

15. Merely because a person lower in order of preference has encroached upon Gaon Sabha land, he cannot and should not be granted the benefit of Section 67A unless and until he is in a position to establish categorically that a person higher in preference is not available in the village. Any other interpretation of Section 67A would result in great injustice as an unauthorized occupant would be liable to be granted its benefit only on account of him or her having illegally encroached upon Gaon Sabha property, despite other needier and persons higher in preference being available in the village.

16. Therefore, and for the reasons given above, this Court is constrained to hold that not only is the land in issue in this writ petitions not land governed by Section 63 of the Code, as it has not been reserved for allotment as abadi site, the petitioners are also, prima facie, not eligible to the benefit of Section 67A as their applications are bereft of necessary pleadings. Therefore on both counts the benefit of Section 67A cannot be extended to the petitioners.

17. Although, reference has also been made in the writ petition as also the applications under Section 67A to provisions of the U.P. Zamindari Abolition and Land Reforms Act, such reference or reliance, in my considered opinion, is not tenable because on date, as also on the date the applications under Section 67A have been filed by the petitioners, the said Act, namely U.P. Zamindari Abolition and Land Reforms Act stood repealed.

18. In view of the foregoing, these writ petitions lack force and are accordingly dismissed.

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 19.04.2023

BEFORE

**THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE PRASHANT KUMAR, J.**

Writ-C No. 39191 of 2022

**V-Mart Retail Ltd., Gurgaon ...Petitioner
Versus
L.I.C. Housing Finance Ltd., Lucknow &
Ors. ...Respondents**

Counsel for the Petitioner:
Sri Jitendra Prasad

Counsel for the Respondents:
C.S.C., Pranjal Mehrotra

Civil Law - Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Section 14. Issue: Whether a secured creditor, in exercise of its power under the Act, could take actual physical possession of the secured asset in possession of a lessee? Held: The Apex Court in *Harshad Govardhan Sondagar* categorized leases into three classes: i *Lease created before the property was mortgaged*: It was held that, in such cases, the lessee will have the right to enjoy the leased property in accordance with the terms and conditions of the lease, irrespective of whether the subsequent mortgagee of the immovable property had knowledge of such lease or not. ii *Lease created after the execution of the mortgage deed*: In cases where the mortgage deed does not prohibit the mortgagor from making a lease of the mortgaged property, and so long as the lease satisfies the requirements of sub-section (2) of Section 65-A of the Transfer of Property Act, it would be valid and binding on the secured creditor. iii *Lease created after service of notice under Section 13(2)*: Such a lease would be void

in view of Section 13(13) of the Act and not binding on the secured creditor. Supreme Court also held that the provisions of the Act do not abridge the rights of the lessees falling under categories (i) and (ii), nor result in termination of the lease. However, this would not be true for cases falling under category (iii). In cases where the secured asset is in possession of a lawful tenant, the secured creditor will have the right to receive any money due, or which may become due (including rent), from the lessee of the borrower after the expiry of sixty days of notice under Section 13(2) of the Act. Possession of the secured asset from a lessee in lawful possession under a valid lease is not required to be taken under the provisions of the SARFAESI Act (Paras 9, 11).

Allowed. (E-5)

List of Cases cited:

1. *Harshad Govardhan Sondagar Vs International Assets Reconstruction Comp. Limited & ors., (2014) 6 SCC 1.*

2. *Vishal N. Kalsaria vs. Bank of India & ors., (2016) 3 SCC 762.*

(Delivered by Hon'ble Manoj Kumar
Gupta, J.
&
Hon'ble Prashant Kumar, J.)

1. The instant petition has been filed praying for a writ of mandamus commanding the respondents to consider the representation of the petitioner dated 24.11.2020 and not dispossess the petitioner from Property No.3/67, Rui Ki Mandi, Shahganj, Agra or interfere in the running of business by the petitioner in the said premises.

2. The facts necessary for disposal of the petition are that the petitioner is a

company incorporated under the Companies Act. It is running its retail business from the aforesaid premises in pursuance of a Memorandum of Understanding (MOU) dated 10.5.2016 between it and respondents no.4 to 8, the owners of the premises (hereinafter for short 'the lessors'). According to the MOU, the petitioner was let out ground floor and first floor of the building admeasuring 11300 square feet. The lessors were to hand over possession of the premises to the petitioner on or before 25.05.2016. The petitioner was given right to vacate the demised premises after serving a three months' notice on the lessors. On the other hand, the lessors were given right of forfeiture of tenancy only when there was continuous default of three months or more in payment of rent and the petitioner fails to pay it within one month of receipt of notice of demand. Subsequently, registered lease agreement dated 15.03.2017 was also executed between the parties. The lease agreement mentions the date of commencement of the lease as 1st July, 2016. The rent for the carpet area of 11000 square feet was approximately Rs.29 per month per square feet payable before 10th of every calendar month. The monthly lease rent was liable to enhancement after regular intervals. According to the petitioner, in terms of the Memorandum of Understanding and the registered lease deed, it occupied the demised premises and is carrying on its retail business therefrom.

3. On 20.02.2020, the petitioner received a notice from the second respondent i.e. LIC Housing Finance Ltd. from which it came to know that the demised property was equitably mortgaged by the lessors in its favour. On 23.11.2020, the second respondent fixed a possession notice on the demised premises in

purported exercise of its powers under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the Act'). The petitioner on 24.11.2020 filed a detailed objection before the second respondent mentioning therein about the MOU dated 10.5.2016 and registered lease deed dated 15.6.2017 and requested the second respondent to immediately stop proceedings for taking actual physical possession of the leased property. The petitioner also made a prayer that in case the property is auctioned, the auction purchaser be informed that he would step into the shoes of the lessors/borrowers, but shall not be entitled to actual physical possession as the property was in possession of a lawful tenant. However, the second respondent did not take notice of the said objection and threatened to take possession of the leased property and consequently, the instant petition.

4. The second respondent has filed a counter affidavit in which the stand taken is that the private respondents (lessors) had taken a loan of Rs.2,35,00,000/- on 28.2.2017 from it and had equitably mortgaged the property in question in favour of the second respondent by deposit of title deeds. The date on which equitable mortgage was allegedly created, has not been disclosed in the counter affidavit. The date of issuance of notice under Section 13 (2) of the Act is 5.12.2019. The date of issuing possession notice is 23.11.2020. It is admitted to the second respondent that it had filed an application under Section 14 of the Act for delivery of actual physical possession of the aforesaid property and the said application is pending.

5. It is clear from the stand taken by the second respondent that it proposes to

take actual physical possession of the property in question in exercise of its rights under the Act.

6. The private respondents (lessors/borrowers) were sent notices by registered post. It is clear from the track consignment report of Indian Post that the notices were delivered to them, but none had appeared on their behalf. Service on the aforesaid respondents was held to be sufficient by order dated 13.4.2023.

7. Learned counsel for the petitioner submits that the petitioner being a lawful lessee of the aforesaid premises and the lease having been created in its favour before the sanction of loan and creation of equitable mortgage, the second respondent is not entitled to take actual physical possession of the demised premises. At best, only symbolic possession could be taken and in which event, it would step into the shoes of the borrowers and would only be entitled to claim rent from the petitioner. In support of his submission, learned counsel for the petitioner has placed reliance on the judgements of the Supreme Court in **Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited and others, and Vishal N. Kalsaria Vs. Bank of India and others.**

8. Sri Pranjal Mehrotra, learned counsel appearing on behalf of the second respondent submitted that since the registered lease deed was executed on 15.03.2017, after the sanction of loan on 28.02.2017 and, therefore, the petitioner is not entitled to benefit of the aforesaid judgements. He further submitted that even if it is held that the petitioner is not liable to be evicted, it be clarified that the secured

creditor (the second respondent) would be entitled to realise rent from the petitioner.

9. In **Harshad Govardhan Sondagar (supra)**, the Supreme Court had considered the issue as to whether a secured creditor in exercise of its power under the Act could take actual physical possession of the secured asset in possession of lessee. The Supreme Court, after considering the entire scheme of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the provisions of the Transfer of Property Act, 1882 categorised the leases into three classes as follows:-

(i) lease created before the property was mortgaged- it was held that in a such case, the lessee will have right to enjoy the leased property in accordance with the terms and conditions of the lease, irrespective of whether the subsequent mortgagee of the immovable property had knowledge of such lease or not.

(ii) lease created after the execution of mortgage deed- in case the mortgage deed does not prohibit the mortgagor from making a lease of the mortgaged property and so long as the lease satisfies the requirement of sub-section (2) of Section 65-A of the Transfer of Property Act, it would be valid and binding on the secured creditor.

(iii) lease created after service of notice under Section 13 (2)- such a lease would be void in view of Section 13 (13) of the Act and not binding on the secured creditor.

10. The Supreme Court also held that the provisions of the Act do not abridge the right of the lessees falling under category (i) and (ii) nor results in termination of the lease. However, this would not be true for

cases falling under category (iii). Relevant part of the Law Report is extracted below:-

"One of the measures mentioned in clause (a) in sub- section (4) of Section 13 of the SARFAESI Act is to take possession of the secured assets of the borrower including the right to transfer by way of lease. Where, however, the lawful possession of the secured asset is not with the borrower, but with the lessee under a valid lease, the secured creditor cannot take over possession of the secured asset until the lawful possession of the lessee gets determined. There is, however, no mention in sub- section (4) of Section 13 of the SARFAESI Act that a lease made by the borrower in favour of a lessee will stand determined on the secured creditor deciding to take any of the measures mentioned in Section 13 of the said Act. Sub- section (13) of Section 13 of the SARFAESI Act, however, provides that after receipt of notice referred to in sub- section (2) of Section 13 of the SARFAESI Act, no borrower shall lease any of his secured assets referred to in the notice, without the prior written consent of the secured creditor. This provision in sub- section (13) of Section 13 of the SARFAESI Act and the provisions of the Transfer of Property Act enabling the borrower or the mortgagor to make a lease are inconsistent with each other. Hence, sub- section (13) of Section 13 of the SARFAESI Act will override the provisions of Section 65A of the Transfer of Property Act by virtue of Section 35 of the SARFAESI Act, and a lease of a secured asset made by the borrower after he receives the notice under sub- section (2) of Section 13 from the secured creditor intending to enforce that secured asset will not be a valid lease."

11. The next issue considered in the judgment was whether the Chief

Metropolitan Magistrate or District Magistrate is empowered to deliver actual physical possession of the secured asset to the secured creditor under Section 14 of the Act even in cases where the secured asset is in possession of a lawful tenant. In such cases, it has been held that the secured creditor will have right to receive any money due or which may become due, including rent from the lessee of the borrower after expiry of sixty days of notice under Section 13 (2) of the Act. In order to protect his possession, the lessee would be entitled to place material before the Chief Metropolitan Magistrate or the District Magistrate and satisfy him that there was a valid lease created before the mortgage or after the mortgage, in accordance with the requirements of Section 65-A of the Transfer of Property Act and the lease has not been determined in accordance with Section 111 of the Transfer of Property Act and in which event, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, cannot pass an order for delivering possession of the secured asset to the secured creditor. The relevant observations in the judgment are as follows:-

"Hence, possession of the secured asset from a lessee in lawful possession under a valid lease is not required to be taken under the provisions of the SARFAESI Act and the Chief Metropolitan Magistrate or the District Magistrate, therefore, does not have any power under Section 14 of the SARFAESI Act to take possession of the secured asset from such a lessee and hand over the same to the secured creditor."

12. The law laid down in **Harshad Govardhan Sondagar** was followed by the Supreme Court in **Vishal N. Kalsaria Vs.**

Bank of India and others and it has been further clarified as follows:-

"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."

13. In the instant case, although it is argued that the registered lease deed was executed on 15.03.2017, after sanction of the loan, but it is not disputed that it was preceded by a memorandum of understanding dated 10.5.2016 under which the petitioner became entitled to occupy the premises as lessee on or before 25.5.2016 and the registered lease agreement specifically recites that the tenancy commenced from 1st July, 2016. The possession of the petitioner as lessee since the aforesaid date is not in dispute. Therefore, we are of the opinion that the case of the petitioner would be covered under category (i) and the possession of the petitioner could not be disturbed by the second respondent under the provisions of the Act unless the lease is validly determined as per contract of tenancy or the statutory provisions. At the same time, the

second respondent having already served notice under Section 13 (2) and sixty days period had expired since then, it had become entitled to realise rent from the petitioner, in enforcement of its rights as a secured creditor.

14. In the facts obtaining above, we are of the opinion that no purpose would be served in relegating the petitioner to agitate its claim before the District Magistrate or Chief Metropolitan Magistrate. It will only lead to procrastination of the litigation.

15. Accordingly, we dispose of the instant petition restraining the second respondent from taking actual physical possession of the property in question from the petitioner until the lease is determined in accordance with law. The petitioner will, however, be liable to pay rent from now onwards to the second respondent and the said amount will be appropriated by it towards adjustment of the outstanding liability of the borrowers, in respect of the loan taken by them.

(2023) 6 ILRA 489
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2023

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE VIPIN CHANDRA DIXIT, J.

Writ-C No. 54341 of 2010
Writ-C No. 55314 of 2011
Writ-C No. 56451 of 2011
Writ-C No. 7490 of 2012
Writ-C No. 20719 of 20193
Writ-C No. 11159 of 20193
Writ-C No. 11157 of 20193

Committee of Management, D.P. Public School, Gautambudh Nagar
Versus
...Petitioner

State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Sri Ravi Agrawal, Sri P.K. Chaurasia

Counsel for the Respondents:
C.S.C., Sri Ramendra Pratap Singh, Sri Suresh Singh, Sri Manish Goyal (Sr. Adv.)

Civil Law- Code of Civil Procedure-1908-Section 114, Order 47 Rule 1- It is well settled that error apparent on the face of the record should not be an error which has to be fished out and searched-The power of review can be exercised for correction of a mistake but not to substitute a view-that though it can be argued by the counsel for the review applicant that some material such as Master plan, the nature of the project, the land use of the acquired land were not taken into consideration by the Court in the original judgment (under review), however, consideration of the said arguments would require us to appreciate the material on record which was allegedly ignored by the Court in the original order and the said exercise of re-hearing being impermissible within the scope of review-No good ground to exercise the power of review in the instant case-The judgment and order of this Court under review having attained finality between the parties, in case of any mistake on the part of the Court in ignoring the pleadings on record and arriving at a different conclusion by considering the other material on record, only remedy before the review applicant was to approach the Apex Court placing the alleged wrong in the judgment under review-(Para 31, 32 & 39)

Review application dismissed. (E-15)

List of Cases cited:

1. Sahara India Commercial Corporation Limited & ors. Vs St. of U. P. & ors. (2017) 11 SCC 339