

9. The argument of the learned counsel for the writ applicant is that a notice was served upon the Bank that he is a tenant but the factum of receipt of such notice was denied by the Bank in the counter affidavit filed in the writ application but the Bank has admitted the receipt of the notice in the supplementary affidavit filed by the appellant on 15th of November, 2016.

10. In the case reported as *Harshad Govardhan Sondagar v. International Assets Reconstruction Company Limited and others*, (2014) 6 SCC 1, the Supreme Court, inter alia, held that if the borrower has already leased out the immovable property then lessee will have the right to enjoy the leased property in accordance with the terms and conditions of the lease irrespective of whether a subsequent mortgagee of the immovable property has knowledge of such a lease or not. The Court concluded as under :-

"18. We may now consider whether the provisions of the SARFAESI Act have the effect of terminating these valid leases made by the borrower or the mortgagor made in accordance with the provisions of the Transfer of Property Act. Section

35 of the SARFAESI Act, on which the High Court has placed reliance in *Trade Well v. Indian Bank*, 2007 Cri LJ 2544 (Bom) as well as in the impugned judgment *International Asset Reconstruction Co. (P) Ltd. v. Union of India*, (2011) 5 Bom LR 3080 is reproduced herein below:

"35. The provisions of this Act to override other laws.- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

Section 35 of the SARFAESI Act, therefore, provides that the provisions of the SARFAESI Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Thus, if there is any provision in the SARFAESI Act and if there is any provision in any other law which is inconsistent therewith, the provision of the SARFAESI Act will have effect and not the provision of any other law."

21. When we read the different provisions of Section 13 of the SARFAESI Act extracted above, we find that sub-section (4) of Section 13 provides that in case the borrower fails to discharge his liability in full within sixty days from the date of notice, as provided in sub-section (2) of Section 13 of the SARFAESI Act, the secured creditor may take recourse to one or more of the measures mentioned therein to recover his secured debt. One of the measures mentioned in clause (a) in sub-section (4) of Section 13 of the SARFAESI Act is to take possession of the secured assets of the borrower including the right to transfer by way of lease. Where, however, the lawful possession of the secured asset is not with the borrower, but with the lessee under a valid lease, the secured creditor cannot take over possession of the secured asset until the lawful possession of the lessee gets determined. There is, however, no mention in sub-section (4) of Section 13 of the SARFAESI Act that a lease made by the borrower in favour of a lessee will stand determined on the secured creditor deciding to take any of the measures mentioned in Section 13 of the said Act. Sub-section (13) of Section 13 of the SARFAESI Act, however, provides that after receipt of notice referred to in sub-section (2) of Section 13 of the SARFAESI Act, no borrower shall lease any of his secured assets referred to it in the notice, without the prior written consent of the secured creditor. This provision in sub-section (13) of Section 13 of the SARFAESI Act and the provisions of the Transfer of Property Act enabling the borrower or the mortgagor to make a lease are inconsistent with each other. Hence, sub-section (13) of Section 13 of the SARFAESI Act will override the provisions of Section 65-A of the Transfer of Property Act by virtue of Section 35 of the SARFAESI Act, and a lease of a secured asset made by the borrower after he receives the notice under sub-section (2) of Section 13 from the secured creditor intending to enforce that secured asset will not be a valid lease."

(emphasis supplied)

11. Vishal N. Nalsaria's case (*supra*) was of a bona fide tenant inducted prior to

mortgage but the lease was not registered. Therefore, the Court held that such tenant cannot be evicted in terms of the provisions of the Act. But present is a case where the tenancy itself is found to be a sham transaction.

12. In the case reported as *Anthony v. K.C. Ittoop & Sons*, (2000) 6 SCC 394 the Supreme Court held as under :-

"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 paragraph has been extracted above and it deals with the mode of creating the particular kinds of leases mentioned therein. The third paragraph 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 paragraph. Thus, dehors the instrument parties can create a lease as envisaged in the second paragraph 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. In the present case, the writ applicant relies upon an unregistered rent agreement but there is no proof of delivery of possession or of payment of rent. Therefore, the writ applicant cannot claim to be a protected tenant.

14. Consequently, we find that the protection extended by the learned Single Bench on the presumption that the writ applicant is a tenant is not tenable. Since the writ applicant is not proved to be in possession as tenant, therefore, the Bank has rightly taken possession of the premises in question.

15. In view of the above, the Letters Patent Appeal is allowed, the order passed by the learned Single Bench is set aside and the writ application is dismissed.