

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF NOVEMBER, 2021

PRESENT

THE HON'BLE MR. RITU RAJ AWASTHI, CHIEF JUSTICE

AND

THE HON'BLE MR. JUSTICE SACHIN SHANKAR MAGADUM

WRIT APPEAL NO.11.02 OF 2021 (GM-RES)

BETWEEN:

SRI. ABDUL KHADER
S/O ABDUL SAMAD
AGED ABOUT 59 YEARS
R/AT NO.16
GROUND AND 1ST FLOOR
DUPLEX HOUSE, 12TH CROSS
KANAKANAGAR
R.T.NAGAR POST
BANGALORE - 560 032

....APPELLANT

(BY SRI AMARESH A. ANGADI, ADVOCATE)

AND:

1. SADATH ALI SIDDIQUI
S/O MOHAMMED NAJBATH ALI SIDDIQUI
AGED ABOUT 57 YEARS
NO.15, 2ND CROSS, 1ST MAIN
MUDDAMMA GARDEN
BENSON TOWN
BANGALORE - 560 046

2. BANK OF MAHARASTRA
BRIGADE ROAD BRANCH
NO.55, REST HOUSE ROAD
BRIGADE ROAD
BANGALORE - 560 001
BY ITS MANAGER

....RESPONDENTS

(R2 SERVED AND UNREPRESENTED)

THIS APPEAL IS FILED UNDER SECTION 4 OF KARNATAKA HIGH COURT ACT PRAYING TO SET ASIDE THE ORDER DATED 17.09.2021 PASSED IN W.P.NO.3623/2021 AND ETC.

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 15.11.2021, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, **SACHIN SHANKAR MAGADUM J.**, DELIVERED THE FOLLOWING:

JUDGMENT

The captioned appeal is filed by the petitioner to the writ petition assailing the correctness of the order dated 17.09.2021 passed by the learned Single Judge in W.P.No.3623/2021.

2. The appellant herein approached the writ court questioning the order dated 05.12.2019 passed by the authority under the provisions of Section 14 of the Securitisation and Reconstruction of Financial Assets and

Enforcement of Securities Interest Act, 2002 (for short 'the SARFAESI Act'). The writ petition was strongly contested by the respondent No.2/Bank by specifically contending that the appellant has an alternate and equally efficacious remedy under Section 17 of the SARFAESI Act. The learned Single Judge having examined the rival contentions disposed of the writ petition reserving liberty to the petitioner to avail alternative remedy under Section 17 of the SARFAESI Act. The appellant has questioned the said order before this Court.

3. Learned counsel appearing for the appellant reiterating the grounds urged in the writ appeal would vehemently argue and contend before this Court that what was challenged before the learned Single Judge was an order passed under Section 14 of the SARFAESI Act which is not amenable to the jurisdiction of the Debt Recovery Tribunal under Section 17 of the SARFAESI Act. Placing reliance on sub-clause (3) of Section 14 of the SARFAESI Act, he would submit to this Court that the appellant has no remedy of an

appeal and therefore, has rightly invoked the writ jurisdiction and this aspect is not dealt by the learned Single Judge. Learned counsel would further place reliance on Section 65-A of the Transfer of Property Act, 1882 and would contend before us that where a secured asset is in possession of a lessee under a valid lease, the Chief Metropolitan Magistrate or the District Magistrate have no power to invoke the provisions of Section 14 of the SARFAESI Act and therefore, would contend that the impugned order being contrary to the dictum laid down by the Hon'ble Apex Court in the case of ***Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and Others***¹, is liable to be examined by the writ court and therefore, he would contend that the learned Single Judge was not justified in dismissing the writ petition as not maintainable at threshold.

4. In support of his contention, learned counsel for the appellant has placed reliance on the judgment rendered by the

¹ (2014) 6 SCC 1

Hon'ble Apex Court in the case of ***Vishal N.Kalsaria vs. Bank of India and Others***². Relying on this judgment, he would submit to this Court that where a secured asset is in possession of a lessee/tenant of borrower, tenant is entitled for protection against unjust evictions in the light of the provisions of the Rent Control Act. He would further place reliance on the judgment rendered by the Hon'ble Apex court in the case of ***Chairman, Indore Vikas Pradhikaran vs. Pure Industrial Coke & Chemicals Ltd. and Others***³ and would contend that Article 300-A confers right to property and on account of action of respondent No.2/Bank, his property rights are affected and therefore, the appellant is entitled to seek redressal of his grievances under writ jurisdiction. On these set of grounds, he would submit to this Court that the learned Single Judge has not examined all these significant details and also the judgment of the Hon'ble Apex Court and therefore, warrants interference at the hands of this Court.

² (2016) 3 SCC 762

³ (2007) 8 SCC 705

5. Heard the learned counsel appearing for the appellant. Perused the material on record.

6. The respondent No.1 applied for a housing loan of Rs.1.80 Crores and submitted an application on 18.09.2017. The respondent No.1 pursuant to sanction of loan, deposited title deeds by executing an equitable mortgage deed in favour of the respondent No.2/Bank. This deed was executed on 03.11.2017. Therefore, as on 03.11.2017, a charge was created over the property in question and the respondent No.2/Bank by securing deposit of title deed had secured the assets towards discharge of housing loan of Rs.1.80 Crores.

7. The present appellant is contesting the recovery proceedings initiated by the respondent No.2/Bank under the provisions of the SARFAESI Act on the strength of lease agreement executed on 12.02.2018. The said agreement was produced by the appellant as Annexure-B to the writ petition.

8. We have bestowed our anxious consideration to the recitals of the lease agreement. Under the lease agreement, the appellant claims that he has paid Rs.14 lakhs to the respondent No.1 and the lease is for a period of two years which would commence from 12.02.2018. If this document is examined, we would find that pursuant to execution of lease, the appellant claims that he has paid Rs.14 lakhs and therefore, the respondent No.2/Bank cannot take possession of the premises by invoking the provisions of Section 14 of the SARFAESI Act and the action of the secured creditor is hit by Section 65-A of the Transfer of Property Act.

9. Learned counsel for the appellant has raised two questions of law before this Court. His contention is that the action taken under Section 14 of the SARFAESI Act does not fall within the ambit of Section 17(1) and therefore, in absence of efficacious remedy, the present appellant who is the lessee can maintain a writ petition under Articles 226 and 227 of the Constitution of India. The second question that is

raised by the appellant herein is that the appellant is the lessee of the premises and therefore, the provisions of the Rent Act has overriding effect over the SARFAESI Act and therefore, the question as to whether the appellant is entitled for protection requires to be adjudicated by the writ Court in absence of efficacious remedy under the SARFAESI Act.

10. In the light of the arguments canvassed by the learned counsel for the appellant, the following points would arise for our consideration:

1) Whether an aggrieved person other than the principal borrower has a remedy against an order passed under Section 14 of the SARFAESI Act by a District Magistrate?

2) Whether the provisions of Rent Act has an overriding effect over the SARFAESI Act?

Re: Point No.1:

11. The first question raised by this Court that since the Executive District Magistrate has passed an order under Section 14 of the SARFAESI Act, the action under Section 14

does not contemplate any remedy under the SARFAESI Act is misconceived. The Hon'ble Apex Court in the case of ***Kanaiyalal Lalchand Sachdev and Others vs. State of Maharashtra and Others***⁴ has held that the action under Section 14 constitutes action taken after stage of Section 13(4) of the SARFAESI Act and therefore, the grievance, if any, falls within the ambit of Section 17(1) and therefore, the aggrieved party has a remedy before the competent Tribunal under Section 17(4A) of the SARFAESI Act.

12. The arguments canvassed by the appellant that since the impugned order under challenge is passed under Section 14 of the SARFAESI Act and therefore, the appellant has no remedy would also not detain us for long in the light of Section 17(4A) of the SARFAESI Act. Sub-section (4A) of Section 17 would be relevant to the present *lis* and therefore, the same is culled out as under:

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section

⁴ (2011) 2 SCC 782

(4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

[(4A) 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 subsection (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 sub-clause (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.]"

13. The above said sub-section (4A) leaves no manner of doubt that appellant who is asserting leasehold rights on the ground that he is a tenant of the premises which is the subject matter of recovery proceedings under the SARFAESI Act, has an efficacious remedy under sub-section (4A) of Section 17 of the SARFAESI Act. Therefore, what emerges from the above said sub-section (4A) is that the DRT Act and SARFAESI Act not only facilitate creation of special machinery for speedy recovery of dues of banks and financial institutions, but equally provides an adequate remedy to those who are in possession of the secured assets either as a tenant or under some other possessory rights.

14. The Hon'ble Apex Court in the case of **Hemraj Ratnakar Salian vs. HDFC Bank Ltd. and Others**⁵, has

⁵ AIR 2021 SC 3880

declined to grant any relief even though a claim was made that he was a tenant and therefore, is entitled for protection under the Maharashtra Rent Control Act. Therefore, on perusal of the above said sub-section (4A) and the judgment of the Hon'ble Apex Court, we would sum up the issue by relegating the appellant to work out his remedies before the Debt Recovery Tribunal. The question as to whether a lawful lease was created before the borrower pledged his properties by depositing title deeds or whether the borrower had secured the consent of secured creditor while leasing the secured asset in favour of tenant are all questions to be examined by the competent Tribunal under Section 17(4A) of the SARFAESI Act.

15. The Hon'ble Apex Court in the case of ***United Bank of India vs. Satyawati Tondon and Others***⁶ has come down heavily on the courts including High Courts entertaining writ petitions in respect of matters exclusively falling within

⁶ (2010) 8 SCC 110

the domain of SARFAESI Act. The Hon'ble Apex Court at paragraph 55 has expressed its serious concern that despite repeated pronouncement, High courts have been entertaining writ petitions ignoring the availability of statutory remedies under the DRT Act and SARFEASI Act.

16. Therefore, the contention of the appellant that the orders under Section 13 of the SARFAESI Act are only amenable to the appellate jurisdiction under Section 17(1) of the SARFAESI Act is totally misconceived. The said issue is dealt by the Hon'ble Apex Court in the judgment cited supra and therefore, the contention urged by the appellant that since he has no remedy under the provisions of the SARFAESI Act, he can maintain a writ petition before this Court under Articles 226 and 227 of the Constitution of India cannot be acceded to. Accordingly, point No.1 formulated above is answered in the affirmative.

Re: Point No.2:

17. Regarding the second point raised by this Court, it would be useful for us to cull out Section 26-E of the SARFAESI Act, which reads as follows:

"26E. Priority to secured creditors.-

Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

Explanation.-for the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

18. On plain reading of Section 26-E of the SARFAESI Act, we would find that the secured creditor has precedence over all other charges. By Amendment Act 44 of 2016 which

came into effect from 01.09.2016, a new provision was incorporated into the SARFAESI Act and therefore, under Section 26-E of the SARFAESI Act, priority in payment has been statutorily created in favour of the secured creditor over all other debts including taxes payable to the Central Government or the State Government on registration of security interest. The *non obstante* clause under the provision makes the intention of the parliament explicit that even against statutory charges created under the Central Act, secured creditor shall have the right for priority in payment and priority to release the debt for bringing the secured asset for sale. The *non obstante* clause used in Section 26-E is a tool by which legislature gives complete predominance to that provision over all other provisions of law.

19. The present appellant is asserting right on the basis of the lease agreement. On perusal of the recitals in the lease deed, it is found that the appellant has paid Rs.14 lakhs and the lease would commence from 12.02.2018 for a period of

two years. This lease agreement is executed by the respondent No.1/landlord after deposit of title deeds by executing equitable mortgage deed on 03.11.2017. Therefore, we are unable to understand, under the lease agreement, how the appellant can assert and claim right under Section 65-A of the Transfer of Property Act. Even if the appellant had any such right under Section 65-A of the Transfer of Property Act, even then in terms of Section 26-E of the SARFAESI Act, the secured creditor has precedence and first charge over the secured assets and it is well within the jurisdiction of the Bank to proceed against the secured assets.

20. A secured creditor in whose favour the security interest has been created has a priority in sale and payment over all other charges, if any. The appellant, even otherwise, cannot agitate his rights against the secured creditor. If he has paid any amount under the lease agreement, and if there is a breach on the part of the respondent No.1/landlord, it would give rise to civil consequences and therefore, the

appellant has to seek redressal of his grievances before a competent civil Court. Therefore, in the light of discussion made supra, point No.2 formulated by this Court that the provisions of the Rent Act would override the provisions of the SARFAESI Act is misconceived and the same is answered in the negative.

21. The judgment cited by the appellant in the case of *Vishal N.Kalsaria (supra)* does not come to the aid of the appellant herein. It is not in dispute that the lease deed is executed by the respondent No.1/landlord subsequent to deposit of title deeds in favour of the respondent No.2/Bank. Therefore, as discussed supra, the question as to whether there was a valid lease has to be adjudicated under section 17(4A) of the SARFAESI Act. Therefore, in the light of the provisions of Sections 26-E and 17(4A) of the SARFAESI Act, an aggrieved person other than the principal borrower can seek adjudication of his rights, more particularly a tenant can seek redressal of his grievance as to whether there was a valid

and lawful tenancy created much prior to principal borrower depositing the title deeds with the secured creditor. All these rival contentions can be examined in the light of the provisions of Section 17(4A) of the SARFAESI Act.

22. For the foregoing reasons, the writ appeal is devoid of merits and the same is accordingly dismissed.

The pending interlocutory applications, if any, stand disposed of.

Sd/-
CHIEF JUSTICE

Sd/-
JUDGE

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