

BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI

Present : Mr Justice Ashok Menon, Chairperson

Appeal No. 37/2022

Between

M/s. National Laminate Corporation, ... Appellant/s
a Partnership Firm, through its Partner,
Mrs. Sushila Hansraj Gala

V/s.

The Cosmos Co-operative Bank Ltd. & Anr. ... Respondent/s
Mr. Rohit Gupta along with Mr. Alok Mishra, Advocate for Appellant.
Mr. Rishabh Shah, i/b M/s. Raval-Shah & Co., Advocate for
Respondent No.1.

-: Order dated: 08/08/2023

The Appeal is filed by the Applicant impugning the order dated 30.03.2021 in Securitization Application (S.A.) No. 119/2016 on the files of Debts Recovery Tribunal No. II, Mumbai (D.R.T.). I.A. No. 204/2022 is for staying the operation of the impugned order. As consideration of the application would be tantamount to disposal of the appeal itself, the appeal is being disposed of by this order.

2. The S.A. was filed by the applicant u/s 17(1) of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Act, 2002 ('SARFAESI Act', for short) on being aggrieved with the Sarfaesi measures initiated by the first

Respondent Bank to take over possession of the secured assets and put them up for sale.

3. The Appellant M/s. National Laminate Corporation started a sole proprietorship business run by its sole proprietor Mr Jayantilal L Nisar involved in conducting the business of plywood and other wood products. It is the Appellant's case that the secured asset namely, the property situated at Glow Metal Compound, Safed Pool, Village Mohili, Sakinaka, Taluka Kurla in the Registration District, Sub-District of Mumbai Suburban, bearing Survey No.63, Hissa No.1 (Part) and City Survey No.569 and admeasuring about 2,299 square yards, equivalent to 1,922.3 Sq. Mtrs. which is being proceeded against under the SARFAESI Act(subject property) was taken on lease by him on 01.09.2000 from the 2nd Respondent, M/s Subhnen Ply Pvt. Ltd, a company, on an annual rent of ₹60,000/- which was enhanced to ₹1,20,000/- after eighteen months by virtue of an unregistered lease deed.

4. The proprietorship was thereafter constituted into a partnership firm in and around 2008, and Ms Gunvantiben Nenshi Shah, who was one of the directors of the Respondent company, and the wife of another director namely, Shri. Nenshi L. Shah, who had also executed the mortgage deed in favour of the first Respondent, was made a partner in the firm. The tenancy continued and rent receipts were issued for rent received by the company. It is also stated that the audited statement of the company mentions the receipt of rent as an income of the company and standard deduction was also claimed by the company under the provision of the Income Tax Act.

5. The Appellant alleges that on 25.03.2013, a few strangers together with representatives of the company visited the subject property, and on inquiry by Jayanthilal, he was informed by the officers of the company that the property is put up for sale and the appellant firm was directed to vacate the premises at the earliest after terminating the lease.

6. In order to protect the possession of the subject property and prevent forcible eviction by the second Respondent company and its men, except by due process of law, the appellant firm filed R.A.D. Suit No. 614/2014 on 01.04.2013 before the Small Causes Court at Mumbai seeking a declaration of the firm's tenancy rights and a consequential injunction prohibiting the defendants therein from interfering with the peaceful possession of the property. The firm obtained a temporary injunction against the Respondent No.2 company. On 08.09.2015, when a few officers of the 1st Respondent Bank visited the subject property, the appellant firm came to know about the creation of a mortgage by the company and also realised that the Bank is taking over possession of the secured assets because of the alleged default debt committed by the company. The appellant resisted and the officers retreated with a threat to return for forcible possession with Police aid.

7. The appellant thereafter came to know about the pendency of case No.154/SA/2015 a proceeding before the Chief Metropolitan Magistrate Court, Mumbai, (C.M.M.) filed by the Bank u/s 14 of the SARFAESI Act to take over physical possession of the property. The

C.M.M. vide order dated 18.06.2015 directed the Assistant Registrar of the Court to take over possession of the subject property.

8. The aforesaid order of C.M.M. was challenged by the appellant before the Bombay High Court Writ Petition (W.P) No. 2419/2015. However, the Hon'ble High Court dismissed W.P. on 09.10.2015 and the appellant was constrained to take up the matter before the Hon'ble Supreme High Court of India as Civil Appeal No. 422 of 2016. On 20.01.2016 the order of the C.M.M. dated 18.06.2015, as well as the order dated 09.10.2015 of the Hon'ble Bombay High Court in W.P No. 2419/2015, were set aside.

9. To the utter surprise of the appellant firm, the C.M.M. passed another order on 30.07.2016 deputing an Advocate Commissioner to take over physical possession of the property, who sent a notice to the appellant on 03.10.2016 informing about the taking over of the possession of the subject property on 10.10.2016. This is when the appellant firm approached the D.R.T. with S.A. No.119/2016. After detailed consideration of the materials before the Tribunal, the learned P.O. vide the impugned judgment dated 30.03.2021 dismissed S.A. No. 119/2016. The appellant is before this Tribunal impugning that judgment in the S.A.

10. The first Respondent had in the S.A before the D.R.T filed a reply stating that the mortgage agreement between the Respondent Bank and the 2nd Respondent company was executed in 1998 and that the second Respondent company defaulted payment of the amount and as a consequence, the loan was classified as Non-Performing Assets (N.P.A.) on 31.03.2012. The Bank issued a demand notice u/s

13(2) of the SARFAESI Act on 30.01.2013, calling upon the second Respondent to pay a total sum of ₹21,92,40,388.85. Though the notice was served on 02.02.2013, no objections were raised. The outstanding amount thereafter mounted to ₹30 Crores and the Respondent Bank approached the Court of Chief Metropolitan Magistrate seeking physical possession of the secured assets under S.14 of the SARFAESI Act, as stated above. It is contended that the mortgagor had not created any lease of the property at the time of mortgaging the property. The alleged lease was admittedly created in on 01.09.2000 and the tenancy allegedly came into effect on 21.12.2000 in favour of the proprietorship belonging to Shri. Jayantilal L. Nishar. It is further submitted that the 2nd Respondent company had no right to create a lease of the mortgaged property by virtue of Section 65-A of the Transfer of Property Act. Hence the alleged lease is bad in law. The Mortgage Deed which was annexed as Exhibit A to the reply before the D.R.T. was executed on 22.06.1998. The Respondent Bank also contends that u/s 55 of the Maharashtra Rent Control Act, an agreement for tenancy is to be mandatorily registered which was not done in the instant case. The collusion between the Appellant and the 2nd Respondent company is further established by the fact that one of the Directors of the second Respondent company viz. Ms Gunvantiben Nenshi Shah is none other than the wife of one of the directors of the company, Shri. Nenshi L. Shah, who had also executed the mortgage deed. It is further pointed out that the Appellant Mr. Jayantilal Lakhamshi Nishar is also the brother-in-law of Shri. Nenshi L. Shah. The recital in the rent deed for enhancing the rent to double

the original rent, after 18 months is also a suspicious circumstance, according to the first Respondent. The objection raised by the Appellant regarding the C.M.M. appointing an Advocate Commissioner to take over the possession of the property cannot be challenged in view of the latest decision of the Hon'ble Supreme Court indicating that the Advocate Commissioner is an officer of the Court. In the R.A.D. Suit No. 614/2014 filed before the Small Causes Court, Mumbai, by the appellant firm a temporary order of injunction was passed against the 2nd Respondent company. In view of the above circumstances, it is clear that it is a collusive suit filed with the intention to defeat the legal action taken by the secured creditor. The Bank is not a party to that Suit. The Hon'ble High Court had dismissed the W.P. filed by the Appellant observing that the tenancy executed on an unregistered document is not acceptable. It was also observed that the mortgagor is guilty of suppression of facts. The attempt made by the Appellant to take resort to the judgment of the Hon'ble Supreme Court dated 20.01.2016 is not of any assistance to the appellant in view of the fact that it was rendered prior to the amendment incorporating Section 17 (4A) of the SARFAESI Act, wherein the jurisdiction is given to the D.R.T. to examine whether the lease or tenancy is contrary to the Section 65-A of the Transfer of Property Act and whether it is contrary to the terms of the mortgage. It is under such circumstances that the C.M.M. had considered the application u/s 14 of the SARFAESI Act and directed the Advocate Commissioner to take over possession of the subject property vide order dated 30.07.2016. Hence, the Respondent prays that there is no reason to interfere with

the impugned order of the Ld. P.O., and that the Appellant is not entitled to get that order set aside under any circumstances.

11. This Tribunal refused to grant a stay pending appeal. That order dated 19.07.2022 of this Tribunal was challenged by the Appellant before the Hon'ble Bombay High Court in Writ Petition (L) No. 31765 of 2022. Vide Order date 08.03.2023, the order of this Tribunal was quashed and I.A. 204/2022 was restored to file. This Tribunal was directed to dispose of the Appeal itself within four weeks after analysing the decision of the High Court in Writ Petition No. 2419/2015 and the decision in Civil Appeal No.422/2016 by the Supreme Court to conclude whether the decision of the Supreme Court operates as *res judicata* or not.

12. Heard the learned counsel Shri. Rohit Gupta appearing for the Appellant and Mr. Rishabh Shah, appearing for the Respondent Bank. Records and documents were perused.

13. There is no dispute that the mortgage of the property was much prior to the alleged lease. The averment is that Mr Jayantilal L Nisar had taken the subject property on lease on 01.09.2000 and started functioning there from 21.12.2000. No rent receipts whatsoever pertaining to that period have been produced. The rent receipts produced starting from 2008 onwards are subsequent to the creation of the firm by inducting Ms Gunvantiben Nenshi Shah as a partner, which, according to the Respondent Bank was with a specific purpose. Admittedly, she is the wife of the mortgagor and also a director of the 2nd Defendant company. The fact that the rent received from the Appellant has been accounted for in the company's audited accounts

is also not of much consequence as the Appellant and the company were allegedly hand in glove to create the evidence. No electricity bills, telephone bills or other evidence pertaining to the functioning of the Appellant's ply-wood business in the subject premises prior to 2008 are produced. The fact that the Appellant and the Directors of the 2nd Defendant company including the mortgagor Shri. Nenshi L. Shah who signed and executed the mortgage deed on 02.06.1998 indicates that they were determined to create evidence about the lease to get over the mortgage somehow or the other. It is also pertinent to note that the lease deed has not been registered despite there being a statutory provision to register year-to-year leases. The suit before the Small Causes Court is apparently a collusive one because the company alone is made a defendant and obviously, they were not going to defend the suit. The creation of the firm was consequent to the classification of the debt as N.P.A. would further bolster the case of the Bank that a fictitious tenancy was being created for the purpose of stalling the measures under the SARFAESI Act.

14. The decision of the Hon'ble Supreme Court setting aside the Bombay High Court's decision in Civil Appeal 422/20116 is of no avail since nothing specific has been stated therein to establish the tenancy in favour of the Appellant. The Hon'ble Supreme Court had while deciding a batch of appeals along with the Appeal preferred by the Appellant herein, in *Vishal N Kalsaria v. Bank of India and Ors* (2016) 3 SCC 762, was considering the controversy arising squarely out of the interpretation of the decision in *Harshad Govardhan Sondagar vs. International Asset Reconstruction Company Ltd.* (2014) 6 SCC 1 and held

that nothing is stated in that judgment 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.

15. The decision in *Harshad Govardhan Sondagar* (supra) was affirmed in toto while the decision in *Vishal N. Kalsaria*(supra) was partly affirmed and partly overruled by the Hon'ble Supreme Court in the decision *Bajarang Shyamsundar Agarwal vs. Central Bank of India & Ano.* (2019) 9 SCC 94. In that decision, it is held that if a tenancy 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 condition of section 65-A of the Transfer Property Act. The section reads thus:

“65-A. 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 within 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.”

16. There is nothing to indicate that the mortgage was created with the concurrence and consent of the first Respondent. The primary question that arises for consideration is whether the decision of the Hon'ble Supreme Court in Civil Appeal 422 of 2016 would result in *res judicata* against the first Respondent's contentions. The Hon'ble Supreme Court has in *Vishal N. Kalsaria* (supra) considered the facts of just one among several cases including the appeal preferred by the Appellant, and in that case, the tenancy was created even prior to the mortgage but no registered deed was executed, and the Hon'ble Supreme Court was concerned with the question whether a "protected tenant" under the Maharashtra Rent Control Act, 1999 can be treated as a leasee and whether the provisions of the SARFAESI Act, will override the provisions of the Rent Act. The Hon'ble Supreme Court has in *Bajarang Shyamsundar Agarwal* after considering the aforesaid two decisions, held thus:

"31. In such an event, wherein the claim of the Appellant tenant is not supported by any conclusive evidence, the rejection of the stay application by the Chief Metropolitan Magistrate cannot be held to be erroneous. Although the Council of the Appellant tenant has placed ample reliance upon the *Vishal N. Kalsaria* case but the same would not help because of the Appellant tenant herein, as the earlier case proceeded with the assumption of a valid and bona fide tenancy. But in the present case, the stay application of the Appellant tenant seems to be an afterthought. It is clear that Respondent to borrower/landlord never intimated Respondent 1 bank about the alleged tenancy. In the light of the above, we are unable to accept the claim of bona fide tenancy of the Appellant tenant."

17. This view of the Hon'ble Supreme Court has been reiterated in *Hemraj Ratnakar Salian vs. HDFC Bank Ltd. 2021 SCC OnLine SC 611*.

18. The claim of the Appellant in the present case is not supported by any cogent or conclusive evidence. There is serious doubt as to the bona fides of the tenancy as there is a lack of sufficient evidence to

establish the tenancy of the Appellant. The action taken by the C.M.M. to take over the possession of the property cannot be held to be erroneous. What is protected by the SARFAESI Act is a valid and legal tenancy. The Ld. P.O. has discussed the evidence and materials placed on record at great length to conclude that the tenancy is bogus and collusive. I find no reason to overturn that decision

The Appeal has, therefore, no merits and requires to be dismissed and I do so. Resultantly, the Application for stay also stands dismissed.

Sd/-
Chairperson

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DRAFT. MUMBAI