

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4151 OF 2016

Manoj Suganchand Agarwal l (Bajari) Petitioner
Vs.
Bank of Baroda & Others Respondents

Mr. Aloukik R. Pai with Mr. Devendra Avhad i/by
M/s. Thodur Law Associates for the Petitioner.
Ms Hema Desai with Mr. Vijay Hinge i/by Singhi
& Co. for Respondent No.1-Bank of Baroda.

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

DATE : AUGUST 31, 2016

ORAL ORDER (Per Shri S.C. DHARMADHIKARI, J.):

1. By this petition under Article 226 of the Constitution of India, the petitioner prays for issuance of writ of certiorari or any other appropriate writ, order or direction under Articles 226 and 227 of the Constitution of India, calling for the records and proceedings from respondent Nos.2 and 3 in respect of Notice dated 28-3-2016 (impugned Notice) issued by respondent No.2 to respondent Nos.1, 4 and 9 and thereafter to set aside not only

that Notice but also an order of the Collector and District Magistrate, Dadra & Nagar Haveli, Silvassa, dated 18-2-2016, pursuant to which this Notice has been issued.

2. The petitioner is an Indian citizen and claiming to be resident of Silvassa, Union Territory of Dadra & Nagar Haveli. The first respondent is a Nationalised Bank. The second respondent is the Mamlatdar, Dadra & Nagar Haveli, Silvassa. Respondent No.3 is the authority, namely, the Collector and District Magistrate, Dadra & Nagar Haveli, Silvassa, who is empowered to pass order under Section 14(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act", for short). Respondent No.4 is a company incorporated and registered under the Indian Companies Act, 1956. Respondent Nos.5, 6 and 7 are the Directors of respondent No.4-company and have also guaranteed the dues of the said company. Respondent No.8 is another guarantor whereas the 9th respondent to this writ petition is the Police Inspector of the local police station.

3. The petitioner claims to be trading in the name and style “Manoj Textiles”. He claims that he is the sole proprietor thereof. He claims that an immoveable property belonging to respondent No.4 and more particularly described in para 2 has been handed over to him and a leasehold interest is created in his favour. Thus he claims to be a lessee under the lessor/landlord-respondent No.4.

4. It is this immoveable property of which possession was to be taken in pursuance of the order dated 18-2-2016, passed by respondent No.3-Collector and District Magistrate, Dadra & Nagar Haveli, Silvassa. That order dated 18-2-2016 resulted in a further step, namely, Notice dated 28-3-2016. That informs all concerned that possession of the immoveable property, more particularly described in the order and the Notice would be taken on 14-4-2016.

5. The petitioner states that some alleged loan/financial and credit facilities were extended to respondent

No.4-company by the first respondent-Nationalised Bank under sanction letters dated 1-2-2010 and 24-9-2013. That loan or facility was secured by mortgage of immoveable property. That dues were guaranteed allegedly by respondent Nos.5 to 8, who were Directors of respondent No.4.

6. The petitioner claims that the Bank has suppressed a material and relevant fact in relation to the petitioner's leasehold/tenancy rights. The Bank has also suppressed that there was an order of injunction dated 5-12-2014. That was passed by the Court of Civil Judge, Senior Division, Dadra & Nagar Haveli at Silvassa in Special Civil Suit No.100 of 2014. That order of injunction is an interim order. Eventually, this suit has been decreed on 26-2-2016. Thus, the petitioner is declared as a lawful tenant of respondent No.4-company in respect of this immoveable property and a permanent injunction has been granted in his favour restraining the defendants to that suit from obstructing or interfering with the petitioner's enjoyment of the tenancy rights and his possession of the said property. The first respondent-Bank was never a party to this suit filed by the petitioner herein.

7. Annexures “C” and “D” to the petition are the orders of temporary injunction and the eventual decree.

8. The petitioner claims complete innocence and states that he learnt for the first time about the mortgage of this property, that is, on reading a possession Notice dated 6-4-2015, published in daily newspapers Free Press Journal (English) and Nav-Shakti (Marathi), both dated 11-4-2015. He, therefore, addressed a letter dated 4-5-2015 to the first respondent-Bank inviting its attention to the tenancy. Annexure-E to the petition is a copy of this letter.

9. In that letter, the petitioner refers to his tenancy and states that he is a lessee of the shops/office. He is utilising it for business purpose. He has expended a sum of Rs.29 lakhs. He is regularly paying rent to the lessor. The petitioner invites the attention of the Bank to the order passed on 5-12-2014 in the civil suit (as above). He, therefore, states that he was resisting any attempt to take possession. This letter is essentially founded on the averments in the plaint. We would at this stage itself

refer to these allegations.

10. In the suit instituted in the Court of Civil Judge, Senior Division, the petitioner has stated that he has filed a suit for declaration and injunction. He states that he is doing business of pharmacy and previously was doing the business of trading of yarns and usually purchasing and selling the yarns by getting the process of manufacturing at Silvassa. He was in need of a godown for the purpose of storage of goods and yarn boxes and thereby doing the business from these premises. The suit pertinently has been filed against the company M/s. Balaji Filaments Limited and one Prahlad Rai Agarwal. He is the Director of the company and a guarantor of the dues of the Bank. He is also respondent No.7 to this writ petition. It is stated that defendant No.2, that is, the said Prahlad Rai (for short) is known to the petitioner/plaintiff. They have friendly relations with each other.

11. It is averred that the company, represented through its Director, stated that it is having a manufacturing unit at

Silvassa since 20 years. The said Prahlad Rai is handling and managing the day-to-day business affairs of this company. He being a Director is having full knowledge about the business transaction and property transaction of the defendant company. It is due to the requirement of the plaintiff that the property was agreed to be given on rent. The description of the property is in Schedule-A to the plaint. It is stated in para 4 of the plaint that the plaintiff has acquired lawful possession of the said tenanted property since 2005 on the basis of consolidated rent. In the year 2005 he paid a consolidated rent of Rs.20,000/-. The plaintiff is the lawful tenant of the said property, is in physical possession of the same till the date of filing of the suit, and is regularly paying the rent. There are no arrears. The company is stated to be the landlord and he the lessee. It is claimed that details of the rent, as set out in para 4 of the plaint, would reveal that there is a consolidated payment and in any event the rent is being increased. It is stated that now the consolidated quarterly rent is Rs.27,000/-. The plaintiff/petitioner placed reliance upon the last rent receipt. It is stated that this rent

receipt is a primary documentary evidence establishing lawful right of tenancy of the plaintiff in the suit property. The defendant/landlord cannot evict the present plaintiff without observing the due process of law. The further averments in the plaint are that the rights and liabilities are governed by the Transfer of Property Act, 1882. It is stated in para 6 that the defendant has demanded that the plaintiff/petitioner should handover vacant possession of the suit property. That is by undue force and influence. The defendant informed the plaintiff by letter dated 13-9-2013 to vacate the premises. The said letter has been replied and it is stated that the plaintiff is paying the rent in advance, keeping the premises in good condition and also keeping good relations. Therefore, the tenancy right be continued. Reliance is placed upon certain letters and details of the same are mentioned in para 6. Then in para 7 the contents of the letter dated 13-10-2014 are set out and thereafter a claim is made that the petitioner/plaintiff is entitled to protect the leasehold rights and possession of the property. It is stated that the cause of action for filing the suit arose on 13-10-2014.

Therefore, the said claim is within limitation. Such a suit is filed on 5-12-2014. The petitioner/plaintiff on the strength of these averments and his affidavit moved an application for interim injunction styled as Exhibit-5. On that day itself, namely, 5-12-2014 the petitioner/plaintiff's Advocate moved this application. He relied on the averments in the plaint and contended that the defendants have threatened the plaintiff to take possession of the suit property by force. It is in these circumstances, the learned Judge was persuaded to pass an order, copy of which is at page 31 of the paper-book. That operative order reads thus:-

“21. Therefore I proceed to pass following order.

O R D E R

(i) Defendant Nos.1 and 2 are hereby temporarily restrained from forcibly dispossessing plaintiff from the possession of suit property either by themselves or through others till filing their say on this application.

(ii) Issue show cause notice to defendants as to why said ad-interim temporary injunction shall not be confirmed till disposal of suit returnable on 12.12.2014.

(iii) Plaintiff to comply Order XXXIX Rule 3 of CPC.”

The petitioner/plaintiff states that this suit was decreed and relies on the order dated 26-2-2016. That order reads as under:-

“1) It is declared that the plaintiff is the lawful lessee/tenant of the suit property and cannot be evicted forcibly by the defendant as being the lessor/landlord without observing the due process of law.

2) It is admitted that the defendant and his legal representatives are restrained that not to evict the present plaintiff from the suit premises and not to take the possession forcibly from the plaintiff, without observing and due process of law.

3) Therefore, in such terms, the suit is to be decreed by compromise as above in the interest of justice and oblige.”

12. The petitioner, therefore, relies upon this Consent Decree to submit that the same crystallises and establishes the rights of the petitioner/plaintiff. The petitioner/plaintiff, therefore, accuses the Bank of having suppressed this tenancy. The petitioner/plaintiff accuses the Bank of having moved the application before the Collector and District Magistrate after invoking the SARFAESI Act. The text of that application and as set out by the petitioner is that, the Bank invoked this Act and the Rules framed thereunder by alleging that at the specific

request of respondent No.1 to that application, namely, the company, it has sanctioned/granted/enhanced/renewed various credit facilities from time to time and lastly, on 24-9-2013. The details of the financial assistance are set out and then it is stated that demand notice dated 5-11-2014, under Section 13(2) of the SARFAESI Act, was issued. The Bank also produced copies of the sanction letters. The Bank also, in para 5 of this application, relied upon the guarantees, security documents and other records in its possession. It also relies upon the acknowledgement of the liability of the company and its Directors/guarantors. It also relies upon the Guarantee Agreements.

13. It is stated that in consideration of these credit facilities, respondent No.1 through its Director have created an equitable mortgage by deposit of title deeds. The original title deeds of the above immoveable properties have been deposited with an intention to secure the credit facilities. Same was recored in the Memorandum, recording creation of equitable mortgage on 5-3-2010. Further extension of the mortgage on

22-8-2011 and Supplemental Memorandum dated 14-2-2015 are relied upon. It is also pointed out as to how the company failed and neglected to make the repayment of the money under these various facilities. The debts have been declared as Non Performing Assets (NPA). That is how the proceedings under the SARFAESI Act, vide Notice under Section 13(2), came to be initiated. As on 31-10-2014, the company and its Directors owed and were liable to pay to the Bank a sum of Rs.26,63,49,964.24 paise. The Notices were duly served on the respondents by registered post acknowledgement due and at the last known address they were duly received.

14. The Bank has also stated in this application that the Notice was received by one Satish Agarwal. He objected by his representation under Section 13(3-A) of the SARFAESI Act on 1-1-2015. That was duly replied on 19-1-2015. The objections were rejected. It is in these circumstances that the Bank took steps under Section 13(4) and for taking the measures thereunder to their logical end and conclusion, it sought the assistance of the Collector and District Magistrate. This

application was filed on 5-8-2015. It is on such an application that the initial order of 18-2-2016 has been passed by the Competent Authority, namely, the Collector and District Magistrate, Dadra & Nagar Haveli, Silvassa.

15. The petitioner has annexed a copy of this order at page 22 of the paper-book. That order records that all the original documents relating to the loan/mortgage and the property in question were produced by the Bank before the Collector and District Magistrate. The details of the transactions were placed before him. He has perused them and upon being satisfied that he is obliged to provide assistance to financial institutions to obtain possession of secured assets, he allows the application with the direction to the Mamlatdar and Police Inspector, Silvassa to render assistance to the Bank in the case of any resistance or a law and order situation by ensuring that the Bank takes possession in a peaceful manner.

16. On 18-2-2016 this order was passed and in pursuance whereof the impugned Notice dated 28-3-2016 was

issued.

17. These measures and the order are thus the subject-matter of challenge in this petition. Pertinently, in the body of the writ petition the petitioner also states that the petitioner is heavily relying upon a Judgment of the Hon'ble Supreme Court of India in Criminal Appeal No.52 of 2016 [arising out of SLP (Crl.) No.8060 of 2015 (*Vishal N. Kalsaria Vs. Bank of India & Ors.*)], dated 20-1-2016. Annexure-H to the petition is a copy of this Judgment.

18. An affidavit in reply has been filed by the Bank to oppose this petition. Its Chief Manager states on oath that this respondent No.4-company availed of credit facilities. It has mortgaged several properties and out of that, one is covered by the impugned order and is the subject-matter of this petition. It is stated that this property was mortgaged with the Bank, firstly, in the year 1994. A copy of Joint Declaration dated 4-6-1994 is relied upon. It is also annexed as Exhibit-1 to this affidavit. The first respondent-Bank then proceeds to allege that the purported

tenancy was created after this mortgage. The tenancy is not admitted. The first respondent-Bank's consent was never taken for creation of this tenancy. The first respondent-Bank states that the tenancy agreement is not registered.

19. It is then stated in para 7 of this affidavit that the petitioner has not made any statement nor the rent receipt makes it clear whether rent was paid in cash or by cheque. The rent receipt does not bear any revenue stamp. The petitioner has not annexed any documents to prove that the Bank was aware of this tenancy. It is then stated that the order passed by the Civil Court will not bind the Bank as, admittedly, it was not a party defendant to the said proceedings. It is stated that the petitioner is claiming alleged tenancy of the property subsequent to its mortgage with respondent No.4-Bank. The Bank was admittedly in possession. It is in these circumstances that the Bank stated that it was not obliged to disclose anything about such transactions in its application to the Collector and District Magistrate and it has denied all allegations of suppression, much less of material fact. It also relies upon Clause (c) on page 7 of

the Joint Declaration dated 4-6-1994 and submits that the borrower company cannot let or give on leave and license basis or by way of sub-lease the immoveable property except to the respondent-Bank. Thus, the claim of tenancy is termed as sham, bogus and put forward to deprive the Bank from recovering its rightful and legitimate dues. It is in these circumstances, that there is no substance in the writ petition.

20. Then it is stated in para 17 that the petitioner is using the entire premises on payment of Rs.9,000/- p.m.. It is stated that the petitioner and respondent Nos.4 to 9 have joined hands to obstruct the Bank from recovering its huge dues. As per the information available with the Bank, the actual market rent of the premises ought not to be less than Rs.1,00,000/-. There is absolutely no substance, therefore, in this claim of tenancy and it is in connivance and collusion to defeat the claim of the Bank.

21. The petitioner has been accused of raising this belated plea in order to prevent the Bank from enforcing its security interest. It is in these circumstances that the Bank places

reliance upon an order passed by this Court on 7-7-2016 in Writ Petition No.7745 of 2016 [*Atul Daulatrai Desai Vs. State of Maharashtra & Others*].

22. After this affidavit in reply was served, the petitioner has tendered a rejoinder. In the rejoinder, the petitioner, in para 7, purports to deal with para 6 of the affidavit in reply. He states that as far as the claim of the Bank based on this Joint Declaration is concerned, it is not a mere record of deposit of the title deeds for the transaction of the mortgage. It contains several terms and conditions regarding repayment of the principal sum of Rs.1,98,35,000/- along with interest and additional interest. The document is required to be compulsorily registered. The petitioner relies upon the Indian Registration Act, 1908. Therefore, he submits that this document is a bargain and not a record of deposit of title deeds. It cannot be relied upon in these proceedings.

23. Pertinently, paras 7 and 8 need to be reproduced for they make a very interesting reading:-

“7. With reference to what is stated in Para No.6 of the reply, Firstly the said Declaration is not a mere record of the deposit of the Title Deeds for the transaction of the Mortgage. It contains several terms and condition regarding repayment of the principal sum of Rs.1,98,35,000/- along with interest and additional interest. Clause 9 contains covenants by which the Mortgagor has bound himself. Clause 9(c) specifically refers to restriction giving the demised premises on leave and licence, letting etc. Hence on a fair construction of the document it is a bargain and not a mere record of deposit of title deeds. It is submitted that such a document is required to be compulsorily registered in accordance with the Indian Registration Act, 1908. It does not seem to have been registered hence cannot affect the said property. Consequently cannot be relied upon by the Respondents in these proceedings. I say that I was a non wholtime director of the Respondent No.4 Company in 1994. I resigned as a Director of the said Respondent No.4 company sometime in March 1995. A copy of return in Form No.32 submitted to the Registrar of companies together with receipt thereof is annexed hereto and marked as **Exhibit “A”**. I say, however, with respect to what is stated therein that assuming without admission even if the suit property was mortgaged with the Respondent No.1 bank in the year 1994 what is stated therein in the Reply of the Respondent no.1 is palpably false to the extent demonstrably recorded herein by me, I say that, from a perusal of the copy of Joint Declaration dt. 04/06/1994 annexed by the Respondent no.1 and marked Exhibit “1” to the reply under rejoinder, it can be clearly seen that the same is pertaining only to a land which is having Survey Number i.e. Survey No.14/2 which forms part of the suit property under

tenancy. It is pertinent to note that predominant portion of the land and building interalia leased to this Petitioner is the land bearing Survey No.14/1 adm. OH.10ARE equivalent to 1000 sq.mts. and land bearing Survey No.14/3 adm. OH.10ARE equivalent to 2600 sq.mts. Respectively situated at Village Naroli, which are admittedly adjacent to and interlocking the land referred to in the said document of joint declaration relied upon by the Respondent.

*8. I say that the land bearing Survey No.14/1 and 14/3 respectively, are inter locking the said land bearing Survey No.14/1 in respect of which alone a Deed of Declaration is executed of which, the Petitioner admits to having prior knowledge, however I say that I had no knowledge of creation of actual mortgage. I say that it is also pertinent to note that the land under Survey No.14/2 referred to by the Respondent No.1 and mentioned in the said deed of declaration is a land admittedly acquired from M/s. Venus Tape Works, as specifically mentioned in the said Deed of Declaration whereas, the land bearing Survey No.14/1 and 14/3 respectively are acquired from one Smt. Kantaben V. Narolivalla by way of Sale Deed dt. 22/12/1994, which is acquired as agricultural land 6 months after the execution of the Deed of declaration and could not have been mortgaged prior in time i.e. in June 1994, a copy of the said Sale Deed dt. 22/12/1994 is annexed hereto and marked as **Exhibit "B"**. I say therefore that the said Declaration do not create any superior rights in favour of the Respondent Bank as such."*

24. The petitioner, therefore, in para 9, states that he had no prior knowledge of any mortgage in respect of land

bearing Survey Nos.14/1 and 14/3. He had knowledge only of a declaration in respect of the land under Survey No.14/2. He did have prior knowledge of the declaration of mortgage in respect of land bearing Survey No.14/2 in the year 1994 and not the actual execution of a mortgage deed. Then he states without prejudice that due to considerable lapse of time, namely, 10 years from the time of mortgage to the time of acquisition of tenancy rights in the year 2005, he was not aware of any of these deals. Therefore, his prior knowledge should not be taken as having kept back any fact which could be termed as material and relevant. The declaration of Civil Court, therefore, binds the parties and does not loose its efficacy. Thereafter, the petitioner denies the contents of the affidavit in reply. He also denies having knowledge of the claim of the Bank. He also accuses the Bank of raising certain pleas so as to counter the claim of tenancy and submits that same cannot be subject-matter of the present proceedings and it should be raised before the Competent Forum.

25. It is on the above material that we have heard

Mr. Pai, appearing for the petitioner, at some length. We have also heard respondent No.1-Bank through its counsel. Mr. Pai, in his oral and written submissions, relied upon the averments in the writ petition and the plaint before the Civil Court to submit that the petitioner is litigating *bona fide* and in order to protect his lawful title or interest that is created way back in the year 2005. Therefore, any steps or measures by the Bank under the SARFAESI Act cannot bind him, much less defeat the order and decree of the Competent Civil Court. Mr. Pai has emphasized that the Hon'ble Supreme Court has held that whenever any claim of tenancy is raised and that claim is based on continued physical possession backed by payment of rent, then, irrespective of whether it is a claim arising out of a protection under the Rent Control Legislation or the Transfer of Property Act, that needs to be protected. It is not the Collector and District Magistrate then who would inquire and go into allegations in relation to such claims. The parties have to be relegated to the Competent Civil Court. In the instant case, a suit was purportedly laid in the Court of Civil Judge, Senior Division,

Silvassa. The plaint was lodged on 5-12-2014. The cause of action set out therein are the continued threats from the landlord/company calling upon the petitioner to handover vacant and peaceful possession of the property. Therefore, rightly and legitimately a protective injunction order was claimed and that was granted. Eventually, the defendants to the suit accepted the claim of tenancy and that is how a compromise decree was passed disposing of the suit on that basis. All such lawful proceedings cannot be set at naught by the Bank.

26. Mr. Pai submits that the petitioner, therefore, is rightly relying upon suppression by the Bank of all these materials in relation to the immoveable property. If non-disclosure of relevant facts would enure to the benefit of the petitioner, then, we should not allow the Bank to take physical possession. The petitioner, therefore, needs to be protected. The petitioner's possession is based on the claim of tenancy evidenced by him by being put in physical possession and payment of rent. Copies of the rent receipts are also annexed. It is in these circumstances, in the written arguments as also his

oral submissions, Mr. Pai relies upon the Judgment of the Hon'ble Supreme Court in the case of **Vishal Kalsaria** (supra). He would therefore submit that the writ petition be allowed.

27. On the other hand, learned Advocate appearing for the first respondent-Bank, which is the real contesting respondent, submits that the affidavit in reply exposes completely the claim of tenancy. It is a bogus and sham transaction. It cannot bind the Bank. The Bank's legitimate dues are sought to be defeated by the parties by resorting to such collusive proceedings. The claims raised are totally frivolous and false and, therefore, the petitioner's conduct alone should be enough to disentitle him from claiming any equitable and discretionary relief. The writ petition, therefore, should be dismissed.

28. With the assistance of the learned Advocates appearing for the parties, we have perused the writ petition and the annexures thereto. We have also perused the affidavit in reply and the rejoinder. We have also perused the relevant

provisions of the SARFAESI Act. We have also perused the decisions relied upon.

29. It is common ground that the SARFAESI Act was enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto.

30. We need not repeat and reiterate the object and purpose in enacting the SARFAESI Act. The claims of the Banks and which were subject-matter of proceedings before the ordinary Civil Courts were not adjudicated for decades together. This ordinary mechanism was resulting in locking up of precious public funds. That had a negative and adverse effect on the economy as well. In order to speed up the recovery of such dues and which was legitimate and lawful, the Parliament stepped in and enacted this law.

31. Ordinarily, this object and purpose has to be carried forward bearing in mind the reason for this legislation. A

interpretation which would advance the remedy and suppress the mischief, therefore, needs to be placed on the provisions of the SARFAESI Act.

32. In the present case, the petitioner claims that he is a lawful tenant of the premises/immoveable property. With the assistance of Mr. Pai, we have carefully perused the plaint and the application for ad-interim injunction, copies of which are annexed. The plaint proceeds on the footing that the plaintiff acquired lawful possession of the tenantable property since 2005 on the basis of consolidated rent. Pertinently, the plaint proceeds on the footing that a limited company registered and incorporated under the Indian Companies Act, 1956 is the owner and landlord of these premises. The property belongs to it and was let out to the petitioner. Ordinarily, one would expect, therefore, a document handing over such physical possession. It is not as if Mr. Prahlad Rai was dealing with his own property. It was a property of the company. It was duly recorded as such in the records of the company. Whenever the company hands over its properties even on lease and for a specified period or

otherwise, it would record the terms and conditions of such lease. We would expect a prudent and wise businessman like the petitioner, who was once associated with this company and knew Mr. Prahlad Rai, not to trust the company so much when he pays rent and takes physical possession, to insist at least on a written record of this transaction and deal. If not by a joint document, at least recording of the same by the petitioner's letter would have been placed before us. None appears on record of any proceedings.

33. Then the petitioner relies upon, what are styled as, rent receipts and payment of consolidated rent.

34. We are in agreement with the Bank when it says that the consolidated rent and which is claimed to have been paid is evidenced purportedly by some receipts. These are not rent receipts on the letter-head or based on any record emanating from the company. The documents which are relied upon as rent receipts are nothing but extracts from some bill book. That bill book from which certain extracts are relied upon at page 102 of

the paper-book make an interesting reading. The so called rent receipts contain the name of the landlord and there is a rubber stamp of the company. The top right hand column reads as “Bill No.” below which appears the date. Below the name of the landlord, the name of the tenant, namely, of the petitioner Manoj S. Bajari (Agarwal) appears. Thereafter, the description of the property and it states that this is an acknowledgement of payment of rent for January, February and March, 2015, including all occupier's taxes. That is received by some gentleman and whose name, designation and how he represents the company has not been clarified. We have, therefore, a alleged receipt or bill book produced on which a rubber stamp of the company appears and is duly signed, as claimed by the petitioner, on behalf of this company. It is, therefore, surprising that this record, though allegedly emanating from the company, has not been relied upon by the company at any time. Yet, the company submits to the jurisdiction of the Civil Court. It enters into an Agreement with the petitioner, accepting the claim of the petitioner readily and agrees further that this Agreement should

be submitted and placed before the Civil Court. It is a compromise between the parties.

35. It is not without any co-incidence that the petitioner and who has been really representing Prahlad Rai files a suit on 5-12-2014, that is, after the company received securitisation notice under Section 13(2) from the first respondent-Bank dated 5-11-2014. Promptly in a month said suit is filed. There is no contest event to the application praying for interim injunction. The suit filed on 5-12-2014 and containing such serious allegations and relying upon the cause of action stated to be based on more than 5 to 10 letters threatening the petitioner/plaintiff of taking possession forcibly, is compromised on 26-2-2016. The compromise is arrived at and confirmed before the Civil Court only after the order of the Collector and District Magistrate dated 18-2-2016. The parties to the suit were aware of this order and thus connived together to defeat and frustrate it. A design and pattern, systematic as it is, emerges right from the institution of the suit till this Consent Decree. The plan was hatched the moment the Notice under

Section 13(2) of the SARFAESI Act was received by the borrowers and guarantors. They colluded with the petitioner/plaintiff in order to delay the inevitable. A prime land or property, which constituted the security interest of the first respondent-Bank, was thus attempted to be snatched away from it. The documents were therefore prepared to carry forward and achieve this plan. All parties to the suit thus conspired in due execution of the above plan. There is no written statement. There are no pleadings or affidavit from the plaintiff or the company referring to any agreement submitting to the decree of the Civil Court and admitting the claim of the petitioner. This writ petition had to be filed in this Court on 5-4-2016, as the petitioner's Advocate states that the petitioner was protected by the interim injunction but the Bank was not a party to that proceedings.

36. The petitioner pleads that the cause of action for the filing of this writ petition is the Notice dated 28-3-2016 informing all concerned that the Bank would be assisted in taking physical possession of the property. The letter from the

Administration of Dadar & Nagar Haveli (U.T.), Department of Revenue and signed by the Mamlatdar is addressed to Bank of Baroda. This is claimed to be a notice and copy of which is served on the company.

37. We have, therefore, no hesitation in concluding that this is really a desperate and last minute effort of the borrower company to resist the claim of the Bank. Having admitted that there were credit facilities extended to the company, which is a fact not even denied by the petitioner, having admitted the default, having not contested the Bank's claim of recovery of an amount of Rs.26,63,49,964/- with interest, it is really surprising that the petitioner has come forward to resist the taking over of physical possession of the property.

38. Pertinently, the petitioner does not disclose in this writ petition anything about the Memorandum/Declaration and which is stated to have been signed as early as on 4-6-1994. Pertinently the petitioner is a signatory to this Memorandum/Declaration.

39. We repeatedly asked Mr. Pai as to how immoveable

property stated to be a piece of land in the Gujarat Industrial Development Corporation area could have been then further leased by respondent No.4-company to the petitioner. Ordinarily, whenever industrial development corporations are set up and properties are handed over to them or they vest in them, they have to assist the industrialists and businessmen to set up industries. Dadra & Nagar Haveli is a Union territory. There a policy was enunciated to encourage setting up of industries. Various pieces and parcels of land and properly measured and carved out were handed over to the industrial corporation. A lease was entered into with the applicants and setting out specific terms and conditions including payment of lease rent. The stringent and strict conditions ensured that there is no parting with possession or creating any third party interest during the subsistence of the lease. It is really surprising, therefore, that all interests have been created purportedly in favour of the petitioner of such a property and unmindful of the manner in which it was handed over to the company.

40. When the petitioner was confronted with this Joint

Declaration dated 4-6-1994, copy of which is annexed as Exhibit-1 to the affidavit, what we have noted is that it was in lieu of cash credit (hypothecation of stocks), cash credit (book debts), bills purchased/discounted, term loan-I and II and such other credit facilities extended by Bank of Baroda to respondent No.4- company. The recitals of this Agreement are that, Kanaiya Lal, Prahlad Rai and the petitioner Manoj Suganchand Agarwal are the only Directors of this company which was then named as a private limited company. The borrower company is stated to have purchased this immovable property on 6-2-1992 from one Sunflag Synthetics Private Limited. The sale was sanctioned by the Gujarat Industrial Development Corporation on 26-3-1992. Recital No.3 of this Agreement, on page 114, states that the plots were acquired on lease from GIDC under lease dated 23-9-1983. That was executed by GIDC in favour of one Raghuvir Texturising Private Limited. Then Clauses 4 and 5 recite as to how the original title deeds of the property described in the Third Schedule of this Agreement were handed over with an intention to create an equitable mortgage. Since that

mortgage has been created by the parties at Mumbai, the Transfer of Property Act, 1882 does not envisage any record in writing of such subsequent transaction. Its registration is, therefore, not compulsory either. It could be a simple memorandum recording the arrangements and handing over of the title deeds. That is held to be enough for bringing about a transaction whereunder the properties are mortgaged to secure the dues of the Bank and styled as equitable mortgage by deposit of title deeds. There is no substance in the contention of Mr. Pai that such an Agreement should have been subsequently registered. The law then prevailing did not oblige any such registration.

41. The recitals and clauses of this deed or declaration would confirm as to how the property vested initially in GIDC and then came to the company. The company was empowered to create a security interest in favour of the Bank. The original title deeds were, therefore, handed over. Pertinently, the petitioner's name appears as a signatory to this Agreement/Joint Declaration and he has signed it. There is no denial of the

execution of this Agreement nor the signature at page 124.

42. It is in these circumstances that we are unable to agree with Mr. Pai that there is a *bona fide* and lawful claim of tenancy. We found that the claim is false, dishonest and bogus. This Court is not obliged to accept such claims of tenancy even if they are based on some legal proceedings. A collusive suit brought before the Civil Court by impleading only the company and Prahlad Rai and, in the above circumstances, compromised hastily cannot be the foundation to seek any order from this Court, in favour of the petitioner, particularly in its equitable, discretionary and extra-ordinary jurisdiction under Article 226 of the Constitution of India.

43. We do not agree with Mr. Pai that a protective order like a temporary injunction or a compromise decree in force would enable the petitioner to resist the claim of the Bank. It will also not enable the petitioner to request the Court to protect the physical possession of the petitioner. The petitioner and the said Prahlad Rai, so also the Directors and guarantors and the

company itself have colluded with each other. They have connived to defeat the claim of the Bank which is lawful. No order of the Court which is founded on collusion, connivance and a calculated fraud can be relied upon in order to defeat an admitted lawful claim and to resist and obstruct the recovery of lawful dues. The petitioner has suppressed a relevant and material fact from the Trial Court and this Court. He has not uttered or said a word about the Memo of Entry/Mortgage executed way back in 1994. He has suppressed the fact he was a signatory thereto. He tries to meet the contents of this memorandum in his affidavit in rejoinder filed in this petition. That is after taking advantage from the Trial Court and securing an ad-interim order from this Court. Thus, a vital fact about the tenancy coming into existence much after this mortgage in favour of the Bank is deliberately held back from this Court so also the Trial Court.

44. It will be a complete mockery of the rule of law if Court becomes a party to above deeds and transactions. We do not think that the order of the Civil Court accepting the

compromise between the petitioner, Prahlad Rai and the company will assist the petitioner in any manner. Firstly, to the suit which was compromised the Bank is not a party. Secondly, Order XXIII, Rule 3 of the Civil Procedure Code requires the Court to be satisfied that the compromise or the Agreement, which is the foundation of its satisfaction, is lawful. If such proceedings, as are initiated and brought before it, are collusive and instituted in order to defeat and frustrate recovery of lawful dues of a public financial institution/Nationalised Bank, then, it was the bounden duty of the learned Judge to have recorded a clear and cogent satisfaction. He should have held that the Agreement is lawful, not contrary to public policy, nor vitiated by any fraud or misrepresentation. It is not a subterfuge. It is not brought forward to defeat or frustrate the legal proceedings instituted by a Nationalised Bank. A perusal of all the orders passed by the Civil Court leave us in no manner of doubt that the Civil Judge, Senior Division has failed to abide by this mandate of law. He has failed to apply his mind to these crucial and relevant matters. The compromise decree, therefore, can

safely be set at naught and ignored by this Court. It would not be failing but rather performing its lawful duty. If such orders are brought before a Court which is exercising constitutional jurisdiction and fully empowered to issue a writ of certiorari or any order or direction in its supervisory jurisdiction, then, all the more we do not think that we should recognise and accept this compromise decree in the above suit. We, therefore, proceed to quash and set aside the proceedings as a whole. Our conclusion is based upon the two Judgments of the Hon'ble Supreme Court reported in AIR 1994 SC 853 [*S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*] and AIR 1994 SC 1673 [*Ramchandra Ganpat Shinde and another Vs. State of Maharashtra and others*]. In the first reported decision, the Hon'ble Supreme Court has come down heavily on litigants indulging in fraud and dishonesty during legal proceedings. The Court observed as under:-

“Fraud-avoids all judicial acts, ecclesiastical or temporal” observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decreed – by the first

court or by the highest court – has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.”

“7. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that “there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence”. The principle of “finality of litigation” cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.”

“8. Non-production and even non-mentioning of the release deed at the trial tantamounts to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Exhibit B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side than he would be guilty of playing fraud on the court as well as on the opposite party.”

In the second Judgment, the Hon'ble Court held that a consent

order or decree of a Competent Court loses its legal sanctity and efficacy if its foundation is on fraud and trickery. The Court held thus:-

“8. It would be obvious that A.K. Patil, Ex-Chairman of the defunct committee with a view to get over that impediment and to enable newly admitted 2000 members after December 17, 1991, set up More, a co-director and Mule, alleged to be his friend, got filed the first writ petition and obtained a direction to conduct election following its heels got filed second writ petition with a format of legal process but immediately Patil intervened and appeared on the very date of admission; put forth consent order and obtained the order from the court to conduct election as per the provisional list existing as on June 30, 1992 and got issued the direction to the Collector with the mandate to conduct election in accordance with that list. It was specifically alleged that Patil colluded with More and Mule, abused the process of the Court, played fraud on the Court and obtained minutes order by consent without knowledge to any member of the society. In the absence of any denial of the allegations and in the light of the background of the case the necessary inference to be unerringly deduced would be that the consent order is a collusive and fraudulent order; made format of due process of law but obtained orders contrary to the statutory mandate of Rule 4(1) of the Rules. It could thus be seen that none of the members of the society had any opportunity to know or to oppose the consent order. Thereby the necessary conclusion would be that a collusive order obtained by abuse of the process of the Court by playing fraud on the Court, became foundation to conduct elections to the Managing Committee of the society circumventing the mandate of Rule 4(1) of the Rules.”

“9. In Nagubai Ammal v. B. Shamma Rao, 1956 SCR 451 at 463 : (AIR 1956 SC 593 at p.599) this Court held that collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial Tribunal for some sinister purpose. In such a proceedings, the claim put forward is fictitious, the contest over it is unreal, and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. This was reiterated in Rup Chand Gupta v. Raghuvanshi Pvt. Ltd., (1964) 7 SCR 760 at 763 : (AIR 1964 SC 1889 at p.1891), in which this Court held that the collusion is an improper act done by an improper refraining from doing an act, for a dishonest purpose. In these two cases this Court set aside the collusive decree obtained by the parties.”

“10. The question emerges whether the said order is liable to be interfered with and if so in what proceeding and to what extent? The order in the second writ petition cannot be reviewed because the appellants are not parties to the proceedings. Undoubtedly, the order passed by the High Court under Article 226 is by the exercise of plenary constituent power and jurisdiction. It is neither a void nor voidable order. As seen no fault could be found in the format of legal process in the pleadings and the reliefs sought for. But when it came up for admission, by consent, orders of minutes were drawn up which have become foundation for avoidance of mandate of Rule 4(1) of the Rules. It is not a case of irregularity in the exercise of the jurisdiction so as to set it right by a review. Since the petitioners therein, namely, More and Mule being henchmen of Patil cannot be expected to invoke the review jurisdiction of the Court. Third party has no right to file an application for review. Obviously in this

backdrop the order being vitiated by collusion at the behest of Patil, More and Mule, the appellants, instead of filing an appeal under [Article 136](#) with leave of the Court, appears to have sought the remedy by way of filing a fresh writ petition under [Article 226](#) and sought modification of the order so that the order of the Court in the second writ petition would be in conformity with Rule 4(1) of the Rules.”

“11. It being a judicial order no third party has a right to intervene and challenge the same in the proceedings under [Article 32](#) of the Constitution. The ratio therein has no application to the facts of this case. Undoubtedly, the order passed by the High Court under [Article 226](#) is a judicial order exercising its constituent power but when its process is abused and obtained an order of minutes by consent hedged with collusion and fraud on the Court and obviously, though not pleaded, on general body of the members of the society, when the facts were brought to the notice of the High Court, it is the High Court alone or on appeal this Court which is to correct such an order.”

“12. Mr. Justice Arthur, J. Venderbilt in his “The Change of Law Reforms 1955” at pages 4 and 5, stated that:

“.....it is the Courts and not in the legislature that our citizens primarily feel the keen, the cutting edge of the law. If they have respect for the work of their Courts, their respect for law will survive the short comings of every other branch of the Government; but if they lost their respect for the work of the Courts, their respect for the law and order will vanish with it to the great detriment of society.”

(vide the Judicial Process by H.J. Abraham, p.3)”

“13. Respect for law is one of the cardinal

principles for an effective operation of the Constitution, law and the popular Government. The faith of the people is the source and succour to invigorate justice intertwined with the efficacy of law. The principle of justice is ingrained in our conscience and though ours is a nascent democracy which has now taken deep roots in our ethos of adjudication – be it judicial, quasi-judicial or administrative as hallmark, the faith of the people in the efficacy of judicial process would be disillusioned, if the parties are permitted to abuse its process and allowed to go scot free. It is but the primary duty and highest responsibility of the Court to correct such orders at the earliest and restore the confidence of the litigant public, in the purity of fountain of justice; remove stains on the efficacy of judicial adjudication and respect for rule of law, lest people would lose faith in the Courts and take recourse to extra-constitutional remedies which is a death-knell to the rule of law.”

“14. Even if the remedy by election petition was available, the tribunal had no jurisdiction to sit over the correctness of the order passed by the High Court. Therefore, the High Court alone had to correct it by exercising its power under [Article 226](#) to prevent such abuse of judicial process and should exercise its power of high responsibility to undo injustice done to the adversary undoing the effect of the order obtained in abusing the process of the Court.”

45. Once we have come to this conclusion, then, the Judgment in the case of Vishal Kalsaria (supra) or in the case of **Harshad Govardhan Sondagar Vs. International Assets Reconstruction Co. Ltd. & Ors.**, reported in (2014) 6 SCC 1,

rendered by the Hon'ble Supreme Court of India would be of no assistance to the petitioner. The foundation for the Judgments rendered by the Supreme Court of India are *bona fide* and lawful claims of tenancy. They were undisputed throughout. The issue was whether the Bank in order to take possession of the premises which constituted its security interest can ignore the claim of tenancy or brush them aside if they are supported by reliable and cogent evidence. There is contemporaneous record available for such tenancy. The Bank may be saying that such claim of tenancy does not bind it, but the Court rendered the Judgment in the context of the Rent Control Legislation and its object and purpose. Thus, claims of lessees arising out of the Transfer of Property Act and which were not in dispute or denied, were therefore protected. They were also protected with an additional rider that before creation of the security interest in favour of the Bank, they came into existence. Therefore, the parties who were claiming under a Agreement of tenancy, backed by complete record, were permitted to avail of the jurisdiction of the Competent Civil Court, if not already availed

of to protect their possession. We do not read the said Judgments, with greatest respect to the Hon'ble Supreme Court of India, as laying down a principle that the moment the defence or claim of tenancy is raised we must assist parties like the petitioner. The foundation of his claim is falsehood, dishonesty and deceit. It is clear in this case that the order of the Trial Court is obtained by holding and keeping back crucial factual events. The documents having a bearing on the claim were held back. Thus, everything is a product of fraud. It is time to nip all this in the bud for everyday we are faced with such proceedings and without any proof or evidence of tenancy, and merely on the strength of the Judgments rendered by the Hon'ble Supreme Court, writ petitions are filed and requests are made to protect the parties against dispossession. Surely, the Hon'ble Supreme Court of India does not wish to extend the protection of law to assist parties like the petitioner. The parties like the petitioner are nothing but another face of the borrower and guarantor. They are put up before the Court by these borrowers and guarantors themselves in a effort to prevent the Bank from

obtaining the physical possession of the secured assets. The order of the Civil Court, therefore, cannot be utilised in order to defeat and frustrate the SARFAESI Act. The Hon'ble Supreme Court has cautioned that the measures under the SARFAESI Act must be allowed to run their course and the Bank should not be involved in unnecessary and frivolous litigation when its claim is just, lawful and right.

46. In above circumstances and strongly deprecating the conduct of the petitioner, we dismiss the writ petition with costs, quantified at Rupees Five Lakhs, to be paid to be first respondent-Bank within four weeks. The petitioner has abused the process of the Trial Court and this Court. He has deprived the Bank from recovering its dues to the extent of Rs.26 Crores and more. If the costs are not paid within the stipulated period, the Collector and District Magistrate, so also the Mamlatdar, in furtherance of the measures of the SARFAESI Act and also under their powers under the Land Revenue Code can initiate such steps and institute such proceedings so as to recover this sum and personally from the petitioner.

47. At this stage, Mr. Pai submits that this Court should also take notice of the fact that for proving the claim of tenancy, there was no written agreement necessary nor any record in that regard. He relied upon the Judgment of the Hon'ble Supreme Court in case of *United Bank of India Ltd. Vs. Lekharam Sonaram and Co. and Ors.*, reported in MANU/SC/0370/1965 = AIR 1965 SC 1591, copy of which is annexed to the written submissions. In the view which we have taken and particularly that the claim of tenancy is false and bogus, we do not think that the petitioner can place reliance on this Judgment.

48. At this stage, the learned Advocate appearing for the first respondent-Bank requests that the amount deposited by the petitioner may be handed over to the Bank. This request is opposed by Mr. Pai.

49. Firstly, we do not think that in the writ petition of the petitioner we can straightaway grant the said relief. Secondly, the Bank has enough remedies and if it finds that the amount that may be obtained from the sale of the mortgaged

property is inadequate, then, it can institute such further proceedings and as are permissible in law. It can also take out proceedings to claim the amount deposited by the petitioner in this Court. We do not think that the claimed amount can be handed over to the Bank straightaway. However, we restrain the petitioner so also the supporting respondents from withdrawing the amount for a period of twelve weeks from today. Mr. Pai submits that by an ad-interim order in this petition this Court has protected the physical possession of the petitioner only till today. That be continued so as to enable the petitioner to adopt appropriate proceedings or to challenge this Order in a higher Court. This request is opposed vehemently by the first respondent-Bank's counsel. Having made the above observations and finding that the petitioner has not approached this Court with clean hands, has suppressed several material and relevant facts in the writ petition and also relied upon a false and bogus claim, we decline this request. The ad-interim order is vacated forthwith.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)