

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.15 OF 2019

Modinasab Indikar
Adult, Indian Inhabitant,
R/at, Survey No.139/1,
Plot No.77, “Khariachemband”
Pulvado, Benaulim, Salcete, Goa.

.... Appellant

V/s

1. Board of Directors of Indian Overseas Bank, represented by its Chairman and Chief Executive Director, 763, Anna Salai, Chennai – 600 002.
2. Indian Overseas Bank, Commercial Branch, State Bank Staff Training Centre Bldg., Patto Plaza, Madgaon, Goa – 403 001.
3. Authorized Officer and Assistant General Manager, Indian Overseas Bank, Commercial Branch, State Bank Staff Training Centre Bldg., Patto Plaza, Madgaon, Goa – 403 001.
4. Hannor Pharma, Flat No.UG-F1, (House No.306/A), Upper Ground Floor of Building “Audi Residency”, Dando Benaulim, Salcete, Goa – 403 716.
5. Manish Jagesh Goel, R/at Survey No.139/1, Plot No.77, Khariachemband Pulvado, Benaulim, Salcete, Goa.

6. Nishi Manish Goel,
R/at Survey No.139/1,
Plot No.77,
Khariachemband Pulvado,
Benaullim, Salcete, Goa.

7. The District Magistrate,
Salcete, Goa – 403 716.

8. The Mamlatdar,
Salcete Taluka, Margao, Goa.

9. The Senior Inspector of Police,
Kolva Police Station, Goa.

.... Respondents

Ms. Maria Nedumpara authorised by Advocate Shri C.J. Joveson, Advocate
for the Appellant.

Shri V. Ajay Kumar, Advocate for the Respondents No.1 to 3.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 14th February 2020

ORAL JUDGMENT:

The appellant claims to be a tenant. The first respondent is the Board of Directors of the second respondent Bank; the third respondent, the authorised officer, that is the Assistant General Manager of the Bank; and the fourth respondent, according to the Bank, does not exist.

2. To ascertain the identity of the fourth respondent, I have asked the learned counsel for the appellant. She has then consulted the appellant present in the Court. He too has said he has no idea.

3. The fifth and sixth respondents are the borrowers. The seventh respondent is the District Magistrate; the eighth respondent is the Mamlatdar; and the ninth respondent, the SI of Police.

4. As narrated by both the learned counsel, the fifth and sixth respondents borrowed the money in 2008 and later defaulted in repaying it. So the Bank has approached the DRT to recover that money, and those proceedings are said to be pending. Pending those proceedings, the Bank invoked the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (“the Securitisation Act”). It issued notice under Section 13 of the Securitisation Act. It was on 24.11.2016.

5. To the Bank’s notice under Section 13 of the Securitisation Act, the fifth and sixth respondents, that is the borrowers, did not respond. Then, the Bank invoked Section 14 and approached the District Magistrate for taking possession of the secured asset. In turn, on 25.07.2017, the District Magistrate passed an order, requiring the Mamlatdar to take possession of the secured asset, with the help of the police, and deliver it to the Bank.

6. In tune with the District Magistrate's order, on 08.09.2017, the Mamlatdar and the Bank officials, along with the police, are said to have gone to the secured asset. Then, the borrowers, as the Bank’s counsel maintains, informed the Mamlatdar and others that “a case was filed”, though they did not provide the details. Therefore, the Mamlatdar and the Bank Officials returned.

7. Later, the Bank received the summons in Civil Suit No.23/2017

from Fast Track Court II, Margao. In fact, the appellant claimed to be the tenant. He questioned the Bank's efforts to dispossess him. On the date of the first hearing, the Bank filed its written statement, besides filing a reply in the appellant's interlocutory application for stay. That apart, the Bank also applied under Order VII Rule 11 of CPC, requiring the trial Court to reject the plaint because it revealed no cause of action and the suit is barred by law, too.

8. Initially, the trial Court granted no stay but later, according to the Bank's counsel, the appellant mentioned the matter out of turn without notice to the Bank and secured an ex parte stay. It was on 21.02.2018. Eventually, the Trial Court rejected the plaint on 11.01.2019. The rejection was on the premise that the Civil Court has no jurisdiction and that the plaint revealed no cause of action. Aggrieved, the appellant has filed this First Appeal.

Submissions:

Appellant:

9. Ms. Maria Nedumpara, the learned counsel for the appellant, advanced the arguments. At that stage, I queried with the advocate whether she had the wakalatnama; then, she submitted that though she had no wakalatnama she was willing to file one. So I permitted her to file wakalatnama signed by the appellant, who is present in the Court. The wakalatnama filed, the learned counsel has resumed her submissions.

10. Ms. Maria Nedumpara has submitted that Section 17 (4) of the Securitisation Act sets out the grounds of tenancy that could be considered by the DRT. But here the tenant has raised larger issues which could not be decided by the Tribunal. Therefore, it is unexceptionable that the appellant has approached the Civil Court, which alone could grant the relief the appellant has sought. In other words, Ms. Nedumpara has insisted that the Civil Court does have jurisdiction.

11. To elaborate, Ms. Nedumpara has also contended that tenancy falls under List II, that is the State List. So the scope of central legislation concerning the disputes involving a tenant is limited. Even in that context, the Civil Court must have jurisdiction.

12. When the Court queried about whether the appellant has filed any proof before the trial Court about the tenancy, Ms. Nedumpara has submitted that the tenancy is oral and equitable. When I further queried about any rent receipts, she has submitted that she is not aware of that. Later, she has also submitted that under equitable tenancy, the payment of rent assumes no importance. Nevertheless, Ms. Nedumpara has repeatedly told the Court that if this Court remands the matter, the appellant will place every proof before the trial Court and establish that he is the tenant.

13. About the cause of action Ms. Nedumpara has drawn my attention to the Supreme Court judgment in *Dhulabhai v. The State of Madhya Pradesh*¹ and contended that the suit is eminently sustainable, but

the trial Court has failed to consider it. Thus, she has urged this Court to allow the appeal.

Respondents:

14. Shri Ajay Kumar, the learned counsel for the respondent Bank, has submitted that the appellant as the alleged tenant had been nowhere in the picture until the District Magistrate passed the order under Section 14 of the Securitisation Act. According to him, the notice under Section 13 of the Act was issued on 24.11.2016, and the District Magistrate passed the order under Section 14 on 25.07.2017. For all these months, the tenant did not choose to agitate the issue.

15. To elaborate, Shri Ajay Kumar has also submitted that the Bank published the notice in the newspapers. Even then the alleged tenant did not respond. He has also submitted that though the Bank officials visited the property on more than one occasion, they found no other person than the respondents no.5 & 6, the original borrowers and owners, at the secured asset.

16. On the objective of the Securitisation Act and the devious devices the borrowers adopt, Shri Ajay Kumar has drawn my attention to the Supreme Court's judgment in *Bajrang v. Central Bank of India*². He has submitted that the appeal lacks merit and deserves to be dismissed. Finally, Shri Ajay Kumar has submitted that though both before the trial

AIR 1969 SC 78

Court and before this Court the respondent nos.5 & 6, that is the owners and borrowers, were put on notice, they did not respond. Had there been any tenancy, they would have approached and informed the Court about it. According to him, that might have, in the end, benefited their own cause—buying more time.

Petitioner's Reply:

17. In reply, Ms. Nedumpara has submitted that if at all the landlord remained unresponsive, the tenant could not be blamed for that. Then, she has once again wanted the Court to remand the appeal to the trial Court, so the appellant could establish his case.

18. Heard Ms. Maria Nedumpara, the learned counsel for the appellant, and Shri V. Ajay Kumar, the learned counsel for the respondents no.1 to 3.

Discussion:

19. Indeed, as to the borrowing by the respondents 5 and 6, their defaulting the loan, and their suffering orders under the Securitisation Act, the facts are not disputed. The dispute concerns the appellant: Is he a tenant?

20. The appellant filed Civil Suit No.23/2017 before the Fast Track Court-II, Margao. In that suit, the appellant sought various reliefs. The Bank appeared and filed its counter-pleadings. Besides, it has also applied under Order VII Rule 11 of CPC. True, the appellant initially secured an

interim order, which remained in force until the suit was dismissed. Eventually, the trial Court took up the Bank's application under Order VII Rule 11 and passed the impugned order. It rejected the plaint.

21. In the impugned order, the trial Court noticed that the appellant wanted the trial Court to declare the Supreme Court's judgment in *Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd.*³ as “*sub silentio*, nay *per incuriam* and to declare that investiture of a jurisdiction of the District Magistrate”. Faced with this plea, the trial Court has held that it has no jurisdiction to sit over the Supreme Court's judgment and consider its correctness, much less declare that the judgment has “gone in silence” about certain statutory aspects of the Securitisation Act. As to the cause of action, the trial Court has found that the plaint on its comprehensive reading has revealed no cause of action.

Has the trial Court erred in rejecting the plaint?

22. The scope of Order 7, Rule 11 needs no reiteration. Challenged as to its sustainability, the plaint should survive on its own—based on the averments it contains. And the documents produced along with the plaint should also form part of the plaint. At that stage, the defence, if any, stands disregarded. Culled out from the judicial precedents, the fundamental aspects of Order 7, Rule 11 are that this provision is not exhaustive, nor does it affect the inherent powers of the court.

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(2014) 6 SCC 1

23. If we examine the propositions of law further, the trial court may well remember that if a meaningful (and not formal) reading of the plaint shows that it is vexatious and meritless, disclosing no right to sue, the court should exercise its power under Rule 11 to ensure that the requirement of law is fulfilled. And if clever drafting has created the illusion of a cause of action, it should be nipped in the bud. “An activist Judge is the answer to irresponsible lawsuits.”⁴ In *Ram Singh v. Gram Panchayat, Mehal Kalan*⁵, the Supreme Court noted when the suit is barred by any law, the plaintiff cannot be allowed to circumvent the bar by clever drafting. Finally, we may note that the court should look into not only the plaint averments but also the documents filed and referred to in the plaint. It is settled law that where a document is sued upon and is referred to in the plaint, that document gets incorporated by reference in the plaint⁶.

24. True, the appellant has relied on *Dhulabai*, rendered by a Constitution Bench of the Supreme Court. It concerns the remedy of a party in the face of a constitutionally invalidated provision. It pays to examine the facts of *Dhulabai*.

25. In *Dhulabai*, the appellants are dealers in tobacco. They get their tobacco locally within the state or import it from outside. Under the

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T. Arivandandam v. T.V. Satyapal, AIR 1977 SC 2421

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(1986) 4 SCC 364

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Church of Christ Charitable Trust And Educational Charitable Society v. Ponniamman Educational Trust, 2012 SCC 8 706

Madhya Bharat Sales Tax Act, Section 3 requires every dealer to pay tax regarding sales or supplies of goods in Madhya Bharat from 1st May 1950. Under the Act, the Government issued several notifications between April 1950 and January 1954. All these notifications imposed the tax at different rates on tobacco. The authorities collected tax in varying amounts from the appellants for different quarters. Aggrieved, after issuing notice under Section 80 of CPC, the appellants sued for refund of the tax. They contended that the tax was illegally collected from them being; it was unconstitutional.

26. In fact, the High Court of Madhya Pradesh, earlier, declared as unconstitutional the notifications under which the State collected the tax from the appellants. The decision was later confirmed by the Supreme Court. That said, the appellants did not take recourse to Article 226 of the Constitution but filed the suits.

27. Section 17 of the Madhya Bharat Sales Tax Act bars civil court's jurisdiction. No assessment made and no order passed under the Act or the Rules by the assessing authority, appellate authority, or the Commissioner shall be questioned in any Court. After elaborately considering the precedential position on the point in issue, *Dhulabhai* has held:

“(1) Where the statute gives a finality to the orders of the special tribunals, the Civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied

with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

...

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. *Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.*

(4) *When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open.* A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) *An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply.*

(italics supplied)

28. In the light of the above proposition, let us examine the exclusionary provision in the Securitisation Act. Section 34 of the Act reads:

34. Civil Court not to have jurisdiction:- No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial

Institutions Act, 1993 (51 of 1993).

29. In *Mardia Chemicals v. Union of India*⁷, the Supreme Court has held that a full reading of Section 34 shows that the civil court's jurisdiction is barred "in respect of matters which a Debts Recovery Tribunal or an Appellate Tribunal is empowered to determine in respect of any action taken or to be taken under any power conferred under the Act. "That is to say, the prohibition covers even matters which can be taken cognizance of by the Debts Recovery Tribunal, though no measure in that direction has so far been taken under Sub-section (4) of Section 13."

30. Later, in *Jagdish Singh v. Heeralal*⁸, the Apex Court has held that the opening portion of Section 34 clearly states that no civil court shall have jurisdiction to entertain any suit or proceeding "in respect of any matter" which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression 'in respect of any matter' referred to in Section 34, according to *Jagdish Singh*, would take in the "measures" provided under Sub-section (4) of Section 13 of the Securitisation Act. Consequently, if any aggrieved person has any grievance against any "measures" taken by the creditor under Sub-section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court.

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(2004) 4 SCC 311

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AIR 2014 SC 371

31. *Jagdish Singh* emphasises that Civil Court in such circumstances has no jurisdiction to entertain any suit or proceedings regarding those matters which fall under Sub-section (4) of Section 13 of the Securitisation Act. Further, Section 35 says, the Securitisation Act overrides other laws if they contradict that Act, “which takes in Section 9 Code of Civil Procedure as well.” To conclude, *Jagdish Singh* holds that “the civil court jurisdiction is completely barred.”

32. In the same vein, recently in *Sree Anandhakumar Mills Ltd. v. Indian Overseas Bank*⁹, the Supreme Court has quoted with approval *Jagdish Singh*. In *Anandhakumar Mills*, a person claiming to be a co-owner sued for partition. The High Court of Madras has held that the suit is maintainable in law, despite Section 34 of the Securitisation Act. Then, the Supreme Court has held that under Sections 17 and 18 of the Securitisation Act, the aggrieved party has an adequate and efficacious remedy.

33. In *Harshad Govardhan*, the Supreme Court has held that only if possession of the secured asset is required to be taken under the Securitisation Act, will the secured creditor move the CMM or the District Magistrate “for assistance to take possession of the secured asset.”

34. In this context, *Harshad Govardhan* deals with the right of

lessees to remain in possession of secured asset when the lease is subsisting and how the Securitisation Act affects those rights. It holds that if the lease precedes the mortgage or the security interest, the lessee is entitled to enjoy the lease as per the terms of the lease. Even after making the property a secured asset, the borrower can lease it out unless the creditor—say the bank—prohibits the borrower from leasing out the property. As declared under Section 35, the Securitisation Act overrides any other law if there is anything inconsistent.

35. Indeed, *Harshad Govardhan* holds that if the lessee is in lawful possession of the secured asset under a “valid lease,” the secured creditor cannot take possession of the secured asset. Granted, any lease created after the borrower’s receiving a notice under Section 13(2) is forbidden under Section 13(13) of the Act; such a lease is invalid. In other words, once a property is mortgaged, the borrower’s right to lease out the mortgaged property depends on Section 65A of the Transfer of Property Act.

36. In this context, on the tenant's rights, we may examine the interplay between Section 17(4A) of the Securitisation Act and Section 65(A) of the Transfer of Property Act. Section 17(4A) of the Securitisation Act reads:

Section 17(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 (4 of 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.

(italics supplied)

37. Now we will also extract Section 65A of the TP Act, and it reads:

65A. (1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2) (a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage,

(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised, and no rent shall be payable in advance,

(c) No such lease shall contain a covenant for renewal,

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made,

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid with a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.

(italics supplied)

38. In the light of the above statutory mandate, in *Jayalakshmi N. Pillai v. Authorized Officer*¹⁰, Kerala High Court has held that Section 17(4A) of Securitisation Act, engrafted through an amendment on 01.09.2016, provides a forum for tenants to have their grievance redressed. As seen from the above extract, the Debt Recovery Tribunal can resolve all claims of tenancy or leasehold rights upon the secured asset. But to assume jurisdiction, the Tribunal must ensure that the tenancy has not expired or stood determined. Jurisdiction assumed, the Tribunal will rule on whether the lease is contrary to Section 65(A) of the TP Act, or the terms of the mortgage. It will also examine whether the lease has been created after notice of default and demand by the Bank under Section 13(2) of the Act.

39. On the other hand, Section 65(A) of the TP Act elaborates on mortgagor's power to lease. Section 65(A)(2)(b) mandates that every lease shall reserve the best rent and "no premium shall be paid or promised, and no rent shall be payable in advance." Under Clause (c) no lease shall contain a covenant for renewal. Eventually, Clause (e) prescribes that if the lease concerns a building, the duration of the lease shall not exceed three years.

40. If we examine deeper, *Harshad Govardhan* also reveals that when a lessee comes to know about the creditor's efforts to take possession, he

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2019 (1) KHC 838

may either surrender the possession or resist the secured creditor's attempt. For this, he should produce before the authorised officer proof that he was inducted as a lessee before the creation of the mortgage or that he was a lessee under the mortgagor in accordance with the provisions of Section 65A of the Transfer of Property Act. He should also demonstrate that the lease has not been determined under Section 111 of the TP Act. If he resists the attempt of the secured creditor to take possession, the authorised officer cannot evict the lessee by force but has to apply before the Chief Metropolitan Magistrate (CMM) or the District Magistrate under Section 14 of the Securitisation Act.

41. Finally, *Harshad Govardhan* interprets the second limb of Section 34 of the Securitisation Act and holds that no court or authority should grant an injunction against any action taken or to be taken under the Securitisation Act.

42. I reckon the Supreme Court's recent judgment in *Bajrang Shyamsunder Agarwal* squarely applies to the facts of this case. It pays to examine the case in detail. The owner of a residential flat mortgaged it with the bank and secured a loan. On his default, the bank invoked the recovery proceedings. It issued a statutory demand notice under Section 13(2) of the Securitisation Act. When the borrower failed to comply with its demand, the bank applied under Section 14 of the Act to take physical possession of the secured asset. The CMM allowed that application.

43. Then, the appellant, claiming to be a tenant, applied to intervene in the proceedings under Section 14. He wanted the CMM's order stayed. The appellant has asserted that the secured asset was let out to him by the borrower/landlord in January 2000 and that he has been paying rent since then. Indeed, the tenancy was said to be based on an oral agreement. Allegedly faced with a notice from the landlord to vacate the flat, the appellant filed a suit before the Court of Small Causes at Mumbai. In course of time, the Small Causes Court granted interim injunction to the appellant.

44. Pending the civil suit, the appellant applied to the CMM not to dispossess him. But the CMM rejected the application, "holding that the appellant being a tenant without any registered instrument is not entitled for the possession of the secured asset for more than one year from the date of execution of unregistered tenancy agreement." Aggrieved, the appellant filed an appeal by Special Leave before the Supreme Court.

45. In the above factual context, to begin with, *Bajarang Shyamsunder Agarwal* has considered the legislative purpose of the Securitisation Act. It has held that the Act "in response to a scenario where slow-paced recovery and staggering amounts of non-performing assets were looming over the banks." The present Act is to enable the banks to resolve the issue of liquidity and aim for the reduction in the number of non-performing assets. The Preamble to the Act emphasises

upon the efficient and expeditious recovery of bad debts.

46. *Bajarang Shyamsunder Agarwal* notes that Section 17 provides for an invaluable right of appeal to any person including the borrower to approach the Debt Recovery Tribunal. Quoting with approval *Harshad Govardhan*, it has further held that the right of appeal is available to the tenant claiming under a borrower, though the right of re-possession does not exist with the tenant.

47. As is the case here, *Bajarang Shyamsunder Agarwal*, too, notes that at no stage of the proceedings did the parties reveal about the tenancy. “It was only after passing of the aforesaid order of the Chief Metropolitan Magistrate, that the appellant tenant started agitating his rights before the Small Causes Court.” The borrower/landlord, again as happened here, did not even respond to the claims of the tenant. The bank has produced multiple records to substantiate its claim that the tenant was nowhere to be seen earlier and that this tenancy was created just to defeat the proceedings initiated under the Securitisation Act. “On the contrary, the appellant tenant has failed to produce any evidence to substantiate his claim over the secured asset.” In such a situation, the appellant tenant “cannot claim protection under the garb of the interim protection granted to him, ex parte, by solely relying upon the xerox of the rent receipts.” Here, even they are absent. In fact, it pays to analyse what *Bajarang Shyamsunder Agarwal* says about the oral tenancy.

48. In paragraphs 33 and 36, *Bajarang Shyamsunder* holds that if it is an oral lease, such tenancy impliedly does not carry any covenant for renewal, as provided under Section 65-A of T.P. Act. Further, Section 13(13) of the Securitisation Act bars the lessor and the lessee from entering into such tenancy beyond January 2012. Then, the person occupying the premises, when the tenancy has been determined, can only be treated as a ‘tenant in sufferance’. And he has no legal rights and is akin to a trespasser.

49. *Bajarang Shyamsunder* also declares that the Rent Act cannot be extended to a ‘tenant in sufferance’ vis-à-vis the Securitisation Act because of Section 13(2) read with Section 13(13) of that Act. A contrary interpretation would violate the legislative efficacy of Section 13(13), “which has a valuable role in making the SARFAESI Act a self-executory instrument for debt recovery.” And, further, any contrary interpretation would also violate the mandate of Section 35 of the Securitisation Act, which is couched in broad terms.

Equitable Lease:

50. The appellant has pleaded equitable tenancy. According to him, it is a common law doctrine that survives even the statutory onslaught. I am afraid it does not. First, equity is not an offshoot or species of common law. It is, in its origin, antithetical to common law. In fact, equity entered where common law failed. Historically, the rigidity of common law has

given rise to equity. Later, they have come to be two streams, as Professor Ashburner has described, flowing in the same channel but never mingling. Lord Diplock disagreed. In *United Scientific Holdings Ltd. v Burnley Borough Council*¹¹, he has said that the ‘two streams’ have certainly mingled now.

51. True, the Anglo-Saxon jurisprudence has come to India with both the streams mixed. That said, it is elementary to note that both the common-law and equity principles stand displaced to the extent a statute occupies the adjudicatory arena. They are invoked where the statute is silent. Further, even in the statutory scheme, they both play a vital role as interpretative tools. Wherever a statute is ambiguous, its interpretation must accord with the already-established common law or equity principles. Thus, they fill the statutory crevices; they neither displace nor negate the statute law, though.

52. An equitable lease, as the *Oxford's A Dictionary of Law*¹² defines, is an agreement for the grant of an interest in land on terms that correspond to a legal lease but do not comply with the necessary formal requirements of a legal lease. For example, a landlord purports to grant tenant a lease for seven years. But the transaction is effected by simple written contract rather than by deed—a registered instrument. Still, the

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[1978] AC 904

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5th Ed. P.178

court may enforce the contract to grant the lease between the parties. This follows the principle that “equity looks upon that as done which ought to be done,” as was held in *Walsh v Lonsdale*¹³. That said, first, this doctrine binds only the parties to that parole contract, but not a third party. And, second, the very doctrine of *Walsh v Lonsdale*, as it is popularly known, sets bounds to that equity principle: The doctrine will only operate where the contract underlying the defective lease complies with the law—say in the Indian context, for example, the Transfer of Property Act—that otherwise governs the transaction. That is, the lease is in writing, contains all express terms, is signed by all parties, provides for consideration, and is specifically enforceable.

53. But the Privy Council has held, at least, in two cases—*Ariff v. Jadunath*¹⁴ and *Mian Pir Bux v. Sardar Modh. Tahir*¹⁵—that no equitable rule could override the provisions of the Transfer of Property Act or Registration Act regarding writing or registration. So, evidently, the doctrine of *Walsh v. Lonsdale* does not apply except in exceptional cases where registration is not required.

54. In *Ariff*, the Privy Council notes that the Courts of equity in England however have decided that once the making of the contract has been established by the part performance of it, one of the parties to it

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(1820) 21 Ch D 9

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AIR 1931 PC 79

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AIR 1934 PC 234

shall not be permitted to use the Statute of Frauds as an instrument of fraud. These decisions have been described in *Britain v. Rossiter*¹⁶ as "bold decisions on the words of the statute," and the doctrine as of a nature "not to be unwarrantably extended."

55. And *Ariff* has eventually held that whether an English equitable doctrine should in any case be applied so as to modify the effect of an Indian statute may well be doubted. Should an English equitable doctrine affecting the provisions of an English statute relating to the right to sue upon a contract be applied by analogy to such a statute as the Transfer of Property Act? More particularly, is it permissible when the application of the doctrine results in creating, without any writing, an interest which the statute says can only be created by means of a registered instrument? To their Lordships mind, in the absence of some binding authority to that effect, the proposition is "impossible."

56. Equivocal as the above proposition, *Ariff* eventually asserts that "the doubt entertained by Mukerji, J., whether the equitable doctrine 'which he thought was applicable could operate so as to nullify the statutory requirement of a registered instrument,' was justified." *Ariff*, finally, could not find the facts of that case raising any equity in the respondent's favour. Even if any such equity was established, *Ariff* holds, it could not operate to nullify the provisions of the Indian Code relating

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[1883] 11 Q.B. 123

to property and transfers of property.” We may note here that *Bajarang Shyamsunder*, too, disallows transactions violating the statutory mandate as contained, for example, in Transfer of Property Act and Registration Act.

Reliefs Sought:

57. The petitioner wanted the Civil Court to declare that (a) he is an equitable tenant; (b) his rights as tenant cannot be interfered with, abrogated, or abridged; (c) Defendants 2 and 3 have no jurisdiction to secure his forcible dispossession; (d) the District Magistrate is a *coram non judice*; (e) the Supreme Court’s judgment in *Harshad Govardhan Sondagar* “is rendered *sub silentio*, nay, *per incuriam*”; (f) the Supreme Court’s judgment in *Harshad Govardhan Sondagar* is rendered *sub silentio*, if not *per incuriam*; (g) the statue conferring jurisdiction on District Magistrate would destroy or negate the separation of powers.

58. Thus, even if we keep aside the contentions on the cause of action, it is very evident that no tenant pleading oral tenancy could get the protection from the provisions of the Securitisation Act. Besides that, as we have noted, Section 34 is emphatic in its declaration that Civil Court shall have no jurisdiction over any matter which the Debts Recovery Tribunal or the Appellate Tribunal is empowered under this Act to determine. And, last, none of the reliefs the petitioner has sought is amenable to an ordinary civil court’s jurisdiction.

Result:

59. Under these circumstances, I reckon that the appellant could not establish that the plaint in his suit passes the judicial muster under Order 7, Rule 11 of CPC. At this juncture, I may note that for this adjudication the plaint is the fulcrum, but the appellant has not filed a copy, though he has secured interim protection and had the matter pending for considerable time. So I render this judgment based on the rival submissions and the material on record, including the impugned judgment. As I find no grounds to interfere with the judgment, I dismiss this appeal. No order on costs.

Tailpiece:

After the dictation was completed and the verdict pronounced, Ms. Nedumpara for the appellant wanted the Court to suspend the operation of this judgment for three weeks, so that the appellant could approach the DRT, Mumbai. Shri Ajay Kumar for the respondent Bank has opposed that plea. At any rate, the plaint rejected, there is no further legal hurdle for the appellant to approach the DRT, Mumbai, if he chooses to. Thus, to conclude, it is open for the appellant to exhaust all statutory or legal options available to him in this regard.

DAMA SESHADRI NAIDU, J.

NH