IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10756 OF 2016

Cosmopolitan Education & Welfare Society, Parbhani
through its authorised person
Ms. Ruhi Khalid Saifuddin Petitioner

Versus

The Bombay Mercantile Cooperative Bank Ltd
Aurangabad and others Respondents

Mr.S.V.Adwant advocate for the petitioner
Mr.A.B. Girase Government Pleader for respondent No.1
Mr. Ruturaj Patil advocate for Respondent No.1

CORAM : R.M. BORDE &
K.K. SONAWANE, JJ

(Date : 24th October, 2016.)

PER COURT :-

1 The petition is presented seeking quashment of order passed by respondent No.2 on 27.6.2010 and 10.10.2016 and the notice issued by respondent No.3 on 17.10.2016.

2 The petitioner institution claims to be tenant in respect of property which is being utilised for running the educational institution since the year of establishment. It is contended that, the educational institution is operating the schools and colleges

over the tenanted property admeasuring 1528.80 sq. meters situated in survey No.15849 at Nanalpeth Parbhani since 1996-1997 onwards. It is not a matter of dispute that, the property is attached under the provisions of The Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (SARFAESI Act) on account of failure of the borrowers to repay the amount of loan. The arrears of amount recoverable from the petitioner are more than 31 crores rupees as on today. A Notice directing the petitioner to deliver the possession of the property is issued upon passing of an order by the District Magistrate, Parbhani.

3 The petitioner, placing reliance on the Judgment in the matter of **Vishal N. Kalsaria Versus Bank of India & others** (2016) 3 SCC 762 contends that, in view of settled position of law that once tenancy is created, a tenant can be evicted only after following the due process of law, as prescribed under the provisions of the Rent Control Act. A tenant cannot be arbitrarily evicted by using the provisions of the SARFAESI Act as that would amount to stultifying the statutory rights of protection given to the tenant. The petitioner places reliance heavily on the observations of the Supreme Court in paragraph Nos.25, 29, 32, 35, 36, 37, 39 and 40 of the Judgment, which read thus:-

" **25.** Further, the provision under Section 35 of the SARFAESI Act provides that it shall override all other laws, which is quoted as hereunder:

"35. ***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."

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29. When we understand the factual matrix in the backdrop of the objectives of the above two legislations, the controversy in the instant case assumes immense significance. There is an interest of the Bank in recovering the non-performing asset on the one hand, and protecting the right of the blameless tenant on the other. The Rent Control Act being a social welfare legislation, must be construed as such. A landlord cannot be permitted to do indirectly what he has been barred from doing under the Rent Control Act, more so when the two legislations, that is the SARFAESI Act and the Rent Control Act operate in completely different fields. While the SARFAESI Act is concerned with non-performing assets of the banks, the Rent Control Act governs the relationship between a tenant and the landlord and specifies the rights and liabilities of each as well as the rules of ejectment with respect to such tenants. The provisions of the SARFAESI Act cannot be used to override the provisions of the Rent Control Act. If the contentions of the learned counsel for the respondent Banks are to be accepted, it would render the entire scheme of all Rent Control Acts operating in the country as useless and nugatory. Tenants would be left wholly to the mercy of their landlords and in the fear that the landlord may use the tenanted premises as a security interest while taking a loan from a bank and subsequently default on it. Conversely, a landlord would simply have to give up the tenanted premises as a security interest to the creditor banks while he is still getting rent for the same. In case of default of the loan, the maximum brunt will be borne by the unsuspecting tenant, who would be evicted from the possession of the tenanted property by the Bank under the provisions of the SARFAESI Act. Under no circumstances can this be permitted, more so in view of the statutory protections to the tenants under the Rent Control Act and also in respect of contractual tenants along with the possession of their properties which shall be obtained with due process of law.

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32. It further saddens us to see the manner in which the decision in *Harshad Govardhan Sondagar*[1] has been misinterpreted to create this confusion. Random sentences have been picked up from the judgment and used, without any attempt to understand the true purport of the judgment in its entirety.

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34. . . .

35. The decision of this Court rendered in *Harshad*

Govardhan Sondagar[1] cannot be understood to have held that the provisions of the SARFAESI Act override the provisions of the Rent Control Act, and that the banks are at liberty to evict the tenants residing in the tenanted premises which have been offered as collateral securities for loans on which default has been done by the debtor/landlord.

36. As far as granting leasehold rights being created after the property has been mortgaged to the bank, the consent of the creditor needs to be taken. We have already taken this view in *Harshad Govardhan Sondagar*[1]. We have not stated anything to the effect that the tenancy created after mortgaging the property must necessarily be registered under the provisions of the Registration Act and the Stamp Act.

37. It is a settled position of law that once tenancy is created, a tenant can be evicted only after following the due process of law, as prescribed under the provisions of the Rent Control Act. A tenant cannot be arbitrarily evicted by using the provisions of the SARFAESI Act as that would amount to stultifying the statutory rights of protection given to the tenant. A non obstante clause (Section 35 of the SARFAESI Act) cannot be used to bulldoze the statutory rights vested in the tenants under the Rent Control Act. The expression "*any other law for the time being in force*" as appearing in Section 35 of the SARFAESI Act cannot mean to extend to each and every law enacted by the Central and State Legislatures. It can only extend to the laws operating in the same field.

38. . . . .

39. If the interpretation of the provisions of the SARFAESI Act as submitted by the learned Senior Counsel appearing on behalf of the Banks is accepted, it would not only tantamount to violation of the rule of law, but would also render a valid rent control statute enacted by the State Legislature in exercise of its legislative power under Article 246(2) of the Constitution of India useless and nugatory. The Constitution of India envisages a federal feature, which has been held to be a basic feature of the Constitution, as has been held by the seven-Judge Bench of this Court in *S.R. Bommai* v. *Union of India*[19], wherein K. Ramaswamy, J. in his concurring opinion elaborated as under: (SCC p. 205, paras 247-48)

"*247. Federalism envisaged in the Constitution of India is a basic feature in which the Union of India is permanent within the territorial limits set in Article 1 of the Constitution and is indestructible*. The State is the creature of the Constitution and the law made by Articles 2 to 4 with no territorial integrity, but a permanent entity with its boundaries alterable by a law made by Parliament. Neither the relative importance of the legislative entries in Schedule VII Lists I and II of the Constitution, nor the fiscal control by the Union per se are decisive to conclude that the Constitution is unitary. The respective legislative powers are traceable to Articles 245 to 254 of the Constitution. The State qua the Constitution is federal in structure and independent in its exercise of legislative and executive power. However, being the creature of the Constitution the State has no right to secede or claim sovereignty. Qua the Union, State is quasi-federal. Both are coordinating institutions and ought to exercise their respective powers with adjustment, understanding and accommodation to render socio-economic and political justice to the people, to preserve and elongate the constitutional goals including secularism.

248. The Preamble of the Constitution is an integral part of the Constitution. Democratic form of Government, federal structure, unity and 787 *integrity of the nation, secularism, socialism, social justice and judicial review are basic features of the Constitution*."

(emphasis supplied)

40. In view of the above legal position, if we accept the legal submissions made on behalf of the Banks to hold that the provisions of the SARFAESI Act override the provisions of the various Rent Control Acts to allow a bank to evict a tenant from the tenanted premises, which has become a secured asset of the bank after the default on loan by the landlord and dispense with the procedure laid down under the provisions of the various Rent Control Acts and the law laid down by this Court in a catena of cases, then the legislative powers of the State Legislatures are denuded which would amount to subverting the law enacted by the State Legislature. Surely, such a situation was not contemplated by Parliament while enacting the SARFAESI Act and therefore, the interpretation sought to be made by the learned counsel appearing on behalf of the Banks cannot be accepted by this Court as the same is wholly untenable in law. "

4 The petitioner places reliance on the Judgment in the matter of Indian Bank versus Nippo Enterprises South and others decided on 17.2.2016 in Civil Appeal Nos.5610-5611 of 2011 by the Honourable Apex Court.

5 Learned counsel appearing for the respondent invited our attention to the provisions of subsection 4-A of section 70 of the

SARFAESI Act to contend that, there is an alternate efficacious remedy provided to approach the Debt Recovery Tribunal and as such petition need not be entertained by this Court. The relevant provisions of Section 17-(4-A) of the Act reads as below:-

> " (4-A) Where -
>
> (i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purpose of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy, -
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> (a) has expired or stood determined; or
>
> (b) is contrary to section 65-A of the Transfer of Property Act, 1882 (4 of 1882); or
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> (c) is contrary to terms of mortgage; or
>
> (d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of Section 13 of the Act; and]
>
> (ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the Sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act. "

6 In view of the amended Act of 2016 (44/2016), the amendment to subsection 17(1) shall come into effect on such date as the Central Government may, by Notification in the Official Gazette declare. The provision of the amended Act (section 14) has been brought in to force on 1.9.2016. Thus, it can be concluded that, an alternate remedy provided under sub-section 4-A of Section 17 of the Act which has been brought into existence in view of section 14 of the Amended Act 2016 since 1.9.2016, is available to the petitioner. It is one of the reasons, why the petition shall not be entertained.

7 The other reason which persuaded us not to entertain the petition is collusive transactions entered into between the petitioner office bearers of the trust and borrower on one hand and the bank on the other. It has been informed that one Gulam Yasin was the original owner of the property who died some 20 years back. It would be natural that, on demise of the original borrower, the property devolve upon his legal heirs. The petitioner education institution appears to be the family affair of the petitioners who are the legal heirs of the owner who had borrowed huge amount of loan from the bank. The President of the Institution Tahsin Ahmed Khan is stated to be the son of Gulam

Yasin, the original owner of the property and is one of the borrowers of the loan from the bank. The Vice President of the Institution Ruhi Khalid Saifoddin is wife of one of the guarantors who stood surety for the loan borrowed by the original borrower i.e. the President of the Institution. One Johara Tahsin Mirza one of the members of the trust is daughter in law of Gulam Yasin Khan, the original owner and one of the original mortgagors. Dr. Ahemad Mohasin Ahemad Khan is also relative of Tahsin Ahemad Khan, the President of the Institution and borrower of the loan. The Secretary of the Institution Ali Ahemad Khan is son of the President Tahsin Ahemad Khan who is the borrower of the loan. One of the members, Fouzia Tahseen Ahemad also appears to be wife of one of the guarantors in respect of loan. As has been stated earlier, the trust operated by the Office bearers prima facie, appears to be a family affair and registered for the purpose of deriving the benefits. The property mortgaged by office bearer of trust for borrowing loan for private purpose is the property let out to the trust. The owners of property are borrowers of bank and they are also office bearers of trust and in their capacity as office bearers of trust, they are claiming protection under the garb of tenancy rights. Thus the same set of individuals are in effect acting in duel capacity of landlord as well as tenant. The collusion between the office bearers of the trust and the owner of the property is writ large and prima facie, conclusion can be drawn in respect of their intention to defeat the interest of the bank. It is the cardinal principle that the extraordinary jurisdiction under article 226 of the Constitution of India shall be exercised in order to meet the ends of justice and to safeguard the interest of the individuals who come to Court with clean hands and jurisdiction need not be exercised in favour of those who take disadvantage of legal process. In our opinion, in the instant matter, jurisdiction need not be exercised for protecting the collusive interest of the petitioners and interference would necessarily lead to unjust disadvantage to lending bank.

8 The writ petition is devoid of substance and hence stands dismissed.

(K.K. SONAWANE, J) (R.M.BORDE, J)

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