

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 2419 OF 2015

(1) M/s. National Laminate Corporation } a partnership firm registered under } the provisions of the Indian Partnership } Act, 1932 and having its address at 63, } Glow Metal Compound, Mohili, Village, } Saki Naka, Mumbai – 400 072 } } (2) Mr. Jayantilal L. Nisar } an adult, Indian Inhabitant, partner of } Petitioner No. 1, having his address } at 63, Glow Metal Compound, Mohili, } Village, Saki Naka, Mumbai – 400 072 } }	Petitioners
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Versus

(1) Euro Merchandise (India) Private } Limited } a company incorporated under the } provisions of the Companies Act, 1956, } having its registered office at Euro } House, Chincholi Bander Road, } Behind Inorbit Mall, Malad West, } Mumbai 400 064 } } (2) Subhnen Ply Private Limited } a company incorporated under the } provisions of the Companies Act, 1956 } having its registered office at 209, } Sangam Arcade, Vallabhbhai Road, } Vile Parle (West), Mumbai – 400 056 } } (3) The Senior Inspector of Police } Sakinaka Police Station, Sakinaka } Andheri (East), Mumbai – 400 072 } }	
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(4) The Cosmos Co-operative	}	
Bank Limited	}	
a Society deemed to be registered	}	
under the Multi State Co-operative	}	
Societies Act, 2002 having its Regional	}	
Office at 36/A, Maru Niketan,	}	
D. O. Vaidya Road, Dadar (West),	}	
Mumbai – 400 028	}	
	}	
(5) The Authorised Officer	}	
The Cosmos Co-operative Bank Limited	}	
having its office at 36/A, Maru Niketan	}	
D.O. Vaidya Road, Dadar (West),	}	
Mumbai – 400 028	}	
	}	
(6) The State of Maharashtra	}	
Mantralaya, Mumbai	}	Respondents

Mr. Samdani-Senior Advocate with
Mr.Mandevia i/b. M/s. Maniar Srivastava and
Associates for the Petitioners.

Mr. Rajeev K. Pandey and Mr. Balraj Kulkarni
i/b. PRS Legal for Respondent No. 4.

**CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.**

DATED :- OCTOBER 9, 2015

ORAL JUDGMENT :- (Per S.C.Dharmadhikari, J.)

Rule. Respondents waive service. By consent, Rule made returnable forthwith.

2) By this Petition under Article 226 of the Constitution of India, the Petitioners are challenging an order under section 14 of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short “the SARFAESI Act”) dated 18th June, 2015, copy of which is at Annexure 'A' to the Petition.

3) By this order, passed under section 14(1) of the SARFAESI Act, the Chief Metropolitan Magistrate, Esplanade, Mumbai has, on an application made by the Cosmos Co-operative Bank Limited, directed as under:-

“ORDER

Application is allowed.

Judicial Clerk, who is in-charge of Assistant Registrar of Bandra Center of Courts, Mumbai is appointed as the Court Commissioner to take possession of the secured assets viz 1) village Mohili, Tah. Kurla, and situated within registration district of Mumbai and sub-district of Mumbai suburban district bearing S. No. 63/1(P); CTS No. 569 admeasuring about 2299 sq. yards and the said property with structure standing thereon and being constructed and 2) shop No. 1 admeasuring about 39.50 sq. mtrs. Situated on the ground floor of the building known as “Abhishek” standing on piece of land bearing plot No. S. No. 254 of village Vile Parle, TPS II Vile Parle, CTS No. 1257/2 to 6 of Vile Parle within the registration district and sub-district of Mumbai city and Mumbai suburban and within the local limits of Greater Mumbai Municipal Corporation by taking such steps and using such force including breaking open the lock thereof or taking assistance of police, if required, at the expenses of the applicant and deliver possession thereof along with documents/articles, if any, found therein to the authorised officer of the applicant after preparing panchanama and taking inventory of the secured assets.

The Assistant Registrar concerned shall report compliance within one month from the receipt of the writ of commission.

Issue writ of commission accordingly on payment of PF. And Rs.5,000/- towards the Court Commissioner's fees, which, if deposited be credited to DLSA, Mumbai.”

4) The present Petition is concerning the premises Survey No. 63, Hissa No. 1(Part), City Survey No. 569 and admeasuring 2299 square yards, situate at Village Mohili, Taluka Kurla in the registration District and Sub-District of Mumbai Suburban. Petitioner No. 1 is a partnership firm registered under the Indian Partnership Act, 1932. The second Petitioner claims to be a partner of Petitioner No. 1 firm.

5) Respondent Nos. 1 and 2 to this Writ Petition are two private limited companies, both registered under the Indian Companies Act, 1956, having their office at the address mentioned in the cause title. The third Respondent is the Senior Police Inspector attached to Sakinaka Police Station and the fourth Respondent is the Cosmos Co-operative Bank Limited, which is registered as a Multi State Co-operative Society under the Multi State Co-operative Societies Act, 2002 functioning from the address mentioned in the cause title.

6) The Petitioners state that the second Respondent is the owner of the said property/premises. After referring to a conveyance in favour of the second Respondent and its registration, what is relied upon is a document, copy of which is at Annexure 'B' to the Writ Petition. It is stated to be an agreement of tenancy dated 1st September, 2000, which has been executed by and between Respondent No. 2 and Petitioner No. 1. It is stated that Respondent No. 2 has demised the said

property in favour of Petitioner No. 1 and permitted to use, occupy and possess the said property on tenancy basis at the rent reserved therein. Upon execution of the said agreement, it is claimed that the second Respondent has put Petitioner No. 1 in vacant and peaceful possession of the said premises. It is stated that the rent payable annually was Rs.60,000/- It was increased after expiry of the initial period of 18 months to Rs.1,20,000/-. It is stated in para 3.3 of the Petition that one of the Directors of the second Respondent was admitted as a partner of Petitioner No. 1 firm. Thereafter, reliance is placed on para 3.4 of the Petition and the sub-paragraphs thereof to submit that the second Respondent has been issuing the rent receipts and there are also registrations and licences obtained under the Bombay Sales Tax Act, 1959 and the Central Sales Tax Act, 1956. The Petitioners have also been making payment of all utility charges in relation to the said property, including the electricity charges payable to Reliance Infrastructure Limited. Copies of all these documents and the registration certificate under the Bombay Shops and Establishment Act, 1948 have been annexed to this Writ Petition. It is claimed that Petitioner No. 1 has been carrying on business of trading in plywood and other wood products since the month of September, 2000. The said premises are the only place where the Petitioners store their stock of plywood and other wood products. They do not have any other

premises and for use as godown or warehouse of adequate size. The Petitioners also place heavy reliance on the fact that Respondent No. 4 Cosmos Bank is the banker of Petitioner No. 1 as well. They have availed of various loans or financial facilities from Respondent No. 4. They are against hypothecation of goods and stock which are lying in the said warehouse. There is a reference made in para 3.13 and subparagraphs thereof to the insurance policies and the insured party is stated to be the Respondent No. 4 Bank. The Petitioners rely upon the fact that when there were heavy floods on 26th July, 2005, their stocks of plywood and other goods lying in the said premises were destroyed. The insurance policy was assigned to Respondent No. 4 and the Petitioners claim a loss of Rs.22,75,024/- towards loss of these goods/stock. After the requisite investigation, the assignee of the insurance policy, namely, Respondent No. 4 Bank was awarded compensation by the New India Insurance Company Limited and even documents in that regard are referred to. This would demonstrate as to how the possession of the Petitioners in respect of the said premises is to the knowledge of the Respondent No.4. The challenge in the Petition proceeds on the footing that even if there is any transaction between the owner of the property and Respondent No. 4 Bank, independent of the Petitioners' dealings, it was incumbent upon Respondent No. 4 to have stated in the application filed before the learned Chief

Metropolitan Magistrate, Esplanade, Mumbai that the Petitioners are in possession of the premises and which possession is to the knowledge of Respondent No. 4 Bank.

7) The Petitioners state that they had no knowledge of any dealings as between Respondent No. 2 and Respondent No. 4. It is only when on or about 25th March, 2013 certain third parties visited the property along with Representative of Respondent No. 2 and finding that there is an attempt made to dispose of the said property, which would seriously jeopardise the Petitioners rights as a tenant that a Suit being RAD Suit No. 416 of 2014 was filed in the Court of Small Causes at Mumbai, inter alia seeking a declaration that Petitioner No. 1 is a tenant of Respondent No. 2 in respect of the said property and thereby seeking a restraint by way of an injunction against Respondent No. 2 and its servants, agents, employees etc. from interfering with the Petitioners' possession of the said property. Reliance is placed upon an interim order, copy of which is at Annexure 'Z' to the Petition passed by the Court of Small Causes at Mumbai, by which temporary injunction has been granted to the aforesaid effect.

8) The Petitioners, therefore, proceeded on the footing that they have taken the requisite steps to protect their lawful possession. However, the officers of Respondent No. 4 Bank attended the premises

on or about 8th September, 2015 with a view to take possession thereof. It is for the first time that the Petitioners were informed that the said premises were mortgaged in favour of Respondent No. 4 and that they having failed to discharge the debt, the mortgage security can be proceeded against under the SERFAESI Act. That is how the Bank has proceeded and after taking the requisite measures in terms of section 13 has sought assistance of the learned Chief Metropolitan Magistrate so as to take peaceful possession of the premises.

9) It is then the Petitioners were made aware of a case, which was filed under section 14 of the SARFAESI Act in the Court of Chief Metropolitan Magistrate, Esplanade, Mumbai. After obtaining the requisite copies the Petitioners learnt about the impugned order dated 18th June, 2015.

10) It is in these circumstances that the impugned order has been challenged in this Petition by the Petitioners.

11) Mr. Samdani, learned Senior Counsel appearing for the Petitioners submits that Respondent No. 4 has approached the Court of learned Chief Metropolitan Magistrate, Esplanade, Mumbai pointing out that the said premises constitute a security interest created in its favour. It filed an affidavit, based on which the impugned order was passed.

That affidavit states that on 28th November, 2005 the Bank sanctioned various credit facilities and to the tune of Rs.600 lacs and these facilities were availed of by Respondent Nos. 1 and 2 and several other persons, who are impleaded as Respondents to case No. 154/SA/2015. The affidavit further states that to secure these facilities, these Respondents have created a mortgage of the said premises in favour of the Respondent Bank. There were defaults in repayment of amount of loan and on 31st March, 2012 the loan account was classified as a non performing asset. On 30th January, 2013, the Bank called upon these Respondents to pay the sum of Rs.21,92,40,383.85, by issuing them notice under section 13(2) of the SARFAESI Act. This notice was duly served on 2nd February, 2013. However, neither the borrowers nor the guarantors replied to the said notice nor they repaid the amount within the stipulated time. The debt amounted to Rs.30 crores and odd and that is how the learned Chief Metropolitan Magistrate was requested to render assistance so as to enable Respondent No. 4 Bank to take possession of the secured assets. Mr. Samdani complains that the affidavit makes a false statement that neither is there any third party in possession nor is there any lease created in respect of the said premises. The further incorrect fact stated is that there was no Suit or legal proceeding pending in respect of the secured assets.

12) Mr. Samdani would submit that the overriding effect of the SARFAESI Act would not enable Respondent No. 4 Bank to obtain assistance of the learned Chief Metropolitan Magistrate in taking possession of the secured assets by ignoring a valid and lawful tenancy. Mr. Samdani would submit that even if the rent is paid annually, this is not a lease covered by the first part of section 107 of the Transfer of Property Act, 1882. Once an unregistered document is placed and relied upon, it is evident that the second part of section 107 of the Transfer of Property Act, 1882 would come into play, meaning thereby if there is a tenancy created and pursuant to which the lessee is put in possession it would denote this tenancy to be of month to month. That requires no registration. That tenancy has not been determined by the landlord. In the circumstances, the Bank would not be in a position to take possession from the tenant and when this tenancy is protected by the then Bombay Rent, Hotel and Lodging House Rates Control Act, 1947 (for short “the Bombay Rent Act”) and the successor enactment, namely, the Maharashtra Rent Control Act, 1999. Once the law is construed to mean that a Bank can override such lawful tenancy, then, that would mean the protection granted by another State legislation for the benefit of tenants would be rendered nugatory. Such is never the intent of the legal provisions and which are relied upon by the Bank. Thus, Mr. Samdani would submit that the settled law is that the lease of

more than one year under the indenture, which is unregistered, is void. However, equally well settled position in law and that is if a lessee is put in possession and is paying rent to the lessor, he is a tenant from month to month. Mr. Samdani would further submit that as far as the State of Maharashtra is concerned and where the rent control legislation is in force and applicable to the premises, the protection thereunder can be claimed and the monthly tenancy is permitted even dehors an unregistered lease. Mr. Samdani, therefore, submits that the Bank proceeded on the footing that the law laid down by the Hon'ble Supreme Court of India in the case of *Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and Ors.* reported in (2014) 6 SCC 1 would apply. However, that judgment itself clarifies that the overriding effect of the SARFAESI Act will not encompass the claim of the nature raised by the Petitioners. Mr. Samdani, therefore, was at pains to point out that this judgment cannot render any assistance to the Bank in this case.

13) We have summarised the contentions of Mr. Samdani and which are to the effect that Respondent No. 4 Bank must suffer the consequences of making a false and misleading statement. If they had complete knowledge of the Petitioners' possession, then, such exclusive possession under a bonafide title or interest could not have been disturbed or interfered with and by taking assistance of the SARFAESI

Act.

14) On the other hand, it is submitted on behalf of the contesting Respondents by Mr. Pandey that this Petition is not a bonafide proceeding. It is a collusive action, inasmuch as the deed of mortgage executed on 6th March, 2009, copy of which has been placed on record in a compilation of documents, would indicate as to how the registered mortgage was created and by the same signatories and same parties, who are dealing with the Petitioners. He would submit that Respondent No. 1 M/s. Euro Merchandise (India) Private Limited is a company and one Mr. Nitesh P. Shah is the signatory or party to the mortgage. The second Respondent is known as Subhnen Ply Private Limited. Previously, Respondent No. 1 was known as Subhnen Veniers Private Limited. Then, the other entity is one M/s. Kanch Ghar, a partnership firm. All these mortgagors have clearly stated in the recitals that the Bank has granted credit facilities, which have been availed of and they have represented to the Bank that the properties are absolutely and exclusively in their possession and enjoyment as owners. This would include the subject premises. Then, Mr. Pandey relies upon a document styled as a mortgage agreement dated 22nd June, 1998 by Respondent No.2 and states that the signatories thereto are Mr. Nensi L. Shah and branch manager of Respondent No. 4. It is this Nensi Shah who is the signatory to the tenancy agreement dated 1st September,

2000. Thus, the Petitioners, who were one time associates of Respondent Nos. 1 and 2, namely the borrowers and guarantors, have been put up by them in order to defeat the rights of the Bank and particularly the order and protection under section 14 of the SARFAESI Act. The reliance placed on the tenancy agreement is thus of no avail. That agreement is executed on 1st September, 2000. That is an unregistered agreement. Mr. Pandey would submit that after the promulgation of the Maharashtra Rent Control Act from 31st March, 2000, by virtue of section 55 thereof, an agreement for tenancy is to be registered and compulsorily. In the absence of a registered agreement, and a unregistered agreement subsequent to the mortgage and which cannot be said to be to the knowledge of the Respondent No. 4 Bank, the action and proceedings under the SARFAESI Act cannot be frustrated. That would mean a parliamentary statute enacted for expeditious recovery of loans, which are outstanding and without taking recourse of the normal legal process, is wholly defeated. Mr. Pandey would submit that in the instant case, no false statement on oath was made by Respondent No. 4 Bank. Respondent No. 4 Bank may be dealing with the Petitioners as a client-constituent, but it does not mean that the Bank is aware of the status of the Petitioners in respect of the premises. Therefore, the reliance placed by Mr. Samdani on several decisions of the Hon'ble Supreme Court of India is entirely misplaced

and the Petition be dismissed.

15) Mr. Samdani has placed reliance on the following decisions:-

(i) *Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and Ors.* **(2014) 6 SCC 1.**

(ii) *Ram Kumar Das vs. Jagdish Chandra Deo* **AIR (39) 1952 SC 23.**

(iii) *Anthony vs. K. C. Ittoop and Sons and Ors.* **(2000) 6 SCC 394.**

(iv) *Burmah Sheel Oil Distributing now known as Bharat Petroleum Corporation Ltd. vs. Khaja Midhat Noor and Ors.* **(1988) 3 SCC 44.**

(v) *Biswabani Pvt. Ltd. vs. Santosh Kumar Dutta and Ors.* **(1980) 1 SCC 185.**

(vi) *Budh Ram vs. Ralla Ram* **(1987) 4 SCC 75.**

16) For properly appreciating the rival contentions, brief reference will have to be made to the SARFAESI Act. The Statement of Objects and Reasons itself clarifies as to how several Committees set up and by the Parliament suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the Court. That would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatch and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. If the Banks are not

empowered to take possession of securities created to secure the financial assistance and sell or lease the same or take over management in the event of default after classification of the borrower's account as non-performing asset, then, before enactment of the said Act, the problems and difficulties faced by the Banks and financial institutions would continue. It is with this object and purpose that the Act has been enacted. We need not refer to various provisions of the Act simply because the Hon'ble Supreme Court in decisions after decisions has emphasised that an interpretation be placed on its provisions which would subserve the above purpose and object. That is how section 13 appearing in Chapter III, titled as "Enforcement of Security Interest" has been interpreted. Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or Tribunal, by such creditor in accordance with the provisions of this Act. By sub-section (4) it is provided that in case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the measures to recover his secured debts. One of the measures to recover the debt is to take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale, for realising the secured asset. By section 14, the

Bank is enabled to approach the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset is situated and requesting him to render assistance to take possession of the same. By the proviso to sub-section (1) of section 14 it is now mandated that the application has to be made by the secured creditor and which shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor declaring certain declarations.

17) Section 14 as is now enacted, reads as under:-

“14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset. -

(1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him -

(a) take possession of such asset and documents relating thereto; and

(b) forward such assets and documents to the secured creditor:

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that -

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

- (iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;
- (iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;
- (v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;
- (vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;
- (vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;
- (viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;
- (ix) that the provisions of this Act and the rules made thereunder had been complied with:

provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets:

provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.

(1A) This District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him -

- (i) to take possession of such assets and documents relating thereto; and
- (ii) to forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate any officer authorised by the Chief Metropolitan Magistrate or District Magistrate done in pursuance of this section shall be called in question in any court of before any authority.”

18) Before us, it is undisputed that the said premises constitute the secured assets and that an interest in favour of the Bank has been created in respect thereof. Therefore, after the loan or credit facilities were not discharged in full and there was a default that the loan account was declared as non performing asset and that is how the borrowers and guarantors were proceeded against. Thus, the Bank was empowered to make an application within the meaning of sub-section (1) of section 14 is undisputed. That the Bank did make such a application and supported by affidavit is apparent from the impugned order.

19) The only objection is that in the application there is a false and misleading statement by the Bank that no one is in the premises as lessee nor any litigation or proceeding is pending in any Court of law.

20) Mr. Samdani has placed heavy reliance on the judgment in the case of *Harshad G. Sandagar* (supra). However, the Hon'ble Supreme Court did not deal with the situation of the present nature and rather clarified that in the event a registered tenancy or lease is relied upon and duly protected by the rent control legislation, then, it

would not be permissible for the Chief Metropolitan Magistrate to render assistance. It would require a brief determination by the Chief Metropolitan Magistrate and for that purpose he must give due notice of this application to the affected parties and pass an order in accordance with law. Mr. Samdani has relied upon the following paragraphs in the judgment of the Hon'ble Supreme Court of India in the case of *Harshad G. Sandagar* (supra):-

“22. We may now consider the nature of the right of the lessee and as to when the lease under the Transfer of Property Act gets determined. Sections 105 and 111 of the Transfer of Property Act, which are relevant in this regard, are quoted hereinbelow:

“**105. Lease defined** – A lease of immovable property is transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined. – The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

111. Determination of lease. – A lease of immovable property, determines –

- (a) by efflux of the time limited thereby;
- (b) where such time is limited conditionally on the happening of some event – by the happening of such event;
- (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event – by the happening of such event;
- (d) in case the interests of the lessee and the lessor in the whole of the property becomes vested at the same time in one person in the same right;
- (e) by express surrender, that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;

- (f) by implied surrender;
- (g) by forfeiture, that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease;
- (h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other”

Section 105 thus provides that a lessee of an immovable property has a right to enjoy such property, for a certain time or in perpetuity when a lessor leases an immovable property transferring his right to enjoy such property for a certain time or in perpetuity. Section 111 of the Transfer of Property Act, 1882 provides the different modes by which a lease gets determined. Thus, so long as a lease of an immovable property does not get determined, the lessee has a right to enjoy the property and this right is a right to property and this right cannot be taken away without the authority of law as provided in Article 300-A of the Constitution. As we have noticed, there is no provision in section 13 of the SARFAESI Act that a lease in respect of a secured asset shall stand determined when the secured creditor decides to take the measures mentioned in Section 13 of the said Act. Without the determination of a valid lease, the possession of the lessee is lawful and such lawful possession of a lessee has to be protected by all courts and tribunals.

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25. The opening words of sub-section (1) of Section 14 of the SARFAESI Act make it clear that where the possession of any secured assets is required to be taken by the secured creditor or 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, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof. Thus, only if possession of the secured asset is required to be taken under the provisions of the SARFAESI Act, the secured creditor can move the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset. We have already held that Section 13 of the SARFAESI Act does not provide that the

lease in respect of a secured asset will get determined when the secured creditor decides to take the measures in the said section. Hence, possession of the secured asset from a lessee in lawful possession under a valid lease is not required to be taken under the provisions of the SARFAESI Act and the Chief Metropolitan Magistrate or the District Magistrate, therefore, does not have any power under Section 14 of the SARFAESI Act to take possession of the secured asset from such a lessee and hand over the same to the secured creditor. When, therefore, a secured creditor moves the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset, he must state in the affidavit accompanying the application that the secured asset is not in possession of a lessee under the valid lease made prior to creation of the mortgage by the borrower or made in accordance with Section 65-A of the Transfer of Property Act prior to receipt of a notice under sub-section (2) of Section 13 of the SARFAESI Act by the borrower. We would like to clarify that even in such cases where the secured creditor is unable to take possession of the secured asset after expiry of the period of 60 days of the notice to the borrower of the intention of the secured creditor to enforce the secured asset to realize the secured debt, the secured creditor will have the right to receive any money due or which may become due, including rent, from the lessee to the borrower. This will be clear from clause (d) of sub-section (4) of Section 13, which provides that in case the borrower fails to discharge his liability in full within the notice period, the secured creditor may require, at any time by notice in writing, any person who has acquired any of the assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

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 SARFAESI Act 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 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 realizing 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 authorized 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 authorized officer.

(3) In the event of possession of immovable property is actually taken by the authorized officer, such property shall be kept in his own custody or in the custody of any person authorized 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 authorized 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:

”

.....

29. Sub-section (3) of Section 14 of the SARFAESI Act provides that no act of the Chief Metropolitan Magistrate or the District Magistrate or any officer authorized by the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of Section 14 shall be called in question in any court or before any authority. The SARFAESI Act, therefore, attached finality to the decision of the Chief Metropolitan Magistrate or the District Magistrate and this decision cannot be challenged before any court or any authority. But this Court has repeatedly held that statutory provisions attaching finality to the decision of an authority excluding the power of any other authority or court to examine such a decision will not be a bar for the High Court or this Court to exercise jurisdiction vested by the Constitution because a statutory provision cannot take away a power vested by the Constitution. To quote, the observations of this Court in *Columbia Sportswear Co. vs. Director of Income Tax* (2012) 11 SCC 224: (SCC p. 234, para 17)

“17. Considering the settled position of law that the powers of this Court under Article 136 of the Constitution and the powers of the High Court under Articles 226 and 227 of the Constitution could not be affected by the provisions made in a statute by the legislature making the decision of the tribunal final or conclusive, we hold that sub-section (1) of Section 245-S of the Act insofar as it makes the advance ruling of the authority binding on the applicant, in respect of the transaction and on the Commissioner and Income Tax Authorities subordinate to him, does not bar the jurisdiction of this court under Article 136 of the Constitution or the jurisdiction of the High Court under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling of the authority.”

In our view, therefore, the decision of the Chief Metropolitan Magistrate or the District Magistrate can be challenged before the High Court under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling of the authority.

30. We may next consider whether a lessee has any remedy by way of an appeal under section 17 of the SARFAESI Act when the secured creditor attempts to take over possession of the secured asset which is in possession of the lessee.

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35. A further question of law raised in these appeals is whether the tenants have remedies under the tenancy law concerned. In the State of Maharashtra, the Maharashtra Rent Control Act, 1999 is in force and this Act applies to premises let for the purposes of residence, education, business, trade or storage specified in Schedule I and Schedule II to the Act as well as houses let out in

areas to which the Bombay Rents, Hotel and Lodging House rates Control Act, 1947 applied before the commencement of the Act. Section 33 of the Maharashtra Rent Control Act is titled “jurisdiction of courts” and it provides that the courts named therein “shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises and to decide any application made under the Act and the applications which are to be decided by the State Government or an officer authorized by it or the competent authority”. The question of law that we have to consider is whether the appellants as tenants of premises in the State of Maharashtra including Mumbai will have any remedy to move these courts having jurisdiction under Section 33 of the Maharashtra Rent Control Act and obtain the relief of injunction against the secured creditor taking possession of the secured asset from the appellants. The answer to this question is in Section 34 of the SARFAESI Act, which is extracted hereinbelow:

“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).”

A reading of the second limb of Section 34 of the SARFAESI Act would show that 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 the Act. Thus, when action is sought to be taken by the secured creditor under Section 13 of the SARFAESI Act or by the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the SARFAESI Act, the court or the authority mentioned in Section 33 of the Maharashtra Rent Control Act cannot grant the injunction to prevent such action by the secured creditor or by the Chief Metropolitan Magistrate or the District Magistrate. Even otherwise, Section 33 of the Maharashtra Rent Control Act vests jurisdiction in the courts named therein to decide disputes between the landlord and the tenant and not disputes between the secured creditor and the tenant under landlord who is a borrower of the secured asset.”

21) Mr. Samdani submits that there is no remedy available to an aggrieved party like the Petitioner and to approach the Tribunal under the SARFAESI Act to protect his lawful possession under a valid

lease.

22) Mr. Samdani has submitted that in para 35 as reproduced above, the Hon'ble Supreme Court has clarified that if there is a tenancy of the premises in the State of Maharashtra including Mumbai, then, whether parties to it could take recourse to the remedies provided by the Maharashtra Rent Control Act and obtain the relief of injunction against the secured creditor taking possession of the secured asset from the Appellant would depend upon the nature of the relief and protection sought. The Hon'ble Supreme Court, after referring to section 34 of the SARFAESI Act and the overriding effect given to it, according to Mr. Samdani, concluded that the said Courts and set up under the Maharashtra Rent Control Act cannot grant the protection by taking cognizance of the dispute between the secured creditor and the tenant under landlord who is a borrower of the secured creditor. The second limb of section 34 restraining it from granting an injunction would come into play. Thus, when action is sought to be taken by the secured creditor under section 13 of the SARFAESI Act or by the Chief Metropolitan Magistrate under section 14 thereof, the Court or the authority mentioned in section 33 of the Maharashtra Rent Control Act cannot grant the injunction to prevent such action. Mr. Samdani, therefore, relied upon heavily on paras 36 and 37.1 and 37.2 of this judgment.

23) We are unable to agree with Mr. Samdani and for more than one reason. True it is, that these conclusions of the Hon'ble Supreme Court would enable parties like the Petitioners to approach this Court to challenge the proceedings and the order under section 14 of the SARFAESI Act but that is in exceptional circumstances. This Court cannot as a matter of course entertain a Writ Petition under Articles 226 and 227 of the Constitution of India and interdict or interfere with the proceedings or the order of the Magistrate. Everything depends upon the facts in each case. If the lease is not valid, the possession is not lawful, then, there is no justification for interference in the extraordinary, discretionary and equitable jurisdiction of this Court. Merely because the person in possession claims to be a lessee does not mean that he should be protected. Else, grant of the injunction/stay/interim relief will be the rule and denial an exception. Such is not the sweep of the observations and conclusions of the Supreme Court in *Sondagar's* case (supra). The Hon'ble Supreme Court may have clarified and as above, however, it has equally taken care and due note of the contentions of the secured creditors that parties like the Appellants before the Hon'ble Supreme Court have not produced any document to prove that they are bonafide lessees of the secured assets. In the case before the Hon'ble Supreme Court, the appellants have relied upon

written instrument or rent receipts issued by the landlord to the tenant. After referring to section 107 of the Transfer of Property Act, what is held by the Hon'ble Supreme Court is that 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/borrower and prior to the mortgage or subject to the mortgage. Where such proof is not produced but reliance is placed only on a unregistered instrument, then, 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 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.

24) We are of the opinion that this clarification of the Hon'ble Supreme Court would assist us in reaching the conclusion that we propose to reach. The Hon'ble Supreme Court was considering a case where parties like the Appellants before it claim that they are lawful tenants/lessees. Therefore, the Hon'ble Supreme Court clarified that if the lease is an annual one, then, in terms of the law, it can only be evidenced by a registered instrument. Absent such registered instrument that lease cannot be said to be affecting any of the measures

under the SARFAESI Act. Meaning thereby, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, are not prevented from proceeding to pass orders on the application and rendering the requisite assistance merely because such persons claim that they are in possession of the secured assets.

25) In the present case, undisputedly, there is a statement of fact in the Petition itself and that the agreement dated 1st September, 2000, copy of which is at Annexure 'B' contemplates rate of Rs.60,000/- payable annually and which was increased subsequently. Admittedly, this tenancy agreement is unregistered. It is therefore that Mr. Samdani would rely upon the second limb of section 107 and to urge that so long as the Petitioner is put in possession, then, the lease is created and which is month to month. First of all section 107 of the Transfer of Property Act in clearest terms states 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. Mr. Samdani would submit that for the purpose of monthly tenancy, the present instrument and in writing is enough. Since the Maharashtra Rent Control Act is applicable to the said premises, then, according to

Mr. Samdani, the Petitioners could have legally protected their possession, which is otherwise lawful and valid, by approaching the competent Court/Tribunal under the Maharashtra Rent Control Act, 1999. That is what they have done and therefore, the Chief Metropolitan Magistrate should have put the Petitioners to notice and only then passed the impugned order.

26) We are unable to accept these contentions as well. Once it is undisputed that the agreement which is relied upon and copy of which is at Annexure 'B' is unregistered, but the rent is claimed to be payable yearly, then, this Act would clearly fall within the mischief and which is noted and duly dealt with by the Hon'ble Supreme Court in the case of *Harshad Sondagar* (supra).

27) Even if Mr. Samdani is right in relying on this document and to support the case of monthly tenancy created thereunder by putting the Petitioners in possession, still, his argument overlooks the fact that the agreement is dated 1st September, 2000. The Maharashtra Rent Control Act came into effect from 31st March, 2000. By section 55 thereof, tenancy agreements are to be compulsorily registered. The said provision reads as under:-

“55. Tenancy agreement to be compulsorily registered. -
(1) Notwithstanding anything contained in this Act or any other

law for the time being in force, any agreement for leave and licence or letting of any premises, entered into between the landlord and the tenant or the licence, as the case may be, after the commencement of this act, shall be in writing and shall be registered under the Registration act, 1908, (XVI of 1908).

(2) The responsibility of getting such agreement registered shall be on the landlord and in the absence of the written registered agreement, the contention of the tenant about the terms and conditions subject to which a premises have been given to him by the landlord on leave and licence or have been let to him, shall prevail, unless proved otherwise.

(3) Any landlord who contravenes the provisions of this section shall, on conviction, be punished with imprisonment which may extend to three months or with fine not exceeding rupees five thousand or with both.”

28) In such circumstances, Mr. Samdani would rely upon the fact that even if there is no registration, still, for approaching the Courts and Tribunals under the Rent Control Act, that is not an impediment. He relies upon sub-section (2) of section 55 as reproduced above. We are not concerned with a case of a statute governing the landlord tenant relationship. No provision thereof falls for our interpretation. We are concerned with the situation where no registered agreement of tenancy being placed on record, could the Chief Metropolitan Magistrate be attributed with the knowledge of any valid and lawful tenancy in favour of the Petitioners and equally the Bank can be said to be obliged to make a declaration in that behalf and not making such a declaration is fatal. We have found from the object and purpose of the SARFAESI Act and the interpretation which is required to be placed on section 14 thereof, that the omission, if any, in the given facts and circumstances was not

fatal. Apart therefrom, the claim of tenancy in this case is prima facie doubtful. The parties to the written agreement of tenancy and at least one of them is a signatory to the prior registered mortgage deed. Yet, he is bold enough to create a tenancy in respect of one of the mortgaged properties.

29) The reliance placed by Mr. Samdani on other judgments of the Supreme Court is of no assistance. The other judgment which has been relied upon particularly in the case of *Ram Kumar Das* (supra) would denote that the tenancy created and in that case from month to month was since inception. In the backdrop of such undisputed factual position, the Hon'ble Supreme Court concluded that the parties did not intend to create a lease for one year. The lease was intended to be for a period of exceeding one year but as that intention was not expressed in the proper legal form, it cannot be given effect to. It is one thing to say in absence of the agreement, that rights of parties would be regulated by law in the same manner as if no agreement exists at all but it is quite another thing to substitute new agreement for the purpose which is contradicted by the admitted facts of the case. It is in that context the Hon'ble Supreme Court held that there is no merit in the case placed before it on behalf of the Plaintiff that one year's rent was paid and therefore the tenancy of one year or yearly tenancy was brought into existence. That was never the case of the Defendant. His case was that

there was tenancy and which was found of month to month. That is how the argument of the Plaintiff was rejected and the Appeal was dismissed.

30) In the case of *Anthony* (supra), the Hon'ble Supreme Court was dealing with the case of jurisdiction of a ordinary Civil Court to take cognizance of a dispute particularly a claim for eviction of a tenant. The claim for eviction under that case was found to be raised, but the protection under the provisions of the rent control legislation intervening that the Court found that the Civil Court will have no jurisdiction. The Trial Court, in that case found that the Appellant before the Hon'ble Supreme Court is not a tenant as the lease was void on account of non registration of the lease deed. In the First Appeal, the District Judge held that in spite of non-registration of the instrument, there was a valid tenancy of the building and hence the appellant could not be evicted except in accordance with the provisions of the Rent Act. In the Second Appeal by the Respondent landlord before the Hon'ble Supreme Court, the Single Judge of the High Court, Kerala set aside the judgment and remanded the matter back to the Trial Court. It in that context that the Appellant approached the Hon'ble Supreme Court and urged that in spite of there being no registered instrument, there could be a lease and covered by the rent control legislation. It is in this context that the observations from paras

6 onwards as made and heavily relied upon by Mr.Samdani. We do not think that reliance placed on this decision and the further decisions of the Hon'ble Supreme Court would advance the case of the Petitioners any further. If a claim of contractual tenancy and statutory tenancy, which has been dealt with in the other judgments of the Hon'ble Supreme Court. Those are on the footing that the provisions of the rent control legislation will enable the tenant holding over to assert and protect his claim. Even if the contractual tenancy has come to an end, the statutory protection can be availed of. We are not holding that the action of the Bank in the present case determines the tenancy, if any. It is while dealing with an argument of suppression of a relevant and material fact by the Bank that we have held that such is not the factual position. The tenancy was not known to the Bank, a third party in the absence of registration of the instrument. Hence, it cannot be held guilty of suppression. None of these judgments can be of any assistance. Finally, the concept of tenant holding over and noted by the Hon'ble Supreme Court in the case of *Budh Ram* (supra) is also of no avail. The lease deed is required to be registered if the rent is required to be paid from year to year. However, when the lease was of one year and it expired, the tenant could be regarded as a tenant holding over and a monthly tenant. Therefore, the observations in para 7 in *Budh Ram's* case (supra), would not assist the Petitioner.

31) As a result of the above discussion, we do not find any merit in this Writ Petition. The same is accordingly dismissed. Rule is discharged but without any order as to costs.

32) At this stage, the Petitioners' Advocate prays that the order passed by the learned Chief Metropolitan Magistrate and upheld by us may not be implemented and executed for a period of two months and this Court should direct accordingly. This request is seriously opposed by Respondent No. 4 and by relying on the conduct of the Petitioners.

33) Having noted the rival contentions on this point, we are not inclined to stay the order of the learned Chief Metropolitan Magistrate and upheld by us particularly in the light of the conclusion reached by us. Merely because the Petitioner desires to approach the higher Court does not mean that we must stay the order. More so when a huge sum is outstanding and payable and the Bank is required to dispose of the secured asset so as to recover it. Stay is accordingly refused.

(B.P.COLABAWALLA, J.)

(S.C.DHARMADHIKARI, J.)