

## **CASE COMMENT**

**(2014) 6 SCC 1**

### **HARSHAD GOVARDHAN SONDAGAR V INTERNATIONAL ASSETS RECONSTRUCTION COMPANY LTD & ORS**

**Date of judgment: 3.4.2014**

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#### **INTRODUCTION**

The bunch of appeals has been stimulated by tenants of properties which are mortgaged to banks and was heard by the Supreme Court. But did the judiciary done a splendid job and did justice by clarifying the rights of a lessee under SARFAESI Act. Presenting in words of thought the case of Harshad Govardhan v International Assets Reconstruction Ltd which was decided in the year 2014.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

##### **Introduction**

The present case is basically a Special Leave Petition which has been filed in Supreme Court against the Judgment and Order of the High Courts. In this case leave was granted by the Supreme Court and it was said that the question of law raised in these appeals will be decided taking into account the facts of the three different categories of the case where the appellants claimed to be in possession of the lease prior to creation of mortgage but the Chief Metropolitan Magistrate passed orders under section 14 of the SARFAESI Act, 2002 for delivery of possession of the secured assets to the secured creditors.

##### **FACTS OF THE CASE:**

The appellants who were intending to be the lessees were occupying different premises in Mumbai which the borrower had kept with the bank as collateral security in order to secure the debt. All these premises were mortgaged to different banks as securities for loan advanced by the banks. The banks here were referred to as the secured creditors. The

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borrowers had taken a loan from the bank and they failed to repay the loan to the secured creditors. Since the borrowers failed to repay the loan to the secured creditors their debts have been classified as non-performing assets by the secured creditors. Thereafter as the borrowers failed to repay the debt or the instalments the notice of 60 days was served upon the borrowers by the secured creditors. Then as per the provisions of the section 13 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 i.e. SARFAESI Act the notice of 60 days period was served upon the borrowers. When the borrowers failed to repay the amount after the lapse of the time the only right the bank has is to enforce the secured assets which was under the possession of the appellants. The secured creditors then exercised their right of enforcing the securities under section 13(4) of the SARFAESI Act, 2002 to take possession of the secured assets of the borrowers. The secured creditors thereafter initiated an action for the enforcement of securities and accordingly the bank requested the Chief Metropolitan Magistrate Mumbai under section 14(1) of the SARFAESI Act to assist in taking the possession of the property. The appellants then approached the court after being threatened to get dispossessed from the premises under section 14(1) of the SARFAESI Act.

### **Procedural Background**

This is a landmark judgment of Supreme Court in which large number of appeals has been filed by the lessee for delivery of possession to the secured creditors and the decision of this case created ripples as the appeal was allowed by the Supreme Court and it determines the right of the lessee and it provides for protection of right of third parties.

### **ARGUMENTS ADVANCED**

The appellants in a Special Leave petition filed before a Supreme Court contended that every citizen has a right to property under Article 300 A of the Constitution and it should not be deprived to anyone save by authority of law. He further contended that lessee with respect to lease also has a right and further alleged that there is nothing in the Section 13 of the SARFAESI Act, 2002 which talks about the protection of third parties and which depicts that

right of a lessee stands extinguished when the bank initiates the action. It was also submitted by the appellants that if we see Section 13(13) of the SARFAESI Act, 2002 it says that if secured creditor has served a notice on borrower such borrower on receiving notice shall not lease out, sell or transfer property, dispose or assign property to any other person. But before that any lease which was created before the serving of notice is valid. Further the appellant contended that under Sub-section (3) of Section 14 of the SARFAESI Act, 2002 the decision of the Chief Metropolitan Magistrate directing to take possession of the secured assets cannot be challenged in any court or before any authority. In other words a lessee would have no remedy against the decision of the Chief Metropolitan Magistrate or the District Magistrate. The contentions of the Respondents were that prior to the mortgage there were no restrictions on the right of the borrower to make a lease but once mortgage is created his right to make a lease is to be regulated by the provisions of Section 65A of the Transfer of Property Act, 1882. Further it was submitted by the respondents that if any lease is created as per the provisions of sub-section (1) of Section 65A of the Transfer of Property Act, 1882 such lease will be valid lease and if the lease fulfils the requirements of sub-section (2) of Section 65A it will be valid lease and will be binding on the secured creditor and it was further submitted by the respondents that if any contrary intention appears the lease will not be a binding on the mortgagee. It was further submitted by the respondents that as far as section 13(13) of SARFAESI Act, 2002 is concerned which talks about restrictions that once notice is served borrower shall not assign the lease to other person without prior consent of the secured creditor and if such lease is assigned without the prior written consent by the bank then that lease shall be void. Another contention that was raised by the respondents was that although the SARFAESI Act is silent on the remedies available to the lessee in accordance with the provisions of section 65A of the Transfer of Property Act, 1882 the lessee has a remedy under section 17(1) of the SARFAESI Act, 2002 as the application under section 17(1) of the SARFAESI Act, 2002 can be filed by any person not just the borrower.

#### **SUMMARY OF COURT'S DECISION:**

##### Decision of the Chief Metropolitan Magistrate:

The appellants claimed to be in possession of the secured assets of a lease prior to the creation of a mortgage but the Chief Metropolitan Magistrate, Mumbai passed orders under section 14 of the SARFAESI Act for delivery of possession to the secured creditors which was set aside and fresh orders were passed after giving opportunity of hearing to the parties.

### Decision of the High Court:

In this case it was said that the statutory provisions shall not be a bar for High Court or this Court as the statutory provisions cannot take away the power vested in the Constitution and the decision of the Chief Metropolitan Magistrate or the District Magistrate can be challenged before High Court under Article 226 or Article 227 of the constitution and the High Court will examine the matter as per the settled principles of law. The High Court in this case failed to appreciate the provisions of section 13 of the SARFAESI Act, 2002 but it does not overrides the rights of lessee under a lease created before a receipt of notice under section 13(2) of the SARFAESI Act, 2002.

### Decision of the Supreme Court:

The Supreme Court in this case dealt with the rights of a lessee and held that when the lessee becomes aware that possession has been taken by the secured creditor he should either restore the possession or made an attempt to prevent a secured creditor from taking the possession by showing that he was a lessee prior to the creation of mortgage or after the mortgage in accordance with the provisions of Section 65A of the Transfer of Property Act, 1882 and that the lease does not stand determined in accordance with section 111 of the Transfer of Property Act, 1882. The Court took strict opinion as to section 14 of SARFAESI Act, 2002 and held that when any bank or the secured creditor is submitting any application before the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the SARFAESI Act, 2002 the secured creditor must state in affidavit whether in collateral there is any interest in favour of the secured creditor and when an application is filed the Chief Metropolitan Magistrate or the District Magistrate will have to give a notice and opportunity of hearing to the parties consistent with the provisions of principles of natural justice and take a decision.

The Supreme Court further said that lessee has no right to file a writ petition and the lessee should approach DRT first before filing the writ petition. The secured creditor as per the provisions of the Section 65A of the Transfer of Property Act, 1882 cannot take the possession of the premises where the lease is created prior to mortgage or after the creation of mortgage under section 14 of the SARFAESI Act, 2002. The power to decide the rights of the lessee is exclusively with the Chief Metropolitan Magistrate under section 14 of the SARFAESI Act, 2002. It was also held by the Supreme Court that Debt Recovery Tribunal does not have the power to restore the possession to the lessee and the Chief Metropolitan Magistrate should before giving any decision should give the opportunity of hearing to the lessee.

## APPRAISAL AND CRITICISM OF THE JUDGMENT

Due to trial of errors the judiciary in a variety of cases used the tool of interpretation which is to be followed. The Supreme Court in this case dealt with the rights of a lessee and the remedies available where the lessee is threatened to be dispossessed by the secured creditor under section 13 of the SARFAESI Act, 2002.

Appraisal and criticism can be dangerous for that one needs to examine the entire judgment. Here is an extract of various judgments that followed to further the fact that a bad judgment can have an impact on good law. Now the trial of the cases that followed:

### SARFAESI Act, 2002

#### **Trade Well, a Proprietorship Firm, Mumbai & Anr v Indian Bank & Anr<sup>1</sup>**

The Bombay High Court further added another addition in this judgment that the borrower as well as the third party has a remedy to file an application under section 17 of the SARFAESI Act before the Debt Recovery Tribunal and if they succeeds the DRT can restore the possession of the premises to the third party as well as to the borrower.

#### **Central Bank of India v State of Kerala and Ors,<sup>2</sup>**

#### **Authorised Officer, Indian Overseas Bank and Anr v Ashok Saw Mill<sup>3</sup>and**

#### **United Bank of India v. Satyawati Tondon<sup>4</sup>**

In these cases it was submitted that the remedy of a lessee is to restore the possession under Section 14 of the SARFAESI Act and to file an application under Section 17(1) of the SARFAESI Act before the Debts Recovery Tribunal and in case he succeeds to establish that the lease was created prior to the mortgage and the lease was to the knowledge of the secured creditor or that the lease was created after the mortgage in accordance with Section 65A of the Transfer of Property Act, 1882 the DRT will restore the possession.

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<sup>1</sup> Trade Well, a Proprietorship Firm, Mumbai and Anr. v Indian Bank and Anr, Cri. L.J.[2007]2544

<sup>2</sup> Central Bank of India v State of Kerala and Ors, 4 SCC[2009]94

<sup>3</sup> Authorised Officer, Indian Overseas Bank and Anr. v. Ashok Saw Mill, 8SCC[2009]366

<sup>4</sup> United Bank of India v Satyawati Tondon and Ors, 8 SCC[2010]110

Income Tax Act, 1961:

**C.B. Gautam v Union of India and Ors<sup>5</sup>**

In this case the provisions of Section 269-UD and Section 269-UE of the Income Tax Act, 1961 to prevent evasion of tax by transfer of immovable property were challenged as ultra vires the Constitution and it was held by the Court if the lessee is in occupation of the premises his leasehold rights would be destroyed and he would have to handover the possession to the appropriate authority. The rights of lessees under a lease executed prior to receipt of notice under Sub-section (2) of Section 13 of the SARFAESI Act, 2002 by the borrower are not affected by the action of secured creditor under Section 13 of the SARFAESI Act, 2002.

**ICICI Bank Ltd. v SIDCO Leathers Ltd. and Ors<sup>6</sup>**

Parliament cannot take away the constitutional right of right to property.

Transfer of Property Act, 1882

**Shri Sanjeev Bansal v Oman International Bank SAOG and Anr<sup>7</sup> and**

**Sree Lakshmi Products v. State Bank of India<sup>8</sup>**

In both these cases it was held by the two High Courts that the tenancies which are created inconsistent with provisions of Section 65A of the Transfer of Property Act, 1882 are not binding on the secured creditors. It was further submitted that once the secured creditor has issued notice to a borrower for the possession of a secured asset and inspite of that borrower transfers the possession of a lease without the consent of the bank the lessee is bound to restore the possession to the secured creditor.

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<sup>5</sup> C.B. Gautam v Union of India and Ors, 1 SCC[1993]78

<sup>6</sup> ICICI Bank Ltd. v SIDCO Leathers Ltd. and Ors, 10SCC[2006]452

<sup>7</sup> Shri Sanjeev Bansal v Oman International Bank SAOG and Anr, 131DLT[2006]729

<sup>8</sup> Sree Lakshmi Products v State Bank of India, AIR [2007]Madras 148

THIS SHOWS THAT SEVERAL COURTS HAVE FAILED TO PROTECT THE RIGHTS OF A LESSEE AND WHEN THE SECURED CREDITOR APPROACHES THE COURT FOR ANY KIND OF ASSISTANCE IN TAKING UP THE POSSESSION THE ONLY REMEDY THE THIRD PARTY OR THE LESSEE HAS IS TO FILE AN APPLICATION UNDER SECTION 17 OF THE SARFAESI ACT BEFORE THE DEBT RECOVERY TRIBUNAL AND IF THEY SUCCEEDS THE DEBT RECOVERY TRIBUNAL CAN RESTORE THE POSSESSION OF THE PREMISES TO THE THIRD PARTY.

### COMMENTS

This landmark judgment of Supreme Court is an important judgment which deals with the rights of the third parties. In *Harshad Govardhan Sondagar v International Assets Reconstruction Co. Ltd. & Ors* and connected appeals, the instance of the Appellants before the Supreme Court was that they are not the borrowers; however they are the tenants of the borrowers and are entitled to remain in possession of the secured assets. Distinctive High Courts have taken diverse position as respects to distinctive issues including the rights of the tenants and the remedies if any accessible to the occupants when the secured creditors move ahead to take ownership of the secured assets in exercise of the powers conferred on them under Section 13 (4) of the SARFAESI Act, 2002. The Supreme Court in *Harshad Govardhan Sondagar v International Assets Reconstruction Co. Ltd. & Ors* has now put an end to clashing perspectives taken by diverse High Courts on a number of issues obliging clarity in this respect. An endeavour has been made in the accompanying passages to clarify the issues which are being within the said judgment to ensure that the Supreme Court's judgment is understood in the right perspective. The significant issue in the present case was whether a mortgagee of a previously rented out property can claim ownership of the property upon the failure of the mortgagor in passing his obligations within the stipulated time. It was also ruled out in this case that without the determination of a valid lease, the possession of the lessee is lawful and such lawful possession of a lessee was to be protected by all courts and tribunals. Considering the essential requirement of deciding the lease, the Court obliged that a tenant could either restore or oppose the ownership of the property by the secured creditor. Further the Court in the case of *M/s Trade Well v. Indian Bank*, set aside a Judgment of the Bombay High Court and said that the appellants had to move to the DRT for a remedy as they have no remedy under the SARFAESI Act, 2002. The Supreme Court then set aside the orders of the Chief Metropolitan Magistrate and ordered them to issue fresh orders after giving opportunity of being heard to the parties.

