

In The Hon'ble High Court Of Judicature At Allahabad,
Lucknow Bench, Lucknow

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Neutral Citation No. - 2024:AHC-LKO:83140-DB

A.F.R.

Court No. - 1

Case :- WRIT - C No. - 10552 of 2024

Petitioner :- Satyanarayan And 7 Others

Respondent :- State Of U.P. Thru. Addl. Chief Secy. Revenue Deptt.
Lko. And 9 Others

Counsel for Petitioner :- Sanjay Kumar Srivastava, Akshat Kumar

Counsel for Respondent :- C.S.C., Brajendra Amiy

Hon'ble Attau Rahman Masoodi J.

Hon'ble Subhash Vidyarthi J.

(Per: Hon'ble Subhash Vidyarthi, J.)

1. Heard Sri. Sanjay Kumar Srivastava, the learned counsel for the petitioners and Sri Brajendra Amiy, the learned counsel for the opposite party no. 6.
2. By means of the instant Writ Petition filed under Article 226 of the Constitution of India, the petitioners have sought quashing of an order dated 15.03.2024 passed by the Additional District Magistrate (Finance and Revenue), Bahraich in Case no. 542 of 2023 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') directing the Sub-divisional Magistrate, Bahraich and the Officer In-charge, Police Station - Kotwali Nagar, Bahriach to take possession of two secured assets for recovery of debts taken by the opposite party nos. 7, 8 and 10, for which the opposite party no. 9 stood a guarantor. They have also sought quashing of the consequential order dated 16.11.2024 passed by the Sub-divisional Magistrate, Sadar Bahraich nominating the Naib Tehsildar Sadar Bahraich as the Magistrate for the purpose of taking possession of the mortgaged property.

3. The petitioners claim that they are tenants in respect of shop nos. 285, 286, 286, 289, 290 and 291 situated in a building in Mohalla-Steelganj, Bisatkhan, Kasgar Gali, Bahraich for the past more than 60 years. The building in which the aforesaid shops are situated, has been mortgaged by the opposite parties no. 7, 8 and 10 without knowledge or consent of the petitioners. The petitioners have filed an application dated 29.11.2024 before the Additional District Magistrate (Finance and Revenue), Bahraich stating that they are tenants in respect of the aforesaid shops and, therefore, instead of taking physical possession of the shops in their tenancy, merely notional / symbolic possession of the shops should be taken from them. The application remains undisposed off and the petitioners have sought issuance of a direction for disposal of their application dated 29.11.2024.
4. Undisputedly, the building, the shops situated wherein are in tenancy of the petitioners, has been mortgaged with Punjab National Bank (the opposite party no. 6) for a loan taken by the opposite party nos. 7, 8 and 10. As on 30.11.2022, a sum of Rs.4,24,92,056.13/- was due against the loan account, besides interest with effect from 01.12.2022 and other expenses. The borrowers have failed to repay the loan amount in spite of a recovery notice having been issued under Section 13(2) of the SARFAESI Act. The borrowers did not deliver possession of the mortgaged property to the Bank whereupon the Bank filed an application under Section 14 of the SARFAESI Act which has been allowed by means of an order dated 15.03.2024 passed by the Additional District Magistrate (Finance and Revenue), Bahraich. Section 14 of the SARFAESI Act provides for taking physical possession of the secured assets in such circumstances.
5. The learned counsel for the petitioner has submitted that the petitioners being the tenants of the shops situated in the mortgaged property, have a legal right to continue in physical possession of the shops in question. Their tenancy rights cannot be affected adversely by the failure of the landlord to repay the amount of loan taken by him from the Bank. He has placed reliance upon a judgment of the Hon'ble Supreme Court in the case of **Bajarang Shyamsunder**

Agarwal versus Central Bank of India and others: AIR 2019 SC 5017 and a judgment passed by this Court in the case of **Trilokchand Fabrication (P) Ltd. v. State of U.P.:** 2024 SCC OnLine All 103 = 2024 (1) ADJ 824.

6. In **Bajarang Shyamsunder Agarwal** (Supra), the appellant claimed to be a tenant of the premises in question since January, 2000 whereas the property was mortgaged on 20.05.2000 i.e. after the commencement of tenancy. Upon failure of the borrower-landlord to repay the outstanding amount, the Bank filed an application under Section 14 of the SARFAESI Act for taking possession of the secured assets, which was allowed. The appellant-tenant filed an application before the Magistrate which was rejected holding that no registered lease deed has been executed by the appellant and, therefore, he is not entitled for the possession of the secured asset for more than one year from the date of execution of the unregistered tenancy agreement in accordance with the law laid down in **Harshad Govardhan Sondagar versus International Assets Reconstruction Company Ltd.:** (2014) 6 SCC 1. The Hon'ble Supreme Court referred to Section 35 of the SARFAESI Act, which provides as follows: -

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

7. In **Bajarang Shyamsunder Agarwal** (Supra), the Hon'ble Supreme Court referred to its earlier decision in **Harshad Govardhan Sondagar** (Supra) in which the appellant - Bajarang Shyamsunder Agarwal was also a party and wherein it was held that if the lawful possession of the secured assets is not with the borrower, rather it is with a lessee under a valid lease, the secured creditor cannot take possession of the secured assets 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 under Section 35 of the SARFAESI Act. If the Magistrate is satisfied that a

valid lease was created before the mortgage and the lease has not been determined in accordance with Section 111 of the Transfer of Property Act, 1882 then he cannot pass an order for delivery of possession of the secured assets 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 creation of mortgage satisfying the requirement of Section 65-A of the Transfer of the Property Act or even though there was a valid lease, the same stands determined in accordance with Section 111 of the Transfer of the Property Act, he can pass order for delivery of the possession of the secured assets to the secured creditor.

8. In **Harshad Govardhan Sondagar** (Supra), the Hon'ble Supreme Court has distinguished the implications of the registered and unregistered lease deed/oral agreement in the following words: -

“36...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 an year from the date of the instrument or from the date of delivery of possession in his favour by the landlord.”

(Emphasis supplied by the Hon'ble Supreme Court)

9. The Hon'ble Supreme Court further held in **Harshad Govardhan Sondagar** (Supra) that :-

“a) The provisions of the SARFAESI Act cannot be used to override the provisions of the Rent Act. The landlord cannot be

permitted to do indirectly what he has been barred from doing under the Rent Act.

b) While a yearly tenancy requires to be registered, oral tenancy can still be proved by showing that the tenant has been in occupation of the premises before the Magistrate under Section 14 of the SARFAESI Act.

c) The nonregistration of the tenancy deed cannot be used against the tenant. For leasehold rights being created after the property has been mortgaged to the bank, the consent of the creditor needs to be taken.

d) Even though Section 35 of the SARFAESI Act has a non obstante clause, it will not override the statutory rights of the tenants under the Rent Control Act. The non obstante clause under Section 35 of the SARFAESI Act only applies to laws operating in the same field.

(Emphasis added)

10. After taking into consideration the aforesaid law laid down in the **Harshad Govardhan Sondagar** (Supra), the Hon'ble Supreme Court has held in **Bajarang Shyamsunder Agarwal** as follows: -

“In our view, the objective of SARFAESI Act, coupled with the Transfer of the Property Act and the Rent Act are required to be reconciled herein in the following manner:

a) 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.

b) 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 65A of the T.P. Act.

c) 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 T.P. Act.”

(Emphasis added)

11. The Hon’ble Supreme Court found that the *bona fide* of the tenant was doubtful, as there was no good or sufficient evidence to establish the tenancy. The tenants had allegedly entered into an oral agreement of tenancy before the mortgage deed was executed. The tenancy created under an oral agreement results in a fresh tenancy after expiry of the statutory period fixed under the Transfer of the Property Act.
12. The Hon’ble Supreme Court concluded in **Bajarang Shyamsunder Agarwal** that when the claim of the appellant-tenants was not supported by any conclusive evidence, the rejection of his stay application by the Magistrate was not erroneous. Further, the operation of the Rent Act cannot be extended to a ‘tenant at sufferance’ vis-a-vis the SARFAESI Act due to the operation of Section 13(2) read-with Section 13 of the SARFAESI Act. A contrary interpretation would fault the intention of the legislature to provide for Section 13, which has valuable role in making the SARFAESI Act a self-executory instrument for debt recovery. Moreover, such an interpretation would also violate the mandate of Section 35 of the SARFAESI Act which is couched in broad terms.
13. In **Trilokchand Fabrication Pvt. Ltd.** (Supra), a co-ordinate Bench of this Court summarized the principles applicable in such situation in the following words :-

“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.

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.

(Emphasis added)

14. When we examine the facts of the present case in light of the law laid down in the aforementioned cases, what comes to light is that the petitioners claim to be tenants in respect of some shops situated in the building, which has been mortgaged by the landlords with the opposite party no 6-Punjab National Bank. The petitioners claim to be the tenants in respect of the various shops for past 60 years or more,

under oral agreements. The opposite parties no. 7, 8 and 10 had taken loans from the Bank in the years 2012 and 2015 and they had mortgaged two properties, inducing the property in which the shops in question are situated. Upon a default having been committed in repayment of the loan amounts, the Bank filed an application under Section 13(4) read with Section 14 of the SARFAESI Act on 21.03.2003. The petitioners have approached this Court for protecting their possession in respect of the shops in question claiming that the shops are in their tenancy created by oral agreements.

15. The Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021 has been enacted by the State Legislature with effect from 01.11.2021. Chapter II of the aforesaid Act contains provisions regarding tenancy. Section 4 falling in Chapter II of the Act provides as follows: -

“4. Tenancy agreement.—

(1) ...

(2) ...

(3) Where, in relation to a tenancy created before the commencement of this Act,—

(a) if an agreement in writing was entered into between the landlord and the tenant, they shall jointly present a copy thereof to the Rent Authority within three months of the commencement of this Act.

(b) if no agreement in writing was entered into, the landlord and the tenant shall enter into an agreement in writing with regard to that tenancy and present the same to the Rent Authority within three months of the commencement of this Act:

Provided that where the landlord or the tenant fail to present jointly a copy of the tenancy agreement or fail to reach an agreement within specified period, such landlord and tenant shall separately file the particulars about such tenancy with the Rent Authority within one month from the date of expiry of period mentioned in clause (b) above, in the form specified in First Schedule. If the landlord has submitted his particulars within the specified period but tenant fails to submit such particulars, the landlord may file an application for eviction on this ground alone:

Provided further that during such eviction proceedings, the Rent Authority shall, notwithstanding anything contained in this Act, decide interim rent payable by the tenant during such adjudication.”

16. There is no averment in the entire writ petition that after commencement of the Tenancy Act, 2021 any agreement was entered into between the petitioners and their landlord or that upon failure of the landlord to enter into any agreement any of the petitioners gave any application to the rent authority for regularization of their tenancy. The petitioners have not disclosed the monthly rents payable by them and there is no pleading that the rents are being paid regularly to the landlords. Thus there is nothing on record to establish that the tenancy of the petitioners is protected under the provisions of the Transfer of Property Act or the Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021.
17. When the petitioners are unable to establish with the help of some cogent material that their tenancy rights which were created under an oral agreement, are still continuing and are protected by any provision of law which would have effect in spite of the non-obstante clause contained in Section 35 of the SARFAESI Act referred to above, the petitioners cannot invoke the extra-ordinary discretionary jurisdiction of this Court under Article 226 of the Constitution of India as establishment of a legally enforceable right and infringement thereof is a *sine quo non* for invoking the writ jurisdiction of this Court.
18. In view of the foregoing discussion, this Court is of the considered view that there is no merit in the writ petition. The writ petition is accordingly **dismissed**.

(Subhash Vidyarthi, J.) (Attau Rahman Masoodi, J.)

Order Date: 11.12.2024

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