

Hemraj Ratnakar Salian Vs. HDFC Bank Ltd. & Ors.

Criminal Appeal No(s). 843-844 of 2021 arising out of S.L.P. (Crl.) No(s). 2969-2970 of 2016
2021-01-01 | S.Abdul Nazeer, J.
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Full judgment text

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[Criminal Appeal No(s). 843-844 of 2021 arising out of S.L.P. (Crl.) No(s). 2969-2970 of 2016]

S.Abdul Nazeer, J.

1. Leave granted.

2. These appeals are directed against the Orders dated 30.12.2015 and 06.01.2016 in Case C.C. No.381/SA/2014 passed by the Chief Metropolitan Magistrate, Esplanade, Mumbai, rejecting the Application (Exh.8) filed by the appellant herein for restraining HDFC Bank, the first respondent herein, from taking possession of the property in the appellant's possession.

3. HDFC Bank had granted financial facility to respondent nos.2 and 3 (for short, 'the Borrowers') of Rs.5,50,00,000/(Rupees Five Crore Fifty Lakhs). On 03.04.2013, the Borrowers had mortgaged a property bearing Flat No.501, 5th Floor, Solitaire, Village Kopari, Adi Shankaracharya Road, MHADA Layout, Powai, Andheri (E), Mumbai (for short, "the Secured Asset") in favour of the Bank with an intention to secure the said credit facility.

4. The accounts of the Borrowers were declared as nonperforming assets (NPA) on 31.10.2013. On 25.01.2014, the Bank issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "SARFAESI Act") to the Borrowers. It is the case of the appellant that he is a tenant of the Secured Asset on a monthly rent of Rs.20,000/since 12.06.2012 with an increase of 5% every year. He has been paying rent regularly to his landlord since inception of his tenancy.

5. The appellant filed Exh.8 application before the Magistrate seeking protection of his possession of the Secured Asset as the Magistrate was seized with the petition under Section 14 of SARFAESI Act filed by the respondent no.1Bank. Vide Order dated 30.12.2015, the intervention application of the appellant was dismissed by the Magistrate holding that there was no registered tenancy placed on record by the appellant.

6. We have heard learned counsel for the parties. Learned counsel for the appellant would contend that the appellant is a protected tenant under the provisions of the Maharashtra Rent Control Act 1999. He has been paying rent regularly to the landlord. He has also paid advance rent till 17.12.2018. There are continuous rent receipts with him from the date of his induction as a tenant. The tenant was residing in the said premises on the basis of an oral tenancy from 12.06.2012. Therefore, he cannot be evicted from the Secured Asset without due process of law.

7. On the other hand, learned counsel for the respondentBank submits that the rent receipt said to have been issued by the landlord for the period from 12.06.2012 to 12.05.2013 is of 12.05.2013 which is after the date of creation of mortgage in favour of the Bank. There is absolutely no material to show that the tenancy was created earlier to the date of mortgage. The tenancy pleaded by the appellant is an oral tenancy.

At the time of grant of facility, thirdparty valuers had confirmed that the Borrowers were staying at the Secured Asset. The Borrowers, while making representation to the Bank, have not claimed that any tenant is staying at the Secured Asset. The tenancy claimed by the appellant is an afterthought which cannot be believed in the facts and circumstances of the case. He prays for dismissal of the appeal.

8. We have carefully considered the submissions made at the Bar and perused the materials placed on the record.

9. As noticed above, it is the case of the appellant that he is a tenant of the Secured Asset since 12.06.2012 and has paid advance rent upto 17.12.2018. The documents produced by the appellant are xerox copies of

the rent receipts. However, in response to the notice issued under Section 13(2) of the SARFAESI Act, the Borrowers have sent a very detailed representation wherein they have not claimed that any tenant is staying at the Secured Asset. The appellant has pleaded tenancy from 12.06.2012 to 17.12.2018. The rent receipt claiming tenancy from 12.06.2012 is a xerox copy of 12.05.2013, which is after the date of creation of mortgage.

10. Procedural mechanism for taking possession of the Secured Asset is provided under Section 14 of the SARFAESI Act. Section 17 of the SARFAESI Act provides for the right of appeal to any person including the borrower to approach Debt Recovery Tribunal (DRT). Section 17 has been amended by Act No. 44 of 2016 providing for challenging the measures to recover secured debts (for short, "the Amendment"). Under the Amendment, possession can be restored to the borrower or such other aggrieved person.

This Amendment has come into force w.e.f. 1st September, 2016. This Court in *Harshad Govardhan Sondagar v. International Asset Reconstruction Co. Ltd. & Ors.*¹ has held that right of appeal is available to the tenant claiming under the borrower. In *Kanaiyalal Lalchand Sachdev v. State of Maharashtra*² this Court has held that DRT can not only set aside the action of the secured creditor but even restore the status quo ante.

Therefore, an alternative remedy was available to the appellant to challenge the impugned order under Section 17 of the SARFAESI Act even before the amendment to Section 17 of the SARFAESI Act. However, given that the instant appeal has been pending consideration before this Court from the year 2016, we propose to examine the case on merits without directing the appellant to avail the alternative remedy.

11. In *Harshad Govardhan Sondagar* (supra) this Court has categorically held that if the tenancy claim is for any term exceeding one year, the tenancy can be made only by a registered instrument. It was held thus:

"36. We may now consider the contention of the respondents that some of the appellants have not produced any document to prove that they are bona fide lessees of the secured assets. We find that in the cases before us, the appellants have relied on the written instruments or rent receipts issued by the landlord to the tenant. Section 107 of the Transfer of Property Act provides that a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made "only by a registered instrument" and all other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Hence, if any of the appellants claim that they are entitled to possession of a secured asset for any term exceeding one year from the date of the lease made in his favour, he has to produce proof of execution of a registered instrument in his favour by the lessor. Where he does not produce proof of execution of a registered instrument in his favour and instead relies on an unregistered instrument or oral agreement accompanied by delivery of possession, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, will have to come to the conclusion that he is not entitled to the possession of the secured asset for more than a year from the date of the instrument or from the date of delivery of possession in his favour by the landlord."

12. A Three Judge Bench of this Court in *Bajarang Shyamsunder Agarwal v. Central Bank of India & Anr.*³, after considering almost all decisions of this Court, in relation to the right of a tenant in possession of the secured asset, has held that if a valid tenancy under law is in existence even prior to the creation of the mortgage, such tenant's possession cannot be disturbed by the secured creditor by taking possession of the property.

If a tenancy under law comes into existence after the creation of a mortgage but prior to issuance of a notice under Section 13(2) of the SARFAESI Act, it has to satisfy the conditions of Section 65A of the Transfer of Property Act, 1882. If a tenant claims that he is entitled to possession of a Secured Asset for a term of more than a year, it has to be supported by the execution of a registered instrument.

In the said decision of this Court, it was clarified that in the absence of a registered instrument, if the tenant only relies upon an unregistered instrument or an oral agreement accompanied by delivery of possession, the tenant is not entitled to possession of the secured asset for more than the period prescribed under the provisions of the Transfer of Property Act. It was held thus:

"24.1. If a valid tenancy under law is in existence even prior to the creation of the mortgage, the tenant's possession cannot be disturbed by the secured creditor by taking possession of the property. The lease has to be determined in accordance with Section 111 of the TP Act for determination of leases. As the existence

of a prior existing lease inevitably affects the risk undertaken by the bank while providing the loan, it is expected of banks/creditors to have conducted a standard due diligence in this regard. Where the bank has proceeded to accept such a property as mortgage, it will be presumed that it has consented to the risk that comes as a consequence of the existing tenancy. In such a situation, the rights of a rightful tenant cannot be compromised under the SARFAESI Act proceedings.

24.2. If a tenancy under law comes into existence after the creation of a mortgage, but prior to the issuance of notice under Section 13(2) of the SARFAESI Act, it has to satisfy the conditions of Section 65-A of the TP Act.

24.3. In any case, if any of the tenants claim that he is entitled to possession of a secured asset for a term of more than a year, it has to be supported by the execution of a registered instrument. In the absence of a registered instrument, if the tenant relies on an unregistered instrument or an oral agreement accompanied by delivery of possession, the tenant is not entitled to possession of the secured asset for more than the period prescribed under Section 107 of the TP Act."

13. It was further held that the Rent Act would not come to the aid of a "tenantinsufferance" visàvis SARFAESI Act due to the operation of Section 13(2) read with Section 13(13) of the SARFAESI Act. It was held as follows:

"35. The operation of the Rent Act cannot be extended to a "tenantinsufferance" visàvis the SARFAESI Act, due to the operation of Section 13(2) read with Section 13(13) of the SARFAESI Act. A contrary interpretation would violate the intention of the legislature to provide for Section 13(13), which has a valuable role in making the SARFAESI Act a selfexecutory instrument for debts recovery. Moreover, such an interpretation would also violate the mandate of Section 35, SARFAESI Act which is couched in broad terms."

14. In the present case, first of all there is a serious doubt as to the bona fide of the tenant, as there is no good or sufficient evidence to establish the tenancy of the appellant. According to the appellant, he is a tenant of the Secured Asset from 12.06.2012. However, the documents produced in support of his claim are xerox copies of the rent receipts and the first xerox copy of the rent receipt is of 12.05.2013 which is after the date of creation of the mortgage.

It is pertinent to note here that the Borrowers have not claimed that any tenant is staying at the Secured Asset. At the time of grant of facility, thirdparty valuers had also confirmed that the Borrowers were staying at the Secured Asset. Be that as it may. The appellant has pleaded tenancy from 12.06.2012 to 17.12.2018. This is not supported by any registered instrument. Further, even according to the appellant, he is a "tenantinsufferance", therefore, he is not entitled to any protection of the Rent Act.

Secondly, even if the tenancy has been claimed to be renewed in terms of Section 13(13) of the SARFAESI Act, the Borrower would be required to seek consent of the secured creditor for transfer of the Secured Asset by way of sale, lease or otherwise, after issuance of the notice under Section 13(2) of the SARFAESI Act and, admittedly, no such consent has been sought by the Borrower in the present case.

15. In view of above, we do not find any merit in these appeals which are accordingly dismissed.

Source disclosure: Complete sanitized public judgment text retained for research. Official-primary replacement and later-history closure remain pending.

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