

**IN THE HIGH COURT OF JUDICATURE FOR RAJ.AT  
JAIPUR BENCH, JAIPUR.**

**S.B. CIVIL WRIT PETITION NO. 1928/2011**

M/S VIKAS BOOK LTD.

---PETITIONER

**VS.**

(1) BANK OF BARODA, NEHRU PLACE, TONK ROAD, JAIPUR THROUGH  
ITS AUTHORIZED OFFICER CUM MANAGER  
(2) SHRI UMRAOMAL CHORDIA

--- RESPONDENTS

**WITH**

**S.B.CIVIL WRIT PETITION NO.2234/2011**

(1) M/S. ARHAM JEWELLERS  
(2) ARPIT SAMCHETI

---PETITIONERS

**VS.**

(1)ADDL.CIVIL JUDGE(J.D.)JAIPUR CITY,JAIPUR.  
(2) A.D.J.NO. 9, JAIPUR CITY, JAIPUR  
(3) BANK OF BARODA , NEHRU PLACE, TONK ROAD, JAIPUR THROUGH  
ITS MANAGER  
(4)SH.UMRAOMAL Chordia

---RESPONDENTS.

**WITH**

**S.B.CIVIL WRIT PETITION NO. 2225/2011**

M/S.CHORDIA SAFE DEPOSIT & VAULTS PVT.LTD.

---PETITIONER

**VS.**

(1)ADDL.CIVIL JUDGE(J.D.)JAIPUR CITY,JAIPUR.  
(2) ADDL.DISTRICT JUDGE NO. 9, JAIPUR CITY, JAIPUR.  
(3) BANK OF BARODA, NEHRU PLACE, TONK ROAD, JAIPUR THROUGH  
ITS MANAGER,  
(4)SHRI SHANTI KUMAR VIPUL KUMAR CHORDIA

---RESPONDENTS

**DATE OF JUDGMENT:-**

6TH MARCH,2012.

**HON'BLE MS. JUSTICE BELA M. TRIVEDI**

Mr. Nitin Jain,for the petitioners,  
Mr. R.K.Salecha, for the respondents,

**REPORTABLE**

**BY THE COURT**

(1) These three petitions were connected  
with the S.B.C.W.P. 999/2011, as per

the orders passed by the co-ordinate bench and therefore were heard together. However, during the course of arguments, it had transpired that the parties and proceedings of Petition No. 999/2003 were different from the present ones and, therefore, the said petition is being disposed of by separate order. In the present three petitions, the petitioners are different, however, the respondent bank in the capacity of a mortgagee, is the same, and the other respondents are the mortgagors/guarantors who had mortgaged the properties in question by way of security in respect of the credit facilities availed of by one M/S Vipul Gems. Hence, they are disposed of by this common order.

- (2) At the out-set, it may be stated that though the subject matter and the parties in S.B.C.W.P. 999/2011 were different, the S.B.C.W.P. 1928/2011 was directed to be connected with the Petition No. 999/2011 at the

request of learned counsel for the petitioner, and an ex-parte order, restraining the respondents not to dispossess the petitioner from the rented premises was passed on 14.2.2011, on the lines of the ex-parte order passed in petition no. 999/2011. Similarly as per the request made by the learned counsel for the petitioner, the Petition No. 2234/2011 was also connected with the other two petitions being Nos. 999/2011 and 1928/2011 and similar ex-parte order not to dispossess the petitioners from the rented premises was passed by the Court on 21.2.2011. The Petition No. 2225/2011 was directed to be connected with the Petition No.2234/2011, on the submissions made by the learned counsel for the petitioner that the said petition was identical as the Petition No.2234/2011. When all the Petitions were listed before this Court, a query was put by the Court as to how the matters were connected with each other, and it was submitted

by the learned counsel for the petitioner that the issue involved in all the petitions as to whether right of the tenant could be extinguished by mere issuance of notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the said Act), being the same, request for connecting these petitions with each other was made. Be that as it may, all these petitions were heard together at the admission stage in view of the said orders passed by the co-ordinate bench and are being disposed of by this common order.

- (3) The facts and proceedings out of which the present petitions have arisen being different, it would be relevant and necessary to narrate the factual position of each of the three petitions separately.

(I) **S.B.C.W.P. 1928/2011**

The present petition has been filed by the petitioner M/s. Vikas Book

Ltd., a registered company through its Director Shri Ravi Jain against the respondent No. 1 Bank of Baroda and respondent No. 2 Shri Umraomal Chordia, seeking issuance of writ, order or direction against the respondent No. 1 Bank, to the effect that the Bank may proceed under the said Act without disturbing the tenancy rights of the petitioner and that the petitioner should not be evicted from the property in question without following the due process of law. It has been averred inter-alia in the petition that the petitioner was in occupation as tenant of the residential premises- 13, Thakteshahi Road, Jawahar Lal Nehru Marg, Jaipur , by virtue of the rent note dated 10.5.2006 executed by the landlord i.e. respondent no.2 in favour of the petitioner. According to the petitioner, on 7.2.2011, the officers of the respondent no. 1 along with some police personnel came to the said premises and asked the petitioner to vacate the premises. At

that time, the petitioner came to know about the order dated 2.2.2011, passed by the District Collector, Jaipur, under Section 14 of the said Act, in which the bank was ordered to take physical possession of the said premises. It is further averred in the petition that the petitioner thereafter came to know from the office of the respondent bank that the respondent no.2 had stood as guarantor towards the security of loan taken by M/S Vipul Gems Pvt. Ltd. and the said property was mortgaged with the respondent no. 1 bank by the respondent no. 2. Since M/S vipul Gems Pvt. Ltd. had not maintained the financial discipline, its account was declared as Non-Performing Asset (NPA) and therefore, the bank had taken the recourse to the measures under Section 13(4) of the said Act. It has been alleged in the petition that the petitioner being the tenant of the respondent No. 2, the respondent no. 1 Bank could not evict the petitioner from

the disputed premises without following the due process of law.

The said petition has been resisted by the respondent No. 1 Bank by filing the reply denying the allegations and averments made in the petition and further raising preliminary objections as regards the maintainability of the petition under Art. 226 of the constitution of India and in view of the alternative efficacious remedy being available to the petitioner under the said Act. The respondent No. 1 has also disputed the status of the petitioner being that of the tenant and contended that the petition involving disputed questions of facts, should not be entertained by the High Court in exercise of the extra-ordinary writ jurisdiction under Art. 226 and 227 of the Constitution of India. It has been further contended that the property in question was mortgaged by the respondent no.2 towards the security for the repayment of loan advanced to the borrower M/S Vipul

Gems along with other properties. Since the said M/S Vipul Gems did not pay the dues of the bank, actions were initiated against borrower/mortgagor under Section 13 (4) of the said Act and police assistance was also sought from the District Magistrate, Jaipur, who had passed the order dated 2.2.2011, under Section 14 of the said Act. It has also been contended in the said reply that the petition was filed by the petitioner in collusion with the respondent no. 2 so as to create obstructions in the way of the respondent bank from taking possession of the disputed property and to frustrate the dues of the bank.

(II) **S.B.C.W.P. NO. 2234/2011**

The present petition has been filed by the petitioners M/S Arham Jewellers, a registered partnership firm through its partner Arpit Sancheti against the respondent bank of Baroda and Shri Umraomal Chordia, seeking issuance of writ, order or

direction for quashing and setting aside the impugned order dated 4.9.2009 , passed by Addl. Civil Judge(Jr. Div.), Jaipur City, Jaipur, and the order dated 1.10.2009 passed by the Additional District Judge No.9, Jaipur City, Jaipur, and further for restraining the respondents from taking the possession of the suit property i.e. 1632 Sonthaliwalon Ka Rasta, Chaura Rasta, Jaipur, from the petitioners without adopting the due process of law. It has been averred in the petition inter-alia that the petitioner had taken on lease the said premises from the owner Shri Umrao Mal Chordia in the year 1996 and since then he is in lawful possession thereof as the tenant. Since the petitioner came to know that the respondent Bank of Baroda was intending to take coercive action in the form of forcible possession and compulsory sale of the said premises, the petitioner filed the civil suit in the court of Addl.

Civil Judge (Jr. Div.), Jaipur City, Jaipur. The petitioner also filed an application seeking temporary injunction under Or. XXXIX Rule 1 and 2 read with Section 151 of C.P.C. The trial court vide its order dated 4.9.2009 rejected the said application holding that once proceedings were initiated under Section 13 of the said Act, the Civil Court would not have the jurisdiction to entertain the suit and that the only remedy available to the aggrieved person like petitioner was to file an application under Section 17 of the said Act. Being aggrieved by the said order of trial court, the petitioner had preferred an appeal before the Appellate Court, which vide the impugned order dated 1.10.2009 dismissed the said appeal. The petitioner thereafter filed the present petition.

On the notices having been served, the respondent bank has filed the reply in the present petition raising similar contentions as

raised in the reply filed in petition being No. 1928/2011. In both the petitions i.e. No. 22234 and 1928/2011, the respondent bank has produced number of documents in support of its contentions raised in the reply. In both the petitions the respondent Umraomal Chordia , the owner of the disputed premises has chosen to remain absent, though duly served.

**(III) S.B.C.W.P.NO. 2225/2011**

The present petition has been filed by M/s Chordia Safe Deposit and Vaults Pvt. Ltd., a registered company through its Director Ravi Jain against the respondent bank of Baroda and Shri Shanti Kumar Vipul Kumar Chordia, seeking issuance of writ, order or direction, quashing and setting aside the impugned order dated 4.9.2009 passed by the Additional Civil Judge (Jr. Div.), Jaipur City, Jaipur, and the impugned order dated 1.10.2009 passed by the A.D.J.No.9, Jaipur City, Jaipur and further restraining

the respondents from taking possession of the suit property being 1633, Sonthaliwalon Ka Rasta, Chaura Rasta, Jaipur, from the petitioner without adopting due process of law. It has been averred in the petition inter-alia that the petitioner had taken on rent the said premises from its owner Shanti Kumar Vipul Kumar Chordia (HUF), in the year 1996 and since then is in lawful possession as the tenant. The petitioner has made similar allegations and averments in this petition as are made in the petition no. 2234/2011. In this petition, notices have not been issued to the respondents, and only the order to connect this petition with the petition No. 2234/2011 was passed.

4. The bone of contention raised by the learned counsel Mr. Nitin Jain for the petitioners in all the petitions is that the respondent-bank could not take the possession of the disputed premises from the petitioners who are the tenants

without following the due process of law. According to him the tenancy is a creation of contractual relationship between the landlord and tenant and therefore, would be governed by the provisions contained in the Rajasthan Land Control Act. Relying upon the judgments of various High Courts, he submitted that the secured creditor i.e. the respondent-Bank had no powers to evict the tenants from the mortgaged property, and that the validity of such action taken by the respondent-Bank cannot be decided by the Debts Recovery Tribunal under Section 17 of the said Act. In this regard Mr. Jain has relied upon the judgment of Gujarat High Court in case of Dena Bank Vs. Shri Sihor Nagarik Sahakari Bank Ltd. & Ors. AIR 2008 Gujarat 110, of Karnataka High Court in case of Nitco Roadways Pvt. Ltd. & Ors. Vs. Punjab National Bank AIR 2011 Kant 27, and in case of Hutchison Essar South Ltd. Vs. Union Bank of India & Anr. AIR 2008 Karnataka 14

and of Delhi High Court in case of Vicky Kumar Rana Vs. Kamal Kumar Nangia & Ors. AIR 2010 Delhi 210. Mr. Jain has also relied upon the decision of the Apex Court in case of Vimlaben Ajitbhai Patel Vs. Vatslaben Ashokbhai Patel & Ors. (2008) 4 SCC 649 in support of the submission that possession of any person cannot be disturbed without following due process of law. As regards the jurisdiction of civil court, learned counsel Mr. Jain has submitted that despite specific bar against the jurisdiction of civil court specified in various acts, the other High Courts have held that the civil court alone could decide and determine the rights of the parties which are of civil nature. In this regard Mr. Jain has relied upon the judgment of Madras High Court in case of Arasa Kumar & Anr. Vs. Nallammal & Ors. II (2005) BC 127, of Gujarat High Court in case of Naliniben Rajnikant Patel & Ors. Vs. Rashmikant Manubhai Amin & Ors. I

(2011) BC 99 (DB), of Karnataka High Court in case of Krishna Vs. Kedarnath & Ors. III (2006) BC 9 (DB), and of Andhra Pradesh High Court in case of Branch Manager, State Bank of India, Commercial Branch, Ongole Vs. Chinigepalli Lathangi & Ors. III (2007) BC 35. Mr. Jain has also relied upon the decision of the Supreme Court in case of Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation (2009) 8 SCC 646 in support of his submission that all courts are tribunals but all tribunals are not courts and, therefore, civil court would have jurisdiction to try all types of suits unless the jurisdiction of civil court is expressly ousted under a particular Statute. Relying upon various provisions of the Rajasthan Rent Control Act and the said Act Mr. Jain has submitted that the secured creditor i.e. the respondent-Bank had to file suit for eviction before the Rent Tribunal

for claiming the actual possession of the disputed premises from the petitioners. He also argued that the respondent-Bank while taking the measures under Section 13(4) of the said Act against defaulter, could take only symbolic possession of the premises if it was in occupation of the tenant. Mr. Jain therefore, submitted that the order dated 2.2.11 passed by the District Collector Jaipur, challenged in the SBCWP No. 1928/11 and the orders passed by the courts below challenged in the SBCWP No. 2234/11 and 2225/11 deserve to be set aside.

5. Repelling the submissions made by the learned counsel Mr. Nitin Jain for the appellant, Mr. R.K. Salecha, learned counsel for the respondent-Bank, has vehemently submitted that these are the frivolous litigations filed by the petitioners at the instance of the respondents-mortgagors who had mortgaged the premises in question by way of security given towards the credit

facilities availed of by the borrower M/s. Vipul Gems Pvt. Ltd. According to him, the borrowers-guarantors having failed to succeed in stalling the recovery proceedings initiated by the respondent-Bank under the provisions contained in the said Act, the proxy litigations by means of present petitions have been filed at their instance by the petitioners. Mr. Salecha vehemently submitted that the concerned mortgagors while mortgaging the said properties with the respondents-Bank had not disclosed that the said properties were tenanted properties occupied by the petitioners and, therefore, the status of the petitioners as that of tenants in all the petitions is highly disputed question of fact which could not be decided by the High Court in exercise of the extraordinary jurisdiction under Article 226 & 227 of the Constitution of India. Pressing into service Section 17 read with Section 34 of the said Act

Mr. Salecha submitted that the aggrieved petitioners could approach the Debts Recovery Tribunal under Section 17 of the said Act and that the jurisdiction of the civil court, to entertain any suit or proceeding in respect of which Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under the said Act, is barred under Section 34 of the said Act. He therefore, submitted that both the courts below have rightly dismissed the applications of the petitioners seeking temporary injunction in the suits filed by them, on the ground of having no jurisdiction. Hence, the orders passed by the two courts below which are under challenge before this court in the two petitions being No. 2234/11 and 2225/11 deserve to be confirmed. Mr. Salecha has also relied upon the judgments of Apex Court in case of Mardia Chemicals Ltd. Vs. Union of India & Ors. AIR 2004 SC 2371 and in case of Nahar Industrial Enterprises

(supra) in support of his submissions. Lastly, relying upon the judgment of Division Bench of Madras High Court in case of Sree Laxmi Products REP Vs. State Bank of India AIR 2007 Madras 148 Mr. Salecha has submitted that the tenant can be dispossessed in pursuance of the recovery proceedings against the borrower and that in view of Section 35 of the said Act, the provisions of the said Act have effect notwithstanding anything inconsistent therewith contained in the State Rent Control Act or any other Law for the time being in force.

6. In order to appreciate the rival contentions raised by the learned counsel for the parties, it would be necessary to refer to and reproduce the relevant provisions of the said Act. Section 13 of the said Act deals with the enforcement of the security interest and sub-section 4 thereof empowers the secured creditor to take recourse to any of

the measures mentioned therein to recover the secured debt, in case the borrower fails to discharge his liability in full within the prescribed time limit. One of such measures mentioned in Section 13(4) is to take possession of the secured assets of the borrower including the right to transfer by way of lease assignment or sale for realising the secured assets. The relevant part of Section 13(4)(a) reads as under :-

"13(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset."

7. The word "borrower" is defined under Section 2(f) of the said Act, which reads as under :-

"borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as

security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance."

8. Section 17 of the said Act confers right upon the person including the borrower aggrieved by any of the measures taken under Section 13(4), to make application to the Debts Recovery Tribunal. Relevant part of Section 17(1) reads as under :-

"17. Right to appeal.--(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken."

9. As regards the jurisdiction of civil court, Section 34 of the Act is relevant, which reads as under :-

"34. Civil court not to have jurisdiction.-- No civil court shall have jurisdiction

to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)."

10. It would also be relevant to reproduce Section 35 of the said Act, which gives overriding effect to the provisions of the said Act over the other inconsistent law for the time being in force. The said Section 13(5) of the said Act reads as under :-

"35.The provisions of this Act to override other laws.-- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

11. In the backdrop of the aforesaid provisions of the said Act, if the facts of the petitions are recapitulated, it transpires that it is not disputed that the properties

in question in the three petitions were mortgaged with the respondent-Bank by the respective respondents-mortgagors by way of security towards credit facilities availed of by M/s. Vipul Gems Pvt. Ltd. from the respondent-Bank to the tune of Rs. 250 lacs, as per the letter dated 14.8.06, annexed by the respondent-Bank alongwith its reply. All the three properties have been covered under the said letter as collateral security by way of first charge. The said facts have not been disputed by the respective petitioners by filing any rejoinder to the said reply filed by the respondent-Bank. As stated earlier the respondent Umrao Mal Chordia in two petitions, being No. 1928/11 and 2234/11 has chosen to remain absent though duly served. Thus, the said facts also remain unchanllenged at the instance of the said respondent Umrao Mal Chordia. There is also nothing on record produced by the petitioners to show that the

properties in question were tenanted properties on the date when they were mortgaged with the respondent-Bank or that the respondent-Bank was aware about such tenancy rights having been created in favour of the petitioners by the concerned respondents-mortgagors i.e. Shri Umrao Mal Chordia or Shanti Kumar Vipul Kumar Chordia. Thus the respondent-Bank has rightly disputed and challenged the very status of the petitioners as that of being tenants of the disputed premises. Under the circumstances as rightly submitted by the learned counsel Mr. Salecha for the respondent-Bank, the petitions involve highly disputed question of facts which could not be entertained by the High Court exercising extraordinary jurisdiction under Article 226 and 227 of the Constitution of India.

12. So far as the jurisdiction of civil court is concerned, the position of law is not only culled out from the provisions of the said Act itself,

but has also been settled by the Hon'ble Apex Court in case of Mardia Chemicals Ltd. Vs. Union of India & Ors. AIR 2004 SC 2371. The relevant paras 50 & 51 of the said judgment are reproduced as under :-

"50. It has also been submitted that an appeal is entertainable before the Debt Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debt Recovery Tribunal or the appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr. Salve one of the counsel for respondents that there would be no bar to approach the civil court. Therefore, it cannot be said no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debt Recovery Tribunal or appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say the prohibition covers even matters which can be taken cognizance of by the Debt Recovery Tribunal though no measure in that direction has so far been taken under sub-

section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debt Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.

51. However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages."

13. As transpiring from the said decision, the civil court would not have jurisdiction to entertain the suit challenging the proceedings initiated by the secured creditor under Section 13(4) of the said Act. Hence, the only remedy available to the person aggrieved by the measures

taken by the secured creditor under Section 13(4) of the said Act would be to make application to the Debts Recovery Tribunal under Section 17 (1) of the said Act. The petitioners of the petition No. 2234/11 and 2225/11 who had approached the civil court by filing the suits have not alleged that the action of the secured creditors was fraudulent or that its claim was absurd or untenable requiring to bring the said action in the civil court, as per the exceptions carved out by the Apex Court in the above referred decision. Under the circumstances the trial court vide the impugned order dated 4.9.09 and appellate court vide the order dated 1.10.09 have rightly held that the civil court did not have jurisdiction to entertain the suit challenging the proceedings of the measures taken by the secured creditors i.e. respondent-Bank under Section 13(4) of the said Act for the recovery of its secured debts. There being no

illegality or perversity in the said orders passed by the courts below, the said orders deserve to be confirmed.

14. It was also sought to be submitted by the learned counsel Mr. Nitin Jain for the petitioners that the respondent-Bank could have taken only the symbolic possession of the disputed premises and not the actual physical possession while taking measures under Section 13(4) of the said Act. There is also no force in the said submission of the learned counsel Mr. Jain in view of the position of law settled by the Apex Court in case of M/s. Transcore Vs. Union of India & Anr. AIR 2007 SC 712 wherein the Apex Court dismissing the plea of symbolic possession, categorically held that the dichotomy between symbolic and physical possession does not find place in the said Act. The relevant para Nos. 55 and 56 of the said judgment are reproduced as under :-

“55. The word possession is a relative concept. It is not

an absolute concept. The dichotomy between symbolic and physical possession does not find place in the Act. As stated above, there is a conceptual distinction between securities by which the creditor obtains ownership of or interest in the property concerned (mortgages) and securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt (charges). Basically, the NPA Act deals with the former type of securities under which the secured creditor, namely, the bank/FI obtains interest in the property concerned. It is for this reason that the NPA Act ousts the intervention of the courts/ tribunals.

56. Keeping the above conceptual aspect in mind, we find that Section 13(4) of the NPA Act proceeds on the basis that the borrower, who is under a liability, has failed to discharge his liability within the period prescribed under Section 13 (2), which enables the secured creditor to take recourse to one of the measures, namely, taking possession of the secured assets including the right to transfer by way of lease, assignment or sale for realizing the secured assets. Section 13(4-A) refers to the word "possession" simpliciter. There is no dichotomy in sub-section (4-A) as pleaded on behalf of the borrowers. Under Rule 8 of the 2002 Rules, the authorised officer is

empowered to take possession by delivering the possession notice prepared as nearly as possible in Appendix IV to the 2002 Rules. That notice is required to be affixed on the property. Rule 8 deals with sale of immovable secured assets. Appendix IV prescribes the form of possession notice. It inter alia states that notice is given to the borrower who has failed to repay the amount informing him and the public that the bank/FI has taken possession of the property under Section 13(4) read with Rule 9 of the 2002 Rules. Rule 9 relates to time of sale, issue of sale certificate and delivery of possession. Rule 9(6) states that on confirmation of sale, if the terms of payment are complied with, the authorised officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the 2002 Rules. Rule 9(9) states that the authorised officer shall deliver the property to the buyer free from all encumbrances known to the secured creditor or not known to the secured creditor. (emphasis supplied). Section 14 of the NPA Act states that where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred, the secured creditor may, for the purpose of taking possession, request in writing to the District Magistrate to take possession thereof. Section 17(1) of NPA Act refers to right of appeal. Section 17(3) states that if the DRT as an appellate authority after

examining the facts and circumstances of the case comes to the conclusion that any of the measures under Section 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the status quo ante. Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by the authorised officer taking possession. As stated above, the NPA Act provides for recovery of possession by non-adjudicatory process, therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8, undoubtedly, refers to sale of immovable secured asset. However, Rule 8(4) indicates that where possession is taken by the authorised officer before issuance of sale certificate under Rule 9, the authorised officer shall take steps for preservation and protection of secured assets till they are sold or otherwise disposed of. Under Section 13

(8), if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred. The costs, charges and expenses referred to in Section 13(8) will include costs, charges and expenses which the authorised officer incurs for preserving and protecting the secured assets till they are sold or disposed of in terms of Rule 8(4). Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a court receiver under Order XL Rule 1 CPC. The court receiver can take symbolic possession and in appropriate cases where the court receiver finds that a third party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorized officer under Rule 8 has greater powers than even a court receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorized officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that third party interests are created overnight and in very many cases those third parties take up the defence of being

a bona fide purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules."

15. Thus, the said decision of the Apex Court clinches the issue to the effect that the dichotomy between the symbolic possession and physical possession does not find place in the said Act and that the security interest in the property created in favour of the Banks/FIS needs to be protected, when the measures have been taken by the banks under Section 13(4) of the said Act. The ratio of the above judgment was also followed by the Madras High Court in case of Sree Laxmi Products Vs. State Bank of India (supra).
16. At this juncture it would also be pertinent to deal with the submissions of the learned counsel Mr. Jain that the respondent-Bank i.e. the secured creditor could not have ousted the tenants of the

mortgaged property without taking recourse to the remedy available under the Rajasthan Rent Control Act. Apart from the fact that the provisions of the said Act have the effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force, in view of Section 35 of the said Act, the secured creditor could not have approached the rent Tribunal seeking possession of the mortgaged property as under Section 18 of the Rajasthan Rent Control Act, the Rent Tribunal has jurisdiction to hear and decide the petitions relating to the disputes between landlord and tenant and matters connected therewith ancillary thereto filed under the provisions of the Rent Act. This being neither the dispute between the landlord and the tenant, nor the proceedings having been filed under the provisions of the Rent Act, and there being specific powers conferred upon the secured creditors

to take measures under Section 13(4) of the said Act to recover the secured debt, the question of respondent-Bank filing suit for eviction against the tenants of the mortgaged property under the provisions of the Rent Act does not arise. The said Act being the Central Act having the effect of overriding other State Laws in view of Section 35 of the said Act, this court does not find any force in the submission of learned counsel Mr. Jain that the respondent-Bank was required to approach the Rent Tribunal seeking possession of the disputed premises and could not have taken the possession of the said premises under Section 13(4) of the said Act. While dealing with the similar contention as raised by Mr. Jain in these petitions, the Delhi High Court in case of Sanjeev Bansal Vs. Oman International Bank SAOG, 2006 (4) BC, 299 (DB), held inter alia that the protection afforded by the Rent Control Act to

a tenant is from the landlord of the premises and that such protection is not available against the mortgagee who seeks to enforce his right under the SARFAESI Act. The court further held that if the lease was created in contravention of Section 65-A of the Transfer of Property Act, by the mortgagor in favour of the lessee, neither the mortgagor nor the lessee can claim any protection to defeat the right of the mortgagee.

17. So far as the judgments relied upon by the learned counsel Mr. Jain is concerned, in case of Dena Bank Vs. Shri Sihor Nagarak Sahakari Bank Ltd. & Ors. (supra), the Gujarat High Court had considered the fact that when the loan was released by the bank in favour of the borrower, the Bank was having the knowledge that part of the mortgaged premises was in possession of the tenant and hence the court held that it was not open to the secured creditor to summarily evict a pre-existing tenant and thereby extinguish his

tenancy contrary to the contract between the landlord and the tenant particularly when such tenancy was known to the secured creditor before advancement of the loan to the borrower. In the instant case, there is nothing on record to suggest that the respondent-Bank had the knowledge about any tenancy rights created in favour of the petitioners in respect of the mortgaged property in question, while granting credit facilities to the borrower M/s. Vipul Gems Pvt. Ltd. In any case as held by the Apex Court in case of M/s. Transcore Vs. Union of India (supra), the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of N.P. Act. Hence, the third party interest created before or after the mortgage in question could not frustrate the provisions of the said Act having effect overriding the other laws for the time being in force. The other judgment of Karnataka High Court

relied upon by Shri Jain, also has no application to the facts of the present case and in view of the ratio of judgment laid down by the Apex Court in case of M/s. Transcore Vs. U.O.I. (supra). The judgment of Delhi High Court in case of Vicky Kumar Rana Vs. Kamal Kumar (supra) relied upon by the learned counsel Mr. Jain is also not helpful to the petitioners, rather is helpful to the respondent-Bank, inasmuch as it has been held therein interalia that the term "any person" contained in Section 17 of the said Act includes the borrower as well, and that the civil suit filed by the tenant for injunction against the borrower and the Bank was not maintainable in view of Section 34 of the said Act. In the instant case also the courts below have refused to take cognizance of the suits filed by the petitioners on the ground of not having jurisdiction in view of Section 34 of the said Act.

18. Though lastly it was sought to be

submitted by the learned counsel Mr. Jain that the respondent-Bank did not have the first charge over the disputed mortgaged premises, the said submission has also no force in view of the contentions raised by the respondent-Bank in its reply to the effect that the said controversy was resolved between the SBBJ and the respondent-Bank as per the order dated 24.2.11 passed by the Division Bench in DB Special Appeal (W) No. 699/09, filed by M/s. Vipul Gems Pvt. Ltd. Shri Umrao Mal Chordia and others against the respondents-Bank and SBBJ. Having regard to the said order and having regard to the facts and circumstances of the case this court has found much force in the submission of Mr. Salecha for the respondent-Bank that the present writ petitions have been filed as a collusive and manoeuvred exercise between the petitioners and the respondent No.2 Umrao Mal, so as to create the inroads and obstructions in the way of the respondent-Bank to

take the actual possession of the disputed premises, consequent upon the measures taken by the respondent-Bank under Section 13(4) of the said Act. There being no merits in the petitions filed by the respective petitioners, the petitioners deserve to be dismissed.

19. In the aforesaid premises, the petitions having been filed by the petitioners as proxy and frivolous litigation at the instance of the respondent-mortgagors, all the three petitions deserve to be dismissed with cost, which is quantified as Rs. 5,000/- for each of the petitions. The respective petitioners shall pay the said cost to the respondent-Bank within two weeks from today. The petitions stand dismissed accordingly.

20. The copy of this judgment be placed in SBCWP No. 2234/11 and SBCWP No. 2225/11.

( BELA M. TRIVEDI)J.

MRG.

All corrections made in the judgment/order have been incorporated in the judgment/order being emailed.

M.R. Gidwani  
PS - cum - JW