

Validity of lease created after issuance of Section 13(2) notice under SARFAESI Act: DRAT KOLKATA

Sri P.V. Ramana Moorthy

...Appellant

M/s Assets Reconstruction Company (India) Limited

...Respondent

Case No: Appeal No. 88 of 2023

Date of Judgement: 19th September, 2023

Judges:

Anil Kumar Srivastava, J- Chairperson

For Appellant: Mr. A.K. Dhandhanian, Learned Senior Counsel, Ms. Mitul Chakrabarty, Ms. Payel Nath, Ms. Anindita Maity, Learned Advocate.

For Respondent: Mr. Jishnu Saha, Learned Senior Counsel, Mr. Sarathi Dasgupta, Mr. Pratik Ghose, Mr. Avishek Roy Chowdhury, Mr. N. Srinivas, Ms. Deboshree Das, Learned Advocate.

Facts:

Appellant Ramana was aggrieved by order passed under Section 14 of SARFAESI Act for taking possession of secured hotel property on lease to him. He filed appeal against order of DRT Visakhapatnam dismissing his application under Section 17. Respondent 1 ARCIL is the secured creditor to whom the debt was assigned by Oriental Bank of Commerce. Respondent 2 Manoharamma is the borrower and guarantor who mortgaged the secured hotel property along with other properties. Respondent 3 Anandaram is the borrower. The hotel property was mortgaged in 2006. Notice under Section 13(2) was issued on 22.12.2015. As per lease deed

dated 08.01.2019, the hotel property was leased to Appellant for 4 years at rent of Rs.65,000 per month plus 10% profit sharing. The lease deed was unregistered. Appellant contends he has been running the hotel with 200 employees. The property was leased to some other person from 2015-2018 before him. He sought quashing of Section 14 order and SARFAESI proceedings on grounds of procedural irregularities, his valid possession under unregistered leases and ongoing negotiations for settlement. Respondents contend that Appellant has no locus standi due to unregistered lease and tenancy created after mortgage and Section 13(2) notice requires consent of secured creditor. All requirements under Section 14 were complied.

Arguments:

Appellant:

Appellant is in possession as lessee under unregistered lease protecting his possession under Article 300A. Even a trespasser cannot be evicted without due process. Details of property were wrongly mentioned in Section 14 order and affidavit. No consideration of mandatory requirements of Section 14 order. As possessor of property, Appellant is an aggrieved person entitled to file Section 17 application. Lease is valid and binding as per Section 65A and 107 of Transfer of Property Act.

Respondent 1:

Appeal is not maintainable. Unregistered lease is invalid, so Appellant is not an aggrieved person lacking locus standi. Section 14 order is correctly passed after complying with all legal requirements.

Respondent 2:

Appellant is in possession under valid lease binding on mortgagee bank. Property was leased out even before Section 13(2) notice.

Court's Reasoning and Conclusions:

Appellant as possessor of property under unregistered lease is an aggrieved person entitled to file Section 17 application. However, Appellant could not prove himself as statutory tenant under valid lease. As per Section 17(4A)(d), tenancy created after Section 13(2) notice without consent of secured creditor is liable to be set aside

under SARFAESI Act. As per Section 107 of Transfer of Property Act, lease over one year must be registered. As per Section 65A, mortgagor can create valid lease binding on mortgagee if conditions met. Appellant's lease was created after mortgage and Section 13(2) notice without consent of bank. The unregistered lease for 4 years expired and did not meet requirements under Section 65A. Hence Appellant cannot take advantage of it and lacks possessory rights under it. As per Section 13(13), no lease can be created after Section 13(2) notice without secured creditor's consent which admittedly was not taken. Section 13(13) overrides Section 65A. Appellant failed to prove himself as statutory tenant under valid lease. Hence he lacks locus standi to file Section 17 application and cannot challenge Section 14 order.

Sections:

Section 17 of SARFAESI Act: Filing of Application to Tribunal by any person aggrieved by action under Section 13(4)

Section 14 of SARFAESI Act: Issue of possession notice

Section 13(2) and Section 13(13) of SARFAESI Act: Restraint on lease of secured assets after notice

Section 65A and Section 107 of Transfer of Property Act: Mortgagor's power to lease and Registration of leases

Section 17(4A) of SARFAESI Act: Examination of validity of leases by Tribunal

Cases Referred:

Vishal N. Kalsaria v. Bank of India (2016):

Unregistered lease and oral tenancy can be proved by evidence of possession and rent payment

Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd. (2014)

Need for registered lease for term exceeding one year

Bajrang Shyamsunder Agarwal v. Central Bank of India (2019):

Section 13(13) overrides Section 65A

Lease created before Section 13(2) notice must meet Section 65A conditions

Hemraj Salian v. HDFC Bank Ltd. (2021): No protection for tenant-at-sufferance under Rent Act against SARFAESI proceedings

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Court

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Full Text of Judgment:

1. Instant appeal has been preferred against a judgment and order dated 06.09.2021 passed by Learned DRT Visakhapatnam dismissing the S.A. No. 45 of 2021 P. V. Ramana Moorthy Vs. M/s ARCIL & Ors.

2. Pleadings of the parties would reveal that the Appellant herein namely P.V. Ramana Moorthy alleges himself to be the lessee. Third Respondent namely M/s Anandaram Developers Pvt. Ltd. is the borrower while Respondent No. 2 M/s Manoharamma Hotel Investments Private Limited represented by its Director Mr. K. Bapaiah is the guarantor. Appellant is aggrieved by the measures initiated by Respondent No. 1 under Section 14 of the SARFAESI Act (hereinafter referred to as the Act).

3. According to the Appellant, an application under Section 14 of the SARFAESI Act was moved by the Respondent No. 1 namely M/s Asset Reconstruction Company (India Limited) before the Chief Metropolitan Magistrate, Rajahmundry by making untrue and baseless allegations. Pursuant to the Application, an order under Section 14 of the SARFAESI Act was issued by the Learned Magistrate on 03.12.2020 for taking physical possession of the schedule property.

4. An application under Section 17 of the SARFAESI Act was filed by the Appellant before the Learned DRT Visakhapatnam stating that the schedule property is a running hotel having 200 employees. Schedule property, which was earlier being run by an another lessee from 2015 to 2018. Thereafter, Appellant is running the hotel by name and style "Anand Regency", situated at D. No. 26-3-7 Jampet, Rajahmundry on lease basis. A lease agreement was executed on 8th January, 2019 for a period of four years. An amount of Rs.65,000/- per month was payable towards monthly rent in addition to the profit sharing.

5. Third Respondent borrowed a term loan of Rs.30,00,00,000/- and another Term Loan of Rs.2,06,00,000/- in the year 2006 from Oriental Bank of Commerce by securing land and building bearing D. No. 17 and 18 situated at Arcot Road, Saligramam, Chennai following an extent of 58,157,76 square feet of undivided share of and in total extent measuring 3.81 acres together with commercial building at TSN No. 08,12,14,15 old S. No. 1941A, 1A, 1A2, 193/ 1F2, 7.8, and 10 situated at D.No. 17 and 18 Chennai belongs to borrower i.e. 3rd Respondent which is a more valuable security the present outstanding and also primary security for the loan and also secured by an extent of 20,069 sq.ft of and in total extent measuring 3.81 acres together with commercial building at T.S. No. 8,12,14,15 Old serial No. 194 1A, IA2, 193/ 1F2, 7,8 and 10 situated at D. No. 17 and 18 Chennai and also secured an extent of 74,794 sq.ft. i.e. undivided share of 44.35% in the total extent measuring 1,68,625 sq. ft. together with commercial building at D. No 110 Chennai including the schedule property as collateral security for the loan availed by the third Respondent. Thereafter, Oriental Bank of Commerce purported to assign the debt to the 1st Respondent. Second Respondent has other securities which are more valuable and are unincumbered to realize all its alleged dues in Chennai.

6. It is further stated that the negotiations for settlement are also continuing.

7. Possession notice was issued on 24.06.2016. In the affidavit annexed with application u/s 14 of the Act, it is stated that the schedule property is vacant site belonging to 2nd Respondent. Orders under Section 14 of the Act were passed while the property is not vacant site. Rather fivestar hotel is running with all buildings and structures thereon. There is suppression of material facts which is a violation of the SARFAESI Act as well as Security Interest (Enforcement) Rules, 2002. Procedure required under Section 14 of the SARFAESI Act is not followed. No opportunity of hearing was afforded to the Appellant. Earlier the schedule property was on lease with some other person. Hence, the property was leased out prior to the date of Demand Notice i.e. 22.12.2015. Although Appellant is occupying the

property without any registered lease deed, but his rights are protected under Article 300A of the Indian Constitution. Accordingly, relief was sought to quash the SARFAESI proceedings initiated by the Respondent No. 1 and the orders issued under Section 14 of the SARFAESI Act.

8. Objections were filed by the Respondents wherein it is stated that Appellant has no right to challenge the order under Section 14 of the SARFAESI Act as he has no locus standi. No registered lease deed exists in his favour. Application under Section 17 of the SARFAESI Act is filed in collusion with the Respondent No. 2. All the legal formalities required under Section 14 of the SARFAESI Act have been complied. The scheduled property was rightly shown in the order as well as in the affidavit filed by the Respondent No. 1. Appellant has no right to challenge the SARFAESI action or the proceedings initiated by the Respondent No. 1.

9. Respondent No. 2 supported the cause of the Appellant. Learned DRT dismissed the SARFAESI Application holding that the Appellant has no right to challenge the SARFAESI action initiated by the Respondent No. 1 as no registered lease deed is executed in his favour. Further, it is held that all the legal requirements in accordance with law were complied with by moving an application under Section 14 of the SARFAESI Act.

10. I have heard the Learned Counsel for the parties and perused the record.

11. Learned Counsel for the Appellant would submit that the impugned order is bad in law. It is submitted that admittedly Appellant is in possession of the secured assets. Learned DRT recorded a finding that the lease deed is not registered. Hence, the Appellant has no right to file the SARFAESI Application and to challenge the actions taken under Section 14 of the SARFAESI Act. However, on the basis of this finding, Learned DRT has not considered the other grounds regarding legality of Section 14 of the SARFAESI Act raised by the Appellant. It is further argued that admittedly Appellant does not have a registered lease agreement in his favour but after the lease agreement, four new lease

agreements for eleven month each were executed which were in accordance with the provisions of Section 65A as well as 107 of the Transfer of Property Act. It is further submitted that since the Appellant is in possession. Even for the sake of argument a trespasser cannot be evicted otherwise in due course of law. Order of the Magistrate was illegal as the details of the schedule property are wrongly mentioned in the orders as well as in the affidavit of the Respondent No. 1. It is further submitted that no satisfaction of nine points, which is required under Section 14 of the Act, is recorded in the order.

12. Further, it is argued that Appellant is a person aggrieved who is entitled to file an Application under Section 17 of the SARFAESI Act.

13. Learned Counsel for the Respondent No. 2 i.e. the owner of the schedule property would submit that the Appellant is in possession as on the strength of a lease deed. Scheduled property is a hotel being run by different persons even prior to the issuance of notice under section 13(4) of the SARFAESI Act dated 22.12.2015. Mortgage was created in 2006.

14. Per contra, Learned Senior Advocate for the Respondent No. 1 would submit that the Appeal itself is not maintainable. He has placed reliance upon Section 65 A and Section 107 of the Transfer of Property Act. It is submitted that admittedly no registered lease deed is executed in favour of the Appellant. Appellant is not a "person aggrieved" within the definition of the SARFAESI Act. He has no right to challenge the orders passed under Section 14 of the SARFAESI Act. Initially lease deed was executed in the year 2019 for a period of four years wherein monthly rent was fixed at Rs.65,000/- plus profit sharing which mandatorily requires registration. Subsequent lease deed could not be executed. There is no provision under the law to renew the lease deed. It is further submitted that the owner has not filed the appeal. Hence, right to occupy the scheduled property by the Appellant could not be proved.

15. There are certain admitted facts in this case. Appellant is in possession over the scheduled property. Respondent No. 2 and 3 are the

borrower and guarantor of the loan availed by them from Oriental Bank of Commerce which was subsequently assigned to the Respondent No. 1. It is also not in dispute that notice under Section 13(2) of the SARFAESI Act was issued on 22.12.2015. Lease deed was allegedly executed in favour of the Appellant on 08.01.2019.

16. Now the question arises as to whether Appellant is a "person aggrieved" who can file an Application under Section 17 of the SARFAESI Act. Further what is the effect of unregistered lease deed executed in favour of the Appellant?

17. Section 17 of the of the SARFAESI Act provides that any person aggrieved by any of the measures referred to in Section 13(4) of the SARFAESI Act may make an application to the Debt Recovery Tribunal. As far as Appellant is concerned, it is to be seen as to whether he is a person aggrieved by any measures undertaken by the Respondent No. 1 under the SARFAESI Act?

18. Section 107 of Transfer of Property Act provides as to how a lease can be made. Section 107 of Transfer of Property Act reads as under:-
"A, lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument. All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Where a lease of immovable property is made by a registered instrument t, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee."

19. Section 106 of the Transfer of Property Act reads as under:-
Duration of certain leases in absence of written contract or local usage.-

(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable,

on the part of either lessor or lessee, by fifteen day's notice.

Section 65A of Transfer of Property Act reads as under:

Mortgagor's power to lease – (1) Subject to the provisions of subsection

(2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgage. 20. In Vishal N. Kalsaria Versus Bank of India and others (2016) 3 SCC 762, it was held that –

“30. The issue of determination of tenancy is also one which is well settled. While Section 106 of the Transfer of Property Act, 1882 does provide for registration of leases which are created on a year to year basis, what needs to be remembered is the effect of non-registration, or the creation of tenancy by way of an oral agreement. 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. 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 the light of the same, neither can the landlord nor the banks be permitted to exploit the fact of non-registration of the tenancy deed against the tenant.

36. As far as granting leasehold rights being created after the property has been mortgaged to the bank, the consent of the creditor needs to be taken. We have already taken this view in Harshad Govardhan Sondagar. We have not stated anything to the effect that the tenancy created after mortgaging the property must necessarily be registered under the provisions of the Registration Act and the Stamp

Act.

37. It is a settled position of law that once tenancy is created, a tenant can be evicted only after following the due process of law, as prescribed under the provisions of the Rent Control Act. A tenant cannot be arbitrarily evicted by using the provisions of the SARFAESI Act as that would amount to stultifying the statutory rights of protection given to the tenant. A non obstante clause (Section 35 of the SARFAESI Act) cannot be used to bulldoze the statutory rights vested in the tenants under the Rent Control Act. The expression "any other law for the time being in force" as appearing in Section 35 of the SARFAESI Act cannot mean to extend to each and every law enacted by the Central and State Legislatures. It can only extend to the laws operating in the same field."

21. In *Bajarang Shyamsunder Agarwal v. Central Bank of India* (2019) 9 SCC 94, a three judges Bench of the Hon'ble Apex Court further considered the law laid down by *Vishal N. Kalsaria* case (supra). In Para No. 36, judgment of the Hon'ble Apex Court in *Harshad Govardhan Sondagar versus International Assets Reconstruction Co. Ltd.* (2014) 6 SCC 1, was relied upon wherein it was held that-

"36. We may now consider the contention of the respondents that some of the appellants have not produced any document to prove that they are bona fide lessees of the secured assets. We find that in the case before us, the appellants have relied on the written instruments or rent receipts issued by the landlord to the tenant. Section 107 of the Transfer of Property Act provides that a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made "only by a registered instrument" and all other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Hence, if any of the appellants claim that they are entitled to possession of a secured asset for any term exceeding one year from the date of the lease made in his favour, he has to produce proof of execution of a registered instrument in his favour by the lessor. Where he does not produce proof of execution of a registered instrument or oral agreement accompanied by delivery of possession,

the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, will have to come to the conclusion that he is not entitled to the possession of the secured asset for more than a year from the date of the instrument or from the date of delivery of possession in his favour by the landlord.”

22. It was further held in Para 22 of the judgment that-

“22. After examining the legal and constitutional position, the Court held that while the SARFAESI Act has a laudable objective of providing a smooth and efficient recovery procedure, it cannot override the objection of the Rent Acts to control the rate of rent and provide protection to tenants against arbitrary and unreasonable evictions. To resolve this conflict, this Court held that:

22.1 The provisions of the SARFAESI Act cannot be used to override the provisions of the Rent Act. The landlord cannot be permitted to do indirectly what he has been barred from doing under the Rent Act.

22.2. While a yearly tenancy requires to be registered, oral tenancy can still be proved by showing that the tenant has been in occupation of the premises before the Magistrate under Section 14 of the SARFAESI Act.

22.3 The non-registration of the tenancy deed cannot be used against the tenant. For leasehold rights being created after the property has been mortgaged to the bank, the consent of the creditor needs to be taken.

22.4 Even though Section 35 of the SARFAESI Act has a non obstante clause, it will not override the statutory rights of the tenants under the Rent Control Act. The non obstante clause under Section 35 of the SARFAESI Act only applies to laws operating in the same field.

23. While we agree with the principle laid out in Vishal N. Kalsaria case, 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 the 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.

24. In our view, the objective of the SARFAESI Act, coupled with the TP Act and the Rent Act are required to be reconciled herein in the

following manner:

24.1 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.

24.2 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 TP Act.

24.3 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 TP Act.

23. Thereafter, in Hemraj Ratnakar Salian versus HDFC Bank Ltd. and others 2021 SCC OnLine SC 611 it was held in

Para 13 that –

“It was further held that the Rent Act would not come to the aid of a “tenant-in-sufferance” vis-à-vis SARFAESI Act due to the operation of Section 13(2) read with Section 13(13) of the SARFAESI Act. It was held as follows:

“35. The operation of the Rent Act cannot be extended to a “tenant-insufferance”

vis-à-vis SARFAESI Act, due to the operation of Section 134(2) read with Section 13(13) of the SARFAESI Act. A contrary interpretation would violate the intention of the legislature to provide for Section 13(13), which has a valuable role in making the

SARFAESI Act a self-executory instrument for debts recovery. Moreover, such an interpretation would also violate the mandate of Section 35, SARFAESI Act which is couched in broad terms.”

24. On the strength of the case laws, now it is to be seen as to whether the Appellant has any right to challenge the actions of the Respondent No. 1 initiated under Section 14 of the SARFAESI Act? Whether he can be treated as a “person aggrieved” who can file an application under Section 17 of the SARFAESI Act.

25. Admittedly Appellant is in possession over the secured assets with effect from 8th January, 2019 when the lease agreement was executed between M/s Manoharamma Hotel Investment Pvt. Ltd. Respondent No 2 and Appellant P.V. Ramanna Murthy. It is stated in the lease deed that the lessor has represented that they are carrying in Hotel business at Rajahmundri situated at Door No. 26/03/7 Jampet Rajahmundri 533103 Andhra Pradesh and the lease Premises was shown as RCC. Roofed, cellar ground, first, second, third and fourth floor hotel building having a total built-up area of 58,257 sq. ft at Door No. 26-3-7 Jampet, Rajahmundry 533103, Andhra Pradesh along with all movable assets of Machinery, Wooden Furniture and other Furniture, Fixture, Air conditions, Kitchen Equipment etc. lying and in the name of M/s. Hotel Anand Regency, Rajahmundry. Effective date was 08.01.2019. Initially term is shown as four years from 08.01.2019, rent Rs. 65,000/- per month with profit sharing of 10% of the net sale. It is also not in dispute that this lease deed is an unregistered document.

26. Learned Counsel for the Appellant would argue that the lease deed was not required to be registered. It is further submitted that the term of the lease was four years. Appellant was in possession over the secured assets who cannot be evicted without following the due process of law. It is further submitted that Appellant is an aggrieved person. After execution of the lease deed, four lease deeds for 11 month each were also executed between the lessor and lessee.

27. It is not in dispute that Respondent Nos. 2 and 3 are the borrower and guarantors of the Oriental Bank of Commerce which assigned the debt to the Respondent No. 1. It is also not in dispute that the

notice under Section 13(2) of the SARFAESI Act was issued on 22.12.2015. There is nothing on record to show that prior to the Appellant, some other lessee was running the hotel business in the secured assets. Rather in the lease deed lessor has admitted that he was carrying out the Hotel business in the secured assets.

28. Now it is to be seen what would be the effect of creation of a lease deed after issuance of notice under Section 13(2) of the SARFAESI Act? Section 17(4A) of the SARFAESI Act reads as under:

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, 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 65A 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 (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 accordance with the provisions of this Act.

29. A bare perusal of the provision will show that the DRT has to examine the four conditions as enumerated under the provisions of Section 17(4A) of the SARFAESI Act. Section 17 (4A)(d) specifically provides that-

“ if the tenancy is created after the issuance of notice of default and demand by the Bank under Section (2) of Section 13 of the SARFAESI Act, DRT, notwithstanding anything contained in any other law for the time being enforce may pass any order as it deems fit.”

30. In *Bajarang Shyamsunder Agarwal v. Central Bank of India* (supra),

reliance was placed upon a judgment of the Vishal N. Kalsaria case (supra) wherein in Para 24.2 it was held that-

“if a tenancy under law comes into existence after creation of mortgage, but prior to the issuance of notice under Section 13(2) of the SARFAESI Act, it has to satisfy the conditions of Section 65A of the Transfer of Property Act.”

Section 65A (1) of Transfer of Property Act provides that-

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

31. But there is an exception provided in 65A (2) (C) of Transfer of Property Act to the effect that ‘no such lease shall contain a covenant for renewal’ and in case of lease of building the duration of the lease in no case exceeds three years.

32. Admittedly in the present case, tenancy was created after the creation of the mortgage and further after the issuance of notice under Section 13(2) of the SARFAESI Act. Neither the conditions of Section 65A of the Transfer of Property Act were satisfied nor the consent of the creditor i.e. Oriental Bank of Commerce was obtained. It was held in Vishal N. Kalsaria Versus Bank of India and others (supra) in para 22.3 that –

“the non-registration of the tenancy deed cannot be used against the tenant. For leasehold rights being created after the property has been mortgaged to the bank, the consent of the creditor needs to be taken.” Even the consent of the Bank was not obtained. Hence the Appellant cannot take any advantage of lease deed.

33. There is some inconsistency between Section 13 (13) of the SARFAESI Act and Section 65A of Transfer of Property Act. Section 13(13) of the SARFAESI Act reads as under:

(13) No borrower shall, after receipt of notice referred to in subsection (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.”

34. In *Bajarang Shyamsunder Agarwal versus Central Bank of India* (supra), it was held by the Hon'ble Apex Court in Para 19 that –
“This Court also recognized the inconsistency between Section 13(13) of the SARFAESI Act and Section 65-A of the Transfer of Property Act. While Section 13(13) of the SARFAESI Act prohibits a borrower from leasing out any of the secured assets after receipt of a notice under Section 13(2) without the prior written consent of the secured creditor. Section 65-A of the TP Act enables the mortgagor to lease out the property. This inconsistency was resolved by holding that the SARFAESI Act will override the provisions of Transfer of Property Act.”(Emphasis supplied)

35. Provisions of Section 13(13) of the SARFAESI Act would prevail over the provisions of Transfer of property Act. There is a specific bar under Section 13(13) of the SARFAESI Act wherein after receipt of notice under Section 13(2) of SARFAESI Act, borrower shall not transfer by way of sale, lease or otherwise any of the secured assets referred to in the notice without prior written consent of the secured creditor. Admittedly, lease was created in favour of the Appellant after issuance of the notice under Section 13(2) of the SARFAESI Act. Thereafter, no written consent of the secured creditor was obtained. Accordingly, lease created by the lessor is also hit by the provisions of Section 13(13) of the SARFAESI Act. Accordingly, Appellant cannot take any advantage of Section 65A or 107 of Transfer of Property Act.

36. No doubt, an application under Section 17 of the SARFAESI Act can be filed by any person including borrower aggrieved by any of the measures referred to Section 13(4) of the SARFAESI Act taken by the secured creditor or his authorized officer. Words 'any person' are wide enough to include lessee also. Appellant could not prove that he is a statutory tenant. Lease deed in favour the Appellant is not registered as required under the law. Lease was created after the mortgage of the secured assets in favour of the secured creditor. Hence, Appellant cannot challenge the SARFAESI actions initiated by the secured creditor against the secured assets.

37. Learned Counsel for the Appellant submits that the Appellants are in possession over the property. They cannot be evicted otherwise in

due course of law.

38. Appellants are not a person aggrieved who can file an application under Section 17 of the SARFAESI Act. Respondent No. 1 is proceeding against the secured assets in accordance with law provided in SARFAESI Act. Hence, it cannot be said that the Appellants are being evicted otherwise than in due course of law.

39. Learned Counsel for the Appellant submits that the lease deed in favour of the Appellant was for four years. Four different lease deeds for eleven months each were also executed. Hence, possession of the Appellant is protected under the law. As has been held in the case of *Bajrang Shyamsunder Agarwal v. Central Bank of India (supra)*, if the Appellant claims that he is entitled to possession of the secured asset for a term of more than a year, it has to be supported by the execution of registered instrument. Since there is no registered instrument in favour of the Appellant, he is not entitled to possession of the secured asset for more than a period described under Section 107 of the Transfer of Property Act. Further, lease deed was for a period of four years only. This period has already expired. Hence, now Appellant cannot take any advantage of the lease deed which too cannot come in the aid of the Appellant being an unregistered document.

40. On the basis of discussion made above, I am of the considered opinion that the Learned DRT has rightly recorded a finding that Appellant cannot be treated as a statutory tenant as the lease claimed by him is on the basis of an unregistered deed which is not valid under the law. Appellant is not entitled for protection under tenancy law. Since Appellant has no locus standi to file an application under Section 17 of the SARFAESI Act, he cannot challenge the action taken by the secured creditor in respect of secured assets. Accordingly, Appeal lacks merit and is liable to be dismissed.

Appeal is dismissed. Order dated 06.09.2021 passed by DRT Visakhapatnam in SA No. 45 of 2021 is confirmed.

No order as to costs.

File be consigned to Record Room.

Copy of the order be supplied to Appellant and the Respondents and a copy be also forwarded to the concerned DRT.

Copy of the Judgment/ Final Order be uploaded in the Tribunal's Website.

Order signed and pronounced by me in the open Court on this the 19th day of September, 2023.