

IN THE HIGH COURT AT CALCUTTA
(CIVIL REVISIONAL JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

C.O. 3765 of 2006

SMT. RADHARANI BOSE (DECEASED) THROUGH L.R.
TUSHAR KANTI BOSE & ASHOKE KANTI BOSE
VS.
BANK OF BARODA & ORS.

For the Petitioner : Mr. Probal Kumar Mukherjee, Sr. Adv.
Mr. Rajat Dutta, Adv.

Hearing concluded on : 7th August, 2023

Judgement on : 18th August, 2023

Siddhartha Roy Chowdhury, J.:

1. This revisional application challenges the Order No. 30 dated 20.9.2006 passed by the learned Presiding Officer, Debts Recovery Tribunal-III, Kolkata and order passed in Appeal No. 3 of 2003 affirming the Order No. 25 dated 06.01.2003 passed by the Recovery Officer in T.R.P. 32 of 2002 under Recovery of Debts Due to Banks and Financial Institution Act, 1993, wherein the Recovery Officer was pleased to direct the Receiver to take appropriate step for causing the suit premises to be vacated immediately and, if necessary, with the active assistance of the local police within two months, coupled with direction upon the Officer-in-Charge of the jurisdictional police station to render all assistance to the learned Receiver for vacating the suit premises.

2. For the sake of convenience the parties will be referred to as they were arrayed before the learned Trial Court.
3. Despite service, none appears on behalf of the opposite parties.
4. Briefly stated, Smt. Radharani Bose, *since deceased*, entered into an agreement for lease on 18.7.1951 in respect of the property in question with Sri Nanilal Bose, the then owner/ landlord. The agreement was duly registered and entered in Book No. I, Volume No. 80 pages 152 to 153 being Deed No. 3483 for the year 1951.
5. The legal heirs of the original landlord instituted a suit for eviction of the tenant Smt. Bose. Though learned Trial Court was pleased to pass a decree for eviction, the judgement was set aside by the learned 4th Additional District Judge, First Appellate Court in Title Appeal No. 436 of 1982. Thereafter, the tenanted premises was sold and transferred to Sri Satyanarayan Saha by a registered deed of sale on 9th May, 1993, without affecting the rights and inherent of the petitioner.
6. On 27th January, 2000 Bank of Baroda, opposite party no. 1 filed an application under Section 19 of the DRT Act against opposite party no. 2 for recovery of a sum of Rs. 15,07,290.35/- only being O.A. 1456 of 1997. Since the certificate debtors failed to pay the debts, Recovery Proceeding 18 of 2000 was initiated which was subsequently transferred to Debts Recovery Tribunal-III and renumbered as T.R.P. 32 of 2022.
7. The petition in a bid to get impleaded in the proceeding made an unsuccessful attempt before the Recovery officer. Property was put to sale and bid of one Sri Puran Chand Malani was accepted.

8. The petitioner, invoking the writ jurisdiction of the Hon'ble High Court challenged the order and was relegated to avail the remedy under Section 30 of the Debts Due to Banks and Financial Institution Act, 1993, before the Debt Recovery Tribunal-III.
9. Learned Tribunal, as aforesaid, was pleased to pass the order impugned.
10. Mr. Probal Kumar Mukherjee, learned senior counsel appearing on behalf of the petitioners submits that the petitioners were declared by the competent court of civil jurisdiction to be governed under *West Bengal Premises Tenancy Act* and they as premises tenants do have certain statutory protection. The property was offered for sale on 'as is whether is basis' and the property was purchased with encumbrances attached to the sale. The Debts Recovery Tribunal-III, according to Mr. Mukherjee, is not competent to make a property sold in auction free from encumbrances by summary eviction of a lessee or tenant.
11. In support of his contention, Mr. Mukherjee, relies upon the judgement of this Hon'ble Court in the case of **RATAN KUMAR KHAITAN VS. UNITED BANK OF INDIA AND ORS.** reported in (2003) SCC OnLine Cal 388, wherein it is held :-

"9. The petitioner is a tenant and is, therefore, entitled to all the protections available under the West Bengal Premises Tenancy Act. The Recovery Officer of the Tribunal has no power under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 to pass an order of eviction against a bona fide tenant in respect of a mortgaged property. Therefore, the order impugned in this application is wholly without jurisdiction. The Recovery Officer of the Tribunal acted without jurisdiction in appointing a receiver in respect of the property in question to take possession

from a lawful tenant when a competent forum has not passed a decree for eviction.

11. Paul Brothers (Tailoring Division) and Ors. v. Ashim Kumar Mondal reported in AIR 1991 SC 796, it is held that the sale on an "as is where is basis" means without prejudice to the claims of other persons in whose favour bona fide encumbrances or interest might have been created earlier qua the property. The order of the Court could not be availed of to ride rough-shod over the rights and interest of others in the property which have been created bona fide. Third parties, who have acquired real interests in the property, could not be called upon to give up their rights. Consequently, the auction purchaser could not claim vacant possession of the property as against lawful tenants.

12. xxxxxx

13. Therefore, the Recovery Officer had no authority to pass an order directing the petitioner either to vacate or to offer the real value to the portion over which he has been found remaining in possession."

12. It is further contended that once tenancy is created, a tenant can be evicted after following the due process of law as prescribed under the provision of the Rent Control Act. A tenant cannot be arbitrarily evicted by using the provision of SARFAESI Act as that would amount to stultifying the statutory rights of protection given to the tenant and in support of his contention Mr. Mukherjee, relied upon the decision of the Hon'ble Apex Court in **VISHAL N. KALSARIA VS. BANK OF INDIA & ORS.** reported in **(2016) 3 SCC 762** Paragraph 35 to 40 wherein it is held :-

"35. The decision of this Court rendered in the case of Harshad Govardhan Sondagar (supra) cannot be understood to have held that the provisions of the [SARFAESI Act](#) override the provisions

of the Rent Control Act, and that the Banks are at liberty to evict the tenants residing in the tenanted premises which have been offered as collateral securities for loans on which default has been done by the debtor/landlord.

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

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

38. Interpreting the non obstante clause of the [SARFAESI Act](#), a three Judge Bench of this Court in the case of [Central Bank of India v. State of Kerala & Ors.](#)[10] has held as under SCC pp. 133-35, paras 108-13 &116)

“108. [The DRT Act](#) and Securitisation Act were enacted by Parliament in the backdrop of recommendations made by the Expert Committees appointed by the Central Government for examining the causes for enormous delay in the recovery of dues

of banks and financial institutions which were adversely affecting fiscal reforms.

109. The committees headed by Shri T. Tiwari and Shri M. Narasimham suggested that the existing legal regime should be changed and special adjudicatory machinery be created for ensuring speedy recovery of the dues of banks and financial institutions. Narasimham and Andhyarujina Committees also suggested enactment of new legislation for securitisation and empowering the banks etc. to take possession of the securities and sell them without intervention of the Court.

110. [The DRT Act](#) facilitated establishment of two-tier system of Tribunals. The Tribunals established at the first level have been vested with the jurisdiction, powers and authority to summarily adjudicate the claims of banks and financial institutions in the matter of recovery of their dues without being bogged down by the technicalities of the Code of civil Procedure. The Securitisation Act drastically changed the scenario inasmuch as it enabled banks, financial institutions and other secured creditors to recover their dues without intervention of the Courts or Tribunals. The Securitisation Act also made provision for registration and regulation of securitisation/reconstruction companies, securitisation of financial assets of banks and financial institutions and other related provisions.

111. However, what is most significant to be noted is that there is no provision in either of these enactments by which first charge has been created in favour of banks, financial institutions or secured creditors qua the property of the borrower.

112. Under Section 13(1) of the Securitisation Act, limited primacy has been given to the right of a secured creditor to enforce security interest vis-à-vis [Section 69](#) or [Section 69A](#) of the Transfer of Property Act. In terms of that sub-Section, a

secured creditor can enforce security interest without intervention of the Court or Tribunal and if the borrower has created any mortgage of the secured asset, the mortgagee or any person acting on his behalf cannot sell the mortgaged property or appoint a receiver of the income of the mortgaged property or any part thereof in a manner which may defeat the right of the secured creditor to enforce security interest. This provision was enacted in the backdrop of Chapter VIII of Narasimham Committee's 2nd Report in which specific reference was made to the provisions relating to mortgages under the [Transfer of Property Act](#).

113. In an apparent bid to overcome the likely difficulty faced by the secured creditor which may include a bank or a financial institution, Parliament incorporated the non obstante clause in [Section 13](#) and gave primacy to the right of secured creditor vis a vis other mortgagees who could exercise rights under [Sections 69 or 69A of the Transfer of Property Act](#). However, this primacy has not been extended to other provisions like Section 38C of the Bombay Act and Section 26B of the Kerala Act by which first charge has been created in favour of the State over the property of the dealer or any person liable to pay the dues of sales tax, etc

116. The non obstante clauses contained in [Section 34\(1\)](#) of the DRT Act and Section 35 of the Securitisation Act give overriding effect to the provisions of those Acts only if there is anything inconsistent contained in any other law or instrument having effect by virtue of any other law. In other words, if there is no provision in the other enactments which are inconsistent with the [DRT Act](#) or Securitisation Act, the provisions contained in those Acts cannot override other legislations.”

(emphasis supplied)

39. If the interpretation of the provisions of [SARFAESI Act](#) as submitted by the learned senior counsel appearing on behalf of

the Banks is accepted, it would not only tantamount to violation of rule of law, but would also render a valid Rent Control statute enacted by the State Legislature in exercise of its legislative power under [Article 246 \(2\)](#) of the Constitution of India useless and nugatory. The Constitution of India envisages a federal feature, which has been held to be a basic feature of the Constitution, as has been held by the seven Judge Bench of this Court in the case of [S.R. Bommai & Ors. v. Union of India](#)[11], wherein Justice K. Ramaswamy in his concurring opinion elaborated as under:

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

248. The preamble of the Constitution is an integral part of the Constitution. Democratic form of Government, federal structure, unity and integrity of the nation, secularism, socialism, social

justice and judicial review are basic features of the Constitution.”

(emphasis supplied)

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

13. In **BAJARANG SHYAMSUNDER AGARWAL VS. CENTRAL BANK OF INDIA & ANR.** reported in **(2019) 9 SCC 94** wherein Hon’ble Apex Court held :-

“21. The second case which dealt with the issue of tenants’ rights under the SARFAESI Act is Vishal N. Kalsaria Case (supra). This Court was concerned with the question Whether a “protected tenant” under the Maharashtra Rent Control Act, 1999 can be treated as a lessee and whether the provisions of the SARFEASI Act, will override the provisions of the Rent Act?

22. After examining the legal and constitutional position, the Court held that while the SARFAESI Act has a laudable objective of providing a smooth and efficient recovery procedure, it cannot override the objective of Rent Acts to control the rate of rent and

provide protection to tenants against arbitrary and unreasonable evictions. To resolve this conflict, this Court held that

22.1 The provisions of the [SARFAESI Act](#) cannot be used to override the provisions of the [Rent Act](#). The landlord cannot be permitted to do indirectly what he has been barred from doing under the [Rent Act](#).

22.2. While a yearly tenancy requires to be registered, oral tenancy can still be proved by showing that the tenant has been in occupation of the premises before the Magistrate under [Section 14](#) of the SARFAESI Act.

22.3. The nonregistration of the tenancy deed cannot be used against the tenant. For leasehold rights being created after the property has been mortgaged to the bank, the consent of the creditor needs to be taken.

22.4. Even though [Section 35](#) of the SARFAESI Act has a non obstante clause, it will not override the statutory rights of the tenants under the Rent Control Act. The non obstante clause under [Section 35](#) of the SARFAESI Act only applies to laws operating in the same field.

23. While we agree with the principle laid out in Vishal N. Kalsaria Case (supra) that the tenancy rights under the [Rent Act](#) need to be respected in appropriate cases, however, we believe that the holding with respect to the restricted application of the non obstante clause under [section 35](#) of SARFAESI Act, to only apply to the laws operating in the same field is too narrow and such a proposition does not follow from the ruling of this Court in Harshad Govardhan Case (supra).

24. In our view, the objective of SARFAESI Act, coupled with the T.P. Act and the [Rent Act](#) are required to be reconciled herein in the following manner:

24.1 If a valid tenancy under law is in existence even prior to the creation of the mortgage, the tenant's possession cannot be disturbed by the secured creditor by taking possession of the property. The lease has to be determined in accordance with [Section 111](#) of the TP Act for determination of leases. As the existence of a prior existing lease inevitably affects the risk undertaken by the bank while providing the loan, it is expected of Banks/Creditors to have conducted a standard due diligence in this regard. Where the bank has proceeded to accept such a property as mortgage, it will be presumed that it has consented to the risk that comes as a consequence of the existing tenancy. In such a situation, the rights of a rightful tenant cannot be compromised under the [SARFAESI Act](#) proceedings.

24.2. If a tenancy under law comes into existence after the creation of a mortgage, but prior to the issuance of notice under [Section 13\(2\)](#) of the SARFAESI Act, it has to satisfy the conditions of [Section 65A of the T.P. Act](#).

24.3. In any case, if any of the tenants claim that he is entitled to possession of a secured asset for a term of more than a year, it has to be supported by the execution of a registered instrument. In the absence of a registered instrument, if the tenant relies on an unregistered instrument or an oral agreement accompanied by delivery of possession, the tenant is not entitled to possession of the secured asset for more than the period prescribed under [Section 107](#) of the T.P. Act.

27. The claim of tenancy made by the appellanttenant is not supported by a registered instrument. We recognise the legal position, as laid out in the Vishal N. Kalsaria Case (supra), that in the absence of a written lease deed the tenant may prove his existing rights by producing other relevant evidence before the Magistrate. The appellanttenant has to produce evidence of payment of rent, property taxes, etc. Furthermore, if the rent and permitted increases were payable, then the quantum ought to

have been mentioned. In addition to the above, the claim of tenancy could have been substantiated by relying upon other tax receipts such as BMC tax, water tax, electricity charges consumed by the tenant, etc. However, the appellanttenant has only submitted xerox copies of rent receipts.”

14. Though the proceeding was not under SARFAESI Act, but under Recovery of Debts Due to Banks and Financial Institutions Act, 1993, yet the principle of law as laid down by the Hon’ble Supreme Court is applicable in this case.
15. Therefore, it can be unhesitantly held that the Presiding officer, Debts Recovery Tribunal-III, Kolkata has failed to exercise the appellate jurisdiction by affirming the order of Recovery officer under Debts Due to Banks and Financial Institutions Act, 1993.
16. The order impugned is manifestly perverse and should not be allowed to remain in force and should be set aside, which I accordingly do.
17. Consequently, the revisional application succeeds.
18. Let a copy of the order be sent down to the learned Trial Court for information and necessary action.
19. Urgent photostat certified copy of this judgement if applied therefor, should be made available to the parties upon compliance of requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)