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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on: 23/07/2018****Judgment Delivered on : 07/08/2018****Writ Appeal No. 321 of 2017***{Arising out of order dated 11.08.2017 passed in Writ Petition (C) No. 1995 of 2017 by the learned Single Judge}*

Dharmendra Kumar S/o Shri Ram Kishore Baghel Aged About 28 Years Occupation Hotel Business Tenant Sapphire I N N Hotel Tikara Para, Ring Road No. 1, Rajendra Nagar Raipur, District Raipur Chhattisgarh R/o C - 25, Bajaj Colony, Sector 1 Ring Road No. 1, Rajendra Nagar Raipur, Police Station Tikara Para Raipur Civil And Revenue District Raipur Chhattisgarh Pin 492001

---- Appellant**Versus**

1. District Magistrate Raipur, Police Station Civil Lines, Raipur, Revenue District Raipur Civil District Raipur, Chhattisgarh P I N 492001
2. Tahsildar, Raipur, Police Station Civil Lines, Raipur, Revenue District Raipur, Civil District Raipur, Chhattisgarh Pin 492001
3. Station House Officer, Police Station Tikarapara, Raipur Revenue District Raipur, Civil District Raipur, Chhattisgarh Pin 492001
4. Axis Bank Limited, Through Prescribed Authority, Tanawgrasta Aasti Prabandhan Vibhag East Nagaland House, Saptam Tal Seventh Floor 11, Saxpiar Sarini, Police Station Saxpiar Sarini, Kolkotta, Revenue District Kolkotta Civil District Kolkotta, P I N 700071
5. Subhas Sharma S/o Shri L.K.Sharma Aged About 58 Years R/o H I G - 109/ A Shailendra Nagar, Raipur Proprietor M/s Hotel Sapphire Inn, Ring Road No. 1 Near Ashoka Milleneum, Raipur Police Station Tikarapara, Raipur Revenue District Raipur Civil District Raipur, Chhattisgarh P I N 492001

---- Respondents

For Appellant	: Shri Yashwant Tiwari, Advocate
For Respondents/State	: Shri A.S.Kachhawaha, Additional Advocate General
For Respondent No. 4	: Smt. Fouzia Mirza, Advocate
For Respondent No. 5	: Shri Aman Kesharwani, Advocate.

**Hon'ble Shri Ajay Kumar Tripathi, Chief Justice and
Hon'ble Shri Prashant Kumar Mishra, Judge**

C.A.V. Judgment

Per Ajay Kumar Tripathi, Chief Justice

1. The Appellant claims himself to be a tenant and in occupation of a property known as "Sapphire Inn" situated at Tikrapara, Ring Road No. 1, Rajendra Nagar at Raipur. He filed a writ application challenging the decision dated 01.06.2017 passed by the District Magistrate, Raipur, where despite his objection that he is a lessee and was in possession of the said premises and could only be evicted in accordance with the provisions contained in Chhattisgarh Rent Control Act, 2011, the possession of the property was handed-over to the Axis Bank.

2. Axis Bank, the secured creditor filed an application under Section 14 of the Secularization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the SARFAESI Act') before the District Magistrate, Raipur seeking assistance for taking physical possession of the secured asset. The District Magistrate entertained the application of the Axis Bank and after hearing the Bank and the debtor/borrower, namely one Shri Subhas Sharma, allowed the application vide his order dated 01.06.2017.

3. What is noticeable is that instead of the borrower being aggrieved by the decision of the District Magistrate, who exercised his powers under the SARFAESI Act, the lessee came forward and decided to challenge the

decision of the District Magistrate, Raipur by filing writ application which was registered as Writ Petition (C) No. 1995 of 2017.

4. The learned Single Judge heard the parties but decided to dismiss the writ application of the Appellant *i.e.* tenant vide his order dated 11.08.2017, therefore, the writ appeal.

5. Argument on behalf of the Appellant against the impugned order of the learned Single Judge is that since the Appellant was a rightful tenant of the property in question and was said to be in possession of the property by virtue of the said registered valid lease, the exercise of power by the District Magistrate under Section 14 of the SARFAESI Act ignoring the claim and objection of the Appellant has violated his right which was created by the lease, which is still subsisting. He takes a stand that since the District Magistrate has allowed the Axis Bank to take possession of the stressed property, the Bank has taken possession and sealed the premises which has serious repercussions for him as he is being prevented from using the property as a lessee. He had a right to raise objections before the District Magistrate that the order allowing possession of the property would amount to his eviction which cannot be done under the SARFAESI Act. If he has to be evicted, that eviction can only be carried out by an authority under the Chhattisgarh Rent Control Act, 2011, which is a codified law governing landlords and tenants.

6. To support such a proposition, reliance has been placed by the learned counsel for the Appellant on two judgments of Hon'ble Supreme Court which are the cases of **Vishal N. Kalsaria v. Bank of India & Others**; reported in (2016) 3 SCC 762 as well as the decision rendered by the Hon'ble Supreme Court in **Indian Bank v. Nippon Enterprises South & Others**; reported in (2016) 15 SCC 79.

7. The sum essence of the two decisions of the Hon'ble Supreme Court is that once a tenancy is created, tenant can be evicted only after following due process of law as prescribed under the provisions of Rent Control Act. Provisions of the SARFAESI Act cannot be used for evicting a rightful tenant as that would amount to stultifying the statutory right and protection given to a tenant.

8. Since the SARFAESI Act and the State Rent Control Act operate in completely different spheres, therefore, SARFAESI Act cannot be used to override the provisions of the Rent Control Act.

9. No doubt, the Hon'ble Supreme Court explained the ambit of the two laws and its interplay i.e. the SARFAESI Act and the State Rent Control Act, but what is noticeable and of significance is that the judgment of the Hon'ble Supreme Court was rendered in **Vishal N. Kalsaria** (supra) on **20.01.2016** and that of **Indian Bank** (supra) on **17.02.2016**. Both the dates are significant for the reason that the law laid down therein has undergone a sea change when the Legislatures decided to amend the SARFAESI Act *w.e.f* **01.09.2016**.

10. Section 17(4A) has been incorporated in the SARFAESI Act of 2002 where now a tenant has been given statutory remedy by moving the Debts Recovery Tribunal if he claims any right or protection as a *bona fide* tenant.

11. Section 17 and especially sub-section (4A) of the SARFAESI Act, after the vital amendment brought about on 01.09.2016, reads as under:

(4A) Where—

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in

relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,—

- (a) has expired or stood determined; or
 - (b) is contrary to section 65A of the Transfer of Property Act, 1882; or
 - (c) is contrary to terms of mortgage; or
 - (d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act; and
- (ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act."

12. After 01.09.2016, the Debts Recovery Tribunals have been conferred jurisdiction and power to go into the issue of a tenancy and test the *bona fide* of the said tenancy. Whether such tenancy is only a ploy or a setup to resist any action taken by a secured creditor against a borrower or not has to be decided by the said forum alone in cases of enforcement of a security interest.

13. The amendment therefore, brought about in Section 17(4A)(ii) of the SARFAESI Act, has overcome the jurisdictional issue or the limitation which the Debts Recovery Tribunal may have had prior to 01.09.2016.

14. In our opinion, therefore, the stand of the Appellant that no action can be taken against him by virtue of being a tenant except under the State Rent Control Act is no longer available to him and to that extent, the ratio of the two decisions rendered by the Hon'ble Supreme Court in the cases of **Vishal N. Kalsaria** (supra) as well as **Indian Bank** (supra) may not come to his rescue. Sufficient safeguards have now been provided by the Legislatures within the framework of the SARFAESI Act by giving an opportunity to a tenant to raise his plea and defence, looking for protection against any action which may amount to his ouster, under the SARFAESI Act.

The intent of the Legislature is to provide a common forum and platform if an action is taken under the SARFAESI Act

15. The alternative argument, thereafter made at the Bar on behalf of the Appellant is that the amendment dated 01.09.2016 would be prospective in nature and any action initiated prior to the said amendment would be covered by the law as laid down by the Hon'ble Supreme Court in the cases of **Vishal N. Kalsaria** (supra) as well as **Indian Bank** (supra).

16. Learned counsel for the Appellant submits that the Axis Bank filed an application No. 108/B-121/Year 2015-16, therefore, the process under Section 14 of the SARFAESI Act was set into motion on such filing and / or when notices came to be issued upon the borrower on 22.03.2016, even though the order may have come to be passed on 01.06.2017, by the District Magistrate. The cause of action therefore has arisen for the Appellant prior to 01.09.2016 and therefore, his case is required to be decided under the old law and within the framework of the interpretation given by the Hon'ble Supreme Court.

17. Without going into the controversy as to when the Appellant was inducted as a tenant and whether it was done with the object of jeopardizing the interest of the secured creditor *i.e.* the Bank etc., the fact is that there is no clear evidence on record that the tenancy so created in favour of the Appellant was with due knowledge and approval of the Bank. If something has been done surreptitiously, may be with an oblique motive, the same cannot be used as an advantage or as a front or a shield by a borrower when the asset becomes a stressed asset. Even otherwise, the proceeding was initiated before the District Magistrate under the SARFAESI Act against the borrower and the tenant was nowhere in picture. He did appear before the District Magistrate, Raipur and filed his objection, but according to our

opinion, cause of action would only arise once an order adverse to the interest of the borrower is passed by the District Magistrate in exercise of power under Section 14 of the SARFAESI Act. Nobody can argue that mere filing of an application is a cause of action. No cause of action would arise if the District Magistrate decides to throw out the application of a secured creditor under Section 14 of the SARFAESI Act. Can such rejection of the application on behalf of the Bank be said to be a cause of action for a borrower or a tenant, claiming under him? Obviously not. It is only when an adverse order is passed detrimental to the interest of the borrower or the tenant claiming under him that the cause of action would arise.

18. In the present context, the order of the District Magistrate has been passed under Section 14 of the SARFAESI Act on 01.06.2017 i.e. almost eight months after the law had undergone a change on 01.09.2016. Therefore, if any challenge is made to the said order of the District Magistrate, the correctness or otherwise will have to be tested in the context of the law in existence and not what it was before the amendment.

19. In view of the above, even this argument made on behalf of the Appellant is required to be rejected.

20. It is not that the Appellant has been left remediless. The Legislatures have decided in their wisdom, keeping in mind inputs that in a large number of cases, where assets have become stressed assets, borrowers are using tenants as a defence and putting at risk public money at stake. They have decided to provide a forum even to the tenants within the framework of the special statute. It can be nobody's case that they will not be governed by the existing legal provision and they can still be allowed to delay and derail the proceedings under the SARFAESI Act by using a tenant,

against any action which are mandated, including attachment of properties as contemplated under Section 14 of the SARFAESI Act.

21. In such a situation, it is our view that a tenant cannot now have an independent right or status to bifurcate the proceedings and agitate the issue before different forums. A composite forum which has been now created i.e. Debts Recovery Tribunal under Section 17(4A) of the SARFAESI Act addresses all issues including protection which a tenant would like to claim, may be by virtue of a valid subsisting lease.

22. The Appellant therefore has a valid judicial forum available to him to take care of his tenancy or his right created under the tenancy provided it is *bona fide*, valid, legal and not being used as a front on behalf of a borrower to shield his interest as a proxy.

23. Learned counsel representing the Bank submits that the law has undergone a significant change after 01.09.2016. The amendment was brought about by the Legislatures by incorporating Section 17(4A) with a rightful intent since it was experienced that the plea of tenancy *etc.* was being used as a method and methodology of resisting actions and forestalling implementation and enforcement of the provisions of the SARFAESI Act.

24. It is his stand that the law laid down by the Hon'ble Supreme Court prior to 01.09.2016 on such issue, therefore, may no longer apply since the interpretation or the ratio which was given in the two decisions of which much emphasis has been placed by the Appellant had been rendered on the basis of provisions before the amendment came into force.

25. Further submission on behalf of the Bank that the learned Single Judge has rightly taken note of the two decisions which have been rendered by the Hon'ble Rajasthan High Court where similar issues and propositions

came up for consideration and the view taken by the said High Court in the two decisions extracted in the impugned order are reproduced hereinbelow since they have relevance:

"11. The Rajasthan High Court in Samtel Color Ltd. v. State Bank of India & others {S.B. Civil Writ Petition No. 11302/2016 decided on 17.10.2016} repelling the similar contention held as under:-

"10. I am afraid, there is no force in the contention of Mr. Kamlakar Sharma. For one, resort to the jurisdiction of this Court under its equitable extraordinary jurisdiction under Article 226 of the Constitution of India cannot be equated with a right to appeal. In the aforesaid context, the mere laying of writ petition against public notice dated 11-7-2016, does not entitle the petitioner to claim that the sub-sequent amendment to Section 17 of the Act of 2002 effective 1-9-2016 if operated against it would entail denial of a vested legal right. In the instant case in the event the petitioner company is required to avail the alternative remedy now obtaining under Section 17 of the Act of 2002 against the public notice dated 11-7-2016 it would not thus entail denial of a vested right. The expansion of the jurisdiction of the Debt Recovery Tribunal jurisdiction by way of the amendments to Section 17 of the Act of 2002 effective 1-9-2016 does not create any disability for the petitioner company nor burdens it with a new duty in respect of a transaction completed. Contrarily it confers a right to avail a statutory remedy removing a lacunae. Under Section 17 of the Act of 2002 as existing prior to 1-9-2016 which even while the petitioner company aggrieved of the public notice dated 11-7-2016 could have taken proceedings under the then extant law as an aggrieved person, it could not have been granted the relief of being put back in possession even if the Debt Recovery Tribunal had theoretically found its rights unlawfully contravened by the secured creditors in dispossessing it from the land on sub-lease with it. This was so held in the case of Harshad Goverdhan Sondagar v. International Assets Reconstruction Company Limited (2014) 6 SCC 1 observing that a person other than a borrower if aggrieved of being dispossessed by the secured creditor under the Act of 2002 could not be put back in possession by the Debt Recovery Tribunal in view of the limitation of the language of Section 17(3) of the Act of 2002 then obtaining. The amendment to Section 17 of the Act of 2002 effective 1-9-2016 sought to overcome the said jurisdictional limitation of the Debt Recovery Tribunal. It is thus plainly curative in nature as would appear from the background facts herein below detailed."

12. Yet in another judgment, the Rajasthan High Court in the matter of **M/s. Alpha Beta Shiksha Samiti (Regd.), Jaipur v. State of Rajasthan** {AIR 2017 Rajasthan 81} has struck a similar proposition as under:-

“7. Even though this Court has taken note of the arguments advanced by both the sides at extenso, but, this Court is not inclined to enter into the same and decide the case on merits, as it is of the opinion that specific remedy has been provided to a tenant by insertion of sub-section (4A) vide Act No. 44 of 2016 w.e.f. 01.09.2016 and sub-section (i) of Section 17(4A) of the SARFAESI Act inter alia provides that any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether the lease or tenancy (a) has expired or stood determined; or (b) is contrary to Section 65A of the Transfer of Property Act, 1882; or (c) is contrary to terms of mortgage; or (d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of Section 13 of the Act. Contention of learned Senior Counsel appearing on behalf of the petitioner that such remedy would not be available to the petitioner as aforesaid provision would apply prospectively only and pending cases would not be affected thereby is noted to be rejected. In the present case, dispossession notice has been issued on 23.07.2016 whereas amendment in Section 17 of the SARFAESI Act introducing Section 17(4A) came into force w.e.f. 01.09.2016, but there is no warrant on any of the said provisions to take a view that remedy is provided to a person, who in an application under sub-section (1) claims any tenancy or leasehold rights upon the secured asset. In the present case, the petitioner is claiming tenancy rights and filed writ petition before this Court on 29.07.2016, at a time when the aforesaid remedy was not provided by the statute to the petitioner-tenant, but now when sub-section (4A) has been inserted in Section 13 (sic 17) to specifically provide remedy to the persons, who claims any tenancy or leasehold rights upon the secured asset, the petitioner has to first approach the Debts Recovery Tribunal.”

26. Learned counsel for the Bank reiterates that the Legislatures have now provided a forum to the tenant *i.e.* the Appellant and he has freedom to move the Debts Recovery Tribunal with all his objections and the same will be tested on its own merits. He cannot be allowed to dilute, delay or divert

the SARFAESI proceedings by trying to drag the issue before a Rent Controller.

27. Learned counsel for the State takes stand in favour of the decision rendered by the District Magistrate. His submission is that the District Magistrate has rightly exercised his power vested in him under Section 14 of the SARFAESI Act and the Appellant, if he is a rightful tenant, is free to approach the Debts Recovery Tribunal. In fact, the District Magistrate has rightly not commented on the issue and status of the Appellant because that may have created some kind of prejudice either in favour or against.

28. The Court also takes note of the fact that the burden of carrying the litigation against the decision of the District Magistrate has been placed on the shoulders of the tenant *i.e.* the Appellant. Somehow the borrower, who is Respondent No. 5 has decided to make only a notional presence and may be to watch the proceedings from the sideline because there was hardly much assistance or arguments which came to be made on his behalf when the appeal was being heard.

29. This Court, while dealing with the Appeal and testing the validity of the order passed by the learned Single Judge in the writ petition has deliberately not taken note of the other details of the factual position behind the present litigation for the reason that the focus of the argument in appeal was more on the legal questions and interpretations about the provisions related thereto rather than the background under which the Bank granted loans *etc.* to the borrower or when and how the tenant came to be inducted in the property. Those aspects will be surely dealt with before the forum which is vested with the jurisdiction.

30. In totality, therefore, we do not find any merit in the appeal. The decision or the interpretations given by the learned Single Judge to the dispute, cannot be said to be erroneous in any manner. The decision is upheld.

31. The appeal therefore has no merit and it is dismissed.

Sd/-
(Ajay Kumar Tripathi)
CHIEF JUSTICE

Sd/-
(Prashant Kumar Mishra)
JUDGE