

(2011) 03 MAD CK 0301

In the Madras High Court

Case No : Writ Petition No's. 1, 2, 23850 and 27432 of 2010

Indian Bank

APPELLANT

Vs

Nippon Enterprises and Others

RESPONDENT

Date of Decision : 08-03-2011

Acts Referred:

Arbitration Act, 1940 — Section 20, 8(2)
Companies Act, 1956 — Section 529A
Constitution of India, 1950 — Article 245, 246(1), 246(2), 246(3), 254(1)
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 11(2)
Estate Duty Act, 1953 — Section 74(1)
Gift Tax Act, 1958 — Section 30
Mines and Minerals (Development and Regulation) Act, 1957 — Section 25(2)
Partnership Act, 1932 — Section 69(2)
Registration Act, 1908 — Section 17(1), 49
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 14(1), 17, 31
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 4(1), 4(2), 4(3), 4(4), 8(1)
Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 — Section 10, 2(8)
Transfer of Property Act, 1882 — Section 106, 107, 108, 17
Workmens Compensation Act, 1923 — Section 14A

Citation : (2011) 2 CTC 474

Hon'ble Judges : S. Nagamuthu, J;D. Murugesan, J

Bench : Division Bench

Advocate : G. Masilamani for B. Murugavel, in W.P. No. 23850 of 2010 and Habibullah Basha for T.P. Sankaran, in W.P. No. 27432 of 2010, for the Appellant; Habibullah Basha for T.P. Sankaran, for R1, R2 and R3, Vijay Narayan for R. Parthiban in W.P. No. 23850 of 2010, V. Jayachandran, for Associates, M. Kempraj, for R5 in W.P. Nos. 23850 and 27432 of 2010 and G. Masilamani for B. Murugavel in W.P. No. 27432 of 2010, for the Respondent

Judgement

D. Murugesan, J.—Both the writ petitions relate to the order passed by the Debts Recovery Appellate Tribunal, Chennai dated 30.9.2010 made in R.A.(S.A.) No. 61 of 2010. Writ Petition No. 23850 of 2010 is filed by the Indian Bank, Adyar Branch (hereinafter called as "the bank") and Writ Petition No. 27432 of 2010 is

filed by M/s Nippon Enterprises South, Chennai (hereinafter called as "the tenant).

2. For disposal of both the writ petitions, we refer to the following facts as culled out from the respective affidavits filed in support of the writ petitions. M/s Elke Enterprises had availed certain financial facilities from the bank amounting to a sum of Rs. 6,50,00,000/- under open cash credit facility and packing credit facility under the sanction ticket dated 16.10.2007. Those financial facilities were duly secured by creating equitable mortgage over the immovable properties belonging to one Mr. Shyam Narain and Mr. Bharat Shyam Narain situate at Laxmi Narain Towers at Door Nos. 71 & 72, Wallajah Road, Triplicane, Chennai. Both the said Shyam Narain and Bharat Shyam Narain stood also as personal guarantors for the financial facilities and created an equitable mortgage by way of deposit of original title deeds with the bank on 10.1.2008. M/s Nippon Enterprises South claims to be the tenant in occupation of the entire ground floor and Shop Nos. B3 & B4 in the basement of the said property. Petitioners in M.P. No. 2 of 2010 in W.P. No. 23850 of 2010 are the employees of the tenant.

3. M/s Elke Enterprises committed default in repayment of the financial facilities and therefore the bank invoked the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter called as "the SARFAESI Act") and the asset of M/s Elke Enterprises was classified as Non Performing Asset and the bank issued notice dated 15.7.2008 u/s 13(2) of the SARFAESI Act. In spite of the said notice and within the period of sixty days, M/s Elke Enterprises did not clear the dues, which resulted in the bank issuing a notice dated 17.9.2008 u/s 13(4) for taking possession. A similar notice u/s 13(4)(d) was also issued to the tenant in respect of the portions of the property under their occupation. The said notice was also duly published in the newspapers.

4. On taking symbolic possession, the bank issued the sale notice dated 4.10.2008 fixing the auction date as 12.11.2008. Questioning the sale notice as well as the possession notice, M/s Elke Enterprises preferred appeal before the Debts Recovery Tribunal-II, Chennai in S.A. No. 113 of 2008. The said appeal was dismissed by the Tribunal in its order dated 29.7.2009. This order was not questioned and therefore it became final.

5. As the bank could not take physical possession, it filed an application u/s 14 of the SARFAESI Act before the learned Chief Metropolitan Magistrate, Egmore, in which the tenant was arrayed as the third Respondent. The learned Chief Metropolitan Magistrate passed the following order dated 1.6.2009 and the relevant portions read as under:

1. ...

2. Where as, after considering the entire materials, this Court is of opinion that u/s 14(1) of the Act, the Petitioner is entitled to take possession/management of the schedule mentioned secured asset for sale.

3. Whereas, this Court intends to appoint an Advocate Commissioner to take possession of the schedule mentioned secured asset so as to enable the Petitioner to sell the property to realise the outstanding dues.

4. You, Tr. Ramakrishnan, Advocate, Egmore Bar Association, Chennai is appointed as Advocate Commissioner to take possession and management of the schedule mentioned asset with the assistance of the Station House Officer of D1 Triplicane P.S., Chennai after taking inventory of the articles found in the premises and removing the inmates and handover the secured asset to the Petitioner so as to proceed to recover the amount due to the Petitioner.

5....

6. Pursuant to the above warrant, the Advocate Commissioner issued a notice dated NIL to the tenant, which was received by the tenant on 22.8.2009. As the manner in which the possession was taken is questioned, we are inclined to extract the contents of the said notice, which are as follows:

In tune with the orders of the Chief Metropolitan Magistrate Court, Egmore, Chennai, I had on this date the 20th of August 2009 executed the Warrant and taken possession of the property before the presence of the inmates by sealing the said premises.

As you are aware, the shop / offices which was occupied by your good self was closed and sealed in your presence. The articles available at your shop may be removed from the said premises for the Indian Bank to have peaceful possession. You are hereby advised to be present on 25th Tuesday, August 2009 at 11.00 AM at your shop to facilitate taking inventory of the articles which are available in the said shop / office by the undersigned and you may make arrangements to remove the same at your cost and expenses.

Please take note that in the event of you not being present on the said date, the undersigned will be completing the process as per the warrant and bank shall not be in any manner responsible / liable for any loss or pilferage.

It is claimed that the tenant had removed the perishable materials from the premises occupied by them on 25.8.2009. Thereafter, the tenant filed W.P. No. 17337 of 2009 seeking for an order prohibiting the bank from taking possession of the entire ground floor and shop numbers B3 & B4 in the basement at the premises in Door Nos. 71 & 72, Wallajah Road, Chennai. The writ petition was dismissed by order dated 25.8.2009 on the ground that a provision of appeal was available to the tenant to question the action of the bank to take possession. This Court also observed that the tenant is entitled to approach the Debts Recovery Tribunal on the question as to the applicability of Section 31(e) of the SARFAESI Act and in such event, the Tribunal would consider the said question as well. The tenant thereafter approached the Debts Recovery Tribunal-II, Chennai by filing S.A. No. 92 of 2009 for a direction to the bank as well as the Advocate Commissioner to remove the seal affixed on the business premises, namely, the

entire ground floor and B3 & B4 in the basement of the building in question.

7. By order dated 28.8.2009, though the Tribunal refused to grant interim relief for restoring the possession of the schedule mentioned property, granted interim order restraining the bank as well as the Advocate Commissioner from removing the equipments and other materials stored in the business premises of the tenant.

8. The following issues were framed by the Tribunal in S.A. No. 92 of 2009:

(i) Whether the applicants are lawful tenants in occupation of that portion of schedule mentioned property under the R3?

(ii) Whether the applicant, which is admittedly a partnership firm, has been registered and if so, whether they can sue the R1?

(iii) Whether the R1 bank is entitled to take physical possession of the schedule mentioned property by executing the warrant issued by the Hon'ble Chief Metropolitan Magistrate, Chennai overlooking the fact that the tenancy of the applicant is 15 years prior to the creation of mortgage by R3 in favour of the R1?

(iv) Whether the applicants are entitled to the relief sought for in the application? So far as the first issue is concerned, the Tribunal found that the Respondent No. 3, namely, the tenant was lawful tenant in occupation of the premises. As regards the second issue, the Tribunal found that the bank cannot be sued by an unregistered partnership firm. So far as the third issue is concerned, the Tribunal found that the bank was empowered to approach the Chief Metropolitan Magistrate u/s 14 to take physical possession of the property. In view of the above answers, the Tribunal ultimately found that the tenant was not entitled to the relief of restoration of possession and dismissed the appeal by its final order dated 24.11.2009.

9. The said order of the Tribunal was questioned by the tenant before the Debts Recovery Appellate Tribunal, Chennai in R.A.(S.A.) No. 61 of 2010. By order dated 30.9.2010, the Appellate Tribunal found that the tenant claims to be in possession under an unregistered lease agreement, which is not in conformity with Section 107 of the Transfer of Property Act, and hence did not agree with the finding of the Debts Recovery Tribunal. So far as the finding of the Debts Recovery Tribunal that an unregistered partnership firm cannot sue the bank is concerned, the Appellate Tribunal found that the partnership firm was a registered one and that the appeal u/s 17 was maintainable before the Debts Recovery Tribunal. The Appellate Tribunal further found that there was no lis arising out of a contract between the firm and the bank and therefore the provisions of Section 69(2) of the Indian Partnership Act were not attracted. So far as the order of the Debts Recovery Tribunal refusing to restore the possession to the tenant is concerned, the Appellate Tribunal found that in view of the failure of the Authorised Officer to adhere to the Rules 4(1), 4(2), 4(3), 4(4) and 8(1), 8(3) and 8(4) of the Security Interest (Enforcement) Rules, 2002 and in view of

the fact that the Advocate Commissioner had exceeded the warrant of commission, set aside the order of the Tribunal to that extent and directed the bank to handover possession of the premises to the tenant within a period of seven days from the date of receipt of a copy of the order. While directing the bank to handover possession of the premises to the tenant, the Appellate Tribunal also found that pursuant to the sale notice issued by the Authorised Officer, the property was sold in public auction on 28.7.2009 and the property was purchased by the bank itself. It was further found that by virtue of that sale, the bank became the owner of the premises and therefore it was no more the holder of the asset as a secured creditor. With that findings, the Appellate Tribunal held that the bank would be entitled to evict the tenant only in accordance with the provisions of the Tamil Nadu Buildings (Lease & Rent Control) Act, 1960.

10. The above order is questioned by the bank in W.P. No. 23850 of 2010. Simultaneously, the tenant has also filed W.P. No. 27432 of 2010 questioning that portion of the very same order of the Appellate Tribunal holding that the bank would be entitled to take possession of the premises from the tenant on the ground that the lease deed was not registered as required u/s 107 of the Transfer of Property Act.

11. We have heard Mr. G. Masilamani, learned senior counsel for the bank, Mr. Habibullah Basha, learned senior counsel for the tenant and Mr. Vijay Narayan, learned senior counsel appearing for the employees of the tenant.

12. Mr. G. Masilamani, learned senior counsel appearing for the bank has submitted that the lease commenced only from 1.8.2000, on which date the lease deed was executed for a period of 15 years upto 31.7.2015, and in terms of Section 107 of the Transfer of Property Act, the lease deed should be compulsorily registered. Hence, the tenant is not entitled to place reliance on the provisions of Section 31(e) to contend that the provisions of the SARFAESI Act are not applicable to the tenant. Hence, the bank would be justified in invoking the provisions of the SARFAESI Act to take possession of the premises by issuance of notice u/s 13(4) and by filing an application u/s 14. The learned senior counsel would also submit that Section 35 of the SARFAESI Act has overriding effect on any other law muchless the State law. The SARFAESI Act was enacted by the Parliament under Entry 45 of List I of Seventh Schedule, whereas the Tamil Nadu Buildings (Lease & Rent Control) Act was enacted by the State Legislature under Entry 6 of List III of Seventh Schedule. In view of Article 254(2) of the Constitution of India, in case of inconsistency between the laws made by the Parliament and the Legislature of the State, the law made by the Parliament shall prevail. Hence, the Appellate Tribunal has erred in holding that the tenant could be evicted only under the provisions of the Tamil Nadu Buildings (Lease & Rent Control) Act. He would also submit that the tenant being an unregistered partnership firm is not entitled to maintain an application before the Debts Recovery Tribunal in view of the bar u/s 69(2) of the Partnership Act.

13. On the other hand, Mr. Habibullah Basha, learned senior counsel appearing for the tenant, has submitted that the tenant is the lawful tenant/lessee under the joint owners of Laxmi Narain Towers. The premises are jointly owned by one Mr. Shyam Narain, Mr. Bharat Shyam Narain and Mr. Nanick Shyam Narain right from 1992. The lease was on a consolidated monthly rent of Rs. 87,746/- after deducting TDS of Rs. 16,034/-. Hence, it is not correct to say that the lease commenced only from 1.8.2000. On the date when the mortgage was created in favour of the bank on 10.1.2008, the tenant was in occupation on the strength of a lease deed, though not registered. In the wake of Section 31(e), the provisions of the SARFAESI Act are not applicable to the lessee in bona fide occupation. He would also submit that inasmuch as the provisions of SARFAESI Act and the Tamil Nadu Buildings (Lease & Rent Control) Act operate on different fields, the question of overriding effect in terms of Section 35 does not arise. He would further submit that the application filed by the tenant, namely, unregistered partnership firm, is not barred u/s 69(2) of the Partnership Act, inasmuch as in the said application, no relief is claimed on the basis of the lease deed in which no security interest has been created and the said deed has been relied upon only for collateral purpose. He would therefore submit that the proceedings initiated by the bank are without jurisdiction. In such event, the tenant could be evicted only by invoking the provisions of the Tamil Nadu Buildings (Lease & Rent Control) Act, 1960.

14. We have carefully considered the above submissions. In view of the rival contentions, the following points arise for our consideration:

(i) Can a lessee/tenant in bona fide occupation of a secured asset for more than a period of one year, could claim the benefit of the lease u/s 31(e) of the SARFAESI Act, in the event there was no registration of the lease deed as required u/s 107 of the Transfer of Property Act? If so, whether the tenant is entitled to invoke the provisions of Section 31(e) on the facts of this case?

(ii) Whether, in terms of Section 35, the SARFAESI Act will override the provisions of the Tamil Nadu Buildings (Lease & Rent Control) Act, 1960, to enable the bank to evict a tenant and take physical possession of the secured asset either by invoking Section 13(4) or Section 14 of the SARFAESI Act?

(iii) Whether an unregistered partnership firm is entitled to maintain an application before the Debts Recovery Tribunal in view of the bar u/s 69(2) of the Partnership Act?

15. Point No. (i): The contention of the tenant is that in view of Section 31(e), the provisions of the SARFAESI Act are not applicable in the instant case. According to the tenant, since it is a bona fide lessee under the borrower, even before the mortgage was created during the year 2007/2008, the proceedings initiated under the provisions of the SARFAESI Act are wholly without jurisdiction and, therefore, the entire proceedings are vitiated. On the other hand, Mr. G. Masilamani, learned senior counsel appearing for the bank would contend that

Section 31(e) of the SARFAESI Act has no application to the facts of the present case, inasmuch as the lease in question is not a registered lease as required u/s 107 of the Transfer of Property Act (for short, "the TP Act") and there was no lease in legal sense.

16. Section 31(e) contemplates that the provisions of the SARFAESI Act shall not apply to conditional sale, hire purchase or lease or any other contract in which no security interest has been created. The TP Act is a Central enactment which is traceable to Entry 6 of List III of Seventh Schedule of the Constitution of India. Subsequently, the Tamil Nadu Buildings (Lease & Rent Control) Act, 1960 (for short, "the TN Rent Control Act") came into force and the same is also traceable to the power of State Legislature under Entry 6 of List III of Seventh Schedule. The TN Rent Control Act has received the assent of the President and therefore, in the event if there is any inconsistency between the provisions of TN Rent Control Act and the provisions of TP Act, to the extent of inconsistency, the TN Rent Control Act shall prevail over the Central Act and shall have overriding effect. In this regard, we may usefully refer to the judgment of the Constitution Bench of the Supreme Court in *V. Dhanapal Chettiar Vs. Yesodai Ammal*, , wherein, after having considered the repugnancy between the TP Act and the TN Rent Control Act, in paragraph-5, the Supreme Court has held as follows:

5. Under the Transfer of Property Act, the subject of "Leases of Immovable Property" is dealt with in Chapter V. Section defines the lease, the lessor, the lessee and the rent. Purely as a matter of contract, a lease comes into existence under the Transfer of Property Act. But in all social legislations meant for the protection of the needy, not necessarily the so-called weaker section of the society as is commonly and popularly called, there is appreciable inroad on the freedom of contract and a person becomes a tenant of a landlord even against his wishes on the allotment of a particular premises to him by the authority concerned. u/s 107 of the Transfer of Property Act a lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. None of the State Rent Acts has abrogated or affected this provision. Section 108 deals with the rights and liabilities of lessors and lessees. Many State Rent Acts have brought about considerable changes in the rights and liabilities of a lessor and a lessee, largely in favour of the latter, although not wholly. The topic of Transfer of Property other than agricultural land is covered by Entry 6 of List III to the Seventh Schedule to the Constitution. The subject being in the Concurrent List, many State Rent Acts have by necessary implication and many of them by starting certain provisions with non obstante clause have done away with the law engrafted in Section 108 of the Transfer of Property Act except in regard to any matter which is not provided for in the State Act either expressly or by necessary implication.

For better appreciation, it is necessary to have a look into the provisions of the TP Act as well as the TN Rent Control Act and to see as to whether there is any inconsistency between Section 107 of the TP Act and Section 10 of the TN Rent

Control Act.

17. Though, to create a valid lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, a registered instrument is necessary u/s 107 of the TP Act, there is no such legal requirement as per the provisions of the TN Rent Control Act. The term "landlord" has been defined in Section 2(6) and the same reads as follows:

2(6). "landlord" includes the person who is receiving or is entitled to receive the rent of a building, whether on his own account or on behalf of another or on behalf of himself and others or as an agent, trustee, executor, administrator, receiver or guardian or who would so receive the rent or be entitled to receive the rent if the building were let to a tenant.

18. In Section 2(8) of the TN Rent Control Act, the term "tenant" has been defined as follows:

any person by whom or on whose account rent is payable for a building and includes the surviving spouse, or any son, or daughter, or the legal representation of a deceased tenant who -

(i) in the case of a residential building, had been living with the tenant in the building as a member of the tenant's family upto the death of the tenant, and

(ii) in the case of a non-residential building, had been in continuous association with the tenant for the purpose of carrying on the business of the tenant upto the death of the tenant and continues to carry on such business thereafter, and a person continuing in possession after the termination of the tenancy in his favour, but does not include

a person placed in occupation of a building by its tenant or a person to whom the collection of rents or fees in a public market, cart-stand or slaughter-house or of rents for shops has been framed out or leased by a Municipal Council or a Panchayat Union Council or the Municipal Corporation of Madras or the Municipal Corporation of Madurai.

19. A close reading of the above provisions would make it clear that under the provisions of the TN Rent Control Act, lease requires no registered instrument and the requirement would be only a jural relationship between the landlord and tenant as defined under Sections 2(6) and 2(8) of the TN Rent Control Act. In the instant case, admittedly, the building in question is in the city of Chennai, to which TN Rent Control Act is indisputably applicable. In view of the specific provision contained in the TN Rent Control Act, the lease deed dated 01.08.2000 could be the basis to establish the jural relationship between the owner of the property and the tenant. The bank has not disputed the fact that the tenant was in occupation of the portion in question and in fact it had asked the tenant to pay the rent directly to the bank. The tenant has also paid the rents which were accepted by the bank as well. The tenant can therefore claim that it was a bona fide tenant in occupation irrespective of the fact the lease is not registered.

Therefore, the contention of the learned senior counsel that in order to claim the benefit of Section 31(e) of the SARFAESI Act the lease should be registered as required by Section 107 of the TP Act, cannot be accepted and accordingly we reject the same.

20. This leads us to the next question as to whether, in the given case, the tenant can claim the benefit of Section 31(e) of the SARFAESI Act. In our considered opinion, Section 31(e) of the SARFAESI Act is not applicable to the facts of the present case. It is not every lease which will make the provisions of the Act inapplicable. It is only a lease in which no security interest has been created which alone makes the provisions of the Act inapplicable. For a better understanding, we may reproduce Section 31(e) of the SARFAESI Act, which reads as follows:

31. Provisions of this Act not to apply in certain cases. The provisions of this Act shall not apply to---

(a) to (d)

(e) any conditional sale, hire purchase or lease or any other contract in which no security interest has been created;

(f) to (j).....

21. The term "security interest" has been defined in Section 2(zf) of the SARFAESI Act and the same reads as follows:

security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31.

22. A conjoint reading of Sections 31(e) and 2(zf) of the SARFAESI Act would show that only in respect of any of the transactions enumerated in Section 31(e) of the SARFAESI Act in which no security interest has been created, then in respect of that transaction, the Act cannot be made applicable and not otherwise. The provisions of Section 31(e) are not attracted in the event any security interest is created in contracts like contract of sale or hire purchase or lease, unless such transactions result in creation of security interest which is similar to a loan.

23. In this context, we may also refer to Section 2(k) of the SARFAESI Act defining "financial assistance". The said section reads as under:

financial assistance" means, any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution.

24. The expression "creation of interest" in respect of the transactions must relate to financial assistance and not otherwise. In the instant case, security interest over the property in question has been created not by the lease in favour

of the tenant, but by means of mortgage executed by the owners of the land in favour of the bank. The action of the bank is not to enforce any security interest created by lease in favour of the tenant. In the absence of the lease in question creating security interest, the provisions of Section 31(e) are not applicable to the facts of this case. Accordingly, point No. (i) is answered.

25. Point No. (ii): The contention of the tenant is that its right to continue to be in possession of the property in question as lessee is protected by the TN Rent Control Act. Hence, u/s 13(4) of the SARFAESI Act, only symbolic possession could be taken and not actual/physical possession. It is the further contention that the SARFAESI Act cannot extinguish the right accrued to a tenant under the provisions of the TN Rent Control Act. On the other hand, it is the contention of the bank that the SARFAESI Act has got overriding effect over the TN Rent Control Act in view of the provisions of Section 35 and therefore the rights said to have been accrued in favour of the tenant under the TN Rent Control Act cannot be enforced as against the bank while the bank invokes the provisions of the SARFAESI Act.

26. The question is, therefore, as to whether the SARFAESI Act has got overriding effect over the TN Rent Control Act. Section 35 of SARFAESI Act reads as under:

35. The provisions of this Act to override other laws.--The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

27. The power to make laws by the Parliament and State Legislature flows from Article 245 of the Constitution. Article 246 of the Constitution deals with the respective subject matter of laws that could be made by the Parliament and State Legislature respectively as provided in Seventh Schedule. By virtue of the non obstante clause contained in Article 246(1) of the Constitution, Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I of Seventh Schedule. By virtue of the non obstante clause contained in Article 246(2) of the Constitution, Parliament and, subject to Clause (1), the Legislature of any State shall have power to make laws with respect to any of the matters enumerated in List III of Seventh Schedule. Likewise, by virtue of Article 246(3) of the Constitution, subject to Clauses (1) and (2), the State Legislature has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II of Seventh Schedule. Article 254 of the Constitution is a mechanism to reconcile a law made by the Parliament and a law made by the State Legislature, in the event there is inconsistency.

28. The scope and ambit of Article 254 of the Constitution came up for consideration before the Supreme Court on various occasions. A Constitution Bench of the Supreme Court in *M. Karunanidhi Vs. Union of India* and Another, had an occasion to consider the issue relating to repugnancy between the law

enacted by the Parliament and the State Legislature and evolved certain principles to be applied for determining the repugnancy between those laws. In paragraph 8 of the said judgment, the Supreme Court has held as follows:

8. It would be seen that so far as Clause (1) of Article 254 is concerned, it clearly lays down that where there is a direct collision between a provision of law made by Parliament with respect to one of the matters enumerated in the Concurrent List,, then, subject to the provisions of Clause (2), the State law would be void to the extent of the repugnancy. This naturally means that where both the State and Parliament occupy the field contemplated by the Concurrent List then the Act passed by Parliament being prior in point of time will prevail and consequently the State Act will have to yield to the Central Act. In fact, the scheme of the Constitution is a scientific and equitable distribution of legislative powers between Parliament and the State Legislatures. First, regarding the matters contained in List I, i.e., the Union List to the Seventh Schedule, Parliament alone is empowered to legislate and the State Legislatures have no authority to make any law in respect of the Entries contained in List I. Secondly, so far as the Concurrent List is concerned, both Parliament and the State Legislatures are entitled to legislate in regard to any of the Entries appearing therein, but that is subject to the condition laid down by Article 254(1) discussed above. Thirdly, so far as the matters in List II, i.e., the State List are concerned, the State Legislatures alone are competent to legislate on them and only under certain conditions Parliament can do so. It is, therefore, obvious that in such matters repugnancy may result from the following circumstances:

1. Where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.
2. Where however a law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall prevail to the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with Clause (2) of Article 254.
3. Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List an entrenchment, if any, is purely incidental or inconsequential.
4. Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will

prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254. So far as the present State Act is concerned, we are called upon to consider the various shades of the constitutional validity of the same under Article 254(2) of the Constitution.

29. Subsequently, in Govt. of A.P. and Another Vs. J.B. Educational Society and Another etc., , in paragraph 9, after referring to M. Karunanidhi's case, the Supreme Court has held as follows:

9. Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I, notwithstanding anything contained in Clauses (2) and (3) of Article 246. The non obstante clause under Article 246(1) indicates the predominance or supremacy of the law made by the Union Legislature in the event of an overlap of the law made by Parliament with respect to a matter enumerated in List I and a law made by the State Legislature with respect to a matter enumerated in List II of the Seventh Schedule.

30. In Central Bank of India v. State of Kerala (2009) 6 CTC 656, after referring to the judgment in State of West Bengal v. Kesoram Industries Ltd. (2004) 1 SCC 201, the Supreme Court has observed as "In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State Law will be ultra vires and shall have to give way to the Union Law."

31. Recently in Zameer Ahmed Latifur Rehman Sheikh Vs. State of Maharashtra and Others, , after referring to the above judgments, more particularly, the judgment of the Constitution Bench in M. Karunanidhi's case, in paragraph 38, the Supreme Court has held as follows:

38. It is common ground that the State legislature does not have power to legislate upon any of the matters enumerated in the Union List. However, if it could be shown that the core area and the subject matter of the legislation is covered by an entry in the State List, then any incidental encroachment upon an entry in the Union List would not be enough so as to render the State Law invalid, and such an incidental encroachment will not make the legislation ultra vires the Constitution.

32. While dealing with an identical case, a Constitution Bench of the Supreme Court in Offshore Holdings Private Limited v. Bangalore Development Authority and Ors. 2011 (1) Scale 533 61, has held as follows:

61. We are dealing with a federal Constitution and its essence is the distribution of legislative powers between the Centre and the State. The Lists enumerate, elaborately, the topics on which either of the legislative constituents can enact. Despite that, some overlapping of the field of legislation may be inevitable. Article 246 lays down the principle of federal supremacy that in case of inevitable and irreconcilable conflict between the Union and the State powers, the Union power, as enumerated in List I, shall prevail over the State and the State power, as enumerated in List II, in case of overlapping between List III and II, the former shall prevail. This principle of federal supremacy laid down in Article 246(1) of the Constitution should normally be resorted to only when the conflict is so patent and irreconcilable that co-existence of the two laws is not feasible. Such conflict must be an actual one and not a mere seeming conflict between the Entries in the two Lists. While Entries have to be construed liberally, their irreconcilability and impossibility of co-existence should be patent. One, who questions the constitutional validity of a law as being ultra vires, takes the onus of proving the same before the Court. Doctrines of pith and substance, overlapping and incidental encroachment are, in fact, species of the same law. It is quite possible to apply these doctrines together to examine the repugnancy or otherwise of an encroachment. In a case of overlapping, the Courts have taken the view that it is advisable to ignore an encroachment which is merely incidental in order to reconcile the provisions and harmoniously implement them. If, ultimately, the provisions of both the Acts can co-exist without conflict, then it is not expected of the Courts to invalidate the law in question.

33. In yet another judgment in *Girnar Traders v. State of Maharashtra and Ors.* 2011 (1) Scale 223 78, the Constitution Bench of the Supreme Court has held as follows:

78. A self-contained code is an exception to the rule of referential legislation. The various legal concepts covering the relevant issues have been discussed by us in detail above. The schemes of the MRTPT Act and the Land Acquisition Act do not admit any conflict or repugnancy in their implementation. The slight overlapping would not take the colour of repugnancy. In such cases, the doctrine of pith and substance would squarely be applicable and rigours of Article 254(1) would not be attracted....

34. Keeping in mind the principles evolved by the Supreme Court in the above judgments, let us consider the scheme of the SARFAESI Act and the TN Rent Control Act. The SARFAESI Act is traceable to Entry 45 of List I of the Seventh Schedule, whereas the TN Rent Control Act is traceable to Entry 6 of list III. Both the Acts have been enacted by the Parliament and the State Legislature respectively well within their respective competence in their respective fields. The question to be considered is as to whether there is any overlapping between the two enactments. To find out whether a particular enactment is within the legislative competence of the Parliament or State Legislature, the doctrine of pith and substance is to be applied. If the same is applied to the facts of the present

case, it goes without saying that the SARFAESI Act is an Act aiming at a mechanism to recover the outstanding dues towards the banks and financial institutions by following certain procedures without the intervention of the Courts and Tribunals. Prior to the enactment of Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the dues to the banks were to be recovered only by approaching the civil Courts. Having experienced the delay in civil courts and taking into account that public money is locked in the hands of unscrupulous persons which is not good for the banking sector and ultimately the economy of the country, the Central Government constituted a committee on the financial system headed by Shri M. Narasimhan to go into the issue and based on the recommendations of the said Committee, the above Act was passed thereby ousting the jurisdiction of the civil Courts in respect of the debts due to the banks and constituting Tribunals. Under the said Act, the banks could approach the Debts Recovery tribunal and for appeal, the Debts Recovery Appellate Tribunal constituted under the Act for recovery of its dues. The said Act is a complete code in itself. During the working of the said Act, it was felt that even the said Act was not effective, as the same did not achieve the desired result. Therefore, it was thought of evolving a new mechanism so that the debts due to the banks could be recovered in a speedy manner. It was under those circumstances, two committees were constituted and the said committees recommended to the Government that even the intervention of the tribunal may not be necessary and instead, the banks themselves can be given power to directly recover the debts due to the banks by following certain procedures. It was based on the said recommendations, the SARFAESI Act came into being. The Act can be treated as one of the legislative measures taken by the Government for ensuring that the dues of secured creditors including banks and financial institutions are recovered from the defaulting borrower without undergoing long drawn litigation in civil Courts. A close reading of the scheme of the SARFAESI Act would go to show that it aims at speedy recovery of the debts due to the banks and financial institutions without the intervention of either the civil court or tribunal. Certain safeguards are also provided for the debtor to approach the Debt Recovery Tribunal by making application u/s 17 of the SARFAESI Act and also to make further appeal to the Debts Recovery Appellate Tribunal, if the debtor is aggrieved by any of the actions of the bank u/s 13 of the SARFAESI Act. From the scheme of the Act, beyond any controversy, the SARFAESI Act is basically procedural in nature only to recover the dues. The Act does not create any substantive right in the bank.

35. As against the above, the TN Rent Control Act was enacted by the State Legislature under Entry 6 of Concurrent List to protect the interest of the tenants. As it was felt that the provisions of the TP Act were not found to be effective to protect the interest of the tenants, the State Legislature thought it fit to bring in the legislation mainly with a view to protect the rights of the lessees. It is needless to point out that under the TP Act, a lease can be terminated without assigning any reason by simply issuing a statutory notice u/s 106 of TP

Act. The TN Rent Control Act was enacted to regulate the letting of residential and non-residential buildings and control of rents of such buildings and the prevention of unreasonable eviction of tenants there from. For the said purpose, Rent Control Tribunals are constituted with a provision of appeal enabling the aggrieved persons to approach them. A further revision is also contemplated to the High Court. Under the TN Rent Control Act, a tenant can be evicted only on specific grounds enumerated u/s 10 of the Act. The lease cannot be terminated by the unilateral act of the landlord. Further, under the TN Rent Control Act, tenancy under an unregistered deed or even under oral agreement is protected and such tenant is also entitled to have equal rights like that of the tenant under the registered lease u/s 107 of the TP Act. The entire scheme of the Act would go to show that it is more substantive as well as procedural and the Act is a complete code in itself. This Act clearly mandates that a tenant is entitled to continue to be in possession of the building until and otherwise he is evicted as per the provisions of the Act and not otherwise.

36. u/s 13(4) of the SARFAESI Act, the secured creditor can take possession of the secured assets of the borrower. There can be no difficulty in taking such possession of the secured assets either u/s 13(4) or u/s 14 of the SARFAESI Act, if the secured asset is in the possession of the borrower or guarantor, as the case may be. SARFAESI Act entitles the creditor to take possession of the secured assets either by issuing possession notice u/s 13(4) or by making application to the Chief Metropolitan Magistrate/District Magistrate to take physical possession u/s 14. Though the function of Chief Metropolitan Magistrate/District Magistrate is only ministerial, the provision of Section 14 confers drastic power to take possession even by use of force. The difficulty arises only in cases where the possession of the property is in the hands of the tenant (lessee). The SARFAESI Act does not contain any specific provision enabling the secured creditor to take possession from the hands of a tenant (lessee). On the other hand, the TN Rent Control Act contemplates that a tenant is entitled in law to continue to be in possession unless he is evicted under the provisions of the said Act. SARFAESI Act being mainly procedural and the TN Rent Control Act being exclusively dealing with the substantive right of tenants, both the Acts operate on different fields. Only in the event the SARFAESI Act contains a provision to enable the bank to take possession of a secured asset from a lessee, then only it can be held that there is conflict between the SARFAESI Act and the TN Rent Control Act in which case, the TN Rent Control Act should give way for the SARFAESI Act to have overriding effect. However, there is no such provision in the SARFAESI Act enabling the bank to take possession from the lessee, though the Act speaks of the right of the bank to take possession of the secured asset. Moreover, right from Section 13(2) till exhausting the provision of appeal, the bank deals only with the borrower/guarantor and the lessee is nowhere in the picture, as the Act does not require the bank to involve the lessee/tenant as well in the proceedings. Thus, we do not find any overlapping or inconsistency between these two Acts. When there is no such overlapping or repugnancy between these two provisions

in respect of taking possession from the lessee, it has to be held that physical possession of the secured assets from the lessee/tenant can be taken only by invoking the provisions of the TN Rent Control Act.

37. In this regard, we may also refer to the judgment of the Supreme Court in *Central Bank of India v. State of Kerala and Ors.* 2009 (6) CTC 656, wherein the Supreme Court dealt with the question as to whether there is repugnancy between Kerala Sales Tax Act, 1963 and Bombay Sales Tax Act, 1959 on one hand and the SARFAESI Act on the other hand. In paragraphs 38 & 39 of the said judgment, the Supreme Court has held as follows:

38. While enacting the DRT ACT and Securitisation Act, Parliament was aware of the law laid down by this Court wherein priority of the State dues was recognised. If Parliament intended to create first charge in favour of banks, financial institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like Section 529A of the Companies Act or Section 11(2) of the EPF Act and ensured that notwithstanding series of judicial pronouncements, dues of banks, financial institutions and other secured creditors should have priority over the State's statutory first charge in the matter of recovery of the dues of sales tax, etc. However, the fact of the matter is that no such provision has been incorporated in either of those enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the Court or Tribunal. The reason for this omission appears to be that the new legal regime envisages transfer of secured assets to private companies. The definition of "secured creditor" includes securitisation/ reconstruction company and any other trustee holding securities on behalf of bank/financial institution. The definition of "securitisation company" and "reconstruction company" in Section 2(v) and (za) shows that these companies may be private companies registered under Companies Act, 1956 and having a certificate of registration from the Reserve Bank u/s 3 of Securitisation Act. Evidently, Parliament did not intend to give priority to the dues of private creditors over sovereign debt of the State.

39. If the provisions of the DRT ACT and Securitisation Act are interpreted keeping in view the background and context in which these legislations were enacted and the purpose sought to be achieved by their enactment, it becomes clear that the two legislations, are intended to create a new dispensation for expeditious recovery of dues of banks, financial institutions and secured creditors and adjudication of the grievance made by any aggrieved person qua the procedure adopted by the banks, financial institutions and other secured creditors, but the provisions contained therein cannot be read as creating first charge in favour of banks etc. If Parliament intended to give priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State legislations, then provisions similar to those contained in Section 14A of the Workmen's Compensation Act, 1923, Section 11(2) of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines

and Minerals (Development and Regulation) Act, 1957, Section 30 of the Gift Tax Act, and Section 529A of the Companies Act, 1956 would have been incorporated in the DRT Act and Securitisation Act. Undisputedly, the two enactments do not contain provision similar to Workmen's Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the DRT Act and Securitisation Act on the one hand and Section 38C of the Bombay Act and Section 26B of the Kerala Act on the other and the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be. The Court could have given effect to the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act vis a vis Section 38C of the Bombay Act and Section 26B of the Kerala Act and similar other State legislations only if there was a specific provision in the two enactments creating first charge in favour of the banks, financial institutions and other secured creditors but as the Parliament has not made any such provision in either of the enactments, the first charge created by the State legislations on the property of the dealer or any other person, liable to pay sales tax etc., cannot be destroyed by implication or inference, notwithstanding the fact that banks, etc., fall in the category of secured creditors... (emphasis supplied)

38. In the above case, the Supreme Court found that since there was no specific provision creating first charge in respect of the amount due to the bank in the SARFAESI Act, such provision contained in the State enactment creating first charge in respect of the dues to the Government shall not indicate any conflict or inconsistency or overlapping between the same. In the case on hand, as we have already stated, there is no specific provision in the SARFAESI Act in respect of taking possession from the hands of the tenant. But the right of the tenant to continue to be in possession is protected by the TN Rent Control Act. The SARFAESI Act is an Act for the expeditious recovery of dues to the banks, financial institutions and secured creditors, whereas the purpose of the State legislation i.e., the TN Rent Control Act is to protect the possession of the tenants. Thus, they are traceable to two different entries in their respective fields and there is neither any conflict nor repugnancy or overlapping. In such view of the matter, there is no difficulty in holding that the bank cannot take physical possession from the tenant protected under Tamil Nadu Rent Control Act by invoking the provisions of Sections 13(4) and 14 of the SARFAESI Act, in the event the tenant is in bona fide occupation. The point is answered accordingly.

39. Point No. (iii): The question is as to whether the tenant, being an unregistered partnership firm, could maintain an application against the bank in view of Section 69(2) of the Partnership Act. Before we delve upon the above, a reference to Section 69(2) of the Partnership Act is necessary and the same

reads as under: "69. Effect of non-registration:

(1)...

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(2A) to (5)....

In order to make the said provision applicable, the following requirements are necessary:

(i) A firm that sues a third party must be a registered firm and should seek to enforce a right arising from a contract.

(ii) To put it otherwise, to escape from the bar under Sub-section (2) of Section 69, the firm must be a registered firm and the persons suing should have been shown in the Register of Firms as partners in the firm.

As far as the facts of this case are concerned, materials were placed before the Appellate Tribunal only to show that as on 14.11.74, the firm was registered and thereafter it is the claim of the tenant that there were entries made upto the year 1995. As there was no change of partners, subsequently, the registration was not renewed. On the date when the firm approached the Debts Recovery Tribunal in the year 2009, admittedly, there was no renewal and consequently, the names of the partners were not shown in the Register of Firms. In order to maintain an application and to avoid the bar contemplated under Sub-section (2) of Section 69, both the above conditions are necessary and must be available on the date on which the application came to be filed. The Supreme Court in the judgment in *Shreeram Finance Corporation Vs. Yasin Khan and Others*, considered a case where there was a change in the partners of the firm and since the corresponding change was not notified to the Registrar and therefore, on the date of the suit, the current partners were not shown in the Register of Firms, the Court held that the suit was not maintainable. The relevant test would be whether on the date of the suit, the firm was registered and the names of the partners were shown in the Register of Firms. Admittedly, there was no renewal of the partnership firm after 1975 and in the absence of renewal, the firm cannot be considered to be as registered. To this extent, the finding of the Appellate Tribunal that the tenant was a registered firm cannot be justified and is liable to be set aside. Accordingly, the same is set aside.

40. However, the question still remains as to whether even in case of an unregistered firm, the application in the present nature would be barred by the provisions of Sub-section (2) of Section 69. In order to apply the said provision, an application against a third party should be to enforce the right arising from a contract. The provisions of Sub-section (2) of Section 69 are not applicable in the event the application is not for enforcement of the right arising from a contract.

41. In support of the contention, Mr. G. Masilamani, learned senior counsel for the bank relied upon the judgment of the Supreme Court in Jagdish Chander Gupta Vs. Kajaria Traders (India) Ltd., . In that judgment, the Supreme Court was considering the scope of Sub-section (3) of Section 69 of the Indian Partnership Act. Though for our purpose the consideration would be only in respect of Sub-section (2) of Section 69, it would be relevant to refer to the finding of the Supreme Court in that judgment. The issue before the Supreme Court was in respect of the meaning of the expression "other proceedings" employed in Sub-section (3) of Section 69 and consequently whether an application filed u/s 8(2) of the Arbitration Act can be regarded as a proceeding to enforce the right arising from a contract falling u/s 69(2) of the Indian Partnership Act. After considering the contentions, the Supreme Court found that the expression "other proceedings" would also cover an application filed u/s 8(2) of the Arbitration Act, since such an application seeks to enforce the right arising from a contract.

42. In the present case, when the possession was sought to be taken in respect of the premises under occupation, by invoking the provisions of Section 17 of the SARFAESI Act, the tenant filed an application before the Debts Recovery Tribunal challenging such an action of the bank. First of all, there is no contract between the bank and the tenant. Secondly, in the appeal, the question of enforcement of the right arising from a contract does not arise. The tenant has approached the Tribunal opposing the action of the bank to take possession solely on the ground that it cannot be evicted, as it was in bona fide occupation and in the light of the provisions of Section 31(e) of the SARFAESI Act. In paragraph-3 of the judgment, the Supreme Court has specifically observed that Sub-section (2) similarly prohibits a suit by or on behalf of the firm against a third party for the purpose of enforcement of right arising from a contract, unless the firm is registered and the partners suing are or shown in the register of firms as the partners in the firm. The above judgment does not lay down the law to hold that even in case of a suit which does not relate to the enforcement of the right arising from a contract between the parties, it is barred under Sub-section (2) of Section 69 of the Indian Partnership Act. Hence, the judgment is of no assistance to the bank to contend that the proceedings initiated by the tenant before the Debts Recovery Tribunal is barred under Sub-section (2) of Section 69 of the Indian Partnership Act.

43. Mr. G. Masilamani, learned senior counsel also relied upon another judgment of the Supreme Court in Delhi Development Authority Vs. Kochhar Construction Work and Another, . In that judgment also, the Supreme Court has held that an application u/s 20 of the Arbitration Act should be treated as a suit, as it is filed to enforce the right arising from a contract. The judgment of the Supreme Court in Jagdish Chandra Gupta's case was also referred to by Their Lordships in the judgment and even from that judgment, we could only read that where a suit is instituted by an unregistered firm to enforce the right arising from a contract, it is barred under Sub-section (2) of Section 69 and not otherwise. In fact, the very

same question came up for consideration before the Supreme Court in the judgment in *Purushotham v. Shivraj Fine Arts Litho Works* (2007) 15 SCC 58 wherein the Supreme Court has held that the test to find out the applicability of the bar under Sub-section (2) of Section 69 of the Partnership Act is as to whether the suit was arising from a contract and was in the course of business dealings with the third party Defendant. In the given case, the question is as to whether a bona fide tenant in occupation much prior to the mortgage could be evicted without following the provisions of the Tamil Nadu Buildings (Lease & Rent Control) Act and that application was not to enforce the right arising from a contract. Hence, it must be held that the application filed by the tenant before the Debts Recovery Tribunal is not barred u/s 69(2) of the Partnership Act and is maintainable.

44. Incidentally a question was raised as to whether an unregistered instrument can create a lease. The said question came up for consideration before the Supreme Court in the judgment in *Rana Vidya Bhushan Singh v. Shri Rati Ram* (1969) 1 SCWR 341 wherein the Supreme Court observed as follows:

The agreement was unregistered. It could not create in favour of the Defendant the right of a tenant for a period of fifteen years. The agreement was on that account inadmissible in evidence to support that claim. But in support of the plea that his possession was that of a tenant the Defendant was entitled to rely upon the recitals contained in that agreement of lease A document required by law to be registered, if unregistered, is inadmissible as evidence of a transaction affecting immovable property, but it may be admitted as evidence of collateral facts, or for any collateral purpose, that is for any purpose other than that of creating, declaring, assigning, limiting or extinguishing a right to immovable property.

In the event an unregistered document is sought to be relied upon for collateral purpose, namely, the purpose other than that of creating, declaring, assigning, limiting or extinguishing a right over immovable property, it is admissible in evidence.

45. In *Anthony v. K.C. It toop and Sons and Ors.* (2001) 1 M.L.J. 12, the Supreme Court found that there are three interdictions to claim that an instrument can create a valid lease in law. The first inhibition is that it should be in accordance with the provisions of Section 107 of the Transfer of Property Act. That Section reads as under:

107. A lease of immovable property from year to year, or for any term exceeding one year, or reserving an yearly rent, can be made only by a registered instrument.

The second inhibition, as pointed out by the Supreme Court, is Section 17(1)(d) of the Registration Act, which states that where a lease of immovable property from year to year or for any term exceeding one year or reserving an yearly rent, such document should be compulsorily registered. The third inhibition, as noted

by the Supreme Court, is Section 49 of the Registration Act relating to the consequence of non-compliance of Section 17. Section 49(c) contemplates that no document required by Section 17 or by any provision of the Transfer of Property Act to be registered shall be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.

46. Having regard to the above three inhibitions, the Supreme Court has held that insofar as the instrument of lease is concerned, there is no scope for holding that the Appellant is a lessee by virtue of the said instrument. Nevertheless, the Supreme Court, taking into consideration of the proviso to Section 49 of the Registration Act, found that an unregistered lease deed may be taken as evidence of any collateral transaction not required to be effected by registered instrument. The Supreme Court, in paragraph-13 of that judgment, has held as follows:

13. When lease is a transfer of a right to enjoy the property and such transfer can be made expressly or by implication, the mere fact that an unregistered instrument came into existence would not stand in the way of the court to determine whether there was in fact a lease otherwise than through such deed.

The Supreme Court further went on to add that when the landlord intended to put the tenant into possession of the building and the tenant was paying monthly rent or had agreed to pay the rent in respect of the building, the legal character of the Appellant's possession should be attributed as a jural relationship between the parties. With that finding, the Supreme Court held in paragraph-14 as follows:

14. When it is admitted by both sides that the Appellant was intended into the possession of the building by the owner thereof and that the Appellant was paying monthly rent or had agreed to pay rent in respect of the building, the legal character of the Appellant's possession has to be attributed in a jural relationship between the parties. Such a jural relationship, on the facts situation of this case, cannot be placed anything different from that of lessor and lessee falling within the purview of the second para of Section 107 of the TP Act extracted above.

47. In the given case, the lease deed which is sought to be relied upon by the tenant in a proceeding initiated by the bank under the provisions of the SARFAESI Act to contend that in the wake of the provisions of Section 31(e) and it being a tenant in bona fide occupation, the bank cannot take possession of the premises in question from the tenant under the provisions of SARFAESI Act. The reliance sought to be placed by the tenant over the unregistered lease deed is only for a collateral purpose to show that the tenant was inducted into the premises right from the year 1992 and thereafter, by an unregistered lease deed, from the year 2000 it had been in possession of the premises.

48. Hence, the contention of the learned senior counsel that in view of Sub-section (2) of Section 69 of the Indian Partnership Act, the application at the instance of an unregistered partnership firm is not maintainable against the bank

cannot be accepted and the point is answered accordingly.

49. For all the above reasons, W.P. No. 27432 of 2010 filed by the tenant is allowed. The finding of the Debts Recovery Appellate Tribunal that the bank would be entitled to take possession of the premises from the tenant even when the lease deed was not registered u/s 107 of the Transfer of Property Act is set aside. In all other respects, the findings of the Debts Recovery Appellate Tribunal stand confirmed including the direction to restore possession of the premises viz., the entire ground floor and Shop Nos. B3 & B4 in the basement at Nos. 71 and 72, Wallajah Road, Chennai to the tenant. In view of the above, W.P. No. 23850 of 2010 filed by the bank is dismissed. Consequently, M.P. No. 1 of 2010 is also dismissed. In view of the dismissal of W.P. No. 23850 of 2010, no order is necessary in M.P. No. 2 of 2010 praying to implead the employees of the tenant as party Respondents and the same is accordingly closed. There shall be no order as to costs.