Neutral Citation No. - 2024:AHC:5811-DB

IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Present: **Court No. 43**

The Hon'ble Justice Siddhartha Varma
AND
The Hon'ble Justice Shekhar B. Saraf

WRIT – C No. 39914 OF 2023

M/S. TRILOKCHAND FABRICATION PVT. LTD.

VERSUS

STATE OF U.P. AND ORS.

For the petitioners	:	Sri Rahul Sripat, learned Senior Advocate assisted by Sri Ishir Sripat and Saurabh Patel, learned counsel.
For the Respondents	:	Sri Sanjai Singh, learned counsel for the respondent no. 4, Sri Shashi Nandan, learned Senior Advocate assisted by Sri Udayan Nandan, learned counsel for the respondents no. 5 to 8 and learned Additional Chief Standing Counsel for the State.

Last Heard On: December 19, 2023
Judgement On: January 11, 2024

1. The instant writ petition has been filed by the petitioner, M/s Trilokchand Fabrication Pvt. Ltd. praying for the issuance of a writ of certiorari quashing the order dated April 18, 2023 (hereinafter referred to as the 'impugned order') passed by The Additional District Magistrate, Finance and Revenue, Bulandshahr (hereinafter referred

to as the ‘Respondent No. 3’) and/or a writ of or in the nature of Mandamus directing the Respondent No. 3 to allow the application filed under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the ‘SARFAESI Act’) without being affected by the temporary injunction order dated November 9, 2021 (hereinafter referred to as the ‘injunction order’).

Facts

2. Factual matrix of the instant case is delineated down below:

a. M/s JN Robotics Automation Pvt. Ltd. (hereinafter referred to as the ‘Respondent No. 5’), Shri Navneet Sharma, Director, Respondent No. 5 (hereinafter referred to as the ‘Respondent No. 6’) and, Shri Jyoti Sharma, Director, Respondent No. 5 (hereinafter referred to as the ‘Respondent No. 7’) had taken a loan from the Punjab National Bank, Circle Shastra Centre, Ghaziabad (hereinafter referred to as the ‘Respondent No. 4’). As a security for the said loan, they had mortgaged their immovable property being plot nos. N1 and N2, Industrial Area, Sikandrabad, District Bulandshahr admeasuring total area 2000 square meters (hereinafter referred to as the ‘immovable property’).

b. Respondents No. 5, 6, and 7 defaulted on the loan and after the classification of the loan as a ‘Non-Performing Asset’ under the provisions of the SARFAESI Act, the immovable property belonging to the Respondents No. 5, 6, and 7 was auctioned.

c. Respondent No. 4 preferred an application under Section 14 of the SARFAESI Act before the District Magistrate, Bulandshahr (hereinafter referred to as the 'Respondent No. 2') for taking possession of the immovable property. During the pendency of the proceedings under Section 14 of the SARFAESI Act, the Respondent No. 4 sold the property to the petitioner vide an auction on December 14, 2022.

d. During the pendency of the proceedings under Section 14 of the SARFAESI Act, a Civil Suit for Injunction, being Original Suit No. 198 of 2021 was preferred by one Sanjiv Kumar (hereinafter referred to as the 'Respondent No. 8') against the Respondent No. 5 praying for a decree of injunction against evicting him without following the due process of law on the ground that the Respondent No. 8 is the tenant of the Respondent No. 5 and has duly entered into a lease for a period of 12 years.

e. Vide order dated November 11, 2021, the Court of Civil Judge, Senior Division, Bulandshahar granted temporary injunction to the Respondent No. 8 over the immovable property against the Respondent No. 5.

f. Application under Section 14 of the SARFAESI Act was later transferred to the Respondent No. 3. Respondent No. 3, keeping in mind, the injunction order passed by the civil court, vide its order dated April 18, 2023, directed the application filed under Section 14 of the SARFAESI Act to be kept under abeyance till the disposal of Original Suit No. 198 of 2021. The

instant writ petition has been preferred against the said order dated April 18, 2023.

Contentions by the Petitioner

3. Shri Rahul Sripat, learned Senior Advocate, has advanced the following arguments on the behalf of the petitioner:

a. The immovable property was leased by the U.P. State Industrial Development Corporation Ltd. (hereinafter referred to as 'UPSIDC') and hence as per the lease deed dated November 15, 2017, the same could not have been sub-let by the borrower.

b. There is no registered lease deed for the immovable property. Hence no lease beyond a period of 11 months is permissible without there being a registered lease deed in as much as the lease of the Respondent No. 5 from the UPSIDCS also prohibits sub-letting of the plot.

c. Order dated April 18, 2023, is patently illegal to the extent that neither the Petitioner nor the Respondent No. 4 is a party to the Original Suit No. 198 of 2021 and hence the said temporary injunction has no binding effect and only the Respondent No. 5 was injuncted in interfering with the possession of the Respondent No. 8.

d. Order dated April 18, 2023, besides being illegal, unjust and arbitrary is also hit by Articles 14, 21, and 300A of the Constitution of India. The said order is in teeth of the settled propositions of law in as much as the Respondent No. 3 ought to have called upon the Respondent No. 8 to submit his lease

deed whereafter the Respondent No. 3 based on the provisions of law ought to have passed its order on merits. Reliance was placed on the judgment of the Hon'ble Supreme Court of India in ***Harshad Govardhan Sondagar -v- International Assets Reconstruction Company Ltd. and Ors*, (2014) 6 SCC 1.**

e. From the aforesaid judgement it is abundantly clear that such injunction orders obtained by illegal occupants referring themselves as the tenants cannot be any reason for keeping the proceedings under Section 14 of the SARFAESI Act under abeyance in as the same will very conveniently frustrate the aims and objectives of the SARFAESI Act.

f. Petitioner has also filed application in Original Suit No. 198 of 2021 to apprise the learned court below of the correct facts and circumstances. However, filing of the said application does not create an estoppel against the Petitioner from challenging the impugned order and getting its rights executed under the law.

g. Petitioner is a bonafide auction purchaser who has invested huge amounts of money and is unable to enjoy the fruits of his purchase due as a result of the impugned order. Although the impugned order has been passed upon the application of the Respondent No. 4 but it is only the Petitioner who is the affected party. Therefore, the petitioner has the *locus standi* to challenge the impugned order.

h. Under the facts and circumstances of the instant case it is expedient in the interest of justice that this Court stays the effect and operation of the impugned order during the

pendency of the instant writ petition before this Court. The impugned order is not a final order under Section 14 of the SARFAESI Act and hence the Petitioner has no other alternative efficacious remedy other than to approach this Court under Article 226 of the Constitution of India.

i. To support the petitioner's case, judgments of the Hon'ble Supreme Court of India in ***Bajrang Shyamsundar Agarwal -v- Central Bank of India and Ors.*** , **(2019) 9 SCC 94** , ***Hemraj Ratnakar Salian -v- HDFC Bank Ltd.*** , **AIR 2021 SC 3880**, ***Agme Marketing Pvt. Ltd. -v- Canara Bank and Ors.*** , **2019 (8) ADJ 272** were relied upon.

j. It is a settled proposition of law that no lease beyond a period of 11 months can be created without a registered instrument as the same is barred by Section 106 of the Transfer of Property Act, 1882 (hereinafter referred to as the 'TPA 1882'). Since the lease is said to be by means of an oral agreement the same is to be considered to be a monthly lease wherein after the expiry of the monthly lease period, fresh oral lease is created and hence after classification of the loan of the Respondents No. 5,6 and 7 as a NPA on August 29, 2020 and the subsequent issue of notice under Section 13(2) of the SARFAESI Act on October 13, 2020, the alleged oral lease in favour of the Respondent No. 8 is barred by Section 13(13) of the SARFAESI Act.

k. The Respondent No. 8 has not produced any document to prove the lease to be a valid lease. As such, the Respondent No. 8 has no right as a tenant in the said property and the

injunction order passed in the Original Suit No. 198 of 2021 has no application in the present proceedings nor does it have any binding effect upon the present proceedings. Only the Borrower and the Respondent No. 8 are parties to the said suit. The said suit has been instituted after commencement of proceedings under Section 14 of the SARFAESI Act, and hence the same is barred by Section 34 and Section 35 of the SARFAESI Act. Even otherwise the Respondent No. 8 cannot seek injunction from eviction without due process of law.

l. The interim injunction will have no binding effect on the present proceedings as the same is barred by the SARFAESI Act. The oral tenancy alleged to have been created in the instant case is governed by the provisions of Section 65A of the TPA 1882 and hence the Respondent No. 8 is not eligible for any relief.

Contentions by The Respondent No. 8

4. Learned advocate appearing on behalf of the respondent no. 8 has made the following submissions:

a. Respondent No. 8 is in actual physical possession of the immovable property in question as a tenant of the said property. The tenancy in question has been entered into between the Respondent No. 6 and the Respondent No. 8 herein and in pursuance thereto, the Respondent No. 8 has deposited rent equivalent to 12 years as an advance payment. The parties have also executed a declaratory document in this regard on May 02, 2019. In pursuance to the tenancy created

between the parties on August 10, 2018, the Respondent No. 8 is in physical possession of the property in question.

b. It is submitted that the present writ petition against the impugned order passed under Section 14 of the SARFAESI Act can only be challenged in proceedings under Section 17 of the SARFAESI Act. The present writ petition challenging the impugned order is not maintainable before this Court.

c. The aforesaid principle of law has been clearly laid down by the Hon'ble Supreme Court in the case of ***ICICI Bank Limited and Others -v- Umakanta Mohapatra and Ors.*, (2019) 13 SCC 497** and in ***Authorized Officer*, *State Bank of Travancore and Anr. -v- Mathew K.C.*, (2018) 3 SCC 85.**

d. The aforesaid judgments have been followed by this Court in Writ-C No. 12664 of 2019 **(Intazar Ali -v- State of U.P. & 3 Others)** dated April 24, 2019. In view of the aforesaid judgments, the present writ petition is not maintainable under Article 226 of the Constitution of India, as the petitioner has an alternative efficacious remedy in the form of Section 17 of the SARFAESI Act.

e. It is further stated that the injunction order does not in any manner contravene the provisions of Section 34 r/w Section 35 of the SARFAESI Act, inasmuch as, the jurisdiction of the civil court has only been barred in respect of any debts, which are within the jurisdiction of the tribunals constituted under the SARFAESI Act. Since the suit in question was only a suit for injunction instituted by the tenant against his

landlord/lessor, the same is not barred either by Section 34 or Section 35 of the SARFAESI Act.

f. The Additional District Magistrate could not have ignored the order passed by a competent civil court while deciding the application filed under Section 14 of the SARFAESI Act and hence, it has rightly stayed its hands in view of the injunction order.

g. The tenancy in question is a tenancy, where no term or period has been fixed between the parties and in view of such fact, the tenancy in question is deemed to be on month-to-month basis. Registration of such a tenancy is not necessary and hence the same would not be hit by the provisions of Section 49 of the Indian Registration Act, 1908 (hereinafter referred to as the IRA, 1908).

h. Even in case of a tenancy, which is not registered or in the case a month-to-month tenancy, the court is not precluded from taking into consideration, the factum of creation of a tenancy or the agreement between the lessor and the lessee. Creation of a month-to-month tenancy created prior to issuance of notice under Section 13(2) of the SARFAESI Act cannot be rejected solely on the ground that the same is contained in an unregistered document.

i. The lease/agreement entered between the borrower and the tenant has not been determined till date and therefore, the tenant cannot be dispossessed by the auction purchaser from the property in question.

j. In view of such facts and circumstances, it is submitted that the present writ petition is not maintainable before this Court under Article 226 of the Constitution of India, and therefore, the present writ petition is liable to be dismissed by this Court.

Analysis and Conclusion

5. We have heard the learned counsel appearing for the parties and perused the materials on record.

6. In the instant case, the petitioner has challenged the order dated April 18, 2023, on primarily two grounds. First, that in the absence of a registered lease deed, no tenancy can last beyond a period of 11 months, and second, that the Respondent No. 3 should have determined the validity of the tenancy itself, instead of keeping the proceedings initiated under Section 14 of the SARFAESI Act under abeyance. Hence, for better adjudication of the issue at hand, I have divided this judgment into four issues:

Issue No. 1: - How are tenancy rights determined beyond the period of 1 year under the TPA 1882?
Issue No. 2: - What is the recourse available to a tenant during the pendency of an application under Section 14 of the SARFAESI Act?
Issue No. 3: - Can civil suits/proceedings be instituted during the pendency of an application under Section 14 of the SARFAESI Act?
Issue No. 4: - Does the present case call for the exercise of writ jurisdiction by this Court?

Issue No. 1

7. Section 107 of the TPA 1882 states that a lease of immovable property, for any term exceeding one year, can be made only by a registered instrument:

> *"**107. Leases how made**.—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.*
>
> *[All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.]*
>
> *[Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:*
>
> *Provided that the State Government may, [***] from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession."*

8. Section 17 of the IRA, 1908 also states that leases of immovable property beyond any term exceeding one year must be registered:

> *"**17. Documents of which registration is compulsory**.—(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been examined on or after the date on which, Act XVI of 1864, or the Indian Registration Act, 1866 (20 of 1866), or the Indian Registration Act, 1871 (8 of 1871), or the Indian Registration Act, 1877 (3 of 1877), or this Act came or comes into force, namely—*
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> *(a) instruments of gift of immovable property;*

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

[(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property :

Provided that the State Government may, by order published in the Official Gazette, exempt, from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees"

9. In ***Shri Janki Devi Bhagat Trust, Agra -v- Ram Swarup Jain (Dead) by Lrs.*, (1995) 5 SCC 314**, the Hon'ble Supreme Court held that the lease of an immovable property, beyond any term exceeding one year can only be made through a registered instrument. Relevant paragraph from the said judgment has been reproduced below:

"4. Under Section 107 of the Transfer of Property Act a lease of immovable property from year to year or for any term exceeding one year can be made only by a registered instrument. Any lease of this kind would be void unless it is created by a registered instrument. All other leases of immovable property may be made either by a registered instrument or by an oral agreement accompanied by delivery of possession. All the courts below have held that there was a valid lease. The High Court has also recorded that it was not the contention of the respondent that his lease was from year to year. The contention was that the lease was for a term exceeding one year and was, therefore, compulsorily registerable under the first part of Section 107 of the Transfer of Property Act. This contention has been negatived by the High Court as also by both the courts below. The High Court has held that the lease was not for a term exceeding one year, and so was not compulsorily registerable under the first part of Section 107. It, however, held that since the lease was for a manufacturing purpose, six months' notice to quit was required under Section 106. In its absence, termination was not valid."

10. This Court, in ***Kiran Dhawan -v- Vivek Mittal and Anr.*, 2018 SCC OnLine All 25**, expounded that only through a registered instrument, can a lease for any term exceeding one year be made. This Court after considering the Hon'ble Supreme Court's judgment in ***Samir Mukherjee -v- Davinder Kumar Bajaj*, (2001) 5 SCC 259** reiterated that an oral agreement, cannot result in creation of a valid lease from year to year. Relevant paragraphs from the aforesaid judgment have been extracted below:

"8. Under Section 107, 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. The second paragraph of Section 107, as applicable in the

State of U.P. provided that all other leases of immovable property may be made either by a registered instrument or, by an agreement oral or accompanied by delivery of possession. Section 106, provides that in the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice. Under the U.P. Amendment, the period of notice stood substituted to thirty days. Later on, by virtue of Central Amendment by Act 3 of 2003, the earlier position stood restored, however, nothing turns upon the same as the notice is not being challenged on the said ground.

9. In Samir Mukerjee (supra), upon which reliance has been placed by the court below, an identical plea was considered. The tenancy in that case was created by an oral agreement. The Supreme Court, after considering the interplay between Section 106 and Section 107 held that Section 106 lays down a rule of construction which would apply only when the parties had not specifically agreed upon as to whether the lease is yearly or monthly. It was held that in case there was a valid agreement between the parties regarding the duration of a lease, section 106 would have no application. On the other hand, Section 107 prescribes the procedure for execution of lease. Thus, where the lease is from year to year or for any term exceeding one year or reserving yearly rent, it can be made only by a registered instrument and not otherwise. The Supreme Court held that since there was no registered lease agreement but only an oral agreement, it would not result in creation of a valid lease from year to year in view of the inhibition contained in first paragraph of Section 107 nor the rule of construction embodied in Section 106 would come into

play. The relevant observations made in this regard in the said judgement are quoted below:—

"5. Section 106 lays down a rule of construction, which is to apply when the parties have not specifically agreed upon as to whether the lease is yearly or monthly between the parties. On a plain reading of this section it is clear that legislature has classified leases in two categories according to their purposes and this section would be attracted to construe the duration of a valid lease in the absence of a contract or local law or usage to the contrary. Where the parties by a contract have indicated the duration of a lease; this section would not apply. What this section does is to prescribe the duration of the period of different kinds of leases by legal fiction-leases for agricultural or manufacturing purposes shall be deemed to be lease from year to year and all other leases shall be deemed to be from month to month. Existence of a valid lease is a pre-requisite to invoke the rule of construction embodied in Section 106 of Transfer of Property Act.

6. Section 107 prescribes the procedure for execution of a lease between the parties. Under the first paragraph of this section a lease of immovable property from year to year or for any term exceeding one year or reserving yearly rent can be made only by registered instrument and remaining classes of leases are governed by the second paragraph that is to say all other leases of immovable property can be made either by registered instrument or by oral agreement accompanied by delivery of possession.

7. In the case in hand we are concerned with an oral lease which is hit by the first paragraph of Section 107 of the Transfer of Property Act. Under Section 107 parties have an option to enter into a lease in respect of an immovable property either for a term less than a year or from year to year, for any term exceeding one year or reserving a yearly rent. If they decide upon having a lease in respect of any immovable property from year to year or for any term exceeding one year,

or reserving yearly rent, such a lease has to be only by a registered instrument. In absence of a registered instrument no valid lease from year to year or for a term exceeding one year or reserving a yearly rent can be created. If the lease is not a valid lease within the meaning of the opening words of Section 106 the rule of construction embodied therein would not be attracted. The above is the legal position on a harmonious reading of both the sections.

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10. In the present case though the appellant has claimed that it was a lease for manufacturing purpose, admittedly there was no registered written lease. Therefore, rule of construction as envisaged in Section 106 would not be applicable as the statutory requirement of Section 107 of the Act has not been satisfied. The plea of the appellant that 15 days notice terminating the present tendency is bad in law would not be sustainable"

11. What emerges from a perusal of the aforesaid judgments is that the bar contained under Section 107 of the TPA 1872 is absolute. As a result, under no circumstances an unregistered instrument can create a valid lease beyond a period of one year. Furthermore, an oral argument cannot create a valid lease from year to year. IRA, 1908 also compulsorily requires lease of an immovable property created for a term exceeding one year to be registered. In absence of such registration, courts cannot take such a lease into consideration as the same would attract the bar contained under Section 49 of the IRA, 1908.

12. It was argued by the Respondent No. 8 before this Court that since the tenancy in question is a tenancy, where no period has been fixed, the tenancy in question is deemed to be on month-to-month

basis and as such, registration is not necessary. However, this argument bears no weight given the present circumstances. As the law stands, if a tenant claims possession of a secured asset beyond the prescribed period under Section 107 of the TPA 1872, he is required to produce a registered instrument executed in his favour.

13. This Court in ***Agme Marketing Private Limited and Anr. -v- Canara Bank and Ors. (supra)***, considered the rights of a tenant in case of a monthly tenancy, and the proceedings initiated under the SARFAESI Act, 2002 as follows:

> *"30. The Court may then consider the rights of the petitioners proceeding on the assumption that a monthly tenancy came to be created in their favour. If this contention were to be accepted, it would necessarily bid the Court to presume the creation of a tenancy on the first date of every month and its expiry on the last date of that month. The problem, however, in considering whether this tenancy would stand saved and not be contrary to the provisions of the 2002 Act arises when one takes into consideration the injunction as engrafted in Section 13(13) thereof. Subsection (13) restrains a borrower from transferring by way of sale, lease or otherwise the secured asset after receipt of a notice under Section 13(2) without the prior written consent of the secured creditor. Undisputedly even a monthly tenancy can be recognised to have come into existence only as an outcome of a bilateral and consensual act of parties. The acceptance of the contention addressed at the behest of the petitioners compels this Court to view the creation of a monthly tenancy by the original borrower in favour of the petitioners at the beginning of every month. This would logically lead to the creation of a monthly tenancy even after 09 October 2012 when the Section 13(2) notice came to be issued. The creation of a monthly tenancy cannot be viewed as an extension or renewal of an earlier term. It essentially and in law amounts to the creation of a fresh tenancy at the*

beginning of every month. If this submission of a monthly tenancy as urged on behalf of the petitioners is accepted, it would lead to a logical conclusion of a monthly tenancy being created and coming into existence even after the Section 13(2) notice came to be issued. It is not the case of the petitioners that the so called monthly tenancy came to be created with the prior and written consent of the secured creditor. Viewed in that light it is manifest that the provisions of Section 13(13) would stand breached. The contention that the statutory restraint engrafted in Section 13(13) of the SARFAESI Act operates only against the lessor/original debtor is misconceived. The creation of a tenancy is the formation of a contract based upon the action of two parties assenting to enter into a legal relationship. The acceptance of this submission would not only be contrary to the plain legislative intent infusing that provision, it would also deprive it of rigour and purpose."

Therefore, a monthly tenancy, cannot entitle a lessee to claim possession of a secured asset after proceedings have been initiated under Section 14 of the SARFAESI Act.

14. At this juncture, this Court also considers it pertinent to refer to the judgment of the Hon'ble Supreme Court in ***Harshad Govardhan Sondagar -v- International Assets Reconstruction Company Ltd (supra)***, wherein the Hon'ble Supreme Court held that if a tenant claims possession of a secured asset for any term exceeding one year from the date of the lease made in his favour, he must produce a registered instrument. We have extracted the relevant paragraphs from the said judgment below:

"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."***

(Emphasis Added)

15. Furthermore, the Hon'ble Supreme Court in its judgment in ***Bajrang Shyamsunder Agarwal -v- Central Bank of India (supra)*** examined the interplay between the SARFAESI Act and the rights of the tenants. The Hon'ble Supreme Court in the aforesaid case held that in case a tenant claims possession of a secured asset based on an unregistered instrument or an oral agreement, accompanied by delivery of possession, the tenant will not be entitled to the possession of the secured asset beyond the period

prescribed under Section 107 of the TPA 1882. Relevant paragraphs from the said judgment have been extracted below:

> *"17. The interplay between the SARFAESI Act and the right of the tenant was first examined by this Court in Harshad Govardhan case [Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd., (2014) 6 SCC 1 : (2014) 3 SCC (Civ) 1] . It may be noted that the present appellant was a party to the aforesaid proceedings. This Court was confronted with the question as to whether the provisions of the SARFAESI Act affect the right of a lessee to remain in possession of the secured asset during the period of the lease. After noticing the scheme of the Act, this Court held that if the lawful possession of the secured asset is not with the borrower, but with a lessee under a valid lease, the secured creditor cannot take possession of the secured asset until the lawful possession of the lessee gets determined and the lease will not get determined if the secured creditor chooses to take any of the measures specified in Section 13 of the SARFAESI Act. Accordingly, this Court concluded that the Chief Metropolitan Magistrate/District Magistrate can pass an order for delivery of possession of secured asset in favour of secured creditor only when he finds that the lease has been determined in accordance with Section 111 of the TP Act.*
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> *18. The Court further held that if the Chief Metropolitan Magistrate/District Magistrate is satisfied that a valid lease is created before the mortgage and the lease has not been determined in accordance with Section 111 of the TP Act, then he cannot pass an order for delivery of possession of the secured asset to the secured creditor. In case, he comes to the conclusion that there is no valid lease either before the creation of mortgage or after the creation of the mortgage satisfying the requirements of Section 65-A of the TP Act or even though there is a valid lease the same stands determined in accordance with Section 111 of the TP Act, he can pass an*

order for delivery of possession of the secured asset to the secured creditor.

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23. While we agree with the principle laid out in Vishal N. Kalsaria case [Vishal N. Kalsaria v. Bank of India, (2016) 3 SCC 762 : (2016) 2 SCC (Civ) 452] that the tenancy rights under the Rent Act need to be respected in appropriate cases, however, we believe that the holding with respect to the restricted application of the non obstante clause under Section 35 of the SARFAESI Act, to only apply to the laws operating in the same field is too narrow and such a proposition does not follow from the ruling of this Court in Harshad Govardhan case [Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd., (2014) 6 SCC 1 : (2014) 3 SCC (Civ) 1] .

24. In our view, the objective of the SARFAESI Act, coupled with the TP Act and the Rent Act are required to be reconciled herein in the following manner:

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."

(Emphasis Added)

16. What flows from the aforesaid discussion is that in absence of a registered instrument executed in its favour, a tenant, cannot be permitted to claim possession of a secured asset for a term beyond one year from the date on which the lease is claimed to have come into effect. If a tenant intends to safeguard his possession of the secured asset, presence of a registered lease deed executed in his favour is the sine qua non for the same. Having concluded that, it is further held that an oral agreement accompanied by delivery of possession, or an unregistered lease deed cannot be relied upon by a tenant to claim possession of a secured asset beyond the period prescribed under Section 107 of the TPA 1872. We also hold that the tenant, who claims tenancy month by month, would not get any advantage as per the judgment of the Supreme Court in **Agme Marketing Pvt. Ltd.** (Supra) as it clearly holds that a month to month tenancy comes to an end at the end of the month and commences at the beginning of every month. If that is the case, then as per Section 13 (13) of the SARFAESI Act, a new tenancy would not

commence after the notice under Section 13 (2) of the SARFAESI Act was issued to the borrower-landlord and, therefore, whenever in any case a plea is taken that the tenant was a tenant on a month to month basis then he would not get any advantage of that assertion as the commencement of tenancy on the first of every month would be a definite breach of the provisions of Section 13 (13) of the SARFAESI Act.

Issue No. 2

17. It has been conclusively established by this Court under Issue No. 1 that only through a registered instrument, a tenant can claim possession of a secured asset beyond the prescribed period under Section 107 of the TPA 1872. Therefore, the question which now emerges is - what is the remedy available to a tenant, in case, during the validity of his tenancy, proceedings are initiated under Section 14 of the SARFAESI Act?

18. Rules 8 (1) and 8(2) of the Security Interest (Enforcement) Rules, 2002 require that in case the secured asset is an immovable property, the officer, authorized by the DM/CMM, as the case maybe, before taking possession, shall deliver a possession notice on the **outer door or at a conspicuous place** of the property. The said possession notice shall also be published, in two leading newspapers, including, one newspaper in the local language. The Hon'ble Supreme Court in ***Harshad Govardhan Sondagar (supra)***, held that after a lessee becomes aware, of such a possession notice, he can either resist the attempt of the secured creditor to take possession of the secured asset, or surrender the possession. The lessee, in case, he

resists possession, is required to produce proof before the authorized officer, that his tenancy was created prior to creation of the mortgage or under the mortgagor, he was a lessee in accordance with Section 65-A of the TPA 1872. The authorized officer is then required to file an application before the CMM/DM, under Section 14 of the SARFAESI Act. The affidavit accompanying the application must state the name and address of the person claiming to be the lessee. On receipt of such an application, the CMM/DM must give notice and an opportunity of hearing to the person who is claiming to be the lessee. Thereafter, if existence of a valid lease is established to the satisfaction of the CMM/DM, he shall not pass an order delivering the possession of secured asset to the secured creditor. If in case, no valid lease exists, the CMM/DM, will pass an order delivering to the secured creditor, the possession of the secured asset. Relevant paragraphs from ***Harshad Govardhan Sondagar (supra)*** have been extracted below:

> *"26. The opening words of sub-section (1) of Section 14 of the Sarfaesi Act also provides that if any of the secured assets is required to be sold or transferred by the secured creditor under the provisions of the Act, the secured creditor may take the assistance of the Chief Metropolitan Magistrate or the District Magistrate. Where, therefore, such a request is made by the secured creditor and the Chief Metropolitan Magistrate or the District Magistrate finds that the secured asset is in possession of a lessee but the lease under which the lessee claims to be in possession of the secured asset stands determined in accordance with Section 111 of the Transfer of Property Act, the Chief Metropolitan Magistrate or the District Magistrate may pass an order for delivery of possession of secured asset in favour of the secured creditor to enable the*

secured creditor to sell and transfer the same under the provisions of the Sarfaesi Act. Sub-section (6) of Section 13 of the SarfaesiAct provides that any transfer of secured asset after taking possession of secured asset by the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset. In other words, the transferee of a secured asset will not acquire any right [Ed.: It would seem that if the sale or transfer of the secured asset is made under the Sarfaesi Act, 2002 without the secured creditor having taken over possession, then the transferee would obtain the secured asset subject to incumbrances i.e. stand in the shoes of the secured creditor. It is to obtain the benefit of S. 13(6), Sarfaesi Act, 2002 i.e. to obtain the secured asset free of incumbrances that possession would have to be taken by secured creditor prior to the transfer. Section 5, Sarfaesi Act, 2002 provides for the transfer of the secured asset subject to incumbrances.] in a secured asset under sub-section (6) of Section 13 of the Sarfaesi Act, unless it has been effected after the secured creditor has taken over possession of the secured asset. Thus, for the purpose of transferring the secured asset and for realising the secured debt, the secured creditor will require the assistance of the Chief Metropolitan Magistrate or the District Magistrate for taking possession of a secured asset from the lessee where the lease stands determined by any of the modes mentioned in Section 111 of the Transfer of Property Act.

27. We may now deal with the remedies available to the lessee where he is threatened to be dispossessed by any action taken by the secured creditor under Section 13 of the Sarfaesi Act. Sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 provide for a possession notice where the secured asset is an immovable property. Sub-rules (1), (2) and (3) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 as well as Appendix IV of the said

Rules, which is the form of such possession notice, are extracted hereunder:

"8. Sale of immovable secured assets.—(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these Rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in sub-rule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as an owner of ordinary prudence would, under the similar circumstances, take of such property."

"Appendix IV

[See Rule 8(1)]

Possession Notice

(For Immovable Property)

Whereas

The undersigned being the authorised officer of the …… (name of the institution) under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) and in exercise of powers conferred under Section 13(12) read with Rule 9 of the Security Interest (Enforcement) Rules, 2002 issued a demand notice dated …….. calling upon the borrower Shri……/M/s

……to repay the amount mentioned in the notice being Rs …….. (in words……) within 60 days from the date of receipt of the said notice.

The borrower having failed to repay the amount, notice is hereby given to the borrower and the public in general that the undersigned has taken possession of the property described hereinbelow in exercise of powers conferred on him/her under Section 13(4) of the said Act read with Rule 9 of the said Rules on this …….. day of …… of the year …….

The borrower in particular and the public in general is hereby cautioned not to deal with the property and any dealings with the property will be subject to the charge of the …… (name of the institution) for an amount Rs……and interest thereon.

Description of the immovable property

All that part and parcel of the property consisting of Flat No. ……/Plot No. …… in Survey No. ……/City or Town Survey No. ……/Khasra No. …… within the registration sub-district …….. and District ……

Bounded;

On the north by

On the south by

On the east by

On the west by

sd/-

Authorised Officer

(Name of the institution)

Date:

Place:"

---

28. A reading of sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 would show that the possession notice will have to be affixed on the outer door or at the conspicuous place of the property and also published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer. At this stage, the lessee of an immovable property will have notice of the secured creditor making efforts to take possession of the secured assets of the borrower. When, therefore, a lessee becomes aware of the possession being taken by the secured creditor, in respect of the secured asset in respect of which he is the lessee, from the possession notice which is delivered, affixed or published in sub-rule (1) and sub-rule (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, he may either surrender possession or resist the attempt of the secured creditor to take the possession of the secured asset by producing before the authorised officer proof that he was inducted as a lessee prior to the creation of the mortgage or that he was a lessee under the mortgagor in accordance with the provisions of Section 65-A of the Transfer of Property Act and that the lease does not stand determined in accordance with Section 111 of the Transfer of Property Act. If the lessee surrenders possession, the lease, even if valid, gets determined in accordance with clause (f) of Section 111 of the Transfer of Property Act, but if he resists the attempt of the secured creditor to take possession, the authorised officer cannot evict the lessee by force but has to file an application before the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the Sarfaesi Act and state in the affidavit accompanying the application, the name and address of the person claiming to be the lessee. 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 take a decision. If the Chief Metropolitan Magistrate or the 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 65-A 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 65-A 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."

19. It is not under dispute that, if a valid tenancy can be established by the tenant under the provisions of the TPA 1872, a secured creditor cannot disturb the tenant's possession of the secured asset. Proceedings under the SARFAESI Act cannot be used to frustrate the rights of a rightful tenant. However, possession of a secured asset for a term exceeding one year, can only be claimed through a registered lease deed. While considering it's earlier judgement in ***Bajrang Shyamsunder Agarwal -v- Central Bank of India (supra)***, the Hon'ble Supreme Court in ***Hemraj Ratnakar Salian -v- HDFC Bank Ltd. And Ors. (supra)***, reiterated this view:

"12. A Three-Judge Bench of this Court in Bajarang Shyamsunder Agarwal v. Central Bank of India[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 65-A 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..."

20. As far as approaching the DRT against the action of the secured creditor is concerned, the Hon'ble Supreme Court in ***Harshad Govardhan Sondagar (supra)*****,** held that while the recourse to approach the DRT maybe availed by the tenant, the DRT has no power to restore the possession of the secured asset to the lessee/tenant. The DRT can only restore possession of the secured asset to the borrower. Relevant paragraph from the aforesaid judgment has been extracted below:

"32. When we read sub-section (1) of Section 17 of the SARFAESI Act, we find that under the said sub-section "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 the chapter, may apply to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measures had been taken. We agree with Mr Vikas Singh that the words "any person" are wide enough to include a lessee also. It is also possible to take a view that within 45 days from the date on which a possession notice is delivered or affixed or published under sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, a lessee may file an application before the Debts Recovery Tribunal having jurisdiction in the matter for restoration of possession in case he is dispossessed of the secured asset. But when we read sub-section (3) of Section 17 of the SARFAESI Act, we find that the Debts Recovery Tribunal has powers to restore possession of the secured asset to the borrower only and not to any person such as a lessee. Hence, even if the Debts Recovery Tribunal comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor are not in accordance with the provisions of the Act, it cannot restore possession of the secured asset to the lessee. Where, therefore, the Debts Recovery Tribunal considers the application of the lessee and comes to the conclusion that the lease in favour of the lessee was made prior to the creation of mortgage or the lease though made after the creation of mortgage is in accordance with the requirements of Section 65-A of the Transfer of Property Act and the lease was valid and binding on the mortgagee and the lease is yet to be determined, the Debts Recovery Tribunal will not have the power to restore possession of the secured asset to the lessee. In our considered opinion, therefore, there is no remedy available under Section 17 of the SARFAESI Act to the lessee to protect his lawful possession under a valid lease."

21. What can be concluded is that a tenant can avail either of the following two options, as a recourse to the proceedings initiated under Section 14 of SARFAESI Act –

a. A tenant, on becoming aware of the proceedings initiated under Section 14 of SARFAESI Act, may approach the authorized officer empowered by the DM/CMM, to take possession of the secured asset. The authorized officer, on receipt of such an application, will then file an affidavit and submit the application for determination of tenancy rights before the DM/CMM. On receipt of such an application, the DM/CMM will provide an opportunity to the tenant to present his case, and then determine the validity of tenancy in accordance with the law. In case, the DM/CMM concludes that the tenant has a valid lease, in accordance with the law, he may not pass an order under Section 14 of SARFAESI Act, delivering the possession of asset in question to the secured creditor.

Or,

b. A tenant can surrender possession of the secured asset, of which he claims to be the leaseholder. The lease, in such a case, will be determined in accordance with Section 111 of the TPA 1882.

22. Issue No. 2 is answered accordingly in the aforesaid terms.

Issue No. 3

23. In order to protect his possession in the instant case, the tenant approached the concerned civil court, to obtain an injunction against the borrower from evicting him without the due process of law.

Taking into consideration the order passed by the civil court, the Respondent No. 3, kept the proceedings initiated under Section 14 of the SARFAESI Act under abeyance. The issue which arises for consideration of this Court now, therefore, is whether the Respondent No. 3 could have done so, and whether the tenant could have approached the civil court.

24. Section 34 of the SARFAESI Act places a bar on the institution of civil suits in respect of any matter in which a Debts Recovery Tribunal or the Appellate Tribunal has jurisdiction:

> *"**34. Civil court not to have jurisdiction**.—No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)."*

25. In ***Mardia Chemicals Ltd. And Ors. -v- Union of India and Ors.*, (2004) 4 SCC 311**, the Hon'ble Supreme Court, stated that Section 34 of the SARFAESI Act places a bar on the civil courts from entertaining an application in any matter in which a DRT or an Appellate Tribunal have jurisdiction. The Hon'ble Supreme Court further outlined that only in extremely limited cases, jurisdiction of a civil court can be invoked in such matters. Relevant paragraphs from the aforesaid judgment have been extracted below:

> *"50. It has also been submitted that an appeal is entertainable before the Debts Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in*

respect of a matter which the Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr Salve, one of the counsel for the respondents that there would be no bar to approach the civil court. Therefore, it cannot be said that no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of Section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debts Recovery Tribunal or an Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say, the prohibition covers even matters which can be taken cognizance of by the Debts Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.

51. However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable which may not require any probe whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as well appearing for the Union of India, namely, V.

Narasimhachariar [AIR 1955 Mad 135] , AIR at pp. 141 and 144, a judgment of the learned Single Judge where it is observed as follows in para 22: (AIR p. 143)

"22. The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought: Adams v. Scott [(1859) 7 WR 213, 249] . I need not point out that this restraint on the exercise of the power of sale will be exercised by courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely. (See Ghose, Rashbehary: Law of Mortgages, Vol. II, 4th Edn., p. 784.)"

26. The Hon'ble Supreme Court in ***Punjab and Sind Bank -v- Frontline Corporation Ltd.*, 2023 SCC OnLine SC 470,** expounded on its earlier judgment in ***Mardia Chemicals (supra)***. Relevant paragraphs have been reproduced below:

"23. It could thus be seen that this Court has held that the jurisdiction of the civil court is barred in respect of matters which a DRT or an Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". The Court has held that the prohibition covers even matters which may be taken cognizance of by the DRT though no measure in that direction has so far been taken under subsection (4) of Section 13 of the SARFAESI Act. It has been held that the bar of

jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. It has categorically been held that any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The Court held that the bar of civil court thus applies to all such matters which may be taken cognizance of by the DRT, apart from those matters in which measures have already been taken under sub-section (4) of Section 13 of the SARFAESI Act.

24. This Court has further held that, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable which may not require any probe whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages."

27. Again, in ***SREE Anandhakumar Mills Ltd. -v- Indian Overseas Bank & Ors.*, MANU/SCOR/15183/2018**, the Hon'ble Supreme Court reiterated that no civil court shall have jurisdiction to entertain any suit or proceeding if an aggrieved person has got any grievance against any measures taken under Section 13(4) of the SARFAESI Act –

"…The opening portion of Section 34 clearly states that no civil court shall have the jurisdiction to entertain any suit or proceeding in respect of any matter which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression in respect of any matter referred to in Section 34 would take in the measures provided under sub-section (4) of Section 13 of the Securitisation Act.

Consequently, if any aggrieved person has got any grievance against any measures taken by the borrower under sub-section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. The civil

court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal.

Further, Section 35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well."

28. Before concluding this issue, reference is made to Section 9 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC 1908' which states as follows:

9. Courts to try all civil suits unless barred.—The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. 4[Explanation I].—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies. 5[Explanation II]. —For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.]"

Upon an examination of Section 9 of the CPC 1908 read in conjunction with Section 34 of the SARFAESI Act, it can unequivocally be ascertained that civil courts are precluded from adjudicating suits pertaining to a subject matter which falls within the jurisdiction of a DRT or an Appellate Tribunal under the SARFAESI Act, except in exceptional circumstances.

29. In the instant case, the tenant erred in seeking redress before the Court of Civil Judge, Senior Division, Bulandshahar, for safeguarding his tenancy rights. Legal provisions do not sanction

such a course of action. The lessee should have availed himself of the appropriate remedy before the DM/CMM, as per the Security Interest (Enforcement) Rules, 2002, and the SARFAESI Act, or surrender possession of the secured asset. Respondent No. 3, possessing the requisite authority, was both empowered and obligated by law to ascertain the tenancy rights of Respondent No. 8 in accordance with the law. Issue No. 3 is accordingly answered in the negative.

Issue No. 4

30. It was also argued before this Court that the petitioner should have approached the DRT under Section 17 of the SARFAESI Act, instead of seeking to avail the writ jurisdiction of this Court under Article 226 of the Constitution of India.

31. It is not disputed that if an efficacious alternative remedy exists, the High Courts will typically refrain from invoking their writ jurisdiction. Nonetheless, presence of an alternative efficacious remedy does not constitute an absolute impediment, in entertaining a writ petition. This view was reiterated by the Hon'ble Supreme Court in ***Whirlpool Corporation -v- Registrar of Trade Marks, Mumbai and Ors.*, (1998) 8 SCC 1.** Relevant paragraphs have been extracted below:

> *"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose"*

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. ***But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.***

16. Rashid Ahmed v. Municipal Board, Kairana [1950 SCC 221 : AIR 1950 SC 163 : 1950 SCR 566] laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. ***This was followed by another Rashid case, namely, K.S. Rashid & Son v. Income Tax Investigation Commission [AIR 1954 SC 207 : (1954) 25 ITR 167] which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances."***

(Emphasis Added)

32. The Respondent No. 8 in the instant case relied upon a judgment of the Hon'ble Supreme Court in the case of ***ICICI Bank Limited and Ors. -v- Umakanta Mohapatra and Ors.*** **(supra)**, to argue against the maintainability of the writ petition in the instant case. The Hon'ble Supreme Court in the said case had remarked as follows:

> "**2.** Despite several judgments of this Court, including a judgment by Hon'ble Navin Sinha, J., as recently as on 30-1-2018, in *State Bank of Travancore* v. *Mathew K.C.* [*State Bank of Travancore* v. *Mathew K.C.*, (2018) 3 SCC 85 : (2018) 2 SCC (Civ) 41] , the High Courts continue to entertain matters which arise under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), and keep granting interim orders in favour of persons who are non-performing assets (NPAs)."

However, the said judgment, to our mind, fails to advance the case of the Respondent No. 8 in the instant case. The Hon'ble Supreme Court in the aforesaid judgment was dealing with a case wherein the borrower had approached the writ court. However, in the instant case, the Petitioner is not the borrower but an auction purchaser, who has approached this Court to protect his rights.

33. Next, the Respondent No. 8 relied upon the judgment of the Hon'ble Supreme Court in ***Authorized Officer, State Bank of Travancore and Anr. -v- Mathew K.C. (surpa).*** The Hon'ble Supreme Court in the aforesaid case held that that the presence of an alternative efficacious remedy would normally bar a writ petition under Article 226 of the Constitution of India:

> ***5.*** *We have considered the submissions on behalf of the parties. Normally this Court in exercise of jurisdiction under*

Article 136 of the Constitution is loath to interfere with an interim order passed in a pending proceeding before the High Court, except in special circumstances, to prevent manifest injustice or abuse of the process of the court. In the present case, the facts are not in dispute. The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. ***The normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well-defined exceptions as observed in CIT v. Chhabil Dass Agarwal [CIT v. Chhabil Dass Agarwal, (2014) 1 SCC 603] , as follows:***

"15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case [Thansingh Nathmal v. Supt. of Taxes, AIR 1964 SC 1419] , Titaghur Paper Mills case [Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 : 1983 SCC (Tax) 131] and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

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10. *In Satyawati Tondon [United Bank of India v. Satyawati Tondon, (2010) 8 SCC 110 : (2010) 3 SCC (Civ) 260] the High Court had restrained [Satyawati Tondon v. State of U.P., 2009 SCC OnLine All 2608] further proceedings under Section 13(4) of the Act. Upon a detailed consideration of the statutory scheme under the Sarfaesi Act, the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding: (SCC pp. 123 & 128, paras 43 & 55)*

"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this Rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

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55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to

ignore the availability of statutory remedies under the DRT Act and the Sarfaesi Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

(Emphasis Added)

The Hon'ble Supreme Court, therein was dealing with a case where a borrower had approached the writ court for appropriate orders. The Hon'ble Supreme Court deprecated the practice of the High Courts exercising their jurisdiction under Article 226 of the Constitution of India despite availability of alternative remedies under the Debts Recovery Tribunal Act (hereinafter referred to as the 'DRT Act') and the SARFAESI Act. Nevertheless, the Hon'ble Supreme Court also affirmed the exceptions to the rule of alternative efficacious remedy. Therefore, the aforesaid case also does not help the Respondent No.8.

34. From a reading of the aforesaid judgments, three conditions emerge which would warrant the exercise of the writ jurisdiction under Article 226 of the Constitution of India despite the presence of alternative efficacious remedy –

a) Where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed;

b) Violation of the principles of natural justice; and

c) Where the vires of an Act is challenged.

35. The impugned order dated April 18, 2023, is a blatant failure of the Additional District Magistrate, Finance and Revenue, Bulandshahr, to act in accordance with the provisions of the SARFAESI Act and other relevant rules. The respondent No.3 was required to take a decision on merits with regard to the tenancy rights of the respondent No.8 (alleged tenant) in terms of the Apex Court judgment in ***Harshad Govardhan Sondagar (supra)*** and the other Apex Court judgments cited above. The respondent No.3 failed to do so, and accordingly, the impugned order is a typical case of an authority failing to exercise proper jurisdiction. Ergo, the impugned order falls within the exceptions defined by the Hon'ble Supreme Court which would call for the exercise of writ jurisdiction, even if an alternative efficacious remedy is present.

36. The judgments relied upon by the respondent No.8 in support of the argument that this Court should not interfere as an efficacious alternative remedy exists by way of an appeal under Section 17 of the SARFAESI Act, is an argument in sophistry, as the Supreme Court in all these judgments laid down the ratio that a borrower cannot be allowed to frustrate the provisions of the SARFAESI Act by seeking a relief under the discretionary jurisdiction under Article 226 of the Constitution of India. In the present case, the Article 226 jurisdiction has been invoked by the auction purchaser to enforce his just rights under the SARFAESI Act and to ensure that the fruits of his labour are not rendered infructuous. The objections raised by the respondent No.8, who is an alleged tenant, with regard to the maintainability of

the writ petition are for the sole purpose of elongating the lis, and the same is evident from the fact that actions have been taken by the respondent No.8 in clear contravention of the law laid down by the Supreme Court. Having acted contrary to the dictum of the Supreme Court, the respondent No.8 cannot and should not be allowed to resist the present writ petition on the ground that an alternative remedy exists. This Court is duty bound to protect the laws passed by the Legislature and the interpretation of the same as laid down by the Supreme Court of India. In light of the same, it is crystal clear that the preliminary objection of the respondent No.8 with regard to maintainability of the petitioner is superfluous and without any basis in law, hence the same is rejected outrightly.

37. Having concluded earlier that the impugned order is a failure of the Respondent No. 3 to exercise its jurisdiction, the instant case is the one which would call for the issuance of the writ of certiorari. Reference is made in this regard to the ***Central Council for Research in Ayurvedic Sciences and Another -v- Bikartan Das and Others*****, 2023 SCC OnLine SC 996,** wherein the Supreme Court reiterated the circumstances under which a writ of certiorari can be issued –

> *"65. Thus, from the various decisions referred to above, we have no hesitation in reaching to the conclusion that a writ of certiorari is a high prerogative writ and should not be issued on mere asking. For the issue of a writ of certiorari, the party concerned has to make out a definite case for the same and is not a matter of course. To put it pithily, certiorari shall issue to correct errors of jurisdiction, that is to say, absence, excess or failure to exercise and also when in the exercise of undoubted*

jurisdiction, there has been illegality. It shall also issue to correct an error in the decision or determination itself, if it is an error manifest on the face of the proceedings. By its exercise, only a patent error can be corrected but not also a wrong decision. It should be well remembered at the cost of repetition that certiorari is not appellate but only supervisory."

38. A Constitution Bench of the Hon'ble Supreme Court in ***Nagendra Nath Bora and Anr. -v- The Commissioner of Hills Division and Appeal, Assam and Ors.*, 1958 SCC OnLine SC 45**, after extensively considering both Indian and English precedents, delineated the principles for issuance of a writ of certiorari:

"36. So far as we know, it has never been contended before this Court that an error of fact, even though apparent on the face of the record, could be a ground for interference by the court exercising its writ jurisdiction. No ruling was brought to our notice in support of the proposition that the court exercising its powers under Article 226 of the Constitution, could quash an order of an inferior tribunal, on the ground of a mistake of fact apparent on the face of the record.

37. But the question still remains as to what is the legal import of the expression 'error of law apparent on the face of the record'. Is it every error of law that can attract the supervisory jurisdiction of the High Court, to quash the order impugned? This court, as observed above, has settled the law in this respect by laying down that in order to attract such jurisdiction, it is essential that the error should be something more than a mere error of law; that it must be one which is manifest on the face of the record. In this respect, the law in India and the law in England, are, therefore, the same. It is also clear, on an examination of all the authorities of this Court and of those in England, referred to above, as also those considered in the several judgments of this Court, that the common-law writ, now called order of certiorari, which was also adopted by our Constitution, is not meant to take the place of an appeal where

the statute does not confer a right of appeal. Its purpose is only to determine, on an examination of the record, **whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer.** *Mere formal or technical errors, even though of law, will not be sufficient to attract this extraordinary jurisdiction."*

(Emphasis Added)

39. A mere error of law would not warrant the issuance of a writ of certiorari. The error must be an **error of law apparent on the face of record.** The impugned order in the instant case passed by the Respondent No. 3, does not merely suffer from an error of law. It is a result of the failure of the Respondent No. 3 to perform what it was mandated under the law to do. As such, it can be classified as an error of such a nature, that it would call upon this Court to exercise its supervisory jurisdiction as the custodian of the Constitution and quash the said order.

Summary

40. We have outlined the principles emerging from the aforesaid discussion below:

a) As mandated by Section 107 of the TPA 1882 and Section 17 of the IRA, 1908, the lease of an immovable property, beyond the period of one year can only be created by a registered instrument. An oral agreement, accompanied by the delivery of possession cannot create a lease beyond the prescribed period under Section 107 of the TPA 1882. An

unregistered lease, cannot be taken into consideration by the courts, given the bar placed under Section 49 of the IRA, 1908.

b) A tenancy where no period has been fixed, or a tenancy which is deemed to be a month-to-month tenancy, cannot entitle a tenant to seek possession of a secured asset beyond a period of one year when proceedings have been initiated under Section 14 of the SARFAESI Act.

c) If a tenant intends to claim the possession of a secured asset when proceedings have been initiated under Section 14 of the SARFAESI Act it must necessarily be done by way of a registered instrument executed in his favour.

d) When a tenant becomes aware, that proceedings have been initiated under Section 14 of the SARFAESI Act he can either approach the concerned officer authorised by the DM/CMM to take possession of the secured asset, or surrender the possession of the secured asset. The authorised officer, in a case where, the tenant, resists surrendering the possession of a secured asset, will file an application accompanied by an affidavit containing the necessary details before the DM/CMM. The DM/CMM on receipt of such an application, will determine the rights of the tenant in accordance with the law. If the DM/CMM comes to the conclusion that the tenant has a valid lease entitling him to possession of the secured asset, he will not pass an order delivering the possession of the secured asset to the creditor.

e) Even if a tenant approaches the DRT, under Section 17 of the SARFAESI Act, the DRT cannot restore possession of the secured asset to the tenant. The DRT is only empowered to restore possession of the secured asset to the borrower, and not anyone else.

f) Section 34 of the SARFAESI Act, read in conjunction with Section 9 of the CPC 1908 places a bar on the institution of civil suits regarding matters which a DRT or Appellate Tribunal has been empowered to deal with under the SARFAESI Act. Furthermore, no civil court, can entertain a suit or proceeding, if an aggrieved person has grievance against any measures taken under Section 13(4) of the SARFAESI Act.

g) The availability of an alternative efficacious remedy would normally act as a bar against entertaining a writ petitioner. Nevertheless, under certain exceptional circumstances, a writ petition can be entertained even if an alternative efficacious remedy is available. These circumstances being – a) where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed; b) violation of the principles of natural justice; and c) where the vires of an Act is challenged.

h) The writ of certiorari can only be exercised under extremely limited circumstances and not every error of law would warrant the issuance of the writ of certiorari. However,

where a lower court/tribunal has failed to exercise its jurisdiction, the same would call for issuance of the writ of certiorari by the High Court.

Epilogue

41. Financial institutions and banks serve as the bedrock of our national economy. They function as custodians of public finances. It is undisputed that a robust banking system is indispensable for a nation's economic health. Consequently, it becomes imperative for all stakeholders, including the judiciary, to collaboratively undertake measures to ensure the security and efficacy of the banking system. The SARFAESI Act stands as a pivotal legislative instrument, endowing banks and financial institutions with the requisite authority to adeptly navigate the issue of NPAs. The fundamental objective underpinning the SARFAESI Act is the facilitation of the expeditious recovery of outstanding dues, thereby circumventing the need for unnecessarily protracted legal proceedings. This assumes heightened significance within the Indian context, where grappling with NPAs has consistently posed a formidable challenge for financial institutions. By authorizing lenders to proactively undertake measures in the retrieval of their investments, the SARFAESI Act assumes the role of a safeguard, preserving the financial well-being of these institutions. The SARFAESI Act also serves as a catalyst for instilling responsible borrowing practices and functions as a deterrent against wilful defaults. The multiplicity of superfluous litigation, which prolongs the resolution of non-performing assets, dilutes and undermines the overarching purpose of the SARFAESI Act. It is incumbent upon all

stakeholders, including borrowers and the judiciary, to ensure that frivolous petitions do not impede the seamless progress of recovery proceedings initiated pursuant to the SARFAESI Act.

Conclusion and Directions

42. Since, the impugned order in the instant case, suffers from the failure of the Respondent No. 3 to exercise its jurisdiction, it warrants the issuance of a writ of certiorari. Accordingly, let there be a writ of certiorari issued against the order dated April 18, 2023 passed by Respondent No. 3. The said order is quashed and set aside.

43. This Court further directs the Respondent No 3 to determine the tenancy rights of the Respondent No. 8 in accordance with law and proceed to decide the application filed under Section 14 of the SARFAESI Act, without taking into consideration any order passed by the Court of Civil Judge, Senior Division, Bulandshahar.

44. This writ petition is allowed in the aforesaid terms. There shall be no order as to the costs.

45. Urgent photostat-certified copy of this order, if applied for, should be readily made available to the parties upon compliance with the requisite formalities.

Date:- January 11, 2024
Ashish

(Shekhar B. Saraf, J.) (Siddhartha Varma, J.)