(2020) 06 DRT CK 0010

In the Debts Recovery Tribunal

Case No : Securitisation Application No. 216 Of 2019

V. Damodharan APPELLANT

Vs

Authorised Officer M/s Electronica Finance Limited And Ors. RESPONDENT

Date of Decision : 01-06-2020

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 3, 4(A), 41(1), 41(f), 13(1), 13(2), 13(3), 13(3A), 13(4), 13(4)(a), 13(13), 14, 17, 17(1), 17(4A), 35
Security Interest (Enforcement) Rules, 2002 — Rule 8(2)
Transfer of Property Act, 1882 — Section 65A, 69, 69A, 105, 106, 107, 111
Companies Act, 1956 — Section 529A, 529(1)
Constitution of India, 1950 — Article 300A
Rent Control Act, 1958 — Section 55(2)
Debts Recovery Tribunal (Procedure) Rules, 1993 — Rule 2(c) 16

Citation : (2020) 06 DRT CK 0010

Hon'ble Judges : Dr. N.V Badarinath, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. The applicant herein, assailed the measures initiated by the first respondent pursuant to the proceedings of the 3rd respondent in R.C.M3/16870/2018 dated 25.04.2019 for recovery of the actual possession of the application schedule mentioned property, inter alia, contending that the said measure is in contrary to law and the provisions of the SERFEASI Act and rules made thereunder and prayed the Tribunal to set aside the same.

2.1 The gist of the case of the applicant is that the applicant is given to understand that the first respondent in connivance with the 2nd respondent had approached the 3rd respondent, the District Collector, Kancheepuram and filed application under Section 14 of SARFAESI Act, seeking delivery of physical possession of the schedule property, which is in applicant's possession and enjoyment. The first respondent taking advantage of the fact that no notice is required to be served either to the borrower / guarantor / owner of the property / tenant in the proceedings under Section 14 of the SARFAESI Act had suppressed the tenancy right of this applicant before the third respondent.

2.2 It is stated that the applicant was the original owner of the schedule property and he was in possession and enjoyment for more than a decade. Due to his financial need, the property was sold to second respondent by a registered document, however, the applicant is in continuous possession of the schedule property by way of lease entered between the applicant and the 2nd respondent on 07.03.2017. Second respondent for purchase of the property had availed loan from 1st respondent. The applicant had taken the schedule mentioned property by virtue of Lease Agreement registered as Doc No.1593/2017 dated 07.03.2017 on the file of SRO, Pallavaram, with full knowledge of the first respondent financier on the basis of NOC dated 06.03.2017 issued by them. The applicant was enjoying peaceful possession of the property and owing to the dispute arisen between the applicant and the lessor, an Original Suit was filed by this applicant in OS No.254/2018 in the Court of Principal District Munsif Court, Alandur and the suit was decreed in favour of the applicant on 04.07.2019.

2.3 It is stated that the District Collector, Kancheepuram vide proceedings dated 25.04.2019 in proceedings No.R.C.M3/16870/2018 was pleased to direct the 4th respondent to assist the 1st respondent bank in taking physical possession of the schedule property with specific direction. The moment when the applicant came to know of the proceedings dated 25.04.2019, the applicant immediately on 14.05.2019 had given a representation to the 3rd respondent especially intimating about the tenancy rights of this applicant. Moreover, the bank is not entitled to approach the 3rd respondent under the provisions of SARFAESI Act to take physical possession. Before the third respondent could consider the representation of the applicant, 4th respondent all of a sudden on 20.10.2019 had come to the schedule property and sealed the premises thereby prevented the applicant from occupying the schedule property. Aggrieved by the action of the 4th respondent, applicant was forced to file Writ Petition in W.P. No.30489 of 2019 before the Hon'ble High Court of Madras. The Hon'ble High Court by order dated 30.10.2019 directed the applicant to approach the Tribunal under Section 17 of SARFAESI Act within two weeks from the date of order and further directed the respondent authorities of the State to de-seal the property the question and allow the petitioner's family to reside in the same.

2.4 First respondent, respondent aware of the fact that applicant is in possession of the property, did not make him a party to the proceedings under Section 14 before the 3rd respondent District Collector, as mandated under law. The District Magistrate, Kancheepuram had infact directed the Tahsildar, Pallavaram Taluk to find out if any tenant is in occupation and any legal proceedings pending before the Hon'ble Court. The said directions were over looked by the Tahsildar and the officials for the reasons best known to them.

2.5 It is submitted that applicant is a third party and is lessee of the property and was not connected with the loan obtained by the 2nd respondent from the

1st respondent and hence the District Collector, Kancheepuram had proceeded against the property leased out to this applicant. The lease owernship of the applicant was confirmed by the order of the Additional District Munsif Court, Alandur vide decree dated 04.07.2019. The applicant had paid a very huge sum of Rs.45 lakhs to the 2nd respondent as lease. The applicant was not served with any notice by the respondent before initiating recovery measures under the provisions of SARFAESI Act. The applicant on coming to know about the proceeding of the District Magistrate and District Collector, Kancheepuram dated 25.04.2019, the applicant immediately sent representation dated 14.05.2019 to the District Collector, Kancheepuram and The Tahsildar, Pallavaram Taluk. The respondent till date did not dispose the representation. However, the Tahsildar, Pallavaram Taluk by its internal communication dated 09.07.2019 (despatched only on 26.08.2019) placed the same to the Deputy Collector, which is under consideration. Without considering the representation dated 14.05.2019, the communication dated 28.08.2019 has been issued by the Tahsildar, Pallavaram Taluk.

2.6 It is stated that the 4th respondent, Tahsildar has not followed the directions of 3rd respondent, in as much as inspection of the schedule property along with the borrower, to verify if there is any order of stay granted by any Court or Tribunal and to verify if there is any tenancy existing, if there is any lease deed. The 4th respondent did not visit the premises along with the borrower i.e., 2nd respondent herein, because if the 4th respondent had inspected the property along with the borrower, the tenancy agreement between the applicant and the borrower (2nd respondent) would have been brought to light. Furthermore, the Civil Court decree passed in OS No.254 of 2018 on the file of Hon'ble District Munsif, Alandur is still in force against the 2nd respondent prohibiting the 2nd respondent from evicting the applicant except by due process of law.

2.7 In the grounds of the application, it is sated that the action of the first respondent company is against the principles of natural justice and equity. The District Magistrate and District Collector, Kancheepuram was mislead by the first respondent to pass the order dated 25.04.2019 by suppressing the facts about the lease and applicant's occupation of the premises, despite the fact that the lease itself was entered into after issuance of NOC by the first respondent. Though the fourth respondent was specifically directed by third respondent to find out there is any tenancy right existing in the schedule property, fourth respondent failed to follow the said directions and had proceeded to seal the schedule property. The respondents failed to take into consideration that the applicant had paid a huge sum of Rs.45 lakhs as lease amount to the 2nd respondent and that the applicant is in possession of the same. The first respondent failed to add the applicant as party in Section 14 proceedings before the District Magistrate, thus depriving the applicant from the opportunity to establish his lease rights under the principal of natural justice. Thus contending, Ld. Counsel prayed the Tribunal to adjudicate upon the tenancy rights of the applicant as per Section 17(4A) of SARFAESI Act in the above SA.

3. In support of his case, Ld. Counsel for the applicant filed the following documents:

(i) Copy of Sale Deed in favour of the 2nd applicant

(ii) No objection Letter given by respondent financial institution for leasing the schedule property in favor of Damodaran dated 06.03.2017.

(iii) First lease agreement entered between the 2nd respondent and V. Damodaran dated 07.03.2017

(iv) Lease Agreement (English Translation) dated 07.03.2017

(v) Lease Extension Agreement entered between the 2nd applicant and V. Damodaran dated 27.02.2018

(vi) Translated extract of Lease Extension Agreement

(vii) Copy of the proceedings of District Magistrate / District Collector, Kancheepuram in proceedings No.RCM3/16873/2018 dated 25.04.2019

(viii) Representation of the petitioner dated 14.05.2019

(ix) Judgment passed by the Hon'ble Additional District Munsif, Alandur in O.S. No.254 of 2018

(x) Translation copy of judgment in O.S. No.254 of 2018

(xi) Communication of the 3rd respondent directing the applicant to vacate and hand over possession of the property which is in occupation and enjoyment of the applicant dated 28.08.2019.

(xii) Copy of Writ Petition in W.P. No.26508 of 2019

(xiii) Copy of the communication dated 09.07.2019 in X/K:/2180/2019/m of the Deputy Collector which was dispatched on 26.08.2019

(xiv) Representation of the Petitioner dated 29.08.2019

(xv) Representation of the Petitioner dated 30.08.2019

(xvi) Copy of the order passed in W.P. No.30489 of 2019

4.1 The first respondent bank in its counter denied all the averments and allegations as false except those that are specifically admitted therein. It is stated that second respondent, who is Proprietor of M/s Satnam Industries availed credit facilities to the tune of Rs.3,49,20,618/- after executing necessary loan and security documents. Loan is secured by equitable mortgage by deposit of title deeds of the properties morefully described in schedule by the second respondent.

4.2 It is stated that the following transactions show the malafide intentions of the appellant and 2nd respondent herein:

(i) On 06.03.2017, the appellant sells the schedule mentioned property to 2nd respondent, who is none other than the Proprietor of M/s Satnam Industries Limited, the borrower.

(ii) On 07.03.2017, the 2nd respondent creates equitable mortgage of the schedule mentioned property in favour of the first respondent herein for the loans obtained and the same was registered as Document No.1502/2017.

(iii) On 08.03.2017, the appellant and the 2nd respondent entered into a Lease Agreement, which was registered as Document No.1593/2017 for a limited period of 12 months i.e., from 07.03.2017 and upto 07.03.2018. The lease was not extended further.

4.3 It is stated that as the second respondent defaulted in repayment of dues, the loan account was declared as NPA on 10.08.2017 and the first respondent initiated SARFAESI action and issued demand notice on 31.01.2018 and possession notice on 24.07.2018. The third respondent, District Magistrate has passed orders on 25.04.2019 and directed fourth respondent, Tahsildar, Pallavaram to execute with adequate police protection from the respective Assistant Commissioner of Police. Thereafter, when the fourth respondent attempted to take physical possession, appellant requested the fourth respondent to defer the execution till 05.10.2019. Even on 18.09.2019, the applicant had submitted an undertaking that he will vacate the secured asset on 05.10.2019 and subsequently made another request that he will hand over the key on 18.10.2019. Thereafter, on 21.01.2019, the applicant has surrendered the secured asset to the Tahsildar, Pallavaram and the Tahsildar has recorded 'nil' inventory in the secured asset.

4.4 It is stated that the applicant had obtained an order at the back of the first respondent in W.P. No.30489 of 2019 by filing a false affidavit, whereby the first respondent was dispossessed without notice after having taken possession of the secured asset, scrupulously following the rules laid down in the SARFAESI Act, 2002 and with the knowledge of the applicant. Based on the false affidavit, the Hon'ble Court was pleased to pass orders on 30.10.2019 directing the 4th respondent to deseal the property. Since the Authorised officer of the first respondent was away on official duty from 04.11.2019 to 09.11.2019, the fourth respondent without giving any notice to first respondent had broke open the lock and handed over the same to the applicant. Aggrieved by the same, the first respondent preferred a Review Petition (WP 223 of 2019), in which Hon'ble High Court of Madras on 16.12.2019 directed the fourth respondent to take back possession of the premises in question from the applicant and restore the position as on 21.10.2019 by keeping the property under lock and key, to be maintained by fourth respondent.

4.5 It is stated that the allegation that the applicant is in continuous possession of the property by way of lease entered between the applicant and the second respondent on 07.03.2017 is unsustainable, since the registered lease period was over on 07.03.2018 and the subsequent allegations that the applicant has a right on the lease entered by him is not only false but an attempt to mislead without having a subsisting valid registered lease agreement entered subsequently. As regards the decree obtained in OS No.254 of 2018 by the applicant, it is stated that it was filed with the connivance of second respondent and the applicant obtained an ex-parte order in a bare injunction suit against the second respondent and the same is not binding on the 1st respondent. The allegation that the first respondent did not consider the representation of the applicant before issuing the communication dated 28.08.2019 is not only false but figment of imagination of the applicant. The allegation of extension of lease beyond 2018 is an afterthought as there is no mention about it in the affidavit filed in the writ petition. Even otherwise, at the time of taking possession, there was no valid lease disentitling the applicant to the relief under the amended Act. The first respondent has followed all the procedures laid down in the SARFAESI Act, 2002 and nothing survives in this SA. Thus contending, Ld. Counsel prayed the Tribunal to dismiss the application with costs.

4.6 Ld. Counsel for the respondent filed the following documents in support of his case.

(i) Term Loan cum Hypothecation Agreement No.148-488181-2015-2-2

(ii) Term Loan cum Hypothecation Agreement No.148-488181-2016-19-3

(iii) Term Loan cum Hypothecation Agreement No.148-488181-2016-2-4

(iv) Term Loan cum Hypothecation Agreement No.148-488181-2016-27-5

(v) Loan sanctioned Letter Loan No.148-488181-2015-2-2 along with summary of sanctioned amount and cash collateral receipt dated 16.05.2016

(vi) Loan sanctioned Letter Loan No.148-488181-2016-19-3 along with summary of sanctioned amount dated 15.07.2016

(vii) Loan sanctioned Letter Loan No.148-488181-2016-2-4 along with summary of sanctioned amount and cash collateral receipt dated 28.09.2016

(viii) Loan sanctioned Letter Loan No.148-488181-2016-27-5 along with summary of sanctioned amount and cash collateral receipt dated 24.02.2017

(ix) Agreement relating to deposit of title deeds registered as Doc No.1502/2017 dated 06.03.2017

(x) Lease Agreement dated 07.03.2017

(xi) 13(2) Demand Notice along with Postal Proofs issued by the Review Petitioner / 4th respondent 31.01.2018

(xii) 13(4) Possession Notice along with Postal Proofs, Photo affixtures, Paper Publication issued by the Review Petitioner / 4th respondent dated 24.07.2018

(xiii) Order copy in Application No.1919 & 1920/2019 in A.No.334/2019 passed by this Hon'ble Court dated 08.03.2019 (xiv) Order issued by the Kancheepuram District Magistrate in Rc. M3/16870 / 2018 dated 25.04.2019.

(xv) Intimation Letter sent to the first respondent / petitioner for vacating the secured asset along with proof dated 07.05.2019

(xvi) Proceedings issued in Na.Ka.No.1340/2019/A1 by the Tahsildar, Pallavaram dated 11.06.2019 along with English Translation

(xvii) Proceedings issued in Na.Ka.No.1340/2019/A1 by the Tahsildar, Pallavaram dated 19.07.2019 along with English Translation

(xviii) Orders passed in SA No.111/2019 by DRT-3, Chennai dated 01.08.2019

(xix) Proceedings issued in Na.Ka.No.1340/2019/A1 by the Tahsildar, Pallavaram dated 19.08.2019.

(xx) Request of the first respondent / petitioner addressed to Pallavaram Tahsildar for extension of time for vacating the secured asset dated 11.09.2019

(xxi) Request of the first respondent / petitioner addressed to Pallavaram Tahsildar for extension of time for vacating the secured asset dated 14.10.2019.

(xxii) Possession taken and handed over to the Review Petitioner along with nil inventory issued by the Tahsildar, Pallavaram with photos dated 21.10.2019

(xxiii) Sale Notice issued by the Review Petitioner / 4th respondent along with Postal Proofs, Paper publication dated 30.10.2019.

(xxiv) Order passed by this Hon'ble High Court in WP No.30489 / 2019 dated 30.10.2019.

(xxv) Encumbrance certificate from 01.01.2017 to 23.04.2019

(xxvi) Statement of Accounts from 01.05.2017 to 29.09.2018

(xxvii) Memorandum of Grounds dated 21.11.2019

(xxviii) Order passed by the Hon'ble High Court Divisional Bench in Review Application No.223 of 2019 dated 16.12.2019 order copy

5.1 Second respondent filed counter submitting therein that though the first respondent had sanctioned a sum of Rs.3,29,01,578/-, only a sum of Rs.2,45,28,115/- was disbursed. The first respondent had charged excess interest on an undisbursed amount of Rs.1,03,73,463/- and hence the total due allegedly claimed by the respondent is false and incorrect and this was the sole reason for delay in repayment by second respondent. The first respondent did not properly maintain the loan account. Second respondent made several representations through E-mails to the first respondent regarding the dispute of charging of interest on undisbursed loan amount, but the first respondent was not ready to present the loan account and reconcile the same. The first respondent simply forwarded the same statement of accounts with vague reply, without addressing the queries raised by the 2nd respondent.

5.2 The first respondent claims that 2nd respondent had defaulted in their loan account and hence the loan account of the 2nd respondent was classified as NPA during August, 2017, but however no communication was sent to the 2nd respondent as per the provisions of Act and the 2nd respondent continued to pay their EMIs on their loan, which was accepted and credited into their account by the first respondent. Second respondent on 31.01.2018 received a demand notice under Section 13(2) dated 31.01.2018, which was described as a mere formality by the first respondent, who continued to accept the EMIs as paid by the 2nd respondent on equated intervals after issuance of Section 13(2) notice.

5.3 It is stated that on receipt of Section 13(2) demand notice, an objection was raised by the 2nd respondent about inclusion of Item No.1, which is residential property located at Rohtak, Haryana as the property was mortgaged with the respondent, which was included in the demand notice issued by the first respondent. The first respondent had issued a letter dated 14.08.2018 that the non-mortgaged residential property in Rohtak was wrongly shown as mortgaged, therefore, further proceedings initiated on the said demand notice dated 31.01.2018 becomes null and void as it violated Section 13(3) and 13(3A) of SARFAESI Act. The notice issued under Section 13(2) did not disclose the date on which the account was classified as NPA, which would also render the notice defective.

5.4 It is stated that first respondent already initiated the arbitration proceeding against the alleged hypothecated machineries, suppressing all such facts without considering any of the earlier proceedings and initiation of action under SARFAESI Act, Arbitration order passed without giving opportunity to hear the 2nd respondent, which is against the principles of natural justice. It is stated that second respondent had paid EMIs even after alleged NPA and after issuance of Section 13(2) and 13(4) notices by the first respondent, a sum of Rs.51,15,708/- on various dates as EMIs against servicing of all the four loan accounts and the calculation sheet is placed for reference of the Tribunal.

5.5 It is stated that first respondent had filed the petition under Section 14 without following the provisions of SARFAESI Act and Rules. The first respondent had suppressed the facts about inclusion of non-mortgaged property in the notice issued under Section 13(2) and also the 11 EMI payments made by the applicants to the tune of Rs.51,15,708/- after alleged NPA and issuance of Section 13(2) and Section 13(4) notices. Therefore, the act of the first respondent is not fair and honest act. It is stated that the second respondent strongly oppose the due amount claimed in the possession notice, because the respondents did not properly give credits to the amounts paid by this respondent.

5.6 It is stated that first respondent, while moving application under Section 14 of SARFAESI Act, failed to disclose about the tenancy of the applicant in the said proceedings, despite direction from third respondent to fourth respondent to verify whether any tenancy occupation is prevalent in the schedule property. The first respondent had parallelly initiated arbitration proceedings and obtained interim protection thereby a Garnishee order to attach all the income of this respondent's company, which he is entitled to receive.

5.7 It is stated that second respondent is not having objection for the schedule property to be delivered to the applicant since the applicant is protected by a Court order passed by District Munsif Court in OS No.254/2019, which is binding on the 2nd respondent and his men or agent. It is stated that first respondent cannot invoke the provisions of SARFAESI Act since they have not followed the conditions laid down under Section 3 of SARFAESI act and they do not come under Section 4(A), 41(1) and 41(f) of the Act. It is further stated that the second respondent is bound to return a sum of Rs.45 lakhs to the applicant pursuant to the lease agreement entered with the applicant. Thus submitting, second respondent prayed to declare the measures of the first respondent under the provisions of SARFAESI Act as illegal and set aside the same.

6. Applicant filed rejoinder to the counter filed by the first respondent and also filed additional affidavit.

7. In the light of the aforesaid contentions, the Tribunal framed the following points for consideration:

(i) Whether the Securitization Application is barred by limitation?

(ii) Whether the measure impugned in this application is not in conformity with law and the provisions of the SARFAESI Act and the Rules made thereunder? If so, can the same be set aside and the possession of the secured asset be restored to the applicant?

Heard the Ld. Counsel for both sides, perused the record and the case law

7.1 At the outset, it is to be stated that even though the SERFEASI Act, has given a free hand to the secured creditor to enforce the security interest if any created in favor of the creditor without the intervention of the Court or Tribunal, it is imperative for the secured creditor, while enforcing the security interest to invariably comply the provisions of the SARFAESI Act and the Rules made thereunder, lest, when challenged, the Tribunal can intervene and may even set aside the measure if noncompliance of the provisions of the Act or rules made thereunder is established.

7.2 Hon'ble Supreme Court of India, in re Mathew Vargheese Vs. M. Amirtha Kumar and others 2014 (5) SCC P-610(paragraph 24) held :

"that a free hand is given to the SECURED CREDITOR for the purpose of enforcing any security interest created in favour of SECURED CREDITOR, without the intervention of the Court or Tribunal. The only other relevant aspect contained in the said sub- section is that such enforcement should be in accordance with the provisions of this Act. A reading of Section 13(1), therefore, is clear to the effect that while on the one hand any SECURED CREDITOR may be entitled to enforce the SECURED ASSET created in its favour on its own without resorting to any court proceedings or approaching the Tribunal, such enforcement should be in conformity with the other provisions of the SARFAESI Act"

8. Insofar as the case on hand is concerned, since the subject matter of challenge being the measure of obtaining the actual possession of the secured asset by the 1st respondent pursuant to the order dated 24/04/2019 passed by the 3rd respondent, it is for the 1st respondent to establish that said measure is in accordance with law and in conformity with the relevant provisions of SERFEASI Act, & Security Interest (Enforcement) Rules, 2002.

9. Before I proceed to discuss the points framed as above, I feel it useful to state herein certain non-controversial facts/aspects of the subject dispute which are as follows:

(i) On 06.03.2017, the first respondent had given 'no objection letter' to the second respondent for execution of the aforesaid lease in favor of the applicant.

(ii). On 07.03.2017 the 2nd respondent created an equitable mortgage by deposit of the title deed of the application schedule mentioned property in favor of the 1st respondent as security for the due discharge of the credit facilities availed by the second respondent from the first respondent and the same was duly registered as document No 1502/2017.

(iii) On 08.03.2017 the second respondent had executed a registered lease deed in favor of the applicant in respect of the application schedule mentioned property vide a Regd Doc No.1593 of 2017 for a period of 12 months, effective from 07.03.2017.

(iv) On 31.01.2018, the first respondent had issued a Demand Notice to the borrowers in terms of Section 13(2) of SARFAESI Act, demanding payment of the amount stated therein.

(v) On 24.07.2018, the first respondent issued a possession notice in terms of Section 13(4) of the Act to the borrowers.

(vi) On 25.04.2019, the first respondent obtained an order of physical delivery of the secured asset from the 3rd respondent/District Magistrate, Kanchipuram whereby the District Magistrate directed the 4th respondent/Tahsildar, Pallavaram, to deliver the possession of the secured asset to the first respondent after verifying inter alia, whether any tenancy occupation is prevalent in the schedule property.

(v) On 07.05.2019, the first respondent informed the applicant that it had obtained necessary orders from District Magistrate, Kancheepuram, for taking possession of the subject property and as it came to know that the applicant and others are residing therein, they are requested to vacate the schedule property within 15 days.

(vi) On 11.06.2019 and 19.07.2019, Tahsildar, Pallavaram has written to the Assistant Commissioner of Police, Pallavaram, seeking police aid for taking necessary action pursuant to the orders passed by Ld. District Magistrate dated 25.04.2019.

(vii) On 01.08.2019, this Tribunal dismissed the SA No.111/2019 filed by the second respondent and two others, challenging the order of the District Magistrate dated 25.04.2019.

(viii) On 19.08.2019, once again Tahsildar, Pallvaram, wrote to the Assistant Commissioner of Police, Pallavaram for police aid, stating that the Tahsildar intended to take possession of the subject property on 28.08.2019.

(ix) On 20.10.2019, the Tahsildar has taken possession of the subject asset under a Nil inventory report and delivered the possession of the same to the first respondent.

(x) On 30.10.2019, the first respondent issued a Sale Notice for sale of the subject property.

(xi) On 30.10.2019, Hon'ble High Court of Madras, directed the Tahsildar, Pall avaram, to de-seal the premises and deliver the same to the applicant vide order in W.P. No.30489 of 2019.

(xi) On 13.11.2019, the applicant filed the present application before this Tribunal.

(xii) On 16.12.2019, on a Review Petition (WP 223 of 2017) filed by the 1st respondent, Hon'ble High Court, directed the Tahsildar, Pallavaram, to seal the subject property and the same be kept in possession of the Tahsildar, Pall avaram, and status quo shall be maintained by both parties. Accordingly, the subject property has been sealed and is kept under the possession and control of the Tahsildar Pallavaram. It was further ordered that both parties shall abide by the final order passed by this Tribunal in the present SA.

Now, I shall proceed to discuss the points framed, supra,

10. Point No.1

Whether the Securitisation Application is barred by limitation?

10.1 At the outset, it is to be stated that it is for the applicant to establish that the present application as filed, is within the prescribed period of limitation, prescribed under Section 17(1) of the SARFAESI Act. Ld. Counsel for the Applicant, while refuting the contention of the 1st respondent that the present Securitization Application is barred by limitation submitted that the 4th respondent appointed by the 3rd respondent, vide order in Rc.M3/16870/2018 dated 24/04/2019, high handedly took possession of the subject secured asset from the applicant on 20.10.2019, and pursuant thereto, the applicant filed WP30489 of 2019 before Hon'ble High Court of Madras and the Hon'ble High Court was pleased to order that the premises be desealed and further directed the applicant to approach the Tribunal under Section 17 of SARFAESI Act within two weeks from the date of order vide order dated 30.10.2019. So much so, the present application having been filed on 13/11/2019 is well within the 45 days period of time prescribed under section 17(1) of SERFEASI At, for filing the appeal, as such the application is not barred by limitation

10.2 Strongly refuting the above submission, Ld. Counsel for the first respondent would contend that, the present challenge pertains to the order of the 3rd respondent /Ld. DM, Kancheepuram, dated 25.04.2019 on a petition filed under Section 14 of SARFAESI Act by the Authorized Officer of the respondent bank under, whereupon the Learned DM, permitted the 1st respondent to take possession of the application schedule property from the applicant with the assistance of 4th respondent and local Police, pursuant to which, the 4th respondent on 20.10.2019 took possession of the secured asset from the applicant and handed over same to the 1st Respondent. Therefore, the challenge if any to the order of the 3rd respondent, shall be made within 45 days from 25.04.2019 (the date of the order) and the present application having been filed on 13.11.2019 is hopelessly barred by limitation.

10.3 Having heard the Ld. Counsel for both sides carefully, and tested their respective contentions on the touch stone of the following rulings, in re,

(i). Standard Chartered bank V Nobel Kumar (2013) 9 SCC 620.

(ii). Roshan Narayanan.C.S vs The Authorized Officer, 2017(2) DRTC page 534.

I am unable to accept the contention of the Ld. Counsel for the 1st respondent that, as the present application has been filed beyond 45 days from 25.4.2019, (the date of order passed by the 3rd respondent), the application is barred by time. I hereby state the reasons for my conclusion as aforesaid.

10.4 A mere perusal of Section 17 (1) of the SARFAESI Act, discloses that any person (including a borrower) aggrieved by any of the measures initiated by the secured creditor/Authorised Officer under Section 13(4)(a) of the SARFAESI Act, can file an appeal against such measure, before the Tribunal, within 45 days from the time when the measure is taken.

10.5 In re, Roshan Narayanan.C.S, supra, it was held that

" The recourse to the Magistrate under Section 14 is thus only a "step" in the "measure" taken by the secured creditor for obtaining physical possession of the secured asset".

" Section 17 of the Act renders the measures taken by a secured creditor under Section 13 (4), including one under Section 13 (4)(a) of the Act, actionable at the instance of any person (including the borrower). Here, the reference to a "measure" must be taken as including a reference to any step in the effectuation of that measure, commencing with the issuance of any notice under Rule 8(2), and including the stages of approaching the Magistrate, obtaining an order from him, issuance of a notice by the Advocate Commissioner, and culminating with the taking of actual physical possession of the secured asset. Each of the above steps, in the measure adopted, would, in my opinion, give rise to a cause of action to approach the DRT through an application under Section 17 of the Act."

10.6 Therefore, taking recourse to the 'Magistrate' under Section 14 by the authorised officer being only a "step" in the "measure" initiated by the authorised officer, for obtaining actual possession of the secured asset from the borrower in order to deliver the same to the creditor, the cause of action for challenging the said measure will accrue only when the said measure fructifies and the period limitation for challenging the such a measure shall began to run from the date of the said cause of action and not from the date of passing the order by the Maistrate.

10.7 In re, Standard Chartered Bank, supra, Hon'ble Supreme Court, has held that:

"On the other hand, Section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the secured creditor). Therefore, the borrower is always entitled to prefer an "appeal" under section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4) (a) declares that the secured creditor may take possession of the secured assets. It does not specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under Section 14. We are of the opinion that by whatever manner the secured creditor obtains possession either through the process contemplated under Section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under Section 17 is available.' (emphasis supplied)

10.8 In the case on hand, the 'measure' initiated by the authorised officer, for obtaining actual possession of the secured asset from the applicant in order to deliver the same to the creditor, admittedly fructified on 20.10.2019 when the 4th respondent took possession of the subject property from the applicant and delivered the same to the creditor. Therefore, the cause of action to challenge the measure of taking actual possession of the secured asset accrued on 20.10.2019. So much so, present application having been filed on 13.11.2019 is well within the time prescribed for filing an application under Section 17(1) of the SERFEASI Act. Point No.1 is answered accordingly.

11. Point No.2

Whether the measure impugned in this application is not in conformity with law and the provisions of the SARFAESI Act and the Rules made thereunder? If so, can the same be set aside and the possession of the secured asset be restored to the applicant?

11.1 According to the Ld. Counsel for the applicant the measure of taking physical possession of the subject property by the first respondent pursuant to the order obtained from the Ld. District Magistrate, is contrary to law, the mandatory provisions of SARFAESI Act & Rules made thereunder, as such the impugned measure is liable to be set aside. Ld. Counsel would further contend that the first respondent despite being fully aware of the registered lease agreement dated 07.03.2017 executed by the second respondent in favour of the applicant, ever since 07.03.2017, intentionally suppressed the existence of the same in the proceedings before the 3rd respondent/District Magistrate. and obtained an order of eviction and thereafter high handedly dispossessed the applicant from the secured asset, pursuant to which the applicant approached the Hon'ble High Court of Madras and the Hon'ble High Court had protected the interest of the applicant by ordering de-sealing of the premises vide order in Writ Petition No 30489 of 2019. Ld. Counsel further submitted that, subsequently, first respondent filed Review Application wherein High Court ordered that the property be re-sealed. According to the Ld. Counsel, on being informed of the fact that the applicant had filed the present SA before this Tribunal, Hon'ble High Court, ordered that the subject property be kept in possession of the Tahsildar, Pallavaram till the final disposal of the present SA by this Tribunal and also ordered that both parties shall maintain status quo, till then. Therefore, the contention of the first respondent that applicant suppressed material facts before Hon'ble High Court is false and baseless. According to the Ld. Counsel, the relationship of tenant and landlord between the applicant and the second respondent is subsisting, in as much as the period of lease mentioned in the registered lease had not come to an end by afflux of time, since the lease period has been subsequently extended by 12 months under the Lease Extension Agreement dated 27.02.2018 entered between the applicant and the 2nd respondent. According to the Ld. Counsel, since the subject lease is not terminated in terms of Section 111 of Transfer of Property Act, the lease between the applicant and the 2nd respondent continues to subsist. In support of these contentions, Ld. Counsel for the applicant relied on the decree passed in his favour by the Civil Court in OS No.254/2018, the report of the 4th Respondent / Tahsildar, wherein the applicant's actual possession of the subject property at the time of execution of the order of the Ld. District Magistrate has been admitted. Thus, submitting Ld. Counsel prayed the Tribunal to set aside the impugned measure.

11.2 Per Contra, Ld. Counsel for the first respondent at the outset, strenuously contended that, when the 4th respondent / Tahsildar, Pallavaram, obtained actual possession of the subject property from the applicant in pursuance of the order passed by the Ld. District Magistrate, the registered lease in favor of the applicant since lapsed by afflux of time prescribed in the said lease, the applicant is not entitled to any relief in this application and the application is liable to be dismissed. Ld. Counsel further submitted that the so-called agreement of extension of Lease dated 27.02.2018 is a fabricated and collusive document. It was further contended that the alleged agreement of extension of lease dated 27.02.2018 being an unregistered document, extension of the subject lease period beyond 6.3.2018 is invalid, consequently, the Lessor - Lessee relationship between the applicant and the 2nd respondent comes to an end. Hence the applicant cannot claim the status of a tenant.

11.3 Ld. Counsel further submitted that the 1st respondent meticulously followed the procedure contemplated under the provisions of the SARFAESI Act and Rules made thereunder while initiating the measure impugned in this application and as the applicant failed to vacate the subject property despite his undertakings to vacate, the 1st respondent on 20.10.2019 obtained possession of the secured asset from the applicant through the 3rd respondent/Tahsildar, Pallavaram. However, the applicant suppressing all these facts filed Writ Petition No.30489/2019 before Hon'ble High Court and obtained an order for de-sealing the premises and re occupied the same, but soon thereafter, on a Review Petition No.223/2019 filed by the 1st respondent, Hon'ble High Court ordered that the subject premises be sealed and be kept in the possession of the 4th respondent / Tahsildar, Pallavaram, besides to maintain status quo by both parties, as such the present application is not sustainable and liable to be dismissed.

11.4 Before I proceed further, I feel it necessary to refer to the following provisions contained in the Transfer of Property Act as well as SARFAESI Act, for effective and proper appreciation of the subject controversy,

Section 65A of Transfer of property Act.

Mortgagor's power to lease.

(1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2) (a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage,

(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance,

(c) No such lease shall contain a covenant for renewal,

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made,

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid with a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.]

Section 105 in The Transfer of Property Act

105. Lease defined.-A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. Lessor, lessee, premium and rent defined. -The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

Section 107 of Transfer of Property Act

Leases how made.

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

2[All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

3[Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:] Provided that the State Government may

4[***] from time to time, by notification in the Official Gazette, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.

Section 111 in The Transfer of Property Act, 1882

Determination of lease.

A lease of immoveable property determines-

(a) by efflux of the time limited thereby;

(b) where such time is limited conditionally on the happening of some event-by the happening of such event;

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event-by the happening of such event;

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;

(f) by implied surrender;

(g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter 1[* * *]; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; 2[or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event]; and in 3[any of these cases] the lessor or his transferee 4[gives notice in writing to the lessee of] his intention to determine the lease;

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other. Illustration to clause (f) A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

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 on 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.

(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 secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

(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 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.

(7) Where any action has been taken against a borrower under the provisions of subsection (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 ischarge 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 s cured creditor, and no further step shall be taken by him for transfer or sale of that secure asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursua t to subsection (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three- fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors: Provided that in the case of a company in liquidation, the

amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956): Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to su- section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen' s dues with the liquidator in accordance with the provisions of section 529A of that Act: Provided also that liquidator referred to in the second proviso shall intimate the secured creditor the workmen' s dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen' s dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen' s dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimate dues with the liquidator: Provided also that in case the secured creditor deposits the estimated amount of workmen' s dues, such creditor shall be liable to pay the balance of the workmen' s dues or entitled to receive the excess amount, if any, deposited by the secured creditor w th the liquidator: Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen' s dues, if any.

Explanation.- For the purposes of this sub- section,-

(a) " record date" means the date agreed upon by the secured creditors representing not less than three- fourth in value of the amount outstanding on such date;

(b) " amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(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, secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measured specifies in clause (a) to (d) of sub- section (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.

Section 17(4-A) of the SARFAESI Act.

"[(4-A) Where-

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured assets, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,-

(a) has expired or stood determined; or

(b) is contrary to section 65-A of the Transfer of Property Act, 1882 (4 of 1882) ; or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act ; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause

(d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in 6 of 8 accordance with the provisions of this Act.]"

11.5 Now, coming to the legal perspective of the subject controversy, it is not in dispute that the subject lease has been duly registered on 07.03.2017 with the prior permission of the 1st respondent and that the demand notice in terms of section 13(2) of the SERFEASI Act, dated 31.01.2018 has been issued to the borrowers during the subsistence of the registered lease agreement between the applicant and one of the borrowers, viz., the second respondent.

Sub Section 13 of Section 13 of SARFEASI Act states as below

"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."

Section 65A of Transfer of property Act, stipulates that

"Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2) (a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage,

(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance,

(c) No such lease shall contain a covenant for renewal,

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made,

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid with a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.]"

11.6 In the light of the afore said provisions of law and in the backdrop of the fact that the subject lease was entered with the prior consent of the 1st respondent, I have carefully examined the subject registered lease and the only irresistible conclusion I could arrive at is, that the subject lease does not offend any of the afore stated sections of law.

10.8 Having thus held, it would be appropriate to refer herein to the ruling of Hon'ble Supreme Court of India, in re, Harshad Govardhan Sondagar Vs. International Asset Reconstruction Company Limited & others reported in (2014) 6 SCC 1, wherein it was held as under:

"34......In our view, therefore, the High Court has not properly appreciated the judgment of this Court in Transcore (supra) and has lost sight of the opening words of sub-section (1) of Section 13 of the SARFAESI Act which state that notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 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 the Act. The High Court has failed to appreciate that the provisions of Section 13 of the SARFAESI Act thus override the provisions of Section 69 or Section 69A of the Transfer of Property Act, but does not override the provisions of the Transfer of Property Act relating to the rights of a lessee under a lease created before receipt of a notice under sub-Section (2) of Section 13 of the SARFAESI Act by a borrower. Hence, the view taken by the Bombay High Court in the impugned judgment as well as in M/ s Trade Well (supra) so far as the rights of the lessee in possession of the secured asset under a valid lease made by the mortgagor prior to the creation of mortgage or after the creation of mortgage in accordance with Section 65A of the Transfer of Property Act is not correct and the impugned judgment of the High Court insofar it takes this view is set aside."

Therefore, it is as clear as crystal from the afore said ruling that, the the rights of a lessee under a lease created before receipt of a notice under sub-Section (2) of Section 13 of the SARFAESI Act by a borrower remain intact, as such the applicant / lessee shall be entitled to enjoy the protection of law until his lease is determined in accordance with section 111 of Transfer of Property Act, supra. The above view of mine is also fortified by the ruling of Hon'ble Supreme Court of India, in re, Harshad Govardhan, supra, wherein it was held that

"Section 105 thus provides that a lessee of an immovable property has a right to enjoy such property, for a certain time or in perpetuity when a lessor leases an immovable property transferring his right to enjoy such property for a certain time or in perpetuity. Section 111 of the Transfer of Property Act, 1882 provides the different modes by which a lease gets determined. Thus, so long as a lease of an immovable property does not get determined, the lessee has a right to enjoy the property and this right is a right to property and this right cannot be taken away without the authority of law as provided in Article 300A of the Constitution.".

11.7 Coming to the factual matrix of the case, indisputably the creditor herein, set the SERFEASI Act, in motion against the borrowers while the registered lease agreement, supra, is in force. The first respondent either before or after issuance of the demand notice, did not demand the 2nd respondent / borrower/ mortgagor/ landlord to take appropriate steps for termination of the lease in favour of the applicant or insisted the 2nd respondent/ borrower/ mortgagor/ landlord not to extend the lease beyond the period covered by the registered Lease. In my considered view recourse to such steps would have obviated the legal hurdles discussed supra as mere issuance of the demand notice in terms of Section 13(2) of the SARFEASI Act, will not put the tenancy between the borrower and the lessee to an end as per the ruling in Harshad Govardhan, supra wherein it was held that,

"As we have noticed, there is no provision in Section 13 of the SARFAESI Act that a lease in respect of a secured asset shall stand determined when the secured creditor decides to take the measures mentioned in Section 13 of the said Act. Without the determination of a valid lease, the possession of the lessee is lawful and such lawful possession of a lessee has to be protected by all courts and tribunals".

11.8 Now I shall deal with the next contention of the 1st respondent, that no valid tenancy subsisted between the applicant and the 2nd respondent when the 3rd respondent/Tahsildar took possession of the secured asset on 20.10.2019 from the applicant as on the premise that the agreement of extension of lease dated 28.02.2017 is an unregistered and a fabricated document.

11.9 It is to be noted that as per Section 107 of Transfer of Property, a lease of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument. Admittedly, the extension of lease period under the agreement dated 27.02.2018 does not exceed the period of one year. Ld. Counsel for the 1st respondent has not brought to my notice the provision of law if any, making registration mandatory for the leases of a duration of one year. That apart, it is not the case of the 1st respondent that the document extending the lease dated 27.02.2018 is insufficiently stamped and the said document was not contested on the said ground. The 2nd respondent has not denied the execution of the said agreement of extension of Lease dated 27.02.2018. The Civil Suit OS 254/2018 filed by the applicant on the file of Addl District Munsiff Court, Alandur, against the landlord/2nd respondent has been decreed in favor of the applicant, by granting a permanent injunction against the 2nd respondent restraining him from interfering with the possession and enjoyment of the subject property by the applicant, except by due procedure of law, wherein the agreement of extension of Lease dated 27.02.2018 has been filed and relied by the applicant. It is not the case of the 2nd respondent that the registered lease between himself and the applicant stood determined in accordance with Section 111 of Transfer of Property Act. The fact that the applicant was disposed by the Tahsildar on 20.10. 2019, pursuant to the order of the Ld. DM, goes to show that the applicant has been in possession of the subject property as on 20.10.2019. Barring the bald plea that the agreement extending the lease dated 27.02.2018 is a fabricated and collusive document no material worth has been placed by the 1st respondent in support of the said plea. Therefore, in the absence of even an iota of basis, this Tribunal cannot be expected to accept the said plea of the 1st respondent more especially when the very same said document has already been filed in the civil proceeding which was initiated much prior to the present proceedings.

11.10 Here, the Tribunal is of the view that it would be apt to refer to the ruling in Vishal N Kalsaria Vs. Bank of India and others reported in AIR (2016) SC 530, wherein it referring to section 107 of T P Act, Hon'ble Supreme Court has held that,

"What is mentioned in the three paragraphs of the first part of Section 107 of the TP Act are only the different modes of how leases are created. The first paragraph has been extracted above and it deals with the mode of creating the particular kinds of leases mentioned therein.

The third paragraph can be read along with the above as it contains a condition to be complied with if the parties choose to create a lease as per a registered instrument mentioned therein. All other leases, if created, necessarily fall within the ambit of the second paragraph. Thus, de hors the instrument parties can create a lease as envisaged in the second paragraph of Section 107 which reads thus:

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession."

According to Section 106 of the Transfer of Property Act, 1882, a monthly tenancy shall be deemed to be a tenancy from month to month and must be registered if it is reduced into writing. The Transfer of Property Act, however, remains silent on the position of law in cases where the agreement is not reduced into writing. If the two parties are executing their rights and liabilities in the nature of a landlord-tenant relationship and if regular rent is being paid and accepted, then the mere factum of non-registration of deed will not make the lease itself nugatory., the learned counsel for the appellants rightly placed reliance on a three Judge Bench decision of this Court in Anthony (supra). At the cost of repetition, in that case it was held as under: "But the above finding does not exhaust the scope of the issue whether the appellant was a lessee of the building. A lease of immovable property is defined in Section 105 of the TP Act. A transfer of a right to enjoy a property in consideration of a price paid or promised to be rendered periodically or on specified occasions is the basic fabric for a valid lease. The provision says that such a transfer can be made expressly or by implication. Once there is such a transfer of right to enjoy the property a lease stands created."

In the same ruling it was also held that,

"If the two parties are executing their rights and liabilities in the nature of a landlordtenant relationship and if regular rent is being paid and accepted, then the mere factum of non-registration of deed will not make the lease itself nugatory."

"If no written lease deed exists, then such tenants are required to prove that they have been in occupation of the premises as tenants by producing such evidence in the proceedings under Section 14 of the SARFAESI Act before the learned Magistrate. Further, in terms of Section 55(2) of the special law in the instant case, which is the Rent Control Act, the onus to get such a deed registered is on the landlord. In light of the same, neither the landlord nor the banks can be permitted to exploit the fact of non-registration of the tenancy deed against the tenant"

11.11 Therefore, in the above back drop, the contention of the Ld. Counsel for the 1st respondent that no valid lease was subsisting as on 20.10.2019 between the applicant and the 2nd respondent on the premise that the agreement extending the subject lease was not registered or that the agreement for extension of lease dated 27.02.2018 is fabricated, in the considered view of the Tribunal does not hold any water.

11.12 Having thus, held so, in my endeavor to decide whether or not the impugned measure initiated by the 1st respondent is in accordance with law and the provisions of SARFAESI Act & Rules made thereunder, I shall once again refer to the ruling in Harshad Govardhan, supra, wherein it was held that,

" The opening words of Sub-section (1) of Section 14 of the SARFAESI Act also provides that if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of the Act, the secured creditor may take the assistance of the Chief Metropolitan Magistrate or the District Magistrate. Where, therefore, such a request is made by the secured creditor and the Chief Metropolitan Magistrate or the District Magistrate finds that the secured asset is in possession of a lessee but the lease under which the lessee claims to be in possession of the secured asset stands determined in accordance with Section 111 of the Transfer of Property Act, the Chief Metropolitan Magistrate or the District Magistrate may pass an order for delivery of possession of secured asset in favour of the secured creditor to enable the secured creditor to sell and transfer the same under the provisions of the SARFAESI Act. Sub-section (6) of Section 13 of the SARFAESI Act provides that any transfer of secured asset after taking possession of secured asset by 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. In other words, the transferee of a secured asset will not acquire any right in a secured asset under Sub-section (6) of Section 13 of the SARFAESI Act, unless it has been effected after the secured creditor has taken over possession of the secured asset. Thus, for the purpose of transferring the secured asset and for realizing the secured debt, the secured creditor will require the assistance of the Chief Metropolitan Magistrate or the District Magistrate for taking possession of a secured asset from the lessee where the lease stands determined by any of the modes mentioned in Section 111 of the Transfer of Property Act.

21. When, therefore, a lessee becomes aware of the possession being taken by the secured creditor, in respect of the secured asset in respect of which he is the lessee, from the possession notice which is delivered, affixed or published in Sub-rule (1) and Sub-rule (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, he may either surrender possession or resist the attempt of the secured creditor to take the possession of the secured asset by producing before the authorised officer proof that he was inducted as a lessee prior to the creation of the mortgage or that he was a lessee under the mortgagor in accordance with the provisions of Section 65A of the Transfer of Property Act and that the lease does not stand determined in accordance with Section 111 of the Transfer of Property Act. If the lessee surrenders possession, the lease even if valid gets determined in accordance with clause (f) of Section 111 of the Transfer of Property Act, but if he resists the attempt of the secured creditor to take possession, the authorised officer cannot evict the lessee by force but has to file an application before the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the SARFAESI Act and state in the affidavit accompanying

the application, the name and address of the person claiming to be the lessee. When such an application is filed, the Chief Metropolitan Magistrate or the District Magistrate will have to give a notice and give an opportunity of hearing to the person claiming to be the lessee as well as to the secured creditor, consistent with the principles of natural justice, and then take a decision. If the Chief Metropolitan Magistrate or District Magistrate is satisfied that there is a valid lease created before the mortgage or there is a valid lease created after the mortgage in accordance with the requirements of Section 65A of the Transfer of Property Act and that the lease has not been determined in accordance with the provisions of Section 111 of the Transfer of Property Act, he cannot pass an order for delivering possession of the secured asset to the secured creditor. But in case he comes to the conclusion that there is in fact no valid lease made either before creation of the mortgage or after creation of the mortgage satisfying the requirements of Section 65A of the Transfer of Property Act or that even though there was a valid lease, the lease stands determined in accordance with Section 111 of the Transfer of Property Act, he can pass an order for delivering possession of the secured asset to the secured creditor".

11.13 A perusal of the record placed by the 1st respondent before the 3rd respondent discloses that the 1st respondent had concealed the fact of granting permission to the 2nd respondent to enter into a lease agreement with the applicant and the due execution of the registered lease agreement by the 2nd respondent in favour of the applicant on 7.03.2017. The 1st respondent did not even whisper before the 3rd respondent in the proceedings under section 14 of the Act, about the execution of the afore stated registered lease, or the about the validity of the agreement extending the lease. . The said act of concealment continued even after the 3rd respondent ordered that the 4th Respondent / Tahsildar, before executing the order passed by the 3rd respondent, shall verify with borrower in the field, whether any DRT orders / any other court orders are in force after issuance of Section 13(2) & 13(4) notice and any tenancy occupation is prevalent there with proper agreements in which case after following the due process of law proceed to take possession of the said property, as the record placed before me does not reveal any statement having been made by the 1st respondent before the 4th respondent regarding the nonexistence of tenancy between the applicant and the 2nd respondent. Thus, the concealment of material information well within the knowledge of the 1st respondent appears to be deliberate all through on the part of the 1st respondent.

11.14 therefore, from my afore stated discussion the conclusions that have emerged are:

(i). The registered lease agreement between the applicant and the 2nd respondent has been duly executed much prior to the issuance of demand notice under Section 13(2), and the said lease does not offend either Section 13 (13) of SARFEASI Act or Section 65A of T P Act.

(ii). The first respondent is in full knowledge of the execution of the registered lease by the second respondent in favor of the applicant.

(iii). The agreement of extension of lease between the applicant and the 2nd respondent dated 27.02.2018 is binding on the 2nd respondent.

(iv). The tenancy between the applicant and the 2nd respondent is not determined as per law.

(v). The existence of valid lease after the mortgage, in accordance with the requirements of Section 65A of the Transfer of Property Act without determination of the said lease in accordance with the provisions of Section 111 of the Transfer of Property Act, the 3rd respondent cannot pass an order for delivering possession of the secured asset to the secured creditor.

11.15 The case on hand is fully covered by the aforesaid ruling as the Tribunal already held that the subject lease satisfied the conditions of Section 65 of Transfer of Property Act. Now, I shall refer to the recent ruling Hon'ble Supreme Court of India, in re Bajrang Shyamsunder Agarwal Vs. Central Bank of India and another reported in (2019) 9 SCC 94, wherein, it was held as follows

"While we agree with the principle laid out in Vishal N. Kalsaria Case (supra) that the tenancy rights under the Rent Act need to be respected in appropriate cases, however, we believe that the holding with respect to the restricted application of the non obstante Clause Under Section 35 of SARFAESI Act, to only apply to the laws operating in the same field is too narrow and such a proposition does not follow from the ruling of this Court in Harshad Govardhan Case (supra).

25. In our view, the objective of SARFAESI Act, coupled with the T.P. Act and the Rent Act are required to be reconciled herein in the following manner:

a) If a valid tenancy under law is in existence even prior to the creation of the mortgage, the tenant's possession cannot be disturbed by the secured creditor by taking possession of the property. The lease has to be determined in accordance with Section 111 of the TP Act for determination of leases. As the existence of a prior existing lease inevitably affects the risk undertaken by the bank while providing the loan, it is expected of Banks/Creditors to have conducted a standard due diligence in this regard. Where the bank has proceeded to accept such a property as mortgage, it will be presumed that it has consented to the risk that comes as a consequence of the existing tenancy. In such a situation, the rights of a rightful tenant cannot be compromised under the SARFAESI Act proceedings.

b) If a tenancy under law comes into existence after the creation of a mortgage, but prior to the issuance of notice Under Section 13(2) of the SARFAESI Act, it has to satisfy the conditions of Section 65-A of the T.P. Act. (emphasis supplied)

c) In any case, if any of the tenants claim that he is entitled to possession of a secured asset for a term of more than a year, it has to be supported by the execution of a registered instrument. In the absence of a registered instrument, if the tenant relies on an unregistered instrument or an oral agreement accompanied by delivery of possession, the tenant is not entitled to possession of the secured asset for more than the period prescribed Under Section 107 of the T.P. Act.

11.16 Therefore, having carefully examined the contentions put forth by both parties and on examination of the record besides the case law, this Tribunal is satisfied that it has been established that

(a) the lease in question has not been determined in terms of Section 111 of Transfer of Property Act,

(b) the lease in question is not contrary to Section 65 of Transfer of Property Act;

(c) the lease in question is not contrary to the terms of mortgage.

(d) the lease in question is not created after issuance of the notice of default and demand by the bank under sub section 2 of section 13 of the SARFEASI Act.

12. Therefore, having satisfied that the tenancy rights or lease hold rights claimed by the applicant herein in the secured asset (application schedule mentioned property) do not offend sub-clauses (a), (b), (c) or (d) of clause (i), of sub clause 4A of section 17 of the SARFEASI Act, the Tribunal hereby declares that the measure of obtaining actual possession of the application schedule mentioned property from the applicant on 20.10.2019 by the 1st respondent through the 4th respondent pursuant to the order dated 25.04.2019 passed by the 3rd respondent, is not in conformity with law and the provisions of the SERFEASI Act and Rules made thereunder, hence the said measure is liable to be set aside. Accordingly, I hereby set aside the same. Since the possession of the application schedule mentioned property is now with the Tahsildar / 4th respondent, I hereby direct the Tahsildar, Pallavaram/ the 4th respondent herein to forthwith de-seal the subject premises and hand over the same to the applicant and to report compliance to this Tribunal. Point No.2 is answered accordingly.

13. In the result, the SA is allowed declaring that the measure of obtaining actual possession of the application schedule mentioned property from the applicant on 20,10,2019 by the 1sr respondent, through the 4th respondent pursuant to the order dated 25.04.2019 passed by the 3rd respondent, is not in conformity with law, the provisions of the SERFEASI Act and the rules made thereunder, hence the same is liable to be set aside. Accordingly, I hereby set aside the same. Since the possession of the application schedule mentioned property is now with the Tahsildar / 4th respondent, I hereby direct the Tahsildar, Pallavaram/ the 4th respondent herein to forthwith de-seal the subject premises and hand over the same to the applicant and to report compliance to this Tribunal.

14. It is made clear herein that this order does not come in the way of the first respondent in bringing the applicant schedule mentioned property to sale, in accordance to law. However, the possession of the applicant in respect of the

application schedule mentioned property shall not be disturbed until the tenancy is determined in accordance to law, either by the lessor or by the prospective purchaser in whose favour the registered sale deed will be executed by the first respondent in the event sale, if any takes place.

15. However under the circumstances there shall be no order as to costs.

16. Communicate a copy of the order to the parties concerned in terms of Rule 16 read with Rule 2(c) of DRT (Procedure) Rules, 1993.

(Dictated to PS, transcribed by her, corrected, signed and pronounced by me in Virtual Court, held through Video Conference on this 01st day of June, 2020)

