

**A.F.R.**

**Court No. - 21**

**Case :-** WRIT - C No. - 39191 of 2022

**Petitioner :-** V Mart Retail Ltd

**Respondent :-** Lic Housing Finance Ltd And 7 Others

**Counsel for Petitioner :-** Jitendra Prasad

**Counsel for Respondent :-** CSC,Pranjal Mehrotra

**Hon'ble Manoj Kumar Gupta,J.**

**Hon'ble Prashant Kumar,J.**

1. The instant petition has been filed praying for a writ of mandamus commanding the respondents to consider the representation of the petitioner dated 24.11.2020 and not dispossess the petitioner from Property No.3/67, Rui Ki Mandi, Shahganj, Agra or interfere in the running of business by the petitioner in the said premises.

2. The facts necessary for disposal of the petition are that the petitioner is a company incorporated under the Companies Act. It is running its retail business from the aforesaid premises in pursuance of a Memorandum of Understanding (MOU) dated 10.5.2016 between it and respondents no.4 to 8, the owners of the premises (hereinafter for short 'the lessors'). According to the MOU, the petitioner was let out ground floor and first floor of the building admeasuring 11300 square feet. The lessors were to hand over possession of the premises to the petitioner on or before 25.05.2016. The petitioner was given right to vacate the demised premises after serving a three months' notice on the lessors. On the other hand, the lessors were given right of forfeiture of

tenancy only when there was continuous default of three months or more in payment of rent and the petitioner fails to pay it within one month of receipt of notice of demand. Subsequently, registered lease agreement dated 15.03.2017 was also executed between the parties. The lease agreement mentions the date of commencement of the lease as 1st July, 2016. The rent for the carpet area of 11000 square feet was approximately Rs.29 per month per square feet payable before 10th of every calendar month. The monthly lease rent was liable to enhancement after regular intervals. According to the petitioner, in terms of the Memorandum of Understanding and the registered lease deed, it occupied the demised premises and is carrying on its retail business therefrom.

3. On 20.02.2020, the petitioner received a notice from the second respondent i.e. LIC Housing Finance Ltd. from which it came to know that the demised property was equitably mortgaged by the lessors in its favour. On 23.11.2020, the second respondent fixed a possession notice on the demised premises in purported exercise of its powers under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the Act'). The petitioner on 24.11.2020 filed a detailed objection before the second respondent mentioning therein about the MOU dated 10.5.2016 and registered lease deed dated 15.6.2017 and requested the second respondent to

immediately stop proceedings for taking actual physical possession of the leased property. The petitioner also made a prayer that in case the property is auctioned, the auction purchaser be informed that he would step into the shoes of the lessors/borrowers, but shall not be entitled to actual physical possession as the property was in possession of a lawful tenant. However, the second respondent did not take notice of the said objection and threatened to take possession of the leased property and consequently, the instant petition.

4. The second respondent has filed a counter affidavit in which the stand taken is that the private respondents (lessors) had taken a loan of Rs.2,35,00,000/- on 28.2.2017 from it and had equitably mortgaged the property in question in favour of the second respondent by deposit of title deeds. The date on which equitable mortgage was allegedly created, has not been disclosed in the counter affidavit. The date of issuance of notice under Section 13 (2) of the Act is 5.12.2019. The date of issuing possession notice is 23.11.2020. It is admitted to the second respondent that it had filed an application under Section 14 of the Act for delivery of actual physical possession of the aforesaid property and the said application is pending.

5. It is clear from the stand taken by the second respondent that it proposes to take actual physical possession of the property in question in exercise of its rights under the Act.

6. The private respondents (lessors/borrowers) were sent notices by registered post. It is clear from the track consignment report of Indian Post that the notices were delivered to them, but none had appeared on their behalf. Service on the aforesaid respondents was held to be sufficient by order dated 13.4.2023.

7. Learned counsel for the petitioner submits that the petitioner being a lawful lessee of the aforesaid premises and the lease having been created in its favour before the sanction of loan and creation of equitable mortgage, the second respondent is not entitled to take actual physical possession of the demised premises. At best, only symbolic possession could be taken and in which event, it would step into the shoes of the borrowers and would only be entitled to claim rent from the petitioner. In support of his submission, learned counsel for the petitioner has placed reliance on the judgements of the Supreme Court in **Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited and others<sup>1</sup>**, and **Vishal N. Kalsaria Vs. Bank of India and others<sup>2</sup>**.

8. Sri Pranjal Mehrotra, learned counsel appearing on behalf of the second respondent submitted that since the registered lease deed was executed on 15.03.2017, after the sanction of loan on 28.02.2017 and, therefore, the petitioner is not entitled to benefit of the aforesaid

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1 (2014) 6 SCC 1

2 (2016) 3 SCC 762

judgements. He further submitted that even if it is held that the petitioner is not liable to be evicted, it be clarified that the secured creditor (the second respondent) would be entitled to realise rent from the petitioner.

9. In **Harshad Govardhan Sondagar (supra)**, the Supreme Court had considered the issue as to whether a secured creditor in exercise of its power under the Act could take actual physical possession of the secured asset in possession of lessee. The Supreme Court, after considering the entire scheme of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the provisions of the Transfer of Property Act, 1882 categorised the leases into three classes as follows:-

(i) lease created before the property was mortgaged- it was held that in a such case, the lessee will have right to enjoy the leased property in accordance with the terms and conditions of the lease, irrespective of whether the subsequent mortgagee of the immovable property had knowledge of such lease or not.

(ii) lease created after the execution of mortgage deed- in case the mortgage deed does not prohibit the mortgagor from making a lease of the mortgaged property and so long as the lease satisfies the requirement of sub-section (2) of Section 65-A of the Transfer of Property Act, it would be valid and binding on the secured creditor.

(iii) lease created after service of notice under Section 13 (2)- such a lease would be void in view of Section 13 (13) of the

Act and not binding on the secured creditor.

10. The Supreme Court also held that the provisions of the Act do not abridge the right of the lessees falling under category (i) and (ii) nor results in termination of the lease. However, this would not be true for cases falling under category (iii). Relevant part of the Law Report is extracted below:-

“One of the measures mentioned in clause (a) in sub- section (4) of Section 13 of the SARFAESI Act is to take possession of the secured assets of the borrower including the right to transfer by way of lease. Where, however, the lawful possession of the secured asset is not with the borrower, but with the lessee under a valid lease, the secured creditor cannot take over possession of the secured asset until the lawful possession of the lessee gets determined. There is, however, no mention in sub- section (4) of Section 13 of the SARFAESI Act that a lease made by the borrower in favour of a lessee will stand determined on the secured creditor deciding to take any of the measures mentioned in Section 13 of the said Act. Sub- section (13) of Section 13 of the SARFAESI Act, however, provides that after receipt of notice referred to in sub- section (2) of Section 13 of the SARFAESI Act, no borrower shall lease any of his secured assets referred to in the notice, without the prior written consent of the secured creditor. This provision in sub- section (13) of Section 13 of the SARFAESI Act and the provisions of the Transfer of Property Act enabling the borrower or the mortgagor to make a lease are inconsistent with each other. Hence, sub- section (13) of Section 13 of the SARFAESI Act will override the provisions of Section 65A of the Transfer of Property Act by virtue of Section 35 of the SARFAESI Act, and a lease of a secured asset made by the borrower after he receives the notice under sub- section (2) of Section 13 from the secured creditor intending to enforce that secured asset will not be

a valid lease.”

11. The next issue considered in the judgment was whether the Chief Metropolitan Magistrate or District Magistrate is empowered to deliver actual physical possession of the secured asset to the secured creditor under Section 14 of the Act even in cases where the secured asset is in possession of a lawful tenant. In such cases, it has been held that the secured creditor will have right to receive any money due or which may become due, including rent from the lessee of the borrower after expiry of sixty days of notice under Section 13 (2) of the Act. In order to protect his possession, the lessee would be entitled to place material before the Chief Metropolitan Magistrate or the District Magistrate and satisfy him that there was a valid lease created before the mortgage or after the mortgage, in accordance with the requirements of Section 65-A of the Transfer of Property Act and the lease has not been determined in accordance with Section 111 of the Transfer of Property Act and in which event, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, cannot pass an order for delivering possession of the secured asset to the secured creditor. The relevant observations in the judgment are as follows:-

“Hence, possession of the secured asset from a lessee in lawful possession under a valid lease is not required to be taken under the provisions of the SARFAESI Act and the Chief Metropolitan Magistrate or the District Magistrate, therefore, does not have any power under Section 14 of the SARFAESI

Act to take possession of the secured asset from such a lessee and hand over the same to the secured creditor.”

12. The law laid down in **Harshad Govardhan Sondagar** was followed by the Supreme Court in **Vishal N. Kalsaria Vs. Bank of India and others** and it has been further clarified as follows:-

“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 on 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.”

13. In the instant case, although it is argued that the registered lease deed was executed on 15.03.2017, after sanction of the loan, but it is not disputed that it was preceded by a memorandum of understanding dated 10.5.2016 under which the petitioner became entitled to occupy the premises as lessee on or before 25.5.2016 and the registered lease agreement specifically recites that the tenancy commenced from 1st July, 2016. The possession of the petitioner as lessee since the aforesaid date is not in dispute. Therefore, we are of the opinion that the case of the petitioner would be covered under category (i) and the possession



of the petitioner could not be disturbed by the second respondent under the provisions of the Act unless the lease is validly determined as per contract of tenancy or the statutory provisions. At the same time, the second respondent having already served notice under Section 13 (2) and sixty days period had expired since then, it had become entitled to realise rent from the petitioner, in enforcement of its rights as a secured creditor.

14. In the facts obtaining above, we are of the opinion that no purpose would be served in relegating the petitioner to agitate its claim before the District Magistrate or Chief Metropolitan Magistrate. It will only lead to procrastination of the litigation.

15. Accordingly, we dispose of the instant petition restraining the second respondent from taking actual physical possession of the property in question from the petitioner until the lease is determined in accordance with law. The petitioner will, however, be liable to pay rent from now onwards to the second respondent and the said amount will be appropriated by it towards adjustment of the outstanding liability of the borrowers, in respect of the loan taken by them.

(Prashant Kumar, J.) (Manoj Kumar Gupta, J.)

**Order Date :- 19.4.2023**

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