
(2013) 03 AHC CK 0197

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No"s. 64630 of 2012 and 982 and 2021 of 2013

Ratan Kumar and Others

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

Date of Decision : 05-03-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1
Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(1), 13(13), 13(2), 13(4)
Transfer of Property Act, 1882 — Section 65A, 69, 69A

Citation : (2013) 3 ADJ 210 : AIR 2013 All 115 : (2013) 4 ALJ 429 : (2013) 97 ALR 692 : (2013) 3 AWC 2403 : (2013) 3 BC 122 : (2013) 119 RD 386

Hon'ble Judges : Ashok Bhushan, J;Abhinava Upadhya, J

Bench : Division Bench

Advocate : Kartikeya Saran and V.B. Shukla, for the Appellant; Archana Singh, B.K. Tripathi, P.K. Tripathi, S.F.A. Naqvi and Vipin Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Ashok Bhushan, J.—These three writ petitions have been heard together and are being decided by this common judgment. In Writ Petition No. 64630 of 2012 (Ratan Kumar and others v. State Bank of India and others) pleadings are complete which is being treated as leading writ petition.

2. Brief facts giving rise to these three writ petitions are; M/s. J.P. Telecom obtained a cash credit limit and term loan from State Bank of India. Smt. Jaggi Devi was one of the guarantors of the loan. House No. 149, Bai Ka Bagh, Kydganj, Allahabad was mortgaged to the Bank by deposit of title deed. The guarantee agreement was executed on 25th June, 2007. The borrower failed to repay the loan. The State Bank of India initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (hereinafter referred to as the 2002 Act) by issuing notice u/s

13(2) dated 25th August, 2008 for recovery of its dues. A notice was also sent to Smt. Jaggi Devi wife of Raja Ram and Ajay Kumar son of Raja Ram, the guarantors. The details of House No. 149 which was mortgaged, was mentioned in Part-II of the notice. The borrower failed to repay the amount within 60 days, hence Bank invoked its power u/s 13(4) of the 2002 Act. The possession notice dated 14th September, 2009 was issued. Before issuing the possession notice, the Bank has filed an application u/s 14 of the 2002 Act before the District Magistrate, Allahabad for taking possession of the house. The District Magistrate passed an order on 19th June, 2009 u/s 14 of the 2002 Act for taking possession of mortgaged assets including House No. 149 area 25.09 square meters and 116.92 square meters. The Bank took symbolic possession of House No. 149 on 14th September, 2009, A notice was also published in the newspapers on 15th September, 2009 informing the public in general that possession of the mortgaged assets have been taken and public in general has been cautioned that no transaction (sale/purchase) be made of the mortgaged assets. M/s. J.P. Telecom was mentioned at Item No. 10 of the notice. The Bank, after taking symbolic possession, proceeded to auction the House No. 149. One Neeraj Kumar (respondent No. 5) in Writ Petition No. 64630 of 2012 purchased the house in auction on 27th May, 2011 for an amount of Rs. 35,51,000/-. The sale was confirmed on 11th June, 2001 on which date the sale certificate was issued to the auction purchaser. The Bank which had taken symbolic possession of the house earlier on 14th September, 2009 had written a letter dated 18th July, 2011 to the Additional City Magistrate-III, Allahabad forwarding the copy of the order of the District Magistrate passed u/s 14 of the 2002 Act dated 19th June, 2009 stating that possession of the mortgaged assets was taken on "symbolic possession basis" and no physical possession was taken. The Bank by the said letter requested for taking of possession. The Additional City Magistrate on 4th August, 2011 wrote to the Station House Officer, Police Station Kydganj to get the possession of the house transferred in favour of the Bank and police help be provided. Notice dated 28th July, 2012 was issued in the name of Smt. Jaggi Devi that possession of the house be transferred to the Bank by 7th August, 2012 failing which police force shall be used. The Bank has again written to the Additional City Magistrate on 4th December, 2012 for handing over the possession to the Bank.

3. One Vinod Kumar Jaiswal, one of the sons of Smt. Jaggi Devi, had filed an appeal u/s 17 of the 2002 Act being Appeal No. 122 of 2011 against the auction which appeal was dismissed on 28th February, 2012. Against the order of Debts Recovery Tribunal securitisation appeal being Appeal No. R-39 of 2012 was filed by Vinod Kumar Jaiswal which too was dismissed on 3rd December, 2012. One Ajai Kumar Jaiswal another son of Smt. Jaggi Devi has also filed an appeal u/s 17 of the 2002 Act which was dismissed on 5th December, 2012. The police officials, bank officials and certain persons reached the House No. 149 on 4.12.2012 and sealed the shops existing in the ground floor of the house. Writ Petition No. 64630 of 2012 was filed by four petitioners in this Court on 10th December, 2012

claiming to be tenants of the shop situate in House No, 149. Petitioner No. 1 claims to be tenant since 1988, petitioner No. 2 since 1991 and petitioner Nos. 3 and 4 since 2007. Petitioners' case in the writ petition is that on the ground floor there are 14-15 shops and the landlord lives on first floor. The petitioners' case further is that on 5th December, 2012 the shops were forcibly sealed. The petitioners in the writ petition claim for a direction for opening the seal and further direction that respondents may not interfere in the peaceful possession and working of the petitioners over the shops.

4. In Writ Petition No. 64630 of 2012 this Court passed an interim order on 21st December, 2012 to the following effect:

Amendment application as prayed is allowed.

Shri Neeraj Kumar is impleaded as respondent No. 5, who is represented by Shri Sandeep Arora.

Learned counsel for the petitioners may carry out the amendment during the course of the day.

Petitioners' claim to be the tenants of premise No. 149, Bai Ka Bagh (Kydganj) Allahabad. The proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 were taken against the borrower and in pursuance of the said proceedings, the aforesaid premise has been sold in favour of the respondent No. 5 by sale certificate dated 11.6.2011. On an application filed u/s 14 of the Act, 2002, the District Magistrate passed an order on 19.6.2009, for giving possession of the aforesaid premise. Petitioners' case is that in pursuance of the proceedings under the Act, 2002 on 4.12.2012, the shops of the petitioners who are tenant in the aforesaid premise have been sealed. Petitioners' case further is that the petitioners do not challenge the proceedings under the Act, 2002, nor the right of the respondent No. 5, on the basis of the auction purchased, but their submission is that they cannot be evicted in the guise of taking possession under the Act, 2002 either by the Bank or by the auction purchaser.

Submission needs scrutiny.

Prima facie case has been made out for grant of interim relief.

Let a counter-affidavit be filed within ten days,

Put up on 3.1.2013, as supplementary fresh.

By that time rejoinder-affidavit may be filed.

We direct that the seal of the petitioners shops be opened within three days from the date of filing a certified copy of this order.

5. In pursuance of the interim order of this Court, the seal of the shop was opened and the petitioners were allowed to run their shops.

6. Writ Petition No. 982 of 2013 has been filed by two petitioners, namely, Raj Kumar Tiwari and Pooja Jaiswal. The petitioners claim to be running an Advocate Chamber and Tailoring shop respectively since last 4-5 years. Petitioners claim that both the shops were sealed on 5th December, 2012. The petitioners claim for reopening of the seal and further mandamus that respondents shall not interfere in peaceful possession of the shop and the chamber. The writ petition was filed on 7th January, 2013 and no interim order was passed in the writ petition.

7. Writ Petition No. 2021 of 2013 has been filed by one Budhram Jaiswal and two other persons praying that respondents be directed not to evict the petitioners from their house situated at 149, Bai Ka Bagh, Allahabad and further not to interfere in peaceful possession. The petitioners claim that mother of petitioner No. 1 was guarantor of a loan taken by one J.P. Telecom in which loan the House No. 149 was mortgaged. The reference of notice u/s 13(2) of the 2002 Act dated 25th August, 2008 and the order of the District Magistrate u/s 14 of the 2002 Act has been made. The house was auctioned in favour of Neeraj Kumar in whose favour sale certificate dated 11th June, 2011 has been issued. One of the brother of petitioners Vinod Kumar Jaiswal had filed Appeal No. 122 of 2011 u/s 17 of the 2002 Act which was dismissed on 28th February, 2012 against which appeal was also dismissed on 3rd December, 2012. In the writ petition no detail has been given regarding the nature of right claimed by the petitioners except that they are resident of first floor of House No. 149 and living since last 40 years.

8. A counter-affidavit has been filed by the bank as well as the auction purchaser. The bank in its counter-affidavit has given details of mortgage and loan taken by M/s. J.P. Telecom on 25th June, 2007. The bank further stated that on default proceedings under the 2002 Act were initiated and symbolic possession on taken on 14th September, 2009. The auction sale was confirmed in favour of Neeraj Kumar on 11th June, 2011 and thereafter the bank wrote to the Additional City Magistrate for handing over the actual possession in pursuance of the order of the District Magistrate dated 19th June, 2009. The bank stated that an application filed u/s 17 of the 2002 Act by Vinod Kumar Jaiswal one of the sons of Jaggi Devi was dismissed on 28th February, 2012 and the appeal against the said order was also dismissed on 3rd December, 2012. One Ajai Kumar Jaiswal also filed an application which has been dismissed. It is stated that possession was taken on 5th December, 2012 through police force. The bank wrote to the police on 11.12.2012 that on 4th December, 2012 only part of possession of the house could be taken by the bank, hence steps be taken for giving possession of rest of the portion. It has been pleaded by the bank in its counter-affidavit that petitioners of Writ Petition No. 64630 of 2012 claim to be tenant and their remedy if any is to file an appeal u/s 17 of the 2002 Act. It is stated by the bank that Jaggi Devi inherited the property by will through her husband and the petitioners claim to be tenant through one Budhram Jaiswal son of Jaggi Devi. It is pleaded that claim of tenancy of the petitioners is on the basis of unregistered document.

9. The auction purchaser Neeraj Kumar has also filed a counter-affidavit who claims to have purchased the house in auction with regard to which sale certificate was issued on 11th June, 2011. It is stated that Vinod Kumar Jaiswal as well as present petitioners have nothing to do with the property in question and they have been installed to delay the proceeding and create hindrance in handing over the peaceful possession. It is pleaded that House No. 149 was in exclusive ownership of late Jaggi Devi. The house was purchased by late Raja Ram Jaiswal who executed a registered will dated 18th May, 1987 bequeathing the property to Jaggi Devi. Late Jaggi Devi derived exclusive ownership on the basis of will dated 18th May, 1987. The name of Jaggi Devi is recorded in the Khasra as the owner. The mortgage was created by Jaggi Devi on 25th June, 2007 who was exclusive owner. After creating the mortgage on 25th June, 2007, Jaggi Devi bequeathed the house by registered will dated 27th June, 2007 in favour of Ajai Kumar Jaiswal. It has been stated that Writ Petition No. 64630 of 2012 which is claimed to have been filed by tenant and Writ Petition No. 2021 of 2003 filed by Budhram Jaiswal, have been filed with intend to delay the proceeding of taking possession by the rightful owner i.e. auction purchaser. It is stated that no tenancy was ever created in favour of the petitioners and no proof of tenancy has been brought on the record. It is further stated that issue of tenancy cannot be determined in writ proceedings and remedy, if any, is to file an appeal u/s 17 of the 2002 Act.

10. Sri Kartikeya Saran, learned counsel for petitioners in Writ Petition No. 64630 of 2012, has submitted that petitioners are tenants of the shops in ground floor of the house. Petitioner Nos. 1 and 2 are tenants since 1988 and 1991 respectively whereas petitioner Nos. 3 and 4 are tenants from 2007. It is contended that petitioners have no grievance with regard to action of the Bank taken under the 2002 Act nor the petitioners are challenging the auction purchase in favour of Neeraj Kumar. It is submitted that Bank has already taken symbolic possession on 14th June, 2009 and after confirmation of the auction sale the Bank has no right to dispossess the petitioners who are tenants of the shop. It is submitted that right of tenancy in the shops in question cannot be affected by auction sale and the auction purchaser, after the auction sale, shall step in the shoes of the landlord but the proceedings for taking possession in pursuance of the order u/s 14 of the 2002 Act cannot be utilized for evicting the petitioners, who are tenants of the shops and carrying on their business since before creation of the mortgage. It is submitted that action of the Bank authorities as well as the police authorities in dispossessing the petitioners was illegal and beyond the scope of provisions of the 2002 Act, hence the petitioners were entitled for restoration of possession and opening of seal which has already been directed by this Court. It is submitted that since the petitioners are not challenging the action of the Bank under the 2002 Act, there is no need for them to file an appeal u/s 17 of the 2002 Act.

11. Smt. Archana Singh, learned counsel for the Bank, refuting the submissions of learned counsel for the petitioners, has contended that Bank has every right to

take actual possession after sale of the mortgage assets. It is submitted that Bank is entitled to take symbolic possession as well as the actual possession and after auction sale, the Bank is obliged to handover the possession to the auction purchaser, hence the request of the Bank to handover actual physical possession was in accordance with the provisions of the 2002 Act and no error has been committed by the police authorities in taking steps for dispossessing the petitioners. It is submitted that Bank was never informed by the guarantors or borrower that there are tenants in the shops and the Bank was unaware of any tenant in the shops, hence no fault can be found with the action of the Bank in requesting the District Magistrate to handover the actual physical possession.

12. Sri S.F.A. Naqvi, learned counsel for the auction purchaser, refuting the submissions of learned counsel for the petitioners, has contended that petitioners are not entitled to resist the action of the Bank and the District administration to hand over the possession to the auction purchaser. It is submitted that petitioners have been put in possession recently only in the month of November-December, 2012 to create hindrance in the right of auction purchaser to take physical possession. It is submitted that no tenancy was created in favour of the petitioners at any point of time. It is stated that owner of the house was Jaggi Devi and after her death Ajai Kumar Jaiswal became the owner. The petitioners do not claim to be tenant of Ajai Kumar Jaiswal, hence the rightful landlord has never created any tenancy in favour of the petitioners. Thus the petitioners have no right to resist in taking over possession. It is further submitted that Budhram Jaiswal has absolutely no right to file the writ petition since the house in question, after the will dated 27th June, 2007 by Jaggi Devi, owned by Ajai Kumar Jaiswal son of Jaggi Devi, he has no right or title in the property. It is further submitted that Vinod Kumar Jaiswal and Ajai Kumar Jaiswal, both sons of Jaggi Devi, having filed applications u/s 17 of the 2002 Act which have been dismissed, the writ petition filed by Budhram Jaiswal also deserves to be dismissed.

13. Learned counsel for the parties have placed reliance on various judgments of this Court, other High Courts and the Apex Court which shall be referred to while considering the submissions in detail.

14. We have considered the submissions of learned counsel for the parties and perused the record.

15. From the pleadings of the parties and submissions made by learned counsel for the parties, following issues arise for consideration in these three writ petitions:

(i) Whether the Bank in exercise of its power u/s 13(4)/14 of the 2002 Act, while taking actual possession of the mortgaged assets, can evict tenants occupying the premises?

(ii) Whether the Bank in exercise of power u/s 13(4)/14 of the 2002 Act while taking actual possession of the mortgaged assets, can take possession from

persons claiming right and title over the property?

(iii) Whether remedy u/s 17 of the 2002 Act can be availed by tenants/other persons claiming right or title to the mortgaged assets for resisting the action of the Bank in taking actual possession of the mortgaged assets?

16. All the above issues being interrelated, are considered together. Before we proceed to consider the issues, as noted above, it is useful to note the scheme and the provisions of the 2002 Act.

17. The 2002 Act has been enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected thereto or incidental thereto. The Statement of Objects and Reasons of the 2002 Act clearly notice the object and reasons for enactment of the 2002 Act. Following portion of the Statement of Objects and Reasons of the 2002 Act are quoted below:

Statement of Objects and Reasons:..... Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the Court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possessions of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.....

18. The words "security interest" has been defined in Section 2(zf) of the 2002 Act which is to the following effect:

(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;

19. Chapter-III of the 2002 Act deals with enforcement of security. Section 69 of the Transfer of Property Act, 1882 deals with the power of mortgagee to sell the

mortgaged property. Section 69-A of the Transfer of Property Act, 1882 dealt with the enforcement of security interest. Sections 13(1), 13(2), 13(4), 13(6) and 13(13), which are relevant for the present case, are quoted below:

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 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 re-payment of secured debt or any instalment there of, 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).....

(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 for 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).....

(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 creditor 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.

.....

.....

(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.

20. The Bank after notice u/s 13(2) of the 2002 Act is empowered to take one or more measures to recover its debt as provided u/s 13(4). Section 13(4)(a) of the 2002 Act empowers the Bank to take possession of the secured assets of the borrower. Section 14 of the 2002 Act provides that Chief Metropolitan Magistrate or the District Magistrate shall assist secured creditor in taking possession of secured asset. Section 14 of the 2002 Act is quoted below:

14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset. -- (1) Where the possession of any secured assets 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 subsection (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.

21. The rules have been framed, namely, the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the 2002 Rules). Rule 8 of the 2002 Rules deals with sale of immovable secured assets. Rules 8(1), 8(2) and 8(3), which are relevant for the purpose, are quoted below:

8. Sale of immovable secured assets. -- (1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in sub-rule (1) shall also be published in two leading newspaper, one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.

22. Rule 9 of the 2002 Rules deals with time of sale, issues of sale certificate and delivery of possession etc. A conjoint reading of provisions of Section 13(4) of the 2002 Act and Rule 8 of the 2002 Rules clearly spells out that word "possession" as used in the statute, has been used both for symbolic possession and actual physical possession. In the present case the Bank itself has come up with the case that it has taken symbolic possession on 14th September, 2009 of the House No. 149 and has subsequently requested the Additional City Magistrate to hand over the actual possession. The copy of the letter dated 18th July, 2011 of the Bank written to the Additional City Magistrate has been enclosed as Annexure-10 to the amendment application in which letter following has been stated by the Bank:

We enclose herewith photocopy of the order dated 19.6.2009 passed by District Magistrate, Allahabad with instruction to take possession of the following properties:

The possession of the above said properties was taken on "Symbolic Possession Basis" and no physical possession was taken.

23. The Bank thus apart from taking symbolic possession of the mortgaged assets is entitled to take actual possession. The provisions of Section 13(13) of the 2002 Act, as quoted above, specifically provides that after receipt of notice u/s 13(2) of the 2002 Act the borrower shall not transfer by way of sale, lease or otherwise the secured assets except with prior written consent of the secured creditor, The format of possession notice, as given in Appendix-IV of the 2002 Rules, specifically provides as under:

.....The borrower in particular and the public in general is hereby cautioned not to deal with the property and any dealings with the property will be subject to the charge of the.....

24. The creation of third party right thus is forbidden after proceeding under the 2002 Act has been initiated by issuance of notice u/s 13(2) of the 2002 Act. The

said provisions have been inserted with specific purpose and object. The borrower is restrained from dealing with the mortgaged assets so that there may not be any difficulty in taking possession of the assets by the bank and transferring the same after sale to the auction purchaser. Any third party right created after issuance of notice u/s 13(2) of the 2002 Act has to be ignored. The Apex Court had occasion to consider the provisions of the 2002 Act in the case of *Transcore Vs. Union of India (UOI)* and *Another*, . Paragraph 74 of the said judgment, which is relevant for the purpose, is quoted below:

74. Keeping the above conceptual aspect in mind, we find that Section 13(4) of the NPA Act proceeds on the basis that the borrower, who is under a liability, has failed to discharge his liability within the period prescribed u/s 13(2), which enables the secured creditor to take recourse to one of the measures, namely, taking possession of the secured assets including the right to transfer by way of lease, assignment or sale for realizing the secured assets. Section 13(4-A) refers to the word "possession" simpliciter. There is no dichotomy in subsection (4-A) as pleaded on behalf of the borrowers. Under Rule 8 of the 2002 Rules, the authorised officer is empowered to take possession by delivering the possession notice prepared as nearly as possible in Appendix IV to the 2002 Rules. That notice is required to be affixed on the property. Rule 8 deals with sale of immovable secured assets. Appendix IV prescribes the form of possession notice. It inter alia states that notice is given to the borrower who has failed to repay the amount informing him and the public that the bank/FI has taken possession of the property u/s 13(4) read with Rule 9 of the 2002 Rules. Rule 9 relates to time of sale, issue of sale certificate and delivery of possession. Rule 9(6) states that on confirmation of sale, if the terms of payment are complied with, the authorised officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the 2002 Rules. Rule 9(9) states that the authorised officer shall deliver the property to the buyer free from all encumbrances known to the secured creditor or not known to the secured creditor, (emphasis supplied). Section 14 of the NPA Act states that 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, the secured creditor may, for the purpose of taking possession, request in writing to the District Magistrate to take possession thereof. Section 17(1) of NPA Act refers to right of appeal. Section 17(3) states that if the DRT as an appellate authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures u/s 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the 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. As stated above, the NPA Act provides for recovery of possession by non-adjudicatory process, therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8, undoubtedly, refers to sale of immovable secured asset. However, Rule 8(4) indicates that where possession is taken by the authorised officer before issuance of sale certificate under Rule 9, the authorised officer shall take steps for preservation and protection of secured assets till they are sold or otherwise disposed of. u/s 13, if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred. The costs, charges and expenses referred to in Section 13(8) will include costs, charges and expenses which the authorised officer incurs for preserving and protecting the secured assets till they are sold or disposed of in terms of Rule 8(4). Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a Court receiver under Order XL Rule 1 CPC. The Court receiver can take symbolic possession and in appropriate cases where the Court receiver finds that a third party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorised officer under Rule 8 has greater powers than even a Court receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorised officer shall take such steps as he deems fit to preserve the secured asset. It is well-settled that third party interests are created overnight and in very many cases those third parties take up the defence of being a bona fide purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules.

25. The Apex Court in the said case noted that third party interest are created overnight and in very many cases those third parties take up the defence of being a, bona fide purchaser for value without notice and such types of disputes are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. Although in the 2002 Rules no dichotomy between symbolic and actual possession has been laid but the 2002 Rules specifically contemplates the consequences when actual physical possession has been taken.

26. Provisions of 2002 Act and the Rules, specifically Section 13(13) prohibit the borrowers to deal with the mortgaged assets by way of sale, lease or otherwise. In the present case, the notice u/s 13(2) of 2002 Act has been issued on 25.8.2008 from which date there is clearly statutory prohibition from execution of any lease or sale. The "borrower" which expression includes "guarantor" as defined u/s 2(f) could not have granted any lease of the property thereafter. Now

coming to the facts of the present case, the petitioners of writ petition No. 64630 of 2012 claim to be tenants since before initiation of proceedings u/s 13(2) of 2002 Act. The petitioners' claim that earlier the landlord was Budhram Jaiswal and Smt. Jaggi Devi and after her death they have been paying the rent to Budhram Jaiswal, Family dispute between the sons of late Smt. Jaggi Devi has also been referred to in the writ petition. After death of Smt. Jaggi Devi, Ajay Jaiswal claimed to be owner by virtue of the Will dated 27.6.2007. The petitioner in the second Supplementary affidavit has filed certain papers to indicate that the shops in house No. 149 have been there for last about 20 years. Certain invoices of the year 1993, 1997 in the name of M/s. Rajeev Button Store which shop is claimed to be run by petitioner No. 2 where address is shown to be 149 Bai Ka Bagh, two inspection notes dated 5.5.2000 have been also brought on the record in the name of Shop Techno Ladies Tailor 149, Triveni Road. From the materials brought on record, it is clear that the shops in building No. 149, Bai Ka Bagh Kydganj are there for last more than a decade. The existence of the shops on the ground floor has not been disputed by the respondents. The submission which has been made by learned Counsel for the auction purchasers is that the petitioners have been put in possession in the Month of November and December, 2012 to create obstruction in taking possession of the shops and they are not bona fide tenants. It is further submitted by learned counsel for the respondents that the issue as to whether the petitioners are tenants of the shops and as to whether they were tenants of the shops since before the creation of mortgage are the question of facts, which cannot be adjudicated in proceedings under Article 226 and remedy if any of the petitioners, is to file an appeal u/s 17 of the 2002 Act, where all these questions can be raised and decided.

27. The issue which is to be answered is as to whether tenant of a mortgaged premises can be asked to vacate the premises and hand over possession to the bank in exercise of powers u/s 13(4)/14 of the 2002 Act when the bank who is secured creditors invokes its right to take possession of the secured assets, The 2002 Act have been enacted with the object to empower the banks and financial institutions to take possession of the securities and to sell them without the intervention of the Court. Taking possession of securities and selling them by the financial institutions is with object to realise their debts in exercise of power under the 2002 Act. The debt is realised by sale of the secured assets. There is no difficulty in taking possession of the mortgaged assets which are in the possession of the borrower which term includes the guarantor. The question which has arisen is as to whether while taking possession, the possession can be taken from the tenants of the premises and whether the possession can be taken from the tenants who claim to be tenants of the premises before mortgage of the assets as is claimed in the present case. In the State of U.P., U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 has been enacted to provide in the interest of general public, for the regulation of letting and rent of and the eviction of tenants from certain classes of buildings situated in urban areas and for matters connected therewith. The word "tenant" has been defined u/s 3(a)

and the word "landlord" has been denned u/s 3(j). Sections 3(a) and 3(j) are as follows:

3. (a) "tenant", in relation to a building, means a person by whom its rent is payable, and on the tenant's death-

(1) in the case of a residential building, such only of his heirs as normally resided with him in the building at the time of his death;

(2) in the case of a non-residential building, his heirs;

(j) "Landlord", in relation to a building, means a person to whom its rent is or if the building were let, would be, payable and includes, except in clause (g) the agent or attorney or such person;

28. The relationship of tenants and landlord is regulated by the statutory schemes as delineated by 1972 Act. The relationship of landlord and tenant is not contemplated to exist only by registered lease rather relationship of landlord and tenant may exist without there being any written or registered deed of tenancy. Section 20 of the Act crates bar of suit for eviction of tenant except on specified grounds. When the right and interest of a borrower or guarantor in a premises is sold in exercise of power u/s 13(4) of 2002 Act by the bank, the auction purchaser steps in the shoes of the owner of the premises and he shall have same right which the borrower or guarantor has prior to sale. Owner of the premises i.e. landlord cannot evict a tenant except on specified grounds as mentioned in Section 20 of the 1972 Act or by getting the premises released on an application filed u/s 21, the same provision shall also be applicable to auction purchaser who steps in the shoes of the owner of the premises and the provisions of 1972 Act cannot be said to be diluted for auction purchaser who purchases a property in auction made by the bank in exercise of powers u/s 13(4) of 2002 Act, If, it is held that auction purchaser who purchases the property by sale made by the Bank u/s 13(4) of 2002 Act, shall have also right to evict the tenants, the sale of tenanted building through bank by owners shall become a device of evicting the tenants by creating a security interest in the premises and after default permitting sale of the premises. Whether 2002 Act shall override the provisions of U.P. Act No. 13 of 1972 is now to be considered. Under 2002 Act, Section 35 gives overriding effect the provisions of 2002 Act to any other law. Section 35 of the Act is 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.

29. 2002 Act overrides any other law for the time being in force which is inconsistent with the 2002 Act. No inconsistency can be read between the 2002 Act and 1972 Act, both are the special Acts which operate in different Fields. The provisions of 2002 Act cannot be interpreted to mean to override the 1972 Act

which operates in different field and which has been enacted for protection of tenants in the State of U.P. and which regulate the relationship of landlord and tenant. Division Bench of Madras High Court relied by learned Counsel for the petitioner in Indian Bank Vs. Nippon Enterprises and Others, , fully supports submissions of learned counsel for the petitioner and following was laid down in paragraphs 24, 25 and 36:

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.

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.

30. Learned counsel for the Bank has relied on the judgment of Delhi High Court in *Shri Sanjeev Bansal Vs. Oman International Bank SAOG and Another*, . In the aforesaid case, the unregistered lease on an insufficient paper was executed by owner of the premises in favour of the tenant i.e. Sanjeev Bansal much after creation of the mortgage deed. Possession of premises in which tenancy was claimed was sought to be taken by the bank in exercise of power u/s 13(4) of the 2002 Act. An appeal u/s 17 of the 2002 Act by the tenant was dismissed by the Debt Recovery Tribunal and Debt Recovery Appellate Tribunal and thereafter the writ petition was filed, which was dismissed by the Delhi High Court. In the said case, the Delhi High Court refused to grant relief since the lease was unregistered, executed on an insufficient stamp paper and much later after the deed of mortgage. Following was laid down in paragraphs 3 and 6 of the judgment.

3. Even a cursory glance over the said provision would clearly show that the protection afforded to a tenant is from the landlord of the premises and the landlord of the premises cannot recover possession from the tenant unless he takes recourse to any of the grounds as available to him u/s 14(1) of the Delhi Rent Control Act and the right of the tenant is fully protected notwithstanding anything contrary contained in any other law or contract. In the present case, it is a mortgagee who has enforced his right under the SRFAESI Act against the principal borrower who had mortgaged the said property in question, by duly and validly executing the memorandum of mortgage in favor of the mortgagor. There is no denial of the fact that the said unregistered lease deed on an insufficient stamp paper was executed much later than the deed of mortgage.

6. Manifestly the said unregistered lease was created for the alleged unlimited period through unregistered lease deed in complete contravention of Section 65-A of the Transfer of Property Act. As per, the said provision of Section 65-A, the lessee can enjoy the protection if the lease is created by the mortgagor in conformity with the mandate of requirements laid down in Section 65-A of TP Act

and not otherwise. Neither the mortgagor nor the lessee can defeat the right of mortgagee and no lessee can claim any protection unless his tenancy is as per the requirements of Section 65-A of Transfer of Property Act. The present petition is devoid of any merits. We would not like to interfere in the orders passed by the DRAT

31. In the said case, the claim of tenancy was subsequent to the deed of mortgage, which was one of the reason for dismissal of the writ petition and further the matter has already gone to Debt Recovery Tribunal and Debt Recovery Appellate Tribunal where in it was held that neither the mortgagor nor the lessee could defeat the right of mortgagee unless his tenancy is as per requirement of Section 65A of the Transfer of Property Act. Division Bench of Madras High Court in writ petition No. 10355 of 2005 (Decided on 23.2.2007) M/s. Sree Lakshmi Products v. State Bank of India, also laid down the same proposition in paragraph 9 which is quoted below:

9. On a plain reading of the observations made in Transcore case it is clear that the bank/FI is entitled to take actual possession of the secured assets" from the borrower or from any other person in terms of Section 13(4) of the SARFAESI Act. Any transfer of secured assets after taking possession of the same by the bank/FI shall vest in the transferee all rights in relation to the secured assets as if the transfer has been made by the owner of such secured assets. Any party aggrieved by such dispossession will have to take recourse to approaching the DRT u/s 17(4) of the SARFAESI Act. If the party is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the status-quo ante. By virtue of Section 17(4) read with Section 35 of the SARFAESI Act, if in a given case the measures undertaken by the secured creditor u/s 13(4) come in conflict with the provisions of any State law, then notwithstanding to such conflict, the provisions of Section 13(4) shall override the local law. Section 13(13) of the SARFAESI Act operates as an attachment/injunction restraining the borrower from disposing of the secured assets and therefore, any tenancy created after such notice would be null and void. Any tenancy created by the mortgagor after the mortgage in contravention of Section 65-A would not be binding on the bank/FI, and in any event such tenancy rights shall stand determined once action u/s 13(4) has been taken by the bank/FI. When the petitioner is claiming a tenancy prior to the creation of mortgage and such tenancy is disputed by the bank the remedy of the petitioner is to approach DRT by way of an application u/s 17 of the SARFAESI Act to establish its rights,

32. Learned Counsel for the Bank as well as learned Counsel for the auction purchaser placed much reliance on the judgment of the Apex Court in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., . Reference has been made to paragraphs 66, 67 and 69. By the aforesaid judgment, the Apex Court upheld challenge to vires of the 2002 Act except that condition of pre-deposit u/s 17(2) of 75% amount was held to be onerous and unconstitutional. It

was further held that Section 17 of the Act contains a safeguards to the borrowers.

33. In *Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others*, , proceedings u/s 13(4) 2002 Act were initiated by the Bank against the borrower. The Bank made application u/s 14 to the Chief Metropolitan Magistrate to take possession of the mortgaged properties wherein an order was passed for taking possession. Notice was issued by the Assistant Registrar to hand over possession of the mortgaged assets which notice was challenged by the borrower in the High Court. High Court dismissed the said writ petition on the ground of availability of alternative remedy u/s 17. However, High Court directed to maintain status quo for a period of 10 weeks. Following was noted in paragraph 9 of the judgment.

9. Being aggrieved by the said notice, the appellants herein again approached the High Court, As afore-stated, the High Court dismissed the said writ petition; vide order dated 28th April, 2009, on the ground that an alternative remedy was available to the appellants u/s 17 of the Act. Nevertheless, the High Court directed the respondents to maintain status quo in the matter for a period of 10 weeks from the date of its order, so as to enable the appellants to approach the Debts Recovery Tribunal (for short the "DRT") u/s 17 of the Act.

34. The application seeking extension of the status quo order was rejected, against which SLP was filed in the Apex Court. The Apex Court considered the provisions of Sections 13(4), 14 and 17. Following was laid down in paragraphs 20, 21 and 22.

20. The 2002 Rules, enacted under sub-section (1) and clause (b) of sub-section (2) of Section 38 read with sub-sections (4), (10) and (12) of Section 13 of the Act, set down the procedure for enforcing a security interest. Rule 4 of the 2002 Rules deals with the possession of movable assets, whereas Rule 8 deals with the possession of immoveable assets. It is manifest that Rule 4 has no application to the facts of the instant case, as contended by the learned counsel for the State.

21. In *Indian Overseas Bank v. Ashok Saw Mill*, the main question which fell for determination was whether the DRT would have jurisdiction to consider and adjudicate post Section 13(4) events or whether its scope in terms of Section 17 of the Act will be confined to the stage contemplated u/s 13(4) of the Act? On an examination of the provisions contained in Chapter III of the Act, in particular Sections 13 and 17, this Court, held as under:

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 Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 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-section (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.

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 u/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 Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT.

22. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action u/s 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action u/s 13(4) of the Act, by providing for an appeal before the DRT.

35. The submission of learned counsel for the respondents that the issue raised by the writ petitioners claiming of their being tenants of the premises since before execution of the mortgage being issue of facts, has to be agitated by filing appeal u/s 17 of the 2002 Act is well founded. This Court in exercise of writ jurisdiction shall not adjudicate the issues of fact specially the claim of petitioners to be tenants prior to date of execution of the mortgage when the tenancy of the petitioners is disputed by the respondents. In writ petition No. 64630 of 2012 the shops were sealed on 5.12.2012 in proceedings undertaken by the Bank for taking possession of the mortgaged assets, which was challenged in the writ petition. Under an interim order of this Court dated 21.12.2012, the seal of the shops were opened and the petitioners of writ petition No. 64630 of 2012 are running their shops at present. We are of the view that ends of justice would be served in giving liberty to the petitioners of writ petition No. 64630 of 2012 to file an appeal u/s 17 of the 2002 Act before the Debt Recovery Tribunal within four weeks from today. We further provide that for a period of ten weeks from today or till the date an order is passed by the Debt Recovery Tribunal on the stay application of the petitioners which ever is earlier, the status quo with regard to shops in possession of the petitioners shall be maintained.

36. In writ petition No. 982 of 2013, petitioners also claimed to be tenants whose shops were sealed on 5.12.2012. However, no interim orders were passed in the said writ petition. The petitioners of writ petition No. 982 of 2013 are also given liberty to file appeal u/s 17 of the 2002 Act before the Debt Recovery Tribunal.

37. In writ petition No. 2021 of 2013, Budhram Jaiswal and others have claimed to be in possession of the first floor of house No. 149, Bai Ka Bagh. The petitioner No. 1, Budhram Jaiswal being son of Smt. Jaggi Devi, the guarantor who was owner of the house could have no better right than the guarantor/borrower. The application u/s 17 by brother of the petitioner Sri V.K. Jaiswal and Ajay Kumar Jaiswal having already been dismissed by Debt Recovery Tribunal, the petitioners have no right to resist the action of the bank of taking possession of the premises. No ground has been made out to grant any relief in writ petition No. 2021 of 2013. Writ petition No. 2021 of 2013 is dismissed. In the result, writ petition No. 64630 of 2012 and writ petition No. 982 of 2013 are disposed of as indicated above and writ petition No. 2021 of 2013 is dismissed.