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Neutral Citation No. - 2025:AHC:135653-DB

Court No. - 3

Case :- WRIT - C No. - 21492 of 2025

Petitioner :- Axis Bank Ltd.
Respondent :- State Of U.P. And 6 Others
Counsel for Petitioner :- Arpita Tarmali,Sanjay Kumar Gupta
Counsel for Respondent :- C.S.C.

Hon'ble Shekhar B. Saraf,J.
Hon'ble Praveen Kumar Giri,J.

(Judgment dictated in open Court by Shekhar B. Saraf, J.)

1. Heard learned counsel appearing on behalf of the parties.

2. This is a writ petition under Article 226 of the Constitution of India wherein the writ petitioner has made the following prayer:

> *"(i) Issue a writ, order or direction in the nature of Mandamus commanding to respondent no. 3 (Sub- Divisional Magistrate (SDM), Dhoulana, District- Hapur) to take physical possession of the property in question i.e. All that part and Parcel of Land/property Khasra No. 373, Situated at Village- Ravali, Pargana & Tehsil- Dhaulana, District- Hapur having Area 12590 Sq. Mt in pursuance to order dated 17.02.2025 passed by respondent no. 3 as subordinate of respondent no. 2 under section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002) and forwarded to petitioner Bank."*

3. Learned counsel appearing on behalf of the petitioner bank submits that in spite of an order dated 17.02.2025 passed under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the Act'), physical possession of the property has not been provided to the petitioner.

4. Learned counsel appearing on behalf of the State submits that the borrowers have created a mortgage of the property after grant of the loan to them. He further submits that a tenant of the borrowers has filed a suit and obtained a stay order from the Civil Court without making the petitioner bank a party in the said suit.

5. Learned counsel appearing on behalf of the petitioner submits that the order passed by the Civil Court is non-est in law as the same is barred by

Section 34 of the Act. Learned counsel further relies on the judgment of a coordinate Bench [authored by one of us (Shekhar B. Saraf, J.)] in **M/S Trilokchand Fabrication Pvt. Ltd. vs. State of U.P. and Others** passed in Writ-C No. 39914 of 2023 on 11.01.2024. He relies specifically on the summary at paragraph No.40 of the said judgment, which is delineated below:

> *"40. We have outlined the principles emerging from the aforesaid discussion below:*
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> *a) As mandated by Section 107 of the TPA 1882 and Section 17 of the IRA, 1908, the lease of an immovable property, beyond the period of one year can only be created by a registered instrument. An oral agreement, accompanied by the delivery of possession cannot create a lease beyond the prescribed period under Section 107 of the TPA 1882. An unregistered lease, cannot be taken into consideration by the courts, given the bar placed under Section 49 of the IRA, 1908.*
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> *b) A tenancy where no period has been fixed, or a tenancy which is deemed to be a month-to-month tenancy, cannot entitle a tenant to seek possession of a secured asset beyond a period of one year when proceedings have been initiated under Section 14 of the SARFAESI Act.*
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> *c) If a tenant intends to claim the possession of a secured asset when proceedings have been initiated under Section 14 of the SARFAESI Act it must necessarily be done by way of a registered instrument executed in his favour.*
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> *d) When a tenant becomes aware, that proceedings have been initiated under Section 14 of the SARFAESI Act he can either approach the concerned officer authorised by the DM/CMM to take possession of the secured asset, or surrender the possession of the secured asset. The authorised officer, in a case where, the tenant, resists surrendering the possession of a secured asset, will file an application accompanied by an affidavit containing the necessary details before the DM/CMM. The DM/CMM on receipt of such an application, will determine the rights of the tenant in accordance with the law. If the DM/CMM comes to the conclusion that the tenant has a valid lease entitling him to possession of the secured asset, he will not pass an order delivering the possession of the secured asset to the creditor.*
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> *e) Even if a tenant approaches the DRT, under Section 17 of the SARFAESI Act, the DRT cannot restore possession of the secured asset to the tenant. The DRT is only empowered to restore possession of the secured asset to the borrower, and not anyone else.*
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> *f) Section 34 of the SARFAESI Act, read in conjunction with Section 9 of the CPC 1908 places a bar on the institution of civil suits regarding matters which a DRT or Appellate Tribunal has been empowered to deal with under the SARFAESI Act. Furthermore, no civil court, can entertain a suit or proceeding, if an aggrieved person has grievance against any measures taken under Section 13(4) of the SARFAESI Act.*
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> *g) The availability of an alternative efficacious remedy would normally act as a bar against entertaining a writ petitioner. Nevertheless, under certain exceptional circumstances, a writ petition can be entertained even if an alternative efficacious remedy is available. These circumstances being – a) where the statutory authority has not acted in accordance with the provisions of the enactment in question, or*

in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed; b) violation of the principles of natural justice; and c) where the vires of an Act is challenged.

h) The writ of certiorari can only be exercised under extremely limited circumstances and not every error of law would warrant the issuance of the writ of certiorari. However, where a lower court/tribunal has failed to exercise its jurisdiction, the same would call for issuance of the writ of certiorari by the High Court."

6. Reliance has been further placed upon paragraphs 19, 20, 23 and 25 of the judgment of the Hon'ble Supreme Court in **Bajarang Shyamsunder Agarwal vs. Central Bank of India and another; (2019) 9 SCC 94** that are delineated below:

"19. The Court further held that if the Chief Metropolitan Magistrate / District Magistrate is satisfied that a valid lease is created before the mortgage and the lease has not been determined in accordance with Section 111 of the T.P. Act, then he cannot pass an order for delivery of possession of the secured asset to the secured creditor. In case, he comes to the conclusion that there is no valid lease either before the creation of mortgage or after the creation of the mortgage satisfying the requirements of Section 65A of the T.P. Act or even though there is a valid lease the same stands determined in accordance with Section 111 of the T.P. Act, he can pass an order for delivery of possession of the secured asset to the secured creditor.

20. This Court also recognised the inconsistency between Section 13(13) of the SARFAESI Act and Section 65A of the Transfer of Property Act. While Section 13(13) of SARFAESI prohibits a borrower from leasing out any of the secured assets after receipt of a notice under Section 13(2) without the prior written consent of the secured creditor, Section 65A of the T.P. Act enables the borrower/ mortgagor to lease out the property. This inconsistency was resolved by holding that the SARFAESI Act will override the provisions of the T.P. Act.

23. 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-

a) 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.

b) 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.

c) The non-registration 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.

d) 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.

25. 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:

a) 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.

b) 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.

c) 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. "

7. From a reading of the above judgments, it is clear that tenancy that has been created during the pendency of the mortgage without permission of the secured creditor, that is, the bank would be subject to the condition of Section 65A of the Transfer of Property Act and whether these conditions are satisfied will have to be decided by the Debts Recovery Tribunal (hereinafter referred to as 'the DRT') only. A tenant is required to move an application under Section 17 before the DRT for asserting his rights under such a registered document.

8. In our view, once an order has been passed under Section 14, the authorities are required to act in pursuance of the same and as per the provisions of the Act. The mechanism used by the borrowers to wiggle out of their liability cannot be countenanced by us.

9. In the present case, it is patently clear that the loan was taken by the borrowers, and subsequently, the registered lease deed was executed by the borrower, without the knowledge of the bank. In such a case, it was for the tenant to approach the DRT and obtain necessary orders therein. However, the tenant in the present case has obtained an order of status quo/stay from the Civil Court by alleged suppression of material facts including mortgage of the property by the borrower without reference to the secured creditor, that is, the petitioner bank.

10. Learned counsel appearing on behalf of respondent No.5 submits that he has recently made an application under Section 17 before the DRT for stay of the proceedings being carried out under Section 14 of the Act.

11. In light of the above discussions, we are of the view that the authorities should act in accordance with the judgment of the Hon'ble Supreme Court in **Bajarang Shyamsunder Agarwal** (supra) and give possession to the petitioner bank.

12. We make it clear that order obtained by the tenant, wherein the petitioner bank has not been made a party is, in a manner of speaking, non-est in law as it contravenes the provision of Section 34 of the Act.

13. In light of the same, the authorities are directed to act in accordance with law and give possession to the petitioner bank within a period of eight weeks from date if there is no other legal impediment.

14. We make it clear that in the event respondent No.5 obtains an order of stay from the DRT, the authorities shall comply with such stay, if granted.

15. With the above directions, the writ petition is disposed of.

Order Date :- 11.8.2025
K.Tiwari

(Praveen Kumar Giri, J.) (Shekhar B. Saraf, J.)