

RECENT SUPREME COURT JUDGMENT – A SHOT IN THE ARM FOR BANKS TO TAKE POSSESSION OF SECURED ASSETS OCCUPIED BY TENANTS

A recent judgment of the Supreme Court in *Harsh Govardhan Sondagar v. International Assets Reconstruction Company Ltd.*, (2014) 6 SCC 1, has provided a shot in the arm to the Banks towards facilitating speedy recovery of their dues by paving way for the Banks to secure quick vacant possession of the property even by evicting certain kinds of Tenants of the Borrower.

The Supreme Court categorised Tenants into three categories:-

1. Tenant who was inducted into the property before it was mortgaged to the Bank

Such lease/tenancy being prior to the mortgage, the Supreme Court has held that such lease/tenancy would be binding on the Bank, and the rights of the Banks under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the “**SARFAESI Act**”) cannot override the rights of the Tenants and if the lease/tenancy is valid and subsisting and has not expired or been terminated at the time when the Bank seeks to take possession, then such Tenants cannot be dispossessed from the property/secured asset till their lease/tenancy rights expire or stand terminated as per law.

2. A Tenant who was inducted into the property after it was mortgaged to the Bank but before the Bank issues notice of default and demands payment under Section 13(2) of the SARFAESI Act

Such lease/tenancy can be classified into three sub- categories:

- (i) A lease/tenancy which is in accordance with the provisions of Section 65A of the Transfer of Property Act, 1882 (“**TP Act**”) and not contrary to the terms of the mortgage;
- (ii) A lease/tenancy which is contrary to the provisions of Section 65A of the TP Act;
- (iii) A lease/tenancy contrary to the terms of the mortgage prohibiting the mortgagor/borrower from creating any tenancy or leasing of the property.

As regards sub-category (i) above, the Supreme Court has held that these Tenants cannot be dispossessed from the property by the Banks unless their leases have expired or have got terminated as per the terms of the lease. The Supreme Court has also observed that for Tenants to claim a lease/tenancy for a period exceeding one year, they would have to produce a registered lease deed/ tenancy instrument as any lease/tenancy for a period exceeding one year can only be created by a registered document/instrument. However, it is possible that the Tenants may contend that though leases were opposed to Section 65A of the TP Act, subsequently, by acceptance of rent by the landlord, a monthly lease/tenancy has resulted. To deal with such contentions, out of abundant caution, it would be advisable for the Banks after taking over the ownership rights under the SARFAESI Act to issue a notice to the Tenants, terminating the alleged lease/tenancy which may be claimed with a 15 days’ advance notice being without prejudice to Bank’s claim in the first place that there is no valid lease/tenancy at all; or in cases of registered lease/tenancy after the period of lease/tenancy has expired.

As regards sub-category (ii) and (iii), such lease/tenancy has been held by the Supreme Court to be invalid and hence in such a case, the Bank would be entitled to directly recover vacant possession by approaching the Magistrate under Section 14 of the SARFAESI Act.

3. A Tenant who was inducted into the property after the Bank has issued a notice of default and made a demand for payment under Section 13(2) of the SARFAESI Act.

Such leases/tenancies would be invalid as the SARFAESI Act itself under Section 13(13) which prohibits any creation of encumbrance without prior consent after such notice by the Bank. Therefore, even in such cases the Banks need not have the Tenants vacated by filing a suit before the Civil Court nor are they constrained to sell the property with such Tenants in possession. The Bank can have such Tenants evicted and directly recover vacant possession under by approaching the Magistrate and have such Tenants vacated with the assistance of Police.

The Supreme Court has also held that if a question arises as to under which category a Tenant would fall or whether the lease/tenancy has been created in violation of the provisions of Section 65A of the TP Act or not, or after the notice of demand under Section 13(2) of the SARFAESI Act or whether the lease/tenancy has stood determined, etc. all of such questions would be decided by the Magistrate himself under the provisions of the SARFAESI Act. Once the decision is made by the Magistrate, that will be binding on the parties and the only remedy to challenge it is by way of a Writ Petition under the provisions of the Constitution of India and the Tenants will not have the option of approaching the DRT.

IndusLaw Quick View:

This judgment certainly sets to rest controversies as to whether the Bank could get the Tenants also evicted under the provisions of the SARFAESI Act itself. It definitely strengthens the hands of the Banks and protects them against sharp practices of the Borrowers trying to induct Tenants or create documents or ante dating documents showing a purported lease/tenancy merely with a view to impede vacant possession being taken and to depress the sale value. The judgment is noteworthy in that it has allowed eviction of Tenants under the SARFAESI Act even if they had been validly and legally inducted in the first place but if their leases/tenancies have expired or stood terminated by the time possession is sought to be taken by Banks.

However, the judgment will have the effect of the Magistrate, who is meant to administer criminal cases, deciding questions of civil character, in terms of this judgment, such as the nature of the lease/tenancy, if the lease/tenancy has been created before or after mortgage etc., with the consequence of the Magistrate assuming the jurisdiction of a Civil Court which is rather startling and one which perhaps was not even contemplated by the Parliament when it enacted the SARFAESI Act. However, the Banks will certainly not be complaining.



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