

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: May 11, 2016*
Judgment Delivered on: May 13, 2016

+ **W.P.(C) 4505/2015**

SWARAJ KISHORE ARORA Petitioner
Represented by: Mr.Sanjiv Kakra, Advocate with
Mr.Amrendra Kr.Singh and
Mr.Bheem Sain Jain, Advocates for
the objector

versus

INDIAN BANK AND ORS. Respondents
Represented by: Mr.P.S.Narasimha, ASG (Amicus
Curiae) instructed by Mr.Arshid
Anand and Mr.Irom Denning,
Advocates
Mr.Rakesh Tikku, Sr.Advocate
instructed by Ms.Seema Gupta,
Advocate for R-1
Mr.Anil K.Khaware, Advocate
with Mr.Abhinav Mishra, Advocate
for auction purchaser

W.P.(C) 4538/2015

RAJINDER KUMAR MALHOTRA Petitioner
Represented by: Mr.Aditya Vikram, Advocate with
Mr.Hari Narayan Takkar, Advocate

versus

INDIAN BANK & ORS Respondents
Represented by: Mr.Rakesh Tikku, Sr.Advocate
instructed by Ms.Seema Gupta,

Advocate for R-1
Mr.Anil K.Khaware, Advocate with
Mr.Abhinav Mishra, Advocate for
auction purchaser

W.P.(C) 7993/2015

SUSHMA PARDEL Petitioner
Represented by: Mr.Sanjeev Bhandari, Advocate

versus

INDIAN BANK AND ANR. Respondents
Represented by: Mr.Rakesh Tiku, Sr.Advocate
instructed by Ms.Seema Gupta,
Advocate for R-1
Mr.Anil K.Khaware, Advocate with
Mr.Abhinav Mishra, Advocate for
auction purchaser

W.P.(C) 4619/2015

PREM AHUJA Petitioner
Represented by: Mr.Sanjeev Bhandari, Advocate

versus

INDIAN BANK AND ORS. Respondents
Represented by: Mr.Rakesh Tiku, Sr.Advocate
instructed by Ms.Seema Gupta,
Advocate for R-1
Mr.Anil K.Khaware, Advocate with
Mr.Abhinav Mishra, Advocate for
auction purchaser

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. A common question of law concerning the power of the Recovery Officer, while executing orders passed by the Debts Recovery Tribunal under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the Act) wherein the bank or a financial institution has obtained a right to recover the debt, as determined by the Debts Recovery Tribunal from the borrower and the guarantors, to proceed against a property held to be mortgaged with the bank or the financial institution to which objections are filed by third parties, claiming an interest in the property, arise for consideration in the above captioned writ petitions and therefore though the factual matrix of the four writ petitions are slightly different they are being decided by a singular order.
2. The above captioned writ petitions relate to different floors of the same building built on plot bearing municipal No.7/3 Old Rajinder Nagar, New Delhi.
3. The admitted position concerning the building on plot bearing municipal No.7/3 Old Rajinder Nagar, New Delhi is, that the Government of India, through the Land and Development Office, granted perpetual leasehold rights in favour of one Sh.Hari Ram son of Ralla Ram under an indenture dated March 30, 1963, duly registered with the Sub-Registrar, New Delhi. Appended as an Annexure to the lease-deed and described as an Appendix is a conveyance deed. Jointly under the two, land ad-measuring 85.3 sq.yards with a two room single storey tenement constructed thereon was demised in perpetuity in favour of Sh.Hari Ram. Vide para-c of the

lease-deed it was stipulated :-

“(c) The lessee can transfer the land after obtaining the permission of the Lessor aforesaid and the Lessor will not share any unearned increment in the value of the land (being the difference in the premium paid by him to the Lessor and the market value of the land then prevailing) for permitting such transfer. The Lessor will, however, be entitled to claim and recover the unearned increment in the value of land in the event of any subsequent transfer of the land by a transferee the amount so to be recovered being 50% of the unearned increment in the value of the land”.

4. Hari Ram died on October 11, 1970. Twelve years after he died, an application was filed on July 12, 1982 by his legal heirs for being substituted as joint lessees, on completion of the requisite codal formalities vide letter dated September 29, 1982, it was conveyed by the lessor to the legal heirs, who were ten in number, that the property stood mutated in their names with Shakuntala Devi, Jagdish Chander, Rajinder Singh, Inder Singh, Randhir Singh, Parkash Devi, Shanti Devi and Chander Kanta, the wife, sons and daughters of the deceased, each having $1/9^{\text{th}}$ share each in the property and Rajinder Kumar and Sukrita Rani, the grand children of the deceased each having $1/18^{\text{th}}$ share in the property.

5. On the strength of a General Power of Attorney executed on May 31, 1983 jointly by the ten legal heirs of Hari Ram, one Ashok Sirpaul son of Sh.Amrit Lal executed a sale-deed on June 23, 1986 in favour of his real brother Anil Sirpaul which was registered as document No.5682 in Additional Book No.1, Volume No.5518 at pages 82 to 85 in the office of the Sub-Registrar, New Delhi on June 23, 1986.

6. Thus, Anil Sirpaul became the registered owner of the subject

property. He died on September 09, 1996, but before that, during his life time he entered into a collaboration agreement on March 25, 1993 with Ms.Alka Wadhwa and Ms.Vibha Sabharwal, who were referred to as builders in the collaboration agreement. The builders were to demolish the existing two room tenement on the plot and construct a four storied building, comprising a ground floor, a first floor, a second floor and third floor, with the ground and the second floor without terrace rights to be the property of Anil Sirpaul and the first and the third floor with terrace rights vesting in the builders.

7. The property was constructed as per the collaboration agreement and Anil Sirpaul took possession of the ground floor and the second floor from the builders who retained the first and the third floor thereof along with terrace rights.

8. Anil Sirpaul executed an agreement to sell on June 19, 1996 concerning the ground floor of the property in favour of Kanwar Bhan Kataria and recorded therein that he has received the entire sale consideration and handed over vacant physical possession of the ground floor to Kanwar Bhan Kataria. But for reasons unknown, Anil Sirpaul executed a will bequeathing the ground floor to Sushma Pardel. Kanwar Bhan Kataria expired on March 31, 2001. The facts are a little hazy, but the haze is irrelevant because said part which cannot be clearly seen is irrelevant to paint the picture. Sushma Pardel prosecutes the litigation before this Court claiming a right under the will and we find that no natural heir of Kanwar Bhan Kataria contests her claim.

9. Concerning the second floor, ownership whereof was with Anil Sirpaul in terms of the collaboration agreement dated March 25, 1993,

relevant fact to be noted is that on March 01, 1994 Anil Sirpaul entered into an agreement to sell with Satish Kumar Mongia, in whose favour he also executed a power of attorney, an indemnity bond and a will, recording in the agreement to sell that having received the entire sale consideration he had handed over vacant physical possession of the second floor to Satish Kumar Mongia. Less than within a year of having acquired possession under the agreement to sell after paying the entire sale consideration, Satish Kumar Mongia entered into an agreement to sell on January 17, 1995 recording therein that having received the entire sale consideration he had handed over vacant physical possession of the second floor to Smt.Vishan Devi Ahuja, who expired on September 27, 2012 and her son Prem Ahuja succeeded to the right of Smt.Vishan Devi Ahuja and litigates as the writ petitioner of WP(C) No.4619/2015.

10. Concerning the first floor, ownership whereof under the collaboration agreement dated March 25, 1993 vested with the builders, on March 01, 1994 Ms.Alka Wadhwa and Ms.Vibha Sabharwal (the builders), executed an agreement to sell recording therein that having received the entire sale consideration possession thereof had been handed over to Rajinder Kumar Malhotra, in favour of whose wife : Madhu Bala Malhotra, a power of attorney was executed by them. Rajinder Kumar Malhotra litigates as the petitioner of WP(C) 4538/2015.

11. Concerning the third floor and the terrace above, one of the two builders : Vibha Sabharwal, entered into two agreements to sell on June 10, 1994, recording therein that having received the entire sale consideration she had handed over vacant physical possession of the third floor as also the terrace above to one Bhupinder Singh Bajaj, in whose favour Vibha

Sabharwal also executed a will. At the asking of Bhupinder Singh Bajaj, Vibha Sabharwal executed a special power of attorney as also a general power of attorney in favour of his wife Harsharan Banaj. However, a receipt and a possession letter of even date acknowledging receipt of payment and possession handed over was executed jointly by both builders : Alka Wadhwa and Vibha Sabharwal. One agreement to sell concerns the third floor and the other terrace above. On May 16, 1995, under two agreements to sell, recording therein that entire sale consideration under the two agreements was received by him from Swaraj Kishore Arora and his wife Uma Arora, Bhupinder Singh Bajaj handed over the possession of the third floor and the terrace above to Swaraj Kishore Arora and his wife Uma Arora and also executed a special power of attorney and a general power of attorney in favour of Swaraj Kishore Arora empowering him to deal with the third floor and terrace above. He willed the third floor to Swaraj Kishore and terrace above to Uma Arora. It needs to be highlighted that one agreement to sell concerning the third floor was with Swaraj Kishore Arora and the other concerning the terrace was with Uma Arora.

12. But before these transactions took place on different dates in the years 1994, 1995 and 1996, on October 12/19, 1990, concerning a request made by M/S Globerac & Alloys Pvt.Ltd.(the principal borrower) to Indian Bank for a credit facility to be advanced by the bank to the company, a letter was written under the signatures of Ashok Sirpaul in his capacity as the Director of the company containing an undertaking to the bank :-

“It is just for your information that we shall transfer this property in the name of M/s Globerac & Alloys Pvt.Ltd. after few days and as when it is felt convenience on our part. This has further reference to the discussion had with

the Zonal Manager.”

13. The contents of the letter evince that the bank was desiring a security by way of charge on some immovable property and the company had offered to create a charge on the immovable property bearing municipal No.7/3, Old Rajinder Nagar, New Delhi, which as of the year 1990 comprise the land a two room tenement thereof for the reason the four storied building was constructed pursuant to the collaboration agreement dated June 10, 1994.

14. Within a few days of the letter dated October 12, 1990, a letter dated October 21, 1990 was addressed to the bank under the signatures of Anil Sirpaul. The letter reads as under:-

“Dear Sir,

I/We hereby acknowledge having already deposited with your at Rana Pratap Bagh, Delhi on 19.10.1990 the title deeds relating to my/our property at 7/3 Old Rajinder Nagar (give full description of property, village, taluk etc.,) with intent to create a valid equitable mortgage over the said property by way of security for due repayment of all advances and credit facilities granted and to be granted by the Bank to M/s Globarc & Alloys Pvt Ltd, at my/our request and on the condition of my/our agreeing to deposit the title deeds of my/our property upto a maximum of ₹1,17,08,274/59 being amount (eligible) in various limits such as OCC/KCC/DCOBP together interest costs, and other charges payable by them to the Bank.

Yours faithfully

Sd/-

Anil Sirpaul

List of documents

- 1. Lease deed dated 30.3.1963 between President of India and Shri Hari Ram S/o Ralla Ram resident of 7/3, Old Rajinder Nagar, New Delhi (Nine pages)*
- 2. Receipt obtained from the seller constituting legal heirs (fourteen paras in these sheets)*
- 3. Affidavit executed by the persons in favour of Ashok Sirpaul (total-10)*
- 4. Affidavit cum understanding from Mrs. Vinod Sehgal*
- 5. General power of Attorney from Mr.Rajinder Luthra resident of USA in favour of Sh.I.S.Luthra.*
- 6. Letter from Ministry of works and Housing & mentioning all the names of legal heirs (reference No.L& DO/PS I/1318 dated 20.9.1982.*
- 7. Copy of death certificate of Shri Hari Ram son of Shri Ralla, the allottee of plot at 7/3, Old Rajinder Nagar.*
- 8. Site plan of the residence signed by all the legal heirs.”*

15. On April 19, 1992, Indian Bank filed a suit on the Original Side of this Court claiming decree in sum of ₹1,48,65,134/- (Rupees One Crore Forty Eight Lacs Sixty Five Thousand One Hundred and Thirty Four only) against the company Globrac & Alloys Pvt.Ltd. impleading therein, amongst others, Ashok Sirpaul and his brother Anil Sirpaul as respondents, pleading that the two were guarantors and with further pleading that an equitable mortgage was created by the company. But the suit was not filed under Order 34 of the Code of Civil Procedure. It did not plead for foreclosure of

the mortgage. It sought a money decree, though there are pleadings of the mortgage being created. On May 15, 1992 the learned Single Judge of this Court before whom the suit was listed passed an injunction order restraining the defendants from transferring, encumbering or parting with possession of property bearing Municipal No.7/3, Old Rajinder Nagar, New Delhi. With the promulgation of the said Act and establishment of Debts Recovery Tribunal, the suit was transferred to the Debts Recovery Tribunal at Delhi and treated as an application under Section 19 of the said Act and registered as OA No.868/1995.

16. The bank filed an affidavit by way of evidence of one Shri Arjun Kumar, the Manager of the bank on March 17, 1997, wherein the bank exhibited various documents and concerning the charge created by way of equitable mortgage, exhibited a photocopy of the perpetual lease-deed dated March 30, 1963 as Ex.P-61 and photocopy of the conveyance deed annexed as an appendix thereto, as Ex.P-62. The letter dated September 20, 1982 written by the Land & Development Office as Ex.P-63 and the letter dated October 12/19, 1990 written on behalf of company by Ashok Sirpaul as its Director as Ex.P-64. Photocopy of the equitable mortgage register evincing receipt of the documents sent to the bank by Anil Sirpaul under cover of the letter dated October 21, 1990 as Ex.P-65.

17. Interestingly, the bank filed, and through the affidavit by way of evidence of Arjun Kumar, exhibited letters dated November 27, 1990 and November 28, 1990 as Ex.P-66 and Ex.P-68, which letters show that Ashok Sirpaul in his capacity as Director of the company informed the bank vide letter dated November 27, 1990 that the property was intended to be sold to one Ram Lal and ₹1,00,000/- (Rupees One Lac only) received from him had

already been deposited with the bank and balance payment received would be deposited with the bank but to effect the sale in favour of Ram Lal, he requires the title deed of the property. Vide letter dated November 28, 1990 it was informed to the bank that ₹12,00,000/- (Rupees Twelve Lacs only) would be deposited when balance sale consideration shall be received by December 30, 1990.

18. The respondents in the Original Application chose to remain ex-parte. They led no evidence. The result was that the learned Debts Recovery Tribunal passed an order on March 18, 1997 allowing the claim with pendente lite and future interest. The cryptic one and half page order simply allows the claim and makes no mention of the charge by way of an equitable mortgage as claimed by the bank.

19. Proceeding to execute the order dated March 18, 1997, the Recovery Officer finalized a sale proclamation, and when it was published objections were filed to the proposed sale and needless to state interest under the various agreements to sell to which we have referred to hereinabove, under which agreements the sale consideration was recorded as having been paid and possession taken over from Anil Sirpaul with respect to the ground floor and the second floor and with respect to the first floor, third floor and terrace above, under the builders, were the foundation of the objections. Another principal fulcrum was that the bank did not have any title document deposited with it and could not claim right as a mortgagee under the perpetual lease-deed dated March 30, 1963 and needless to state this was the only title document with it relied upon by the bank in its pleadings. It was specifically pleaded by the objectors that the title documents in favour of Anil Sirpaul was shown to them in original when they purchased the

different floors of the property under the agreements to sell. The result was the Recovery Officer passing an order on April 28, 1999 directing the bank to produce the original title document on strength whereof it was claiming the rights as a mortgagee, and this document was obviously the original perpetual lease-deed dated March 30, 1963 together with the appendix thereto i.e. the conveyance deed. The bank did not do so. No original title document was produced and none was filed, resulting in the same directions being repeated by the Recovery Officer on November 04, 2003. Even said order was not complied with.

20. Now, from the facts noted hereinabove the following issues arose for determination :

- (i) Whether by not producing any title document and only filing and proving (Ex.P-61 and P-62) the photocopies of the perpetual lease-deed and the appended conveyance deed thereto could the bank claim right as a mortgagee.
- (ii) What was the effect of the sale-deed dated June 23, 1986 executed by Ashok Sirpaul, the holder of a general power of attorney from the ten legal heirs of Hari Ram who were substituted in the record of the Land & Development Office as the joint perpetual lessees, in favour of Anil Sirpaul, which sale-deed preceded the date when the alleged mortgage was created by way of deposit of the perpetual lease-deed dated March 30, 1963.
- (iii) What was the scope of the power of the Recovery Officer to adjudicate the objections to the attachment and sale of the four floors and the terrace above of the property by the four objectors claiming rights under the agreements to sell which record the entire sale consideration paid and possession handed over under the agreements to sell.

(iv) The effect of the injunction order dated May 15, 1992 passed in the suit before it was transferred to the Debts Recovery Tribunal for adjudication.

21. Without focusing on these issues, vide four orders dated July 30, 2004, the objections were dismissed holding that the bank had a charge in its favour under an equitable mortgage created vide letter dated October 21, 1990. An additional reason was given. That on May 15, 1992, when the suit filed by the bank was pending in this Court, a restraint order was passed against the defendants restraining them from transferring, encumbering or selling the property No.7/3, Old Rajinder Nagar, New Delhi.

22. Order dated July 30, 2004 was challenged by way of an appeal(s) under Section 30 of the said Act before the learned Debts Recovery Tribunal and since no stay was granted in the appeal(s), during the pendency thereof, different floors were put up for auction and were purchased by Maninder Singh s/o of Daljit Singh, who also joins the fray because his rights have come into being.

23. Vide order dated September 21, 2011 the four appeals were disposed of. Whereas the claim of the objectors that the four floors and the terrace right above could not be sold in execution of the order dated March 18, 1993 allowing the claim of the bank was rejected and to said extent the objections were dismissed, the sale was set aside, which had taken place during the pendency of the appeal(s), on account of various irregularities found in the conduct of the sale.

24. Thus, five appeals fell into the lap of Debts Recovery Appellate Tribunal, four by the objectors and one by the auction purchaser.

25. Vide order dated January 28, 2015 whereas appeal(s) filed by three

objectors concerning first floor, second floor, third floor and terrace above were dismissed, the one filed by the auction purchaser was allowed. By a subsequent order dated March 18, 2015, the appeal filed by the objector concerning the ground floor was also dismissed following the reasoning in the order dated January 28, 2015. Simply stated, the learned DRT and learned DRAT held that in execution of the order dated March 18, 1993 the four floors and the terrace above could be sold, treating it to be a case of mortgage and additionally on account of an injunction order being passed by the Delhi High Court on May 15, 1992 and the sales under the agreement to sell being subsequent.

26. It is in the aforesaid factual backdrop of the facts, where the claim of the objectors flows through the same channel, the above captioned four writ petitions concerning property at 7/3, Old Rajinder Nagar, New Delhi are being decided together.

27. Section 25 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, reads as under:-

“25. Modes of recovery of debts.--

The Recovery Officer shall, on receipt of the copy of the certificate under sub-section (7) of section 19, proceed to recover the amount of debt specified in the certificate by one or more of the following modes, namely:-

(a) attachment and sale of the movable or immovable property of the defendant;

(b) arrest of the defendant and his detention in prison;

(c) appointing a receiver for the management of the movable or immovable properties of the defendant.”

28. Section 29 of the said Act reads as under:-

“29. Application of certain provisions of Income-tax Act.—

The provisions of the Second and Third Schedules to the Income-tax Act, 1961 (43 of 1961) and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income-tax:

Provided that any reference under the said provisions and the rules to the “assessee” shall be construed as a reference to the defendant under this Act.”

29. Section 30 of the said Act reads as under:-

“30. Appeal against the order of Recovery Officer.—

(1) Notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.

(2) On receipt of an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under sections 25 to 28 (both inclusive).”

30. Rule 4 and 11 of the Second Schedule to the Income Tax Act, 1961 read as under:-

“4. If the amount mentioned in the notice is not paid within the time specified therein or within such further time as the Tax Recovery Officer may grant in his discretion, the Tax Recovery Officer shall proceed to realise the amount by one or more of the following modes:

(a) by attachment and sale of the defaulters movable property;

(b) by attachment and sale of the defaulters immovable property;

(c) by arrest of the defaulter and his detention in prison;

(d) by appointing a receiver for the management of the defaulters movable and immovable properties.”

x x x x x

“11. (1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection :

Provided that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objection, upon such terms as to security or otherwise as the Tax Recovery Officer shall deem fit.

(3) The claimant or objector must adduce evidence to show that

(a) (in the case of immovable property) at the date of the

service of the notice issued under this Schedule to pay the arrears, or

(b) (in the case of movable property) at the date of the attachment,

he had some interest in, or was possessed of, the property in question.

(4) Where, upon the said investigation, the Tax Recovery Officer is satisfied that, for the reason stated in the claim or objection, such property was not, at the said date, in the possession of the defaulter or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the defaulter at the said date, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Tax Recovery Officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from attachment or sale.

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive.”

31. Rule 4 of the Second Schedule of the Income Tax Act, 1961, mirrors Section 25 of the Recovery of Debts due to Banks and Financial Institutions

Act, 1993, and one mode of recovery of a debt determined by the Debts Recovery Tribunal upon the determination attaining finality is by way of sale of the defaulter's immovable property. Rule 11 of the Second Schedule of Income Tax Act, 1961 contemplates a situation where a claim is preferred or an objection is made to the attachment or sale of any property, be it movable or immovable. As per sub-Rule (1) of Rule 11, either a claim may be preferred to the property attached or an objection made to the attachment or sale of the property. If made, the sub-Rule casts an obligation upon the Recovery Officer to investigate the claim or the objection and the proviso to the sub-Rule vests a discretion in the Recovery Officer not to make any such investigation if the claim or the objection is unnecessarily delayed. Thus, one can safely say that the proviso itself throws light on the legal position being that the Recovery Officer has a discretion vested with respect to the recovery proceedings when a claim is preferred or an objection is made to the attachment or sale of the property. As per sub-Rule (2) of the Rule, if the claim or objection is filed after the advertisement is issued inviting offers for sale of the property, the Recovery Officer is empowered to postpone the sale pending investigation of the claim or the objection and may do so upon such terms and furnishing security or otherwise as the Recovery Officer deems fit. The sub-Rule also throws light on the legal position, being that, the Recovery Officer has a discretion vested in the matter of even postponing a sale. As per sub-Rule (3), the claimant or objector is obliged to adduce evidence to show : in case of immovable property, that on the date of service of the notice issued under the Schedule upon the defaulter to pay, the objector has some interest in or was possessed of the property in question. The words in the sub-Rule '*some interest*' and

'or was possessed' are of importance and we shall discuss the same a little later. Sub-Rule (4) evinces that the scope of the inquiry which takes its colour from the preceding sub-Rule requires the Recovery Officer to decide whether the objector has proved that the subject property was not in the actual or constructive possession of the defaulter on the date of the attachment, the property has to be released wholly or to such extent as the Recovery Officer determines.

32. The Rules under the Second Schedule of the Income Tax Act, 1961 have to be understood in their contextual incorporation under the Recovery of the Debts due to Banks and Financial Institutions Act, 1993. Whereas income tax dues are recovered by proceeding against immovable property of a defaulter and not by way of enforcing a charge or a lien created under a mortgage, but dues determined under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 may be with respect to a mortgaged property and may be not.

33. We have hereinabove highlighted that the expression used in the Rules is *'some interest'* and *'was possessed'* in the sub-Rule 3 of Rule 11.

34. Property is a legal concept that grants and protects a person's exclusive right to own, possess, use and dispose of a thing. The term property does not suggest a physical item but describes a legal relationship of a person to a thing.

35. Real property consists of lands, tenements and hereditaments. Land refers to the ground, the air above, the area below the earth's surface and everything that is erected on it. Tenements include the land and certain intangible rights recognized by municipal laws related to the lands. A hereditaments embraces every tangible or intangible interest in real property

that can be inherited.

36. An interest describes any right, claim or privilege that an individual has towards real property. The law recognizes various types of interests in real property. A non-possessory interest in land is the right of one person to use or to restrict the use of land that belongs to other persons such as easementary rights. Non-possessory interest do not constitute ownership of land itself : holders of a non-possessory interest in real property do not have title and the owner of the land continues to enjoy the full rights of ownership, subject to any encumbrances. An encumbrance is a burden, claim or charge on real property that can affect the quality of title and the value and/or use of the property. Encumbrances can represent non-possessory interests in real property. Examples of encumbrances include liens, encroachments, easements, leases, restrictive covenants and protective covenants.

37. The following kinds of interests have been recognized in property:-

- (i) Right to receive voluntary and uncertain offerings at a worship;
- (ii) Priestly office or emoluments attached to it;
- (iii) Grants for maintenance;
- (iv) The office of Mutwali of a Wakf or of Shebait of a temple of Mohunt of a mutt;
- (v) Service tenures e.g. Ghatwali tenures in Bengal;
- (vi) An allowance granted;
- (vii) Personal inams;
- (viii) The right of pre-emption.

38. Though an agreement to sell does not create any title in an immovable property as understood by Section 54 of the Transfer of Property Act, 1882,

but it is settled law that objections to attachment of immovable property can be preferred under Order 21 Rule 58 of the Code of Civil Procedure by a person in whose favour there is a contract of sale of immovable property because the word '*interest*' contemplated by said Rule is not in the sense in which the expression '*interest*' has been used under Section 54 of the Transfer of Property Act, 1882. As held by a Division Bench of this Court in the decision reported as 94 (2001) DLT 841 (DB) Asha M.Jain Vs. Canara Bank & Ors., the attached immovable property can be sold subject to the interest that has been created in the property with possession handed over under an agreement to sell, and we may highlight that an interest is recognized in a property, where under an agreement to sell the entire sale consideration is paid and possession taken over by the purchaser from the seller with an irrevocable power of attorney executed by the seller in favour of the buyer, and falling within the interest irrevocably protected by Section 202 of the Indian Contract Act, 1872.

39. A plain reading of Rule 11 of the 2nd Schedule to the Income Tax Act, 1961 shows that if a person demonstrates an interest or establishes that he is in possession of the property attached, the Recovery Officer has to recognize said interest or possession and pass such suitable orders as are warranted. Needless to state, as per sub-Rule 6 of Rule 11 the decision is subject to a challenge before a Civil Court.

40. Thus, where the objector claims, as in the instant case, agreements to sell in their favour, with sale consideration fully paid and possession handed over to them, it would be sufficient interest and sufficient possession of the objector, for the possession and/or the interest to be recognized, if the agreement to sell precedes the date of the mortgage. In said circumstance,

the bank or the financial institution would be deemed to be in notice of the interest and the possessory title of the objector on account of Explanation II to Section 3 of the Transfer of Property Act, 1882, which reads as under:-

“Explanation II – Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.”

41. A note of clarification. The applicable Rules do not contemplate the objector to prove ownership of the subject property sought to be attached. It would suffice for the objector to plead some interest or being in possession of the property attached, and if the same is made good by the objector, the Recovery Officer is obliged to pass an order either lifting the attachment or continuing with the attachment and sell the property attached, but with the sale proclamation drawn up, clearly indicating to the prospective bidders the nature of interest or the possessory right of the objector, so that the bidder knows the said interest or the possessory right; and needless to state the final bundle of rights conferred upon the bidders if sale bid is accepted would be subject to the interest or the possession of the objector.

42. Since cases of different hues of possession are being filed in this Court concerning orders passed by the Recovery Officer, we would be obliged to speak a few more words on the subject of possession to guide the Recovery Officers. *De facto* possession can be understood as a person being in physical possession and *de jure* possession as the one which is possession in law. Constructive possession would be a possession through a representative, agent, tenant or a trustee. A person in *de facto* possession could be in adverse possession and since we find cases where the objector

simply claims possession for long and adverse to the defaulter, the Recovery Officers have to be guided as to what orders to pass and what should guide them to determine whether the person is, if at all, in adverse possession for the reason fraudulent claims are being put up by defaulters through their friends and well wishers. And we therefore proceed to discuss the concept of ‘*juridical possession*’.

43. Dealing with possession, in Chapter 9, Salmond On Jurisprudence (12th Edition), states that few relationships are as vital to man as that of possession, and we may expect any system of law, however primitive, to provide rules for its protection. Possession of material things is essential to life, it is the most basic relationship between men and things.

44. Elaborating the concept of possession, at page 266, the learned author has opined:

“But the concept of possession is as difficult to define as it is essential to protect. In the first place, possession is an abstract notion and involves the same sort of difficulties, which we have seen to arise with other abstract terms such as "law" and "rule". There is nothing which we can point at and identify as possession in the same way as we can do with concrete things such as tables and chairs. Moreover, it is an abstract term to which the traditional type of definition is as inappropriate as we saw it to be for the term "rule". Just as we could not locate the notion of a rule within some wider class of concepts, so too with possession we cannot define it by placing it in a wider class and then distinguishing it from other members of the class; for possession is, it would seem, is a class of its own.

A second cause of difficulty is the fact that possession is not purely a legal concept. Our discussion of ownership showed that possession differs from ownership in that the

former is of temporary duration whereas the latter is of a more permanent, ultimate and residuary nature. But possession differs from ownership in another quite different respect. ownership, as we saw, consists of a combination of legal rights, some or all of which may be present in any particular instance; and such rights imply the existence of legal rules and a system of law. With possession this is not so. A possessor is not so much one who has certain rights as one who actually has possession. Whether a person has ownership depends on rules of law; whether he has possession is a question that could be answered as a matter of fact and without reference to law at all. The notion of possession has application in a pre-legal society, and even perhaps outside society altogether. Of course in so far as statements about possession are statements of law, then they imply the existence of that law, but the existence of possession is independent of, and prior to, that of law. Whereas ownership is strictly a legal concept, possession is both a legal and a non-legal or pre-legal concept.”

45. At page 274, the learned author has opined that in a civilized society some protection of possession is essential. There are two methods of protecting the possession. Firstly, the possessor can be given certain legal rights, such as a right to continue in possession free from interference by others. Secondly, the law can protect possession by prescribing criminal penalties for wrongful interference and wrongful dispossession.

46. In relation to the former i.e. the first method by which law can protect possession, the learned author opines that the possessory right in rem can be supported by various sanctioning rights in personam against those who violate the possessor's right: he can be given a right to recover compensation for interference and for dispossession, and a right to have his possession restored to him.

47. The learned author goes on to explain that whenever such remedies are invoked, it will be important to ascertain whether a person invoking them actually has any possession to be protected. Consequently, a legal criteria has to be evolved to determine whether a person is in possession of an object.

48. But, legal concept of possession is not restricted to the commonsense concept of possession, namely physical control. Possession in fact is not a simple notion. The question whether in fact a person is in possession of an article depends on various factors such as the nature of the article itself and the attitudes and activities of other persons.

49. Possession may be lawful, it may be unlawful. It may be legal or illegal. The acquisition of legal possession would obviously be lawful and would of necessity involve the occurrence of some event recognized by law whereby the subject matter falls under the control of the possessor. But a problem arises where the duration for which possession is recognized is limited by the grantor or the law. Continuance of possession beyond the period specified by the grantor or recognized by law is not treated as a lawful possession. For example, a tenant acquires legal as well as lawful possession of the tenanted premises from the landlord with the express consent of the landlord but limited to the duration of the lease. On expiry of the lease, if the landlord does not consent to the lease being continued, the possession of such tenant would not be a lawful possession. The nature of possession being not lawful would entitle the landlord to regain possession.

50. Can he do so by entering upon the tenanted premises and physically throwing out the tenant?

51. From a commonsense point of view, lawful possession must be the state of being a possessor in the eyes of law. The possession must be warranted or authorized by the law; having the qualifications prescribed by law and not contrary to nor forbidden by the law.

52. But law recognizes possession as a substantive right or an interest. Continued possession of a person is recognized by law as a sufficient interest capable of being protected by the possessor, right being founded on mere fact of possession.

53. This concept of law relating to possession has been a source of fertile litigation and if I may use the expression, a lawyer's delight and a Judge's despair.

54. Salmond On Jurisprudence (12th Edition), page 294, while discussing possessory remedies has noted that in English law, possession is a good title of right against anyone who cannot show a better title. Thus, a possessor, including a wrongful possessor, has the rights of an owner with respect to all persons except the true owner. Many legal systems go much further and treat possession as a provisional or temporary title even against the true owner. A wrongdoer who is deprived of his possession can recover it from any person whatsoever, simply on the ground of his possession and where the true owner uses force to throw out the wrongdoer, these legal systems do not permit the true owner to set up his superior title to protect the possession which was regained by force. He is compelled to give up possession and then proceed in due course of law for the recovery of the thing on the strength of his ownership.

55. In the latter legal systems, the intention of the law is that every possessor shall be entitled to retain and recover his possession until deprived of it by an action according to law.

56. Legal remedies for protection of possession even against ownership are called possessory. Legal remedies for protection of possession or regaining possession based on ownership (title) are proprietary. In the modern and medievous civil law, the distinction is expressed by the contrasted terms petitorium (a proprietary suit) and possessorium (a possessory suit).

57. This duplication of remedies, with the resulting provisional protection of possession, has its beginnings in Roman Law. It became part of the Canon Law, where it received considerable extension, and through the common law it became a prominent feature of medieval Jurisprudence. It is a part of modern continental systems; but although well known to the earlier law of England, it has been long since rejected in England as cumbrous and unnecessary.

58. Reason why some legal systems recognize possessory suit as distinct from proprietary suits is that evils of violent self help are deemed serious and Therefore are discouraged. It is also based on the recognized principle of law that no one has a right to become a judge in his own cause. Civil society recognizes that where law recognizes a right and provides for a remedy to protect the right, the right has to be protected only as per the remedy provided by law.

59. Extended to the extreme it would mean: he who helps himself by force even to that which is his own must restore it even to the thief and recover the same as per a recognized legal procedure.

60. Section 6 of the Specific Relief Act recognizes a right of a person possessed of immovable property to recover possession thereof if dispossessed without his consent or otherwise than in due course of law.

61. What does the phrase '*due course of law*' mean? As explained in the report published 1992 Supp (2) SCC 29, East India Hotels Ltd. v. Syndicate Bank (Para 30):

“30. What is meant by due course of law? Due course of law in each particular case means such an exercise of the powers by duly constituted tribunal or court in accordance with the procedure established by law under such safeguards for the protection of individual rights. A course of legal proceedings according to the rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. To give such proceedings any validity, there must thus be a tribunal competent by its constitution, there is by law of its creation, to pass upon the subject matter of the suit or proceeding; and, if that involves merely a determination of the personal liability of the defendant, it must be brought within its jurisdiction by service of process within the State, or his voluntary appearance. Due course of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right determination of the controversy by proof, every material fact which bears on the question of fact or liability be

conclusively proved or presumed against him. This is the meaning of due course of law in a comprehensive sense.

62. But as we see it, the real problem lies where a person openly proclaims: Yes I am a trespasser, yes I admit that I wrongfully took possession of the property, but because I have continued to be in possession thereof over a sufficiently long period of time, my possession is a settled possession. It has given to me an enforceable right. Since I was dispossessed by force, please restore my possession.

63. Position of a person who lawfully enters upon possession is different than he who gains possession in an unlawful manner. The former would not be a trespasser. The latter would be. When right of the former to continue in possession is extinguished by law or by contract, continued possession is not akin to the possession of a trespasser. The possession, if original entry was under a lease would be that of a tenant at sufferance. If initial possession was permissive, possession would be simple at sufferance. Possession of a person who lawfully enters upon a property but retains it beyond the terms of the grant is treated as a juridical possession.

64. Decisions under Section 6 of the Specific Relief Act 1963, equating possession of a trespasser whose very entry was unlawful at par with the possession of a person who otherwise lawfully enters upon the property, with consent of the owner, but asserts a right to continue in possession after the agreed period during which he was to retain possession has expired would be illustrated of the principle of law to be adopted.

65. A peep into the legal precedents show a fairly hazy picture.

66. The fore runner of Section 6 of the Specific Relief Act 1963 was Section 9 of the Specific Relief Act 1877. It was the subject matter of discussion in various decisions.

67. In the report published as (1911)13 Bom.LR 1200 Hillava Subbava v. Narayanappa it was observed:

“No doubt, the true owner of property is entitled to retain possession, even though he has obtained it from a trespasser by force or other unlawful means: Lillu v. Annaji ILR (1881) 5 Bom. 387 and Bandu v. Naba ILR (1890) 15 Bom. 238.”

68. Speaking through to Chagla C.J., a Division Bench of the Bombay High Court, in the decision reported as AIR 1954 Bom. 358 Brig. K.K. Verma and Anr. v. UOI and Anr. opined as under:

"The statement of the law just referred to in Hill and Redman on Landlord and Tenant would rather go to show that in every case a landlord must express his intention by some act which is subsequent to the termination of the ,tenancy. and the reason for that seems to be clear because after the termination of the tenancy, - however the tenancy may be terminated, - there is as it were a neutral position created. The landlord may consent to the tenant continuing, may accept rent from him, in which case the tenant would become a tenant at will. He may, on the other hand, make it clear that he does not want the tenant to continue in possession in which case the tenancy on sufferance which was created by the termination of the tenancy would cease and the tenant would become a trespasser.

But, in our opinion, the position in English law is unnecessary to be considered because, as we shall presently point out, the law in India is essentially

different, and even assuming Mr. Desai is right that under the English law on the facts of this case the tenant became a trespasser, the same position would not arise under the Indian law. Under the Indian law, the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy, his possession is juridical and that possession is protected by statute. Under Section 9 of the Specific Relief Act, a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprives him of possession otherwise than in due course of law, but a trespasser who has been thrown out of possession cannot go to Court under Section 9 and claim possession against the true owner.

Therefore, our law makes a clear and sharp distinction between a trespasser and an erstwhile tenant. Whereas the trespasser's possession is never juridical and never protected by law, the possession of an erstwhile tenant is juridical and is protected by law. Therefore, as far as the Indian law is concerned, an erstwhile tenant can never become a trespasser. It may or may not be that in English law in certain circumstances he can become a trespasser and it does seem that the landlord can enter the premises and deprive the erstwhile tenant of his possession, but in India a landlord can only eject his erstwhile tenant by recourse to law and by obtaining a decree for ejectment.

(underlining emphasized)

69. In the report published as AIR 1968 SC 620 Lallu Yeshwant Singh v. Rao Jagdish Singh and Ors. , in para 11 of the report, 2nd passage above quoted from the decision of Chagla C.J. in K.K. Verma's case was noted and approval accorded in para 15 of the decision by recording as under:

In our opinion, the law on this point has been correctly stated by the Privy Counsel, by Chagla C.J. and by the full Bench of the Allahabad High Court, in the cases cited above.”

70. However, we may hasten to add that in the decision in Lallu Yeshwant Singh's case, the Supreme Court observed that law respects possession even if there is no title to support it.

71. On facts, the Supreme Court was dealing with a dispute between the plaintiff and the defendant pertaining to a Land Tenancy Act where the plaintiffs claim to be inducted as Sairda - Khillkar Cultivators and alleged forcible dispossession. The defendant pleaded that the right in favor of the plaintiff having ceased as per law, defendant was entitled to regain possession. The Board of Revenue took a view that possession of the tenant whose right has been so extinguished is not put to an end automatically and the land owner must be regain possession by following the procedure prescribed by the Tenancy Act. The High Court took a contra view, holding that the tenant could protect only lawful possession. The Supreme Court reversed the view taken by the High Court and restored the decision of the Board of Revenue.

72. Though without a detailed legal discussion, much less drawing a distinction between possession of a trespasser whose very entry was unlawful viz-a-viz right to continue in possession by a person whose initial entry was lawful but dispute was on right to continue in possession, a learned Single Judge of the Allahabad High Court, in the report published as AIR1960All227 Anant Bahadur Singh v. Ashtbhuja Baks Singh held that where a person entitled to possession based on title regains possession, but

by peaceful means, from a person not entitled to possession, the latter cannot recover possession on basis of mere possessory title.

73. The facts were that a widow transferred possession of property which had devolved through her husband and as per Hindu Law she had no right to alienate the same. She had a limited right to possess the property during her life time. Corpus vested in the reversioners. On her death, the reversioners of the husband took peaceful possession. The alienee brought an action for recovery of possession based on possessory title. It was observed:

“In the present case, the defendants did dispossess the plaintiff peacefully. Now that the rightful owners are in possession, the plaintiff, who has no title in the property, cannot obtain the aid of court to dispossess the rightful owners.”

74. Though not dealing with an issue directly relating to Section 6 of the Specific Relief Act 1963, jural concepts evolved in the decision reported as AIR 1974 SC 104 M.C.Chockalingam & Ors.Vs. V.Manickavasagam & Ors. give good guidance to understand the concept of lawful, legal and juridical possession. The Supreme Court was dealing with the claim of a lessee, whose lease had expired, to obtain a license to operate a cinema hall on the leased premises under the Madras Cinemas (Regulation) Act 1955. The rules framed there under, in particular Rule 13, viz-a-viz non owner occupants of a site required lawful possession of the applicant. It was urged by the lessee that notwithstanding lease having expired and the landlord having not consented to the continued occupation, till lessee was evicted by due process of law, his possession was lawful as also legal and Therefore he was entitled to the requisite license.

75. Noting the decision of Chagla C.J. in K.K. Verma's case (supra) as affirmed by the Supreme Court in Lallu Yeshwant Singh's case (supra), the Supreme Court held that lawful possession and juridical possessions are different concepts. A tenant holding over without the consent of the landlord would be in juridical possession. His possession would not be lawful. Notwithstanding that the landlord could evict such tenant through the medium of a process recognized by law, possession of the tenant, post efflux of the lease period, was and could not be treated as lawful possession. It was held that he may not be a trespasser as conventionally understood and to that extent it may be said that the possession is legal, but in jural concept the possession would be treated as a juridical possession.

76. In para 13 of the report, ratio of Lallu Yeshwant Singh's case (supra) was explained with reference to Section 9 of the Specific Relief Act 1877, in that, said Section was held as protecting juridical possession. To quote, the Supreme Court stated as under:

“In Lallu Yeshwant Singh's case AIR 1968 SC 620 where this Court considered the possession of a tenant after expiry of the lease, as in this case, as a juridical possession in the context of a provision similar to Section 9 of the Specific Relief Act.”

77. Black's law dictionary, 4th Edition (page 990), defines juridical as follows:

“Juridical: Relating to administration of justice or office of a Judge.”

78. In the same dictionary (page 1032) the word 'lawful' is defines as follows:

“Lawful: Legal; warranted or authorized by the law; having the qualifications prescribed by law; not contrary to nor forbidden by the law.”

79. Thus, lawful possession would mean a legal possession which is rightful or at least excusable and consistent with the superior right to possess in some other person i.e. the owner.

80. Decision of the Supreme Court reported as AIR 1996 SC 140 R.V.Bhupal Prasad v. State of A.P. highlights the applicability of the concept of a legal/lawful or juridical possession.

81. The Supreme Court referred to and explained its earlier decisions in Lallu Yeshwant Singh's case and M.C.Chockalingam's case.

82. In R.V.Bhupal Prasad's case the Supreme Court was dealing with a right to have a license renewed under the A.P. Cinemas (Regulation) Act 1955. In para 8 it was noted that a tenant who continues in possession after the expiry of a lease, though referred to as a tenant holding over, actually is a tenant at sufferance but where the landlord consents to the continued retention of possession, the tenant is holding possession under a tenancy at will. It was held that the possession under the former category would not be a lawful possession but would be a juridical possession. In para 9, with reference to its decision in M.C.Chockalingam's case meaning of the expression lawful possession was explained in the following words:

“...Lawful possession is not litigious possession and must have some foundation in a legal right to possess the property which cannot be equated with a temporary right to enforce recovery of the property in case a person is wrongfully or forcibly dispossess from it....We are clearly

of opinion that juridical possession is possession protected by law against wrongful dispossession but cannot per-se always be equated with lawful possession....Lawful possession means legal possession which is also rightful or at least excusable. Thus that which is not stricto legalo may yet be lawful. It should not be forbidden by law.... Lawful is wider in connotation than legal”

83. However, I would be failing if do not note that in para 11 of the report, the Supreme Court has noted that even a trespasser would be entitled to be evicted by a due process of law.

84. There are two maxims of law which need to be noted. First: *adversus extraneous vitiose possession prodesse solet* - prior possession is a good title of ownership against all who cannot show a better title. Second: *possession contra omnes valat praeter eur cui ius sit possessionis* - he that hath possession hath right against all but him that hath the very right.

85. If the 2 maxims are strictly applied, no possession can be protected without a right to possess against the owner of the property in whom law recognizes the right to possess.

86. However the maxim: *nemo debet esse iudex in propria causa* - no one should be judged in his own cause, is also recognized by law and this maxim is the foundation against permitting the owner to regain possession of his property without the aid of a court or a tribunal established by law i.e. compels the owner to regain possession in the manner prescribed by law.

87. Indeed, if people are allowed to be the judge of their own cause, there would be lawlessness in the society. More often than not there are

competing claims. More often than not a party asserts no right in the occupier who affirms a right in himself. The two must have the dispute resolved from the court of competent jurisdiction.

88. There are wheels and wheels within the laws. Niceties, caveats, exceptions to the rule and rules within rules have unfortunately become a part of every legal system.

89. Whatsoever and howsoever may be the theories of law, the common man understands law by instinct. His instinct guides him that whatever is rational and fair is lawful and anything which is irrational or oppressive is unlawful. But, more often than not, law is discovered in a court room through forensic battles fought at length by legal luminaries. On many an occasion, after hearing arguments, a Judge goes into legal transcendental meditations to unfathom the niceties of the law.

90. Instinct and commonsense would guide that where a man trespasses into somebody's property and proclaims no right to possess the property and states that I am a trespasser but please go to court to regain possession, such a claim cannot be countenanced inasmuch as it would protect a wrongdoer.

91. After all, possession may prima facie raise a presumption of a title, but when the facts are known, where is the place for a presumption? I wonder!

92. It could be urged that regaining lost possession, albeit, without creating a law and order problem and without resorting to violence, prima facie, from a commonsense point of view would not amount to taking advantage under an illegal action.

93. From a moralist point of view, why should a court come to the aid of a person who founds his cause of action upon an immoral or illegal act of his. The maxim *ex dolo malo non oritur actio* means: a right of action does not arise out of fraud. No court will lend its aid to a man who founds his cause of action on an illegal act. As observed by Lord Mansfield C.J. in (1775) 1 Cow 341 Holman v. Johnson:

“If, from the plaintiff's own stating or otherwise the cause of action appears to arise exturpicausa or the transgression or a positive law or this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”

94. Courts in India have struck a middle path. Where possession of a trespasser assumes the status of a settled possession, it is protected against forcible ejectment by even the true owner. The guiding principle of this middle approach is the observations of Lord Macnaghten in the celebrated decision of the Judicial Committee reported as 1907 AC 73 Perry v. Clissold wherein the principle was stated as follows:

“It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of Limitation applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title.”

95. Without expressly authorizing a person to occupy one's property and lose the right to possess the same, an owner may by his action, inaction or deeds do something which would be treated as acquiescence by the owner, resulting in the person entering into possession acquiring settled possession.

96. In the report published as 1 (2004) SLT 675 Rame Gowda v. M.Varadappa Naidu, recognizing the right of a owner who has been wrongly dispossessed of property to regain possession, if he can do so, peacefully and without the use of unreasonable force, only limitation placed was when the trespasser acquires effective possession or settled possession. In para 11 of the report it was observed that the sine qua non for settled possession or effective possession of a trespasser was when the same extended over a sufficiently long period of time and acquiesced to by the true owner. In relation to the concept of settled possession developed by various judicial pronouncements, noting the same in para 11 of the report, it was observed that the phrase ‘*settled possession*’ does not carry any special charm or magic, nor is it a ritualistic formula which can be confined in a straight jacket. However, following tests which could be adopted as working rules were evolved:

“(i) That the trespasser must be in actual physical possession of the property over a sufficiently long period;

(ii) That the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;

(iii) The process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and

(iv) That one of the usual tests to determine the equality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession.”

97. A deceitful, undercover or a trespass shrouded under darkness of secrecy; not to the knowledge, express or implied of the owner, howsoever long may be the duration of the possession would not amount to a settled possession. The reason for the law is that where a person knowingly permits another to take possession of his property and deal with the same he may encourage the trespasser to improve upon the property i.e. permit the trespasser to spend his time, money or energy on the property. Having encouraged the trespasser to do so, the owner would be precluded i.e. estopped from alleging that the trespasser has no right whatsoever in the property.

98. To put it differently, where the owner permits a trespasser to be in settled possession, he permits the status of the possession of the trespasser acquiring a status akin to that of a juridical possession. Thus, juridical possession or possession akin thereto in any case becomes the sine qua non for an actionable claim to resist possession being taken over.

99. It would therefore be wrong to state that every trespasser has a right to retain possession till evicted by a due process of law. If that was the legal

position there would have been no need for courts to evolve the concepts of legal possession, lawful possession, juridical possession, settled possession etc.

100. In legal possession or lawful possession the possessor has a claim recognized by law to enjoy possession of a property. The entry upon the property and its retention is with the consent or permission of the owner. In a case of juridical possession, the possessor asserts a legal right to possess and the facts on which the right is found is asserted have to be decided and since no one can be a judge in his own cause, the dispute has to be resolved by a lawful authority. But where a person asserts no right to possess a property but illegally holds on to it, nothing requires adjudication. The judicial forum has to decide nothing, or to put it differently there is not even a semblance of a claim. There is nothing juridical which exists.

101. To put it pithily '*juridical possession*' can be understood as possession founded on some right as was held in the decision reported as AIR 1956 All 709 Batra Vs. Laxmi Insurance Company Ltd. and this right could be settled possession for long.

102. Where possession is claimed under an agreement to sell post mortgage created, it would have to be seen very carefully by the Recovery Officer whether at all a proper mortgage was created and if it is a case where the mortgage is by way of deposit of title, it has to be ensured that the bank proves title document deposited with it and continuing to lie deposited with it. For if the buyer claims that the seller showed the original title document to the buyer, said statement on oath has to be believed if the bank does not

produce the original title deed, if it is a case of mortgage by deposit of title deed.

103. Regretfully, in spite of the Recovery Officer passing directions twice, firstly on April 28, 1999 and secondly on November 04, 2003 directing the bank to produce the title deeds, and none being produced the Recovery Officer held that the mortgage could be enforced. The record of the Original Application in which the order was passed shows that only a photocopy of the lease-deed dated March 30, 1963 was filed by the bank. There is just no evidence that the original title deed in question was with the bank.

104. There is a further problem. Acting under the General Power of Attoreny dated May 31, 1983 executed in his favour by ten legal heirs of Hari Ram, Ashok Sirpaul sold the lease-hold property to his brother Anil Sirpaul by executing a sale-deed on June 23, 1986. Thus title in the property vested in Anil Sirpaul on said date. Therefore no mortgage of the property by deposit of title deeds could be created by depositing the perpetual lease-deed dated March 30, 1963. The bank was totally negligent in not carrying out a proper title search. Further, from the facts noted by us in para 12 to 16, the position would be that the borrower company informed the bank in a letter written on October 12, 1990 under the authority of Ashok Sirpaul that the property would be transferred in the name of the company and would be offered as security. Within a few days, on October 21, 1990 Anil Sirpaul addressed a letter acknowledging his intention to create an equitable mortgage over the property and wrote that the leased-deed dated March 30, 1963 has been deposited with the bank. This letter can be treated as Anil Sirpaul's unequivocal intent to mortgage the property and admission qua

him that the title deed i.e. the lease-deed dated March 30, 1963 was deposited with the bank. But as regards third parties the bank had to show that as a matter of fact the title deed was deposited with the bank and continued to remain with the bank, for the reason if the lease-deed went outside the custody of the bank and in the hands of Anil Sirpaul an innocent third party had no means to verify and acquire knowledge of the mortgage.

105. The facts probablize that the officers of the bank were hand in glove with Anil Sirpaul and his brother Ashok Sirpaul who appear to have deposited the perpetual lease-deed with the bank to create a mortgage but managed to procure the same back, and we have good intrinsic evidence in the form of Ex.P-66 and Ex.P-68, concerning the contents whereof we have made a reference in para 17 above. Regretfully, the issues which the Recovery Officer had to focus on and discuss, which we have highlighted in paragraph 20 above have just not been kept in mind by the Recovery Officer and this omission permeates in the decision passed by the learned Debts Recovery Tribunal as also the learned Debts Recovery Appellate Tribunal.

106. Now, there is a serious problem with respect to the charge created by way of an equitable mortgage. Concededly Hari Ram was the perpetual lessee of the property under the perpetual lease-deed March 30, 1963 executed in his favour by the Land & Development Officer, which was registered by the Sub-Registrar New Delhi on April 16, 1963. On his death, 10 legal heirs were substituted as perpetual lease in the office of Land & Development Officer evinced by letter dated September 20, 1982 written by the Land & Development Officer. The 10 legal heirs executed a power of attorney on May 31, 1983 in favour of Ashok Sirpaul. In the letter dated

October 12/19, 1990 written by Ashok Sirpaul to the bank in his capacity as Director of the company he offered to create a charge over the property after it was transferred in the name of the company i.e. wrote that the company would consent to the charge being created and would deposit the title deed in the name of the company. Ashok Sirpaul did not follow up this letter and neither the bank insisted on the follow up action. The letter written by Anil Sirpaul would be his consent and act of creating the charge by way of an equitable mortgage by deposit of the perpetual lease-deed dated March 30, 1963, for which he did not have the authority because there were ten legal heirs of the perpetual lessee whose names were entered in the record of Land & Development Office as the perpetual lessees. The bank remained totally negligent. Everything was done unofficially as if it was a family affair. Further, by the year 1990 dawning, as noted above, much prior thereto, on June 23, 1986, acting on the strength of general power of attorney dated May 31, 1983, Ashok Sirpaul had executed a sale deed in favour of Anil Sirpaul and had the bank bothered to inspect the record of the Sub-Registrar which the bank was obliged to do, it would have dawned on the bank that Ashok Sirpaul could not, acting under the power of attorney dated May 31, 1983 offered to create a charge over the property by depositing the perpetual lease-deed dated March 30, 1963. He had no authority to write to the bank that as the general power of attorney holder of the ten recorded perpetual lessees he would convey the property in the name of the company and secured a charge by depositing the said title deed. As regards Anil Sirpaul, if he was to create the charge over the property by deposit of title deed, it had to be the sale-deed dated June 23, 1986 which was duly registered with the Sub-Registrar, Delhi.

107. The impugned orders, on the reasoning that the property was mortgaged in October, 1990 and the agreements to sell relied upon by the petitions are subsequent thereto, cannot be sustained for two reasons. Firstly, the bank has failed to prove creation of an equitable mortgage by deposit of the original perpetual lease-deed dated March 30, 1963 and its continued possession with the bank. Secondly that the deposit of the said perpetual lease-deed as the title document to encumber the property was on the strength of the general power of attorney dated May 31, 1983 executed by the ten legal heirs of Hari Ram in favour of Ashok Sirpaul, but before October, 1990, under the sale-deed dated June 23, 1986 Ashok Sirpaul had sold the property to his brother Anil Sirpaul and the registered sale-deed dated June 23, 1986 became the document of title under which Anil Sirpaul alone became the owner of the property. It was incumbent upon the bank to carry out a title search and if the bank did so it would have insisted that the equitable mortgage be created by Anil Sirpaul by depositing the sale-deed in question which the bank admittedly did not do. It is apparent that the petitioners or their predecessors-in-interest, to whom the original sale-deed dated June 23, 1986 was shown acted bona-fide to enter into the agreements to sell and after giving the entire sale consideration take possession of different floors of the subject property.

108. That leaves the issue concerning the injunction order dated May 15, 1992 passed by this Court and possessions handed over under agreements to sell subsequently.

109. Relying upon the decision reported as (2013) 5 SCC 397 Thomson Press (India) Ltd. vs. Nanak Builders and Investors Pvt.Ltd. & Ors., an

issue arising out of an application for impleadment in a suit speaking specific performance, it was urged by learned counsel for the petitioners that, in paragraph 53 of the opinion it was observed:-

“53. There is, therefore, little room for any doubt that the transfer of the suit property pendente lite is not void ab initio and that the purchaser of any such property takes the bargain subject to the rights of the plaintiff in the pending suit. Although the above decisions do not deal with a fact situation where the sale deed is executed in breach of an injunction issued by a competent court, we do not see any reason why the breach of any such injunction should render the transfer whether by way of an absolute sale or otherwise ineffective. The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent court may issue in the suit against the vendor.”

110. The argument was that since the bank did not prove a valid mortgage created by deposit of title-deed the petitioners were bona-fide purchasers for valuable consideration and in any case by themselves or through their predecessor-in-interest were in possession of different floors of the property when the attachment was effected and thus had sufficient interest as also possessory rights to defeat the attachment.

111. On the other hand, learned counsel for the respondents cited the decisions reported as AIR 1996 SC 135 Surjeet Singh vs. Harbans Singh & Ors. AIR 1967 SC 1386 Mulraj vs. Murti Raghunathji Maharaj. to urge to the contrary.

112. But we need not quibble with said decisions because, before a legal principle has to be applied, the facts have to be kept in mind. It is trite that it

is the facts which attract the law.

113. It is trite, and this principle was recognized in Mulraj's case (supra) that an injunction operates from the date it is brought to the notice of the party against whom the injunction order is issued. There is no proof that injunction order dated May 15, 1992 was ever served upon the defendants in the suit and in particular Anil Sirpaul, who entered into the collaboration agreement dated noted above on March 25, 1993. The four storyed building was built thereafter. There appears to be a total connivance of the officers of the bank evidenced from the fact that the injunction order was conveyed by the Superintendent (O) of this Court on January 27, 1994, and the formal order drawn up to be conveyed is as under:-

*“THE HIGH COURT OF DELHI AT NEW DELHI
(ORDINARY ORIGINAL CIVIL JURISDICTION)*

I.A.No.7042/92

IN THE SUIT NO.1788/92

INDIAN BANK

PLAINTIFF

VS.

GLOBERC AND ALLOYS P.LTD.

DEFENDANTS

TO

- 1. Globearc and Alloys P.Ltd. 3992, Ajmere Gate, Delhi*
- 2. A.L.Sirpaul, Director, M/s Globerc and Alloys P.Ltd. 7/2, Old Rajinder Nagar, New Delhi.*
- 3. Ashok Sirpaul/Director, M/s Globerc and Alloys P.Ltd. 7/2, Old Rajinder Nagar, New Delhi.*
- 4. Anil Sirpaul, Director M/s X Globberac and Alloys P.Ltd. 7/2, Old Rajinder Nagar, New Delhi.*
- 5. H.S.Lalwani, Director, M/s Globberac and Alloys P.Ltd.*

3992, Ajmere Gate, Delhi

- 6. Smt.Prabha Pradhan, Director M/s Globerac and Alloys P. Ltd., 82/C, Paschim Apartments, 8th floor, Opp.Kirti College, Dadar, Bombay*
- 7. Arun Kapoor, Director, M/s Globerac and Alloys P.Ltd. 19/3, Moti Nagar, New Delhi-110015.*

UPON MOTION made into this court by Sh.Nanda counsel for the plaintiff/applicant and UPON CONSIDERING the application (I.A.No.7042/92) u/o 39 rules 1 and 2 sec. 151 CPC (copy enclosed) and after hearing the counsel for the plaintiff THIS COURT doth order THAT you, your servants, employees or agents be and the same are hereby restrained from alienating, transferring, selling or otherwise creating any third party rights in properties bearing No.D-220, out of khasra 149, Shakarpur, Delhi-3 Mehrauli Road, Gurgaon and 7/3, Old Rajinder Nagar, New Delhi.

TAKE NOTICE that the application (I.A.No.7042/92) and 7084/92) are fixed for hearing on 13/5/94.

AND THIS COURT DOTH LASTLY ORDER that this order will punctually be observed, obeyed and carried out by all concerned.

Given under my hand and the seal of this court this the 27th day of Jan 1994.

*Sd/-
SUPERINTENDENT (O)I
FOR REGISTRAR”*

114. There is no proof of the injunction order ever being served. The suit was transferred to the Debts Recovery Tribunal when the Tribunal was constituted and was registered as OA No.868/1995. Further, prior to the

date when the injunction order was conveyed by the Registrar Original of this Court i.e. on January 27, 1994, on March 25, 1993 a collaboration agreement was entered into with the builders under which the first and third floor as also the terrace rights vested in the builder and the ground and the second floor were retained by Anil Sirpaul. On March 01, 1994 the builders handed over the first floor to Rajinder Kumar Malhotra. On June 10, 1994 they handed over the third floor as also the terrace above to Bhupinder Singh Bajaj and his wife. As regards Anil Sirpaul, he executed the agreement to sell concerning the ground floor on June 19, 1996 and regarding the second floor on March 01, 1994. The injunction order which had to be conveyed was formally drawn up and signed by the Registrar General of this Court on January 27, 1994. The dispatch registers and receipt registers of this Court for said period are not available, but our experience firstly as members of the Bar and then on the Bench is that it takes about 2 days to 3 days for the dispatch branch to enter the dockets in the dispatch register and thereafter send it to the process serving agency for service and the process service agency takes 2 to 3 weeks to serve the injunction orders. Thus there is intrinsic evidence that the agreements to sell entered into on March 01, 1994 by Anil Sirpaul and the builders concerning the second floor and the first floor respectively were entered prior to when the injunction order could possibly have been served and thus said purchasers in any case would not only be bona-fide purchasers but without any taint of the two floors being sold in contravention of the knowledge of the injunction order to the seller. Regarding the other portions of the property, today there cannot be any proof gathered as to when were the injunction orders served, if it all they were served because the dispatch and the receipt registers of the year 1994

are not available.

115. The writ petitions are accordingly allowed. The impugned orders dated July 30, 2004 passed by the Recovery Officer, September 21, 2011 passed by the Debts Recovery Tribunal and the orders dated January 28, 2015 and March 18, 2015 passed by the Debts Recovery Appellate Tribunal are set aside. Objections to the attachment filed are allowed holding that the writ petitioners have shown sufficient interest including protectable possession. Sale effected is set aside with a direction that the purchaser would be refunded the bid amount deposited.

116. Parties shall bear their own costs in the writ petitions.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

MAY 13, 2016
skb/mamta