

(2011) 09 KL CK 0040

In the High Court Of Kerala

Case No : Writ Petition (C) No. 14496 of 2008

Pushpangadan

APPELLANT

Vs

Federal Bank Ltd.

RESPONDENT

Date of Decision : 23-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 36
Companies Act, 1956 — Section 529A
Constitution of India, 1950 — Article 141, 226, 254
Criminal Procedure Code, 1973 (CrPC) — Section 133
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 11(2)
Estate Duty Act, 1953 — Section 74(1)
Gift Tax Act, 1958 — Section 30
Kerala Buildings (Lease and Rent Control) Act, 1965 — Section 11, 11(4), 25
Kerala General Sales Tax Act, 1963 — Section 26B
Mines and Minerals (Development and Regulation) Act, 1957 — Section 25(2)
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 34(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(1), 13(2), 13(4), 13(6)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 8, 9, 9(9)
State Financial Corporations Act, 1951 — Section 29, 29(2), 46B
Transfer of Property Act, 1882 — Section 106, 109, 48, 69, 69A
Workmens Compensation Act, 1923 — Section 14A

Citation : (2011) 4 KLT 134 : (2011) 4 RCR(Civil) 804 : (2011) 4 RCR(Civil) 804 : (2011) 2 RCR(Rent) 370 : (2011) 2 RCR(Rent) 370

Hon'ble Judges : P.N. Ravindran, J;K.T. Sankaran, J;J. Chelameswar, J

Bench : Full Bench

Advocate : Jawahar Jose, for the Appellant; Mohan Jacob George, P.V. Parvathi, Reena Thomas, L. Ram Mohan, T.K. Vipindas, P.K. Priya, K.M. Hashir, K.V. Sree Vinayakan, A. Krishnan, Grashious Kuriakose and B. Premod, for the Respondent

Judgement

K.T. Sankaran, J.

When this Writ Petition along with another Writ Petition came up for hearing before another Bench of this Court, the following question so flaw were framed

for consideration:

(i) Whether the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "Securitisation Act") has an overriding effect over the provisions of the Kerala Buildings (Lease and Rent Control) Act, 1965 ? and

(ii) Whether a tenant under the provisions of the Kerala Buildings (Lease and Rent Control) Act of a premise which is the subject matter of securitisation proceedings can be summarily evicted under Sections 13 (4) and 14 of the Securitisation Act irrespective of the protection available to him under the Rent Control Act?

2. According to the petitioners, they are tenants in a line building consisting of six rooms in Ward No. 13 of Cherthala Municipality, The building belonged to the predecessor in interest of respondents 2 to 4. The second respondent availed a loan from the first respondent Bank in the year 2004. It is stated that respondents 2 to 4 have created security interest over the property as collateral security for the loan availed from the Bank. The loan was classified as non-performing assets (NPA) and the first respondent Bank initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Securitisation Act"). The Bank filed a petition under S. 14 of the Securitisation Act before the Court of the Chief Judicial Magistrate, Alappuzha, who passed an order to take possession of the property. A Commissioner was appointed for that purpose. The Commissioner issued Ext. PI notice to the tenants in the building stating that he would visit the property on 9.5.2008 to take possession. The tenants were directed to give vacant possession.

3. According to the petitioners, they are tenants in the building and they are entitled to protection from eviction under the provisions of the Kerala Buildings (Lease and Rent Control) Act, 1965 (hereinafter referred to as "the Rent Control Act") and also under the Transfer of Property Act. It is stated that the father of the first petitioner had taken a building in the property on lease, about seventy years back, from the original landlord. Later, the property was purchased by the predecessor in interest of respondents 2 to 4. The landlord filed a petition under S. 11 (4)(iv) of the Rent Control Act, on the ground of reconstruction of the building. That petition was allowed and the present building with six rooms was reconstructed in the year 1986. The first petitioner was inducted in 1986 on a monthly rental of Rs. 150/-, which was subsequently enhanced to Rs. 400/-. The first petitioner is conducting a bakery and tea stall in the building. The second petitioner is a tenant in respect of another room since 1991 and he is conducting a photo studio on a rental of Rs. 300/-, which was subsequently enhanced to Rs. 500/-. The third petitioner took on lease another room in the line building in 1996 and he is conducting a watch repair shop on a rental of Rs. 300/-, which was subsequently enhanced to Rs. 500/-. The fourth petitioner is a tenant in respect of another room since 1988 on a rental of Rs. 300/-, which was

subsequently enhanced to Rs. 500/-. He is conducting a store under the name and style "Anitha Lady Store" in that room. The fifth petitioner took the room on rent in 1986 and he is conducting a medical store under the name and style "Rasheed Medicals" on a rental of Rs. 350/-, which was subsequently enhanced to Rs. 500/-. The sixth petitioner took the southernmost room from respondents 2 to 4 in the year 2000 and he is conducting a tailoring shop therein. Exts. P2 to P14 documents were produced by the petitioners to prove that they are tenants in the building. They contended that no notice was issued to them in any proceeding except the notice issued by the Commissioner.

4. According to the petitioners, since they were tenants at the time of creation of the mortgage, their tenancy right would not be affected by any of the measures taken under S. 13 (4) of the Securitisation Act. The leasehold right of the petitioners was not terminated in accordance with law and it could be terminated only by an order of eviction under the provisions of the Rent Control Act. The prayer in the Writ Petition is to quash Ext. P1 notice by the issue of a writ of certiorari and to declare that the secured creditor having not obtained the leasehold right, the petitioners are not liable to be evicted by the secured creditor without recourse to the due process of law.

5. In the counter affidavit, the first respondent contended as follows: The writ petitioners are set up by respondents 2 to 4 to delay the proceedings under the Securitisation Act. Respondents 2 to 4 filed W.P. (C) No. 31273 of 2006 challenging the notice issued for taking possession and the notice issued for sale under S. 13(4) of the Securitisation Act. The writ petitioners therein undertook to settle the liability to the bank. An interim order of stay was passed on 24.11.2006. The interim order was later extended by six months on condition that the writ petitioners therein should deposit Rs. 2.5 lakhs per month commencing from March, 2007. It was held that in case of default, the interim order would stand vacated. Respondents 2 to 4 (writ petitioners in W.P. (C) No. 31273 of 2006) committed default. They also moved the Debts Recovery Tribunal in Securitisation Application No. 33 of 2007. That application was disposed of by Ext. R1 (c) order dated 12.6.2007 granting time to the applicants till 26.10.2007 to settle the liability. Confirmation of sale was stayed till 26.10.2007. Respondents 2 to 4 did not settle the liability as agreed. Instead, they filed W.P. (C) No. 31708 of 2007 seeking enlargement of time. The said Writ Petition was dismissed on 25.10.2007 (Ext. R1(d)). Respondents 2 to 4 challenged the judgment of the learned single Judge in W.A. No. 2587 of 2007, which was disposed of by Ext. R1 (e) judgment dated 26.2.2008 granting two more months' time to respondents 2 to 4 herein to settle the entire liability to the bank. The defaulters having failed in all their attempts to protract the proceedings under the Securitisation Act, they have now set up the petitioners to further delay the matter. The first respondent contended that the petitioners were inducted only after creation of mortgage in favour of the bank and even after sale of the property to the fifth respondent. It was contended that the notice under S. 13(4) was affixed in the property and it was also published in the

newspapers. It was further contended that before the sale also, notice was published in two newspapers. The remedy of the petitioners, if any, is to file an appeal under S. 17(1) of the Securitisation Act. It is also contended that the documents produced by the writ petitioners are fabricated.

6. The first respondent also contended that the provisions of the Securitisation Act have overriding effect over the provisions of the Rent Control Act and the Transfer of Property Act.

7. On a consideration of the facts and circumstances of the case, we are not inclined to hold, *prima facie*, that the writ petitioners were inducted into possession of the building after creation of the mortgage in favour of the bank. The documents produced by the petitioners, *prima facie*, indicate that they were tenants in the buildings even before the date of creation of the mortgage in favour of the bank in 2001.

8. The Securitisation Act defines the terms "secured asset", "secured debt" and "secured interest" in Sections 2(zc), 2(ze) and 2(zf) as follows:

2. Definitions:- (1) In this Act, unless the context otherwise requires,--

(zc) "secured asset" means the property on which security interest is created;

(zd).....

(ze) "secured debt" means a debt which is secured by any security interest;

(zf) "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;

Section 31 states that the provisions of the Act shall not apply to the categories of cases mentioned in clauses (a) to (j) therein.

9. It is apposite to extract the relevant portions of Sections 13 and 14 of the Securitisation Act. They are:

13. Enforcement of security interest:-

(1) Notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured

creditor shall be entitled to exercise all or any of the rights under sub-section (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal u/s 17 or the Court of District Judge u/s 17 A.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (d) of sub section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager

on behalf of the secured creditors shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

(9).....

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of subsection (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.

14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset:--

(1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured

creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him -

(a) take possession of such asset and documents relating thereto; and

(b) forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority.

10. Section 34 of the Securitisation Act provides that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. S.35 provides for the overriding effect of the Securitisation Act. S.35 reads as follows:

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.

11. When the Writ Petition came up for hearing before a learned Single Judge, reliance was placed by the first respondent on the decision of a Division Bench in *Antony v. Kerala Financial Corporation* (1999 (2) KLT 457), wherein S. 46B of the State Financial Corporations Act, 1951, which is more or less identical to S.35 of the Securitisation Act, was interpreted. Doubting the correctness of the decision in *Antony v. Kerala Financial Corporation*, the learned single Judge referred the case to a Division Bench. The Division Bench by a detailed order of reference, referred the case to a Full Bench. The Division Bench doubted the correctness of the decisions in *Antony v. Kerala Financial Corporation* (1999 (2) KLT 457), *Shameem v. City Police Commissioner* (2005 (4) KLT SN 70 (Case No. 96) and *Business India Builders & Developers Ltd. v. Union Bank of India* (2007 (2) KLT 237).

12. The Kerala Buildings (Lease and Rent Control) Act, 1965 is an Act to regulate the leasing of buildings and to control the rent of such buildings in the State of Kerala. The objects and reasons of the Rent Control Act states that the Act was made for regulation of the letting of buildings, the prevention of unreasonable eviction of tenants from buildings and for the control of rents. Sub-s.(1) of S. 11

of the Rent Control Act provides that "notwithstanding anything to the contrary contained in any other law or contract a tenant shall not be evicted, whether in execution of a decree or otherwise, except in accordance with the provisions of this Act". S.11 provides for various grounds of eviction, namely, arrears of rent, bona fide need of the landlord for own occupation or for the occupation of any member of his family dependent on him, sub-letting by the tenant, user of the building by the tenant in such a manner so as to destroy or reduce its value or utility materially and permanently, the tenant acquiring possession of another building or putting up another building, bona fide need of the landlord to reconstruct the building, renovation of the building, etc. There are provisions in the Rent Control Act for protection of the tenants even when the bona fide need of the landlord is established. In a reconstructed building, the tenant has the first option to occupy. The Rent Control Act contains various provisions which protect the interests of the tenant as well as the landlord. The Rent Control Act being a special statute, the provisions of Sections 106 of the Transfer of Property Act would not apply.

13. In *Central Bank of India Vs. State of Kerala and Others*, , the question which arose for consideration was whether the provisions of S. 38 C of the Bombay Sales Tax Act, 1959. S. 26B of the Kerala General Sales Tax Act, 1963 and similar provisions contained in other State legislations by which first charge has been created on the property of the dealer or such other person, who is liable to pay sales tax, etc., are inconsistent with the provisions contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "DRT Act") and the Securitisation Act for enforcement of security interest and whether in view of the non obstante clauses contained in S.34(1) of the DRT Act and S.35 of the Securitisation Act, those Acts will have primacy over the State legislations. The Supreme Court held thus:

112. Under S.13(1) of the Securitisation Act, limited primacy has been given to the right of a secured creditor to enforce security interest vis-a-vis S.69 or S.69-A of the Transfer of Property Act. In terms of that sub-section, a secured creditor can enforce security interest without intervention of the court or tribunal and if the borrower has created any mortgage of the secured asset, the mortgagee or any person acting on his behalf cannot sell the mortgaged property or appoint a Receiver of the income of the mortgaged property or any part thereof in a manner which may defeat the right of the secured creditor to enforce security interest. This provision was enacted in the backdrop of Chapter VIII of the Narasimham Committee's Second Report in which specific reference was made to the provisions relating to mortgages under the Transfer of Property Act. 113. In an apparent bid to overcome the likely difficulty faced by the secured creditor which may include a bank or a financial institution, Parliament incorporated the non obstante clause in S. 13 and gave primacy to the right of secured creditor vis-a-vis other mortgagees who could exercise rights under Ss. 69 or 69-A of the Transfer of Property Act. However, this primacy has not been extended to other provisions like S.38-C of the Bombay Act and S.26-B of the Kerala Act by which

first charge has been created in favour of the State over the property of the dealer or any person liable to pay the dues of sales tax, etc. Sub-s.(7) of S. 13 which envisages application of the money received by the secured creditor by adopting any of the measures specified under sub-s.(4) merely regulates distribution of money received by the secured creditor. It does not create first charge in favour of the secured creditor.

116. The non obstante clauses contained in S.34(1) of the DRT Act and S.35 of the Securitisation Act give overriding effect to the provisions of those Acts only if there is anything inconsistent contained in any other law or instrument having effect by virtue of any other law. In other words, if there is no provision in the other enactments which are inconsistent with the DRT Act or the Securitisation Act, the provisions contained in those Acts cannot override other legislations. S.38C of the Bombay Act and S.26B of the Kerala Act also contain non obstante clauses and give statutory recognition to the priority of the State's charge over other debts, which was recognised by Indian High Courts even before 1950. In other words, these sections and similar provisions contained in other State legislations not only create first charge on the property of the dealer or any other person liable to pay sales tax, etc., but also give them overriding effect over other laws.

126. While enacting the DRT Act and the 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 S.529A of the Companies Act or S.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 these 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.

128. If the provisions of the DRT Act and the 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.

129. 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 S. 14-A of the Workmen's Compensation Act, 1923, S. 11 (2) of the EPF Act, S.74(1) of the Estate Duty Act, 1953, S.25(2) of the Mines and Minerals (Regulation and Development) Act, 1957, S.30 of the Gift Tax Act, and S.529-A of the Companies Act, 1956 would have been incorporated in the DRT Act and the Securitisation Act.

158. On the basis of the above discussion, we hold that the DRT Act and the Securitisation Act do not create first charge in favour of banks, financial institutions and other secured creditors and the provisions contained in S.38-C of the Bombay Act and S.26-B of the Kerala Act are not inconsistent with the provisions of the DRT Act and the Securitisation Act so as to attract non obstante clauses contained in S.34(1) of the DRT Act or S.35 of the Securitisation Act.

(emphasis supplied)

14. While considering the overriding effect of the Securitisation Act over other laws, as provided in S.35 of the Securitisation Act, it is necessary to consider the effect of sub-s.(1) of S. 13 of the Securitisation Act and Ss. 69 and 69A of the Transfer of Property Act. For the sake of convenience, relevant parts of Sections 69 and 69 A of the Transfer of Property Act are quoted below:

69. (1) Power of sale when valid--A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section have power to sell or concur in selling the mortgaged property or any part thereof, in default of payment of the mortgage-money, without the intervention of the court, in the following cases and in no others, namely:--

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State Government, in the Official Gazette;

(b) where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is the Government;

(c) where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage-deed and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras, Bombay, or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf.

69A. Appointment of receiver - (1) A mortgagee having the right to exercise a power of sale under S.69 shall, subject to the provisions of sub-section (2), be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

15. In the non obstante clause in sub-s.(1) of S. 13 of the Securitisation Act, specific mention is made about Ss. 69 and 69A of the Transfer of Property Act. The non obstante clause does not cover the other provisions of the Transfer of Property Act. The various clauses in sub-s.(4) of S. 13 of the Securitisation Act make it clear that the measures provided therein are those akin to the provisions of Ss. 69 and 69A of the Transfer of Property Act. This is a clear indication that, the rights and liabilities of the landlords and tenants in respect of the buildings covered by the Transfer of Property Act are not inconsistent with the provisions of the Securitisation Act. The operation of the provisions of the Transfer of Property Act, to the extent it is available, would continue to operate notwithstanding the provisions in the Securitisation Act. The Rent Control Act would apply to the buildings in Corporations, Municipalities and Panchayats notified under the Act. S.25 of the Rent Control Act provides for exemption of any building or class of buildings from all or any of the provisions of the Rent Control Act. In respect of the buildings covered by the Rent Control Act, the provisions of the Transfer of Property Act which are inconsistent with the provisions of the Rent Control Act, would have no application. The provisions of the Transfer of Property Act, to the extent it applies, would apply to those buildings which are not covered by the Rent Control Act. We are of the view that the specific mention of Ss. 69 and 69A of the Transfer of Property Act in the non obstante clause in S. 13(1) of the Securitisation Act is an indication of the exclusion of the other provisions in the Transfer of Property Act from the purview of the non obstante clause. Clause (a) of sub-s.(4) of S.13 of the Securitisation Act authorises the secured creditor to take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured assets. If the building is already let out to a tenant how could the secured creditor create a lease without terminating the lease created by the landlord? A lease is the transfer of a right to enjoy immovable property in consideration of price, money or any other consideration. It is an incident of the proprietary right of the owner to create a lease in respect of the property or the building situated therein. On a creation of the lease, the lessor as well as the lessee have certain rights and liabilities against each other. A third party cannot interfere with the rights and liabilities of the lessor and lessee without any right conferred on the third party to do so. We do not think that the provisions of the Securitisation Act confer any such right on the secured creditor to trench upon the rights of the tenant inducted by the borrower/owner before the security interest is created.

16. Clause (d) of sub-s.(4) and sub-s.(5) of S. 13 of the Securitisation Act indicate that the Act recognises the continued existence of the right of a transferee from the borrower or a person who has acquired any rights from the borrower, even after creation of the security interest. The secured creditor would be entitled to call upon the person who has acquired any of the secured assets from the borrower to pay to the secured creditor any money due from such person to the borrower. Such payment by the third party shall give him a valid

discharge as if he had made the payment to the borrower. The expression "any person who has acquired any of the secured assets from the borrower" certainly takes in creation of any subsidiary right by the borrower in favour of a stranger. The only requirement is that money should be payable by the transferee to the borrower, in which case, the secured creditor could call upon the transferee to pay that money to the secured creditor. The position may be different if the lease is created by the owner/borrower contrary to the terms of the agreement between him and the secured creditor.

17. The continued existence of the landlord-tenant relationship between the borrower and the stranger is not interdicted by a recourse taken by the secured creditor under sub-s.(4) of S.13. The expression "take possession of the secured assets of the borrower" occurring in clause (a) of sub-s.(4) of S.13 only indicates the right of the secured creditor to take possession to the extent it is possible. Such possession could be immediate possession or mediate possession. Possession could be actual possession or symbolic possession. Even after taking symbolic possession, clause (a) of sub-s.(4) of 5.13 of the Securitisation Act empowers the secured creditor to exercise his right to require the tenant to pay the rent to the secured creditor, exercising the power under clause (d) of sub-s. (4) of S. 13 of the Securitisation Act.

18. Section 13 (6) of the Securitisation Act provides that "any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditors shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset." (emphasis supplied). When the owner of the land transfers immovable property, the rights of the tenants would not be affected by such transfer. The transferee would be entitled to receive rent from the tenants. If the transferee so chooses, he may file a Rent Control Petition to evict the tenants from the building under the provisions of the Kerala Buildings (Lease and Rent Control) Act. In such a case, the tenants would get the protection of the Rent Control Act. The owner of the property could create security interest only in respect of his rights in the property. If the property is subject to lease to a stranger, what the owner of the land could offer as security interest and what the secured creditor could take as security interest is the right of the owner excluding the leasehold right of the tenant. The recourse that could be taken by the secured creditor under sub-s. (4) of S. 13 could only relate to the rights which the owner of the land had at the time of creating the security interest. 5.14 of the Securitisation Act could be invoked by the secured creditor for getting possession or control of the secured asset, only to the extent to which such possession or control could be had. If the building in the property is in the possession of a tenant, after the secured asset is sold, the auction purchaser could get only symbolic possession. That is the law which would apply if the secured creditor files a suit and gets the property sold in court action. (See R.36 of O.XXI of the Code of Civil Procedure). The Securitisation Act was enacted with the object of providing speedy recovery of

debts due to banks and financial institutions by providing a non adjudicatory process. (see *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, - paragraph 34). What the auction purchaser could not achieve in the matter of execution of the decree of a civil court, could not be achieved by taking recourse to the Securitisation Act. The secured creditor is entitled to realise the amounts due to him/it. For that purpose, different modes are provided in the Securitisation Act. The overriding effect as provided under S.35 of the Securitisation Act would empower the secured creditor to take recourse to one or more of the measures provided in sub-s.(4) of S. 13 of the Act, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

19. Sub-section (13) of S.13 of the Securitisation Act is also relevant in the context. Sub-s.(13) does not create an absolute bar to the transfer of the secured asset, by the borrower, even after receipt of notice under sub-s.(2) of S. 13 of the Act. The only requirement is that prior written consent of the secured creditor should be obtained for that purpose. This provision is a clear indication that transfer by way of lease created by the owner of the property is not affected by the creation of a security interest subsequently by the owner in favour of the secured creditor. The lessee's right would not be affected by the creation of such security interest. By creation of a mortgage, the lease hold right in favour of the stranger would not be extinguished. Notice under sub-s.(2) of S.13 of the Securitisation Act need be issued only to the borrower. The borrower is expected to discharge the liability. If he fails to do so, his existing rights in the property would be dealt with under the provisions of the Securitisation Act. By taking recourse to the provisions of the Securitisation Act, the pre- existing rights of strangers in the property could not be affected, annihilated, dealt with or denied.

20. Section 109 of the Transfer of Property Act provides that "if the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him." S.8 of the Transfer of Property Act provides that "unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof." Section 48 of the Transfer of Property Act provides that "where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created." Sub-s.(6) of S.13 of the Securitisation Act is not inconsistent with Ss. 8, 48 and 109 of the Transfer of Property Act. On the other hand, sub-s.

(6) of S. 13 of the Securitisation Act is in tune with Ss. 8, 48 and 109 of the Transfer of Property Act.

21. Section 35 of the Securitisation Act only provides that the provisions of the 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. When there is no inconsistency, the overriding effect under S.35 has no application. The overriding effect provided under S.35 is only to the extent indicated therein. It is also apposite to refer to S.37 of the Securitisation Act. S.37 states that the provisions of the Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956, The Securities and Exchange Board of India Act 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or any other law for the time being in force, (emphasis supplied). Any law for the time being in force, which is not inconsistent with the provisions of the Securitisation Act, would apply to even a case in which proceedings under the Securitisation Act are taken. The Securitisation Act is not intended to destroy the statutory rights vested in persons. The object and purpose of the Securitisation Act is only speedy recovery of the debt due to the secured creditor. In that process, the Securitisation Act does not contemplate extinguishment of the vested rights of third parties. The Securitisation Act is not a piece of legislation which destroys the substantive laws relating to property and the procedural laws in respect of suits and other proceedings concerning thereto. However when such laws, whether substantive or procedural, are inconsistent with the provisions of the Securitisation Act, the former should give way to the latter. That is all what is intended by S.35 of the Securitisation Act. S.35 of the Securitisation Act does not deny the legitimate rights of strangers available to them under the Transfer of Property Act and the Kerala Buildings (Lease and Rent Control) Act, so long as those rights are not inconsistent with the provisions of the Securitisation Act.

22. An owner of a building may wish to get his tenant evicted. A particular owner may have so many tenants under him. In view of the provisions of the Kerala Buildings (Lease and Rent Control) Act, a landlord can get an order of eviction only if the grounds enumerated in the Rent Control Act are established. An unscrupulous landlord may apply under S. 133 of the Code of Criminal Procedure and get an order for demolition of the building; even without notice to the tenants. The tenants may, sometimes, be successful in resisting such illegal action, by approaching the civil court. If it were to be held that the Securitisation Act overrides the Kerala Buildings (Lease and Rent Control) Act, a landlord who has let out his building to several tenants and wants to get them evicted can easily manipulate things to achieve that object without recourse to the machinery provided under the Rent Control Act. He can take a loan from a bank on mortgaging the tenanted building, deliberately commit default in repaying the loan and allow the measures under S. 13 (4) and 14 of the Securitisation Act to be taken by the secured creditor. The tenants can thus be easily evicted

summarily, either before the sale or after sale under the Securitisation Act. If a sale takes place, the landlord can also manage to have it purchased in the name of his confidant. In such cases, how could the civil court or the High Court or the authorities under the Securitisation Act protect the interests of the tenants, if the interpretation of the law is as stated above? If that is the interpretation of law, we would be creating two categories of tenants in respect of tenanted buildings; namely (a) those who are governed by the Kerala Buildings (Lease and Rent Control) Act but whose landlord has not taken any loan and created security interest in respect of the tenanted building and (b) those who are not entitled to the protection of the Rent Control Act only for the reason that the landlord has created a security interest in respect of the building and proceedings under the Securitisation Act have been taken. The Securitisation Act, in our view, does not create such a situation denying the rights of tenants under the Kerala Buildings (Lease and Rent Control) Act.

23. We shall now deal with the contention that the decisions of this Court in *Antony v. Kerala Financial Corporation*: 1999 (2) KLT 457, *Shameem v. City Police Commissioner* (2005 (4) KLT SN 70 Case No. 96) and *Business India Builders & Developers Ltd. v. Union Bank of India* (2007 (2) KLT 237) require re-consideration.

24. In *Antony v. Kerala Financial Corporation*, 1999 (2) KLT 457, towards security for repayment of loan, the owner of a hotel building created equitable mortgage in favour of the Kerala Financial Corporation. The agreement between the parties stipulated that the borrower shall not sell, mortgage, lease, transfer etc., of the hotel building or any part thereof. Contrary to the agreement, lease was granted in respect of three rooms to the writ petitioner. The Kerala Financial Corporation initiated proceedings u/s 29 of the State Financial Corporations Act and took possession of the building including the tenanted premises. The tenant challenged the said proceedings in the Writ Petition. The Division Bench held that lease was contrary to the agreement between the borrower and the Corporation and therefore the tenant was not entitled to any protection and relief. It was also held that S.46 B of the State Financial Corporations Act, 1951 has overriding effect over the Kerala Buildings (Lease and Rent Control) Act. However, in view of the agreement between the parties, the writ petitioner was allowed to continue in occupation of the premises till sale was confirmed.

25. In *Shameem v. City Police Commissioner*. 2005 (4) KLT SN 70 Case No. 96, a Division Bench held:

The provisions of the Securitisation Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. In respect of transactions governed by the said Act, the overriding provisions effectively nullify the rights normally admissible even to a tenant, as available under the Rent Control Act, as if it can be only subservient to a later Central enactment.

26. In *Business India Builders & Developers Ltd. v. Union Bank of India* (2007 (2) KLT 237) a partnership firm and a proprietary concern availed loan from a bank, on deposit of title deeds in respect of an item of immovable property. The bank initiated proceedings under the Securitisation Act. When the authorised officer attempted to take possession of the property, he was obstructed by persons set up by the borrowers. As per the order under S.14 of the Act, possession was taken. The property was sold and it was purchased by a stranger. The writ petitioner challenged the proceedings under the Securitisation Act contending that he was entitled to protection under the Kerala Buildings (Lease and Rent Control) Act. The Writ Petition was dismissed. On appeal, the Division Bench held that contrary to the terms of the agreement between the borrowers and the bank, the petitioner was inducted in the building. The appellant contended that lease is not an encumbrance within the meaning of Rule 9 of the Security Interest (Enforcement) Rules, 2002. Repelling the contentions, the Division Bench held that lease is an "encumbrance" over the property within the meaning of Rule 9 (9) of the Rules. It was also held that since the lease was created contrary to the terms of the agreement, it was not necessary for the secured creditor to resort to the provisions of the Rent Control Act. The Division Bench relied on Antony's case and Shameem 's case (supra) and held that the Securitisation Act has overriding effect over the Kerala Buildings (Lease and Rent Control) Act.

27. Rules. 8 and 9 of the Security Interest (Enforcement) Rules, 2002 deal with the procedure for sale of immovable secured assets, issue of sale certificate and delivery of possession. The proviso to sub-r.(6) of R.8 provides for publication of notice of sale if the sale of the secured asset is being effected by either inviting tenders from the public or by holding public auction. Cl.(a) to the proviso stipulates for setting out in the notice "the description of the immovable property to be sold, including details of the encumbrances known to the secured creditor." Sub-rr.(6), (7), (8), (9) and (10) of R.9 read as follows:

(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the form given in Appendix V to these rules.

(7) Where the immovable property sold is subject to any encumbrances, the authorized officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him:

Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of the money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen days from the date of finalization of the sale.

(8) On such deposit of money for discharge of the encumbrances, the authorized officer shall issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.

(9) The authorized officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

(10) The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.

28. On a reading of the above clauses, it is clear that the encumbrances referred to in sub-rule (9) are those encumbrances referred to in sub-r.(7). Sub-r.(7) contemplates only those encumbrances which are capable of being discharged by depositing money. For discharge of those encumbrances, notice is required to be issued to the persons interested. On discharge of such encumbrances, the authorized officer shall deliver the property to the purchaser free from such encumbrances. The certificate of sale shall specifically mention whether the purchase was free from any encumbrance. Appendix V to the Rules (Sale Certificate) contains the following: "The sale of the scheduled property was made free from all encumbrances known to the secured creditor listed below on deposit of the money demanded by the undersigned." The list of encumbrances shall be shown in the sale certificate. The scheme of Rr. 8 and 9 of the Security Interest (Enforcement) Rules does not indicate that a sale under the Securitisation Act would be free from all encumbrances. The sale would be free from only those encumbrances known to the secured creditor and which were discharged as provided in the Rules. It cannot be said that when a sale takes place under the provisions of the Securitisation Act, all encumbrances would automatically come to an end. The sale and purchase would be free from only those encumbrances which were known to the secured creditor and which were discharged in the manner provided in the Rules. With respect, we are not inclined to accept the contrary view taken by the Division Bench in *Business India Builders & Developers Ltd. v. Union Bank of India* (2007 (2) KLT 237).

29. To consider the question whether the Securitisation Act has overriding effect over the Kerala Buildings (Lease and Rent Control) Act, it is apposite to extract Art. 254 of the Constitution of India:

254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States.-

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the

Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

30. Parliament has exclusive power of legislation in respect of any matter falling under List I (Union List) in the Seventh Schedule of the Constitution of India. The State Legislature has exclusive power to make laws with respect to any matter in List II (State List) of the Seventh Schedule. Both Parliament and the State Legislature have power to make laws with respect to matters enumerated in List III (Concurrent List) of the Seventh Schedule. The Kerala Buildings (Lease and Rent Control) Act comes under Entry Nos. 6,7 and 13 of the Concurrent List. The Securitisation Act was enacted under Entry 45 of List I. The State Financial Corporations Act comes under Entry 43 of List I of the Seventh Schedule. There is no conflict between the Securitisation Act and the Kerala Buildings (Lease and Rent Control) Act. They operate in different fields. It is well settled that the question of repugnancy between the law made by Parliament and the law made by the State Legislature may arise only in cases where both the legislations occupy the same field with respect to any of the matters enumerated in the Concurrent List. The Securitisation Act and the Kerala Buildings (Lease and Rent Control) Act were enacted respectively under List I and List IE of the Seventh Schedule. They occupy different fields. Therefore, Art. 254 of the Constitution does not apply and it cannot be held that the Kerala Buildings (Lease and Rent Control) Act is repugnant to the Securitisation Act and hence void. The Securitisation Act is not a later law with respect to the same matter as that of the Rent Control Act. There is no specific provision in the Securitisation Act affecting the operation of the Kerala Buildings (Lease and Rent Control) Act. (Vide: *Zaverbhai Amaldas Vs. The State of Bombay*, ; *Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others*, ; *The State of West Bengal Vs. Kesoram Industries Ltd. and Others*, , *Central Bank of India Vs. State of Kerala and Others*, .

31. In *Central Bank of India Vs. State of Kerala and Others*, , it was held thus:

35. The ratio of the above noted judgments is that Art. 254 gets attracted only when both Central and State legislations have been enacted on any of the matters enumerated in List III in the Seventh Schedule and there is conflict

between two legislations. Though in *State of W.B. v. Kesoram Industries Ltd.*, some observations appear to have been made suggesting that Art. 254 gets attracted even though legislations may have been enacted in different entries in Lists I and II, but the same have to be read in consonance with the plain language of the said article and other judgments including the three-Judge Bench judgment in *Hoechst Pharmaceuticals Ltd v. State of Bihar*, which has been expressly approved by the Constitution Bench.

36. Undisputedly, the DRT Act and the Securitisation Act have been enacted by Parliament under Entry 45 in List I in the Seventh Schedule whereas the Bombay and Kerala Acts have been enacted by the State Legislatures concerned under Entry 54 in List II in the Seventh Schedule. To put it differently, two sets of legislations have been enacted with reference to entries in different lists in the Seventh Schedule. Therefore, Art. 254 cannot be invoked per se for striking down State legislations on the ground that the same are in conflict with the Central legislations. That apart, as will be seen hereafter, there is no ostensible overlapping between two sets of legislations. Therefore, even if the observations contained in *Kesoram Industries* case are treated as law declared under Art. 141 of the Constitution, the State legislations cannot be struck down on the ground that the same are in conflict with Central legislations.

32. In *Abhav Kumar Pandey v. State of Bihar* (AIR 1997 Patna 160), the Patna High Court held that a person in rightful occupation of the premises as a tenant cannot be dispossessed under S.29 of the State Financial Corporations Act, 1951. It was held:

From sub-s. (2) of S. 29 it is clear that in the case of transfer of property by the Corporation in exercise of power under sub-s.(1) of S. 29 the transferee shall be vested with the rights in the property transferred as if the transfer had been made by the owner of the property. In that view of the matter also a person in rightful occupation of the premises as a tenant cannot be dispossessed merely because of the transfer of the property by the Corporation under S. 29 of the said Act. I have no hesitation to hold that S. 29 of the said Act will not prevail upon the law under which a person in occupation of the premises as a tenant cannot be evicted without due process of law.

33. In *A. Stephen Samuel & Saraswathy Transports v. Union of India & Ors.* ((2004) 118 Comp Cases 82), property in the possession of tenants was sold in a proceeding against their landlord under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The order of the Recovery Officer was challenged. The Madras High Court held thus:

"The appellants herein are not defaulters to the bank. They do not claim to be in occupation of the properties under a title created by the judgment debtor subsequent to the attachment of the properties by the Recovery Officer, nor do they claim that they entered into possession subsequent to the recovery certificate issued by the Recovery Officer. There is no doubt that the appellants

are the lawful tenants of the defaulter to the bank even before the initiation of the proceedings by the bank against the defaulter. Therefore, when the property was in the occupation of tenants at the time when it was sold, the auction purchaser would be entitled to symbolical possession of such property, but he would not be entitled to claim that the tenants should be directed to hand over actual possession of the respective portions of the property in their possession. In our view, it is impermissible for the auction purchaser to get actual possession of the property by throwing the tenants out of the property. The auction purchaser, in our view, will be entitled to possession in accordance with R.40 of the ITCP Rules and the delivery contemplated in the rule is not actual delivery, but symbolical delivery of the property to the auction purchaser.

34. In *Hutchison Essar South Ltd. v. Union Bank of India* (AIR 2008 Kar. 14), it was held that if the secured asset is in the possession of a bonafide lessee or tenant, he cannot be thrown out by invoking Ss. 13 and 14 of the Securitisation Act and the secured creditor or the purchaser has to take recourse to the appropriate legal proceedings for taking actual possession of the premises from the bonafide tenant or lessee. The same view was taken by the Calcutta High Court in *Manager, UCO Bank Vs. Samar Sarkar and Others*, .

35. For the aforesaid reasons, with respect, we are not inclined to agree with the reasonings in *Antony v. Kerala Financial Corporation* (1999 (2) KLT 457), *Shameem v. City Police Commissioner* (2005 (4) KLT SN 70 (Case No. 96) and *Business India Builders & Developers Ltd. v. Union Bank of India* (2007 (2) KLT 237) and we overrule the same.

36. The next question to be considered is whether the petitioners are entitled to get the reliefs in the Writ Petition filed under Art. 226 of the Constitution of India. The learned counsel appearing for the respondents contended that the remedy of the petitioners, if any, is to file an application under S. 17 of the Securitisation Act. The learned counsel for the petitioners submitted that they have no efficacious alternative remedy.

37. In various decisions, the Supreme Court emphasized the necessity to resort to the alternative remedy under the Securitisation Act rather than to resort to proceedings under Art. 226 of the Constitution. Vide: *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, and *United Bank of India Vs. Satyawati Tondon and Others*, .

38. Section 17 of the Securitisation Act provides that any person (including borrower), aggrieved by any of the measures referred to in sub-s.(4) of S.13 taken by the secured creditor or his authorized officer under Chapter III may make an application to the Debts Recovery Tribunal. The heading of S. 17 is "Right to Appeal". Learned counsel for the Petitioners submitted that the remedy under S.17 of the Securitisation Act is not an efficacious alternative remedy since under sub-s.(3) of S. 17 of the Securitisation Act, the Tribunal need only consider the question whether "any of the measures referred to in sub-s.(4) of S.13,

taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder". It is submitted by the counsel that the Tribunal has no jurisdiction to consider the question whether the petitioners had any pre-existing leasehold right and whether they are entitled to protection under the Kerala Buildings (Lease and Rent Control) Act.

39. In *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, , the Supreme Court considered the scope and ambit of Section 17. It was held:

59. We may like to observe that proceedings under S.17 of the Act, in fact, are not appellate proceedings. It seems to be a misnomer. In fact it is the initial action which is brought before a forum as prescribed under the Act, raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing a suit in civil court. As a matter of fact proceedings under S. 17 of the Act are in lieu of a civil suit which remedy is ordinarily available but for the bar under S.34 of the Act in the present case.

62. As indicated earlier, the position of the appeal under S. 17 of the Act is like that of a suit in the court of the first instance under the Code of Civil Procedure. No doubt, in suits also it is permissible, in given facts and circumstances and under the provisions of the law to attach the property before a decree is passed or to appoint a receiver and to make a provision by way of interim measure in respect of the property in suit. But for obtaining such orders a case for the same is to be made out in accordance with the relevant provisions under the law. There is no such provision under the Act.

40. In *Fakrudheen Haji V.P. v. State Bank of India & Anr.* (2009 (1) KLT 227 : ILR 2009 (1) Ker. 357), a Division Bench of this Court considered the question whether a person other than the borrower would be entitled to take recourse to S. 17 of the Securitisation Act. Answering in the affirmative, it was held:

The contention of the petitioner is that though S.17 empowers any person (including borrower) to make an application to the Debts Recovery Tribunal, restoration of possession of the secured assets could be made only in favour of the borrower. Therefore, it is contended that the remedy provided under S. 17 is illusory. We are not inclined to accept this contention. There cannot be any doubt that any person (including the borrower) can challenge the measures taken under S.13 (4) by making an application to the Debts Recovery Tribunal as provided in sub-s.(1). If the Debts Recovery Tribunal comes to the conclusion that any of the measures taken by the secured creditor under S.13 (4) are not in accordance with the provisions of the Act and the Rules made thereunder, it may declare the measures taken under S.13 (4) as invalid. S.17(3) also empowers the Debts Recovery Tribunal to restore the secured assets to the borrower. S.17(3) also states that the Debts Recovery Tribunal may pass such order as it may consider appropriate and necessary in relation to any of the recourses taken by the secured creditor under sub-s.(4) of S.13. If the Tribunal finds that the

recourse taken by the creditor under S. 13 (4) is invalid, nothing prevents the Tribunal from passing appropriate orders protecting the interests of the appellant, whether the appellant is the borrower or any other person. The fact that specific mention is made for restoration of possession in favour of the borrower does not mean that restoration of possession in favour of a person other than the borrower is impossible while passing an order under S.17 (3). If the Tribunal finds that the recourse taken under S.13 (4) is invalid, and if it is found that the appellant who is not a borrower was dispossessed by such recourse under S.13 (4), it would only be proper for the Tribunal to pass an order putting the appellant in possession of the property or to pass any other appropriate order in the facts and circumstances of the case. The expressions "after examining the facts and circumstances of the case and evidence produced by the parties" and "pass such order as it may consider appropriate and necessary" in sub-s.(3) of S.17 clearly indicate that the Debts Recovery Tribunal has ample powers to deal with any situation where a recourse was taken by the secured creditor under S.13 (4) and when the Tribunal finds that such recourse was not in accordance with the provisions of the Act and Rules. S.17 (3) does not prevent restoration of possession in favour of a person other than the borrower. It cannot be said when a right is conferred on any person aggrieved, to file an appeal to the Debts Recovery Tribunal, the Tribunal would have no power to redress his grievance. Restoration of possession to the borrower mentioned in sub-s.(3) of S.17 would not in any way fetter the jurisdiction of the Tribunal to pass any order including restoration of possession in favour of any person aggrieved, whether he is a borrower or not, if the facts and circumstances of the case warrant such restoration. We are of the view that the expression "evidence produced by the parties" occurring in S. 17 (3) would include evidence produced by the appellant, though he is a person other than the borrower.

41. In *United Bank of India Vs. Satyawati Tondon and Others*, , the Supreme Court held thus:

42. There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued under S.13 (4) or action taken under S. 14, then she could have availed remedy by filing an application under S.17 (1). The expression "any person" used in S. 17 (1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under S. 13 (4) or S. 14. Both the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

42. In *Authorized Officer, Indian Overseas Bank and Another Vs. Ashok Saw Mill*, , the Supreme Court considered the scope and ambit of S. 17 of the Securitisation Act and held thus:

35. In order to prevent misuse of such wide powers and to prevent prejudice

being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in S.17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-s.(4) of S.13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in sub-s.(3) thereof.

36. The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.

37. The consequences of the authority vested in the DRT under sub-s.(3) of S.17 necessarily implies that the DRT is entitled to question the action taken by the secured creditor and the transactions entered into by virtue of S.13 (4) of the Act. The legislature by including sub-s.(3) in S. 17 has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases. Resultantly, the submissions advanced by Mr. Gopalan and Mr. Atlaf Ahmed that the DRT has no jurisdiction to deal with a post-S.13 (4) situation, cannot be accepted.

39. We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated under S. 13 (4) of the Act. On the other hand, the law is otherwise and it contemplates that the action taken by a secured creditor in terms of S. 13(4) is open to scrutiny and can not only be set aside but even the status quo ante can be restored by the DRT.

43. In *Transcore Vs. Union of India (UOI) and Another*, , (in paragraph 74 at page 166) thus:

Therefore, the scheme of S.13(4) read with S. 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then DRT is entitled to put the clock back by restoring the status quo ante. Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by the authorised officer taking possession.

44. In *K. Sami Vs. Branch Manager, Bank of India, Authorised Officer and Chief Manager and Arun P. Samuel, Proprietor*, , a learned Single Judge of this held that it is not necessary for an aggrieved person to wait till actual or symbolic possession is taken by the financial institution before resorting to the remedy as provided under S.17 of the Securitisation Act.

45. When an application is made under S. 17 of the Securitisation Act by a

person claiming to be a tenant under the borrower or any person under whom the borrower claims title, the Debts Recovery Tribunal has jurisdiction to entertain the application and to enquire into the question whether the applicant had any right, title or interest or possession anterior to the creation of the security interest and to what extent such interest could be protected. If the claim made by the applicant is found to be genuine and legal, appropriate orders can be passed by the Tribunal holding that: (a) his actual possession shall not be disturbed; (b) only symbolic possession shall be taken; (c) any sale shall be subject to the rights of the applicant; and/or (d) any other order or direction which is required in the facts and circumstances of the case.

46. Since the petitioners have an adequate, alternative and efficacious remedy to make an application to the Debts Recovery Tribunal under S. 17 of the Securitisation Act, we decline the reliefs sought for in the Writ Petition. However, in the facts and circumstances of the case, the petitioners are permitted to file an application before the Tribunal under S. 17 of the Securitisation Act, within a period of one month from today. If such an application is filed within a month, the Debts Recovery Tribunal shall dispose of the same in accordance with law, treating the application as having been filed within the period of limitation.

47. For the aforesaid reasons, we answer the reference as follows: The Securitization Act has no overriding effect over the provisions of the Kerala Buildings (Lease and Rent Control) Act, 1965. A tenant inducted in the premises before creation of the security interest cannot be summarily evicted under Ss. 13 (4) and 14 of the Securitisation Act. We also hold that such a tenant, whose right, title, interest or possession is affected by a measure taken under S. 13(4) of the Securitisation Act, would be entitled to make an application to the Debts Recovery Tribunal under S. 17 of the Securitisation Act.

The Writ Petition is disposed of as above.