

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL No. 736 OF 2014
(Arising out of S.L.P. (Crl.) No.1666 of 2012)

Harshad Govardhan Sondagar Appellant

Versus

International Assets Reconstruction Co.
Ltd. & Ors. Respondents

WITH

CRIMINAL APPEAL No. 737 OF 2014
(Arising out of S.L.P. (Crl.) No.4058 of 2012),

CRIMINAL APPEAL No. 738 OF 2014
(Arising out of S.L.P. (Crl.) No.4052 of 2012),

CRIMINAL APPEAL No. 739 OF 2014
(Arising out of S.L.P. (Crl.) No.4061 of 2012),

CRIMINAL APPEAL No. 740 OF 2014
(Arising out of S.L.P. (Crl.) No.4057 of 2012),

CRIMINAL APPEAL No. 741 OF 2014
(Arising out of S.L.P. (Crl.) No.4066 of 2012),

CRIMINAL APPEAL No. 742 OF 2014
(Arising out of S.L.P. (Crl.) No.4062 of 2012),

CRIMINAL APPEAL No. 743 OF 2014
(Arising out of S.L.P. (Crl.) No.4063 of 2012),

CRIMINAL APPEAL No. 744 OF 2014
(Arising out of S.L.P. (Crl.) No.4053 of 2012),

CRIMINAL APPEAL No. 745 OF 2014

(Arising out of S.L.P. (Crl.) No.4064 of 2012),

CRIMINAL APPEAL No. 746 OF 2014

(Arising out of S.L.P. (Crl.) No.4068 of 2012),

CRIMINAL APPEAL No. 747 OF 2014

(Arising out of S.L.P. (Crl.) No.4111 of 2012),

CRIMINAL APPEAL No. 748 OF 2014

(Arising out of S.L.P. (Crl.) No.4123 of 2012),

CRIMINAL APPEAL No. 749 OF 2014

(Arising out of S.L.P. (Crl.) No.4117 of 2012),

CRIMINAL APPEAL No. 750 OF 2014

(Arising out of S.L.P. (Crl.) No.4115 of 2012),

CRIMINAL APPEAL No. 751 OF 2014

(Arising out of S.L.P. (Crl.) No.4114 of 2012),

CRIMINAL APPEAL No. 752 OF 2014

(Arising out of S.L.P. (Crl.) No.4124 of 2012),

CRIMINAL APPEAL No. 753 OF 2014

(Arising out of S.L.P. (Crl.) No.4119 of 2012),

CRIMINAL APPEAL No. 754 OF 2014

(Arising out of S.L.P. (Crl.) No.4129 of 2012),

CRIMINAL APPEAL No. 755 OF 2014

(Arising out of S.L.P. (Crl.) No.4118 of 2012),

CRIMINAL APPEAL No. 756 OF 2014

(Arising out of S.L.P. (Crl.) No.4130 of 2012),

CRIMINAL APPEAL No. 757 OF 2014

(Arising out of S.L.P. (Crl.) No.4127 of 2012),

CRIMINAL APPEAL No. 758 OF 2014

(Arising out of S.L.P. (Crl.) No.4125 of 2012),

CRIMINAL APPEAL No. 759 OF 2014

(Arising out of S.L.P. (Crl.) No.4120 of 2012),

CRIMINAL APPEAL No. 760 OF 2014

(Arising out of S.L.P. (Crl.) No.4618 of 2012),

CRIMINAL APPEAL No. 761 OF 2014

(Arising out of S.L.P. (Crl.) No.4619 of 2012),

CRIMINAL APPEAL No. 762 OF 2014

(Arising out of S.L.P. (Crl.) No.4620 of 2012),

CRIMINAL APPEAL No. 763 OF 2014

(Arising out of S.L.P. (Crl.) No.6587 of 2012),

CRIMINAL APPEAL No. 764 OF 2014

(Arising out of S.L.P. (Crl.) No.6598 of 2012),

CRIMINAL APPEAL No. 765 OF 2014

(Arising out of S.L.P. (Crl.) No.6522 of 2012),

CRIMINAL APPEAL No. 766 OF 2014

(Arising out of S.L.P. (Crl.) No.6639 of 2012),

CRIMINAL APPEAL No. 767 OF 2014

(Arising out of S.L.P. (Crl.) No.6523 of 2012),

CRIMINAL APPEAL No. 768 OF 2014

(Arising out of S.L.P. (Crl.) No.6612 of 2012),

CRIMINAL APPEAL No. 769 OF 2014

(Arising out of S.L.P. (Crl.) No.6622 of 2012),

CRIMINAL APPEAL No. 770 OF 2014

(Arising out of S.L.P. (Crl.) No.7731 of 2012),

CRIMINAL APPEAL No. 771 OF 2014

(Arising out of S.L.P. (Crl.) No.7733 of 2012),

CRIMINAL APPEAL No. 772 OF 2014

(Arising out of S.L.P. (Crl.) No.7743 of 2012),

CRIMINAL APPEAL No. 773 OF 2014

(Arising out of S.L.P. (Crl.) No.7744 of 2012),

CRIMINAL APPEAL No. 774 OF 2014

(Arising out of S.L.P. (Crl.) No.7745 of 2012),

CRIMINAL APPEAL No. 775 OF 2014

(Arising out of S.L.P. (Crl.) No.7746 of 2012),

CRIMINAL APPEAL No. 776 OF 2014

(Arising out of S.L.P. (Crl.) No.7747 of 2012),

CRIMINAL APPEAL No. 777 OF 2014

(Arising out of S.L.P. (Crl.) No.7749 of 2012),

CRIMINAL APPEAL No. 778 OF 2014

(Arising out of S.L.P. (Crl.) No.9426 of 2012),

CRIMINAL APPEAL No. 779 OF 2014

(Arising out of S.L.P. (Crl.) No.9170 of 2012),

CRIMINAL APPEAL No. 780 OF 2014

(Arising out of S.L.P. (Crl.) No.9163 of 2012),

CRIMINAL APPEAL No. 781 OF 2014

(Arising out of S.L.P. (Crl.) No.9253 of 2012),

CRIMINAL APPEAL No. 782 OF 2014

(Arising out of S.L.P. (Crl.) No.9164 of 2012),

CRIMINAL APPEAL No. 783 OF 2014

(Arising out of S.L.P. (Crl.) No.9160 of 2012),

CRIMINAL APPEAL No. 784 OF 2014

(Arising out of S.L.P. (Crl.) No.614 of 2013),

CRIMINAL APPEAL No. 785 OF 2014

(Arising out of S.L.P. (Crl.) No.379 of 2013),

CRIMINAL APPEAL No. 786 OF 2014

(Arising out of S.L.P. (Crl.) No.1467 of 2013),

CRIMINAL APPEAL No. 787 OF 2014

(Arising out of S.L.P. (Crl.) No.1782 of 2013),

CRIMINAL APPEAL No. 788 OF 2014

(Arising out of S.L.P. (Crl.) No.3575 of 2013),

CRIMINAL APPEAL No. 789 OF 2014

(Arising out of S.L.P. (Crl.) No.3579 of 2013),

CRIMINAL APPEAL No. 790 OF 2014

(Arising out of S.L.P. (Crl.) No.3580 of 2013),

CRIMINAL APPEAL No. 791 OF 2014

(Arising out of S.L.P. (Crl.) No.3581 of 2013),

CRIMINAL APPEAL No. 792 OF 2014

(Arising out of S.L.P. (Crl.) No.4024 of 2013),

CRIMINAL APPEAL No. 793 OF 2014

(Arising out of S.L.P. (Crl.) No.4032 of 2013),

CRIMINAL APPEAL No. 794 OF 2014

(Arising out of S.L.P. (Crl.) No.4030 of 2013),

CRIMINAL APPEAL No. 795 OF 2014

(Arising out of S.L.P. (Crl.) No.4025 of 2013),

CRIMINAL APPEAL No. 796 OF 2014

(Arising out of S.L.P. (Crl.) No.4031 of 2013),

CRIMINAL APPEAL No. 797 OF 2014

(Arising out of S.L.P. (Crl.) No.3715 of 2013),

CRIMINAL APPEAL No. 798 OF 2014

(Arising out of S.L.P. (Crl.) No.3563 of 2013),

CRIMINAL APPEAL Nos. 799-800 OF 2014

(Arising out of S.L.P. (Crl.) Nos.5533-5534 of 2013),

CRIMINAL APPEAL No. 801 OF 2014

(Arising out of S.L.P. (Crl.) No. 2914 of 2013)
(Crl. M. P. No.15167 of 2013),

CRIMINAL APPEAL No. 802 OF 2014

(Arising out of S.L.P. (Crl.) No. 2915 of 2013)
(Crl. M. P. No.16083 of 2013),

CRIMINAL APPEAL No. 803 OF 2014

(Arising out of S.L.P. (Crl.) No.7835 of 2013),

CRIMINAL APPEAL No. 804 OF 2014

(Arising out of S.L.P. (Crl.) No.8365 of 2013),

CRIMINAL APPEAL No. 805 OF 2014

(Arising out of S.L.P. (Crl.) No.9217 of 2013),

CRIMINAL APPEAL No. 806 OF 2014

(Arising out of S.L.P. (Crl.) No.10346 of 2013),

AND

CRIMINAL APPEAL No. 807 OF 2014

(Arising out of S.L.P. (Crl.) No.10502 of 2013),

J U D G M E N T**A. K. PATNAIK, J.**

Leave granted.

Facts:

2. The appellants claim to be tenants of different premises in Mumbai. These premises were mortgaged to different banks as securities for loans advanced by

the banks (hereinafter referred to as 'the secured creditors'). As the borrowers have defaulted in repayment of their secured debts or instalments thereof and their accounts in respect of such debts have been classified by the secured creditors as non-performing assets, the secured creditors have issued notices of 60 days period under sub-section (2) of Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act') to the borrowers saying that they intend to enforce the secured assets in the event of non-payment of the secured debts. As the borrowers have failed to discharge their liability in full within the period of sixty days from the date of notice, the secured creditors have exercised their right under sub-section (4) of Section 13 of the SARFAESI Act to take possession of the secured assets of the borrowers. The secured assets, however, consist of the premises under possession of the appellants. The secured creditors have, therefore, made a request under Section 14(1) of the SARFAESI Act to the Chief

Metropolitan Magistrate, Mumbai, to take possession of the premises and handover the possession of the premises to the secured creditors in accordance with the provisions of Section 14 of the SARFAESI Act. Threatened by dispossession of the premises under their possession by the Chief Metropolitan Magistrate, Mumbai, under Section 14 of the SARFAESI Act, the appellants have moved this Court in this batch of cases. Their case is that they are not borrowers, but they are lessees of the borrowers and are entitled to remain in possession of the secured assets. A Division Bench of the Bombay High Court in *M/s Trade Well, a Proprietorship Firm, Mumbai & Anr. v. Indian Bank & Anr.* [2007 CRI. L.J. 2544] has, however, held that when a secured creditor takes measures under subsection (4) of Section 13 of the SARFAESI Act on account of failure of the borrower to repay his liability and approaches the Chief Metropolitan Magistrate for assistance to take possession of the secured assets, the liability of the borrower having been crystallized, there can be no adjudication by the Chief Metropolitan

Magistrate and possession has to be taken by a non-adjudicatory process and there is no question of pointing out to the Chief Metropolitan Magistrate at that stage that the person who is to be dispossessed is a tenant. The Division Bench of the Bombay High Court has further held in *M/s Trade Well* (supra) that the remedy of the borrower as well as a third-party is to file an application under Section 17 of the SARFAESI Act before the Debts Recovery Tribunal and in case the borrower or a third-party succeeds, the Debts Recovery Tribunal can restore possession of the secured assets to the borrower or a third-party. This view taken by the Bombay High Court in *M/s Trade Well* (supra) has been followed in the impugned judgment dated 20.08.2011 of the High Court passed in the case of *International Assets Reconstruction Company Limited v. Union of India & Ors.* The grievance of the appellants is that if the impugned judgment of the High Court is implemented, the appellants have no option but to surrender possession to the Chief Metropolitan Magistrate, Mumbai, and

move the Debts Recovery Tribunal under Section 17 of the SARFAESI Act. Such a remedy, according to the appellants, is not actually available under Section 17 of the SARFAESI Act and if the remedy is available, it is meaningless as they have to move out from the tenanted premises and only in the event the Debts Recovery Tribunal decides in favour of the appellants, they may come back to the tenanted premises. Aggrieved by the impugned judgment, they have, therefore, filed these appeals by way of special leave under Article 136 of the Constitution.

Contentions of the learned counsel for the appellants:

3. Mr. C.A. Sundaram, learned senior counsel appearing for the appellants, submitted that under Article 300A of the Constitution, every person has a constitutional right not to be deprived of his property save by authority of law. He submitted that a tenant is a lessee and has a right to be in possession of the property of the lessor during the period of the lease and this right cannot be taken away save by authority of law. He submitted that there is nothing in the

provisions of the SARFAESI Act, and in particular Section 13 of the said Act, to show that this right of a lessee to remain in possession of the secured asset during the period of the lease stands extinguished when the secured creditor initiates action under Section 13 of the SARFAESI Act. He submitted that the language of sub-section (13) of Section 13 of the SARFAESI Act, however, shows that no borrower shall, after receipt of notice under sub-section (2) of section 13, transfer by way of sale, lease or otherwise any of his secured assets referred to in the notice, without the prior written consent of the secured creditor. He submitted that this provision in the SARFAESI Act is a clear indication that a lease of a secured asset by the borrower before receipt of a notice by him under sub-section (2) of Section 13 of the SARFAESI Act was not prohibited under the said Act. He submitted that in the absence of any express language in the SARFAESI Act affecting a lease of a secured asset made by the borrower in favour of a lessee, the lease continues to

be a valid lease even after the secured creditor initiates action under Section 13 of the SARFAESI Act.

4. In support of this argument, he cited a decision of the Constitution Bench of this Court in *C.B. Gautam v. Union of India & Ors.* [(1993) 1 SCC 78]. In this case, the provisions of Section 269-UD and Section 269-UE of the Income Tax Act, 1961 made by Parliament to prevent evasion of tax by transfer of immovable property for an apparent consideration less than the market price of the property were under challenge as *ultra vires* the Constitution. Sub-section (1) of Section 269-UD of the Income Tax Act, 1961 provided that on an order for purchase by the Central Government of an immovable property, the Central Government would be liable to pay as compensation to the owner of the property an amount equal to the amount of apparent consideration and sub-section (1) of Section 269-UE provided that in case an order for compulsory purchase is made under sub-section (1) of Section 269-UD, the property in respect of which the order is made shall vest in the Central Government free from

all encumbrances and sub-section (2) of Section 269-UE further provided that the transferor or any other person who may be in possession of the immovable property in respect of which an order under sub-section (1) of Section 269-UD is made is required to surrender or deliver possession of the property to the appropriate authority or any other person duly authorised by the appropriate authority within fifteen days of the service of the order on him. This Court held that if there is a lessee in occupation of the property concerned, his leasehold rights would be destroyed and he would have to handover the possession of the property to the appropriate authority or any other person nominated by the appropriate authority and this clearly shows that an order for compulsory purchase results in the leasehold rights being destroyed. This Court further held that an order for compulsory purchase in such cases would necessarily result in gross injustice to the lessees and to their being deprived of their rights without their being in any way involved in the attempt at a tax

evasion. This Court, therefore, read down sub-section (2) of Section 269-UE so as to make it inapplicable to bonafide lessees in possession of the property. He submitted that this Court should accordingly hold in this case that the rights of bonafide lessees under a lease executed prior to receipt of notice under sub-section (2) of Section 13 of the SARFAESI Act by the borrower are not affected by the action of secured creditor under Section 13 of the SARFAESI Act. He relied on the observation of this Court in *ICICI Bank Ltd. v. SIDCO Leathers Ltd. & Ors.* [(2006) 10 SCC 452] that while enacting a statute, Parliament cannot be presumed to have taken away the right to property which is a constitutional right.

5. Mr. Sundaram next submitted that the view taken by the Bombay High Court in *M/s Trade Well* (supra) and in the impugned judgment that a third-party such as a lessee can under Section 17 of the SARFAESI Act make an application before the Debts Recovery Tribunal and that in case he succeeds, the Debts Recovery Tribunal can restore possession of the secured assets to the

lessee is not at all correct. He referred to the provisions of sub-section (3) of Section 17 of the SARFAESI Act to show that the Debts Recovery Tribunal can restore possession of the secured assets only to the borrower and not to the lessee. He submitted that the Debts Recovery Tribunal has no power under Section 17 of the SARFAESI Act to restore possession of the secured assets to a lessee. He submitted that under the SARFAESI Act no notice either by the secured creditor or by the Chief Metropolitan Magistrate or the District Magistrate is required to be given to a lessee of the secured assets in possession of the secured creditor and in the absence of such a notice, the lessee will not have any opportunity to move either the Debt Recovery Tribunal under Section 17 or the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the SARFAESI Act. He submitted that sub-section (3) of Section 14 of the SARFAESI Act further provides that no act of the Chief Metropolitan Magistrate or the District Magistrate or any officer authorised by the

Chief Metropolitan Magistrate or District Magistrate to take possession of the secured assets shall be called in question in any court or before any authority and this would mean that a lessee would have no remedy against the decision of the Chief Metropolitan Magistrate or the District Magistrate. He submitted that as there is no remedy under the SARFAESI Act to protect the lawful possession of the lessee under a lease and the Act also does not bar the remedies under the respective local tenancy laws, this Court should hold that the remedies for the parties in a case where the secured assets are in possession of the lessees are under the respective tenancy laws. These arguments of Mr. Sundaram were adopted by all other counsel appearing for the lessees.

Contentions of the learned counsel for the respondents:

6. Mr. Vikas Singh, learned senior counsel appearing for the State Bank of India and the Indian Banks Association, submitted that while there are no restrictions on the right of the borrower to make a

lease of an immovable property prior to the mortgage, once a mortgage is created, his right to make a lease of the mortgaged property is regulated by the provisions of Section 65A of the Transfer of Property Act, 1882. He submitted that under Section 65A of the Transfer of Property Act, a mortgagor, while lawfully in possession of the mortgaged property, has the power to make leases thereof subject to the provisions of sub-section (1) of Section 65A of the said Act. He submitted that if a lease made by a mortgagor satisfies the requirements of sub-section (2) of Section 65A of the Transfer of Property Act, it will be a valid lease and will be binding on the secured creditor. He submitted that sub-section (3) of Section 65A of the Transfer of Property Act further made it clear that if a contrary intention is expressed in the mortgage-deed, prohibiting the mortgagor from making a lease of the mortgaged property while he is in lawful possession of the same, the mortgagor cannot make a lease and if such lease is made, such lease will not be binding on the mortgagee. According to him, possession of the lessee under the

following two categories of leases: (i) leases created prior to the mortgage and (ii) leases created in accordance with Section 65A of the Transfer of Property Act is protected by law, and possession of other persons claiming to be lessees is not protected by law.

7. Mr. Vikas Singh next submitted that sub-section (13) of Section 13 of the SARFAESI Act further provides that no borrower shall, after receipt of notice referred to in sub-section (2) of Section 13 of the SARFAESI Act, transfer by way of lease, any of his secured assets referred to in the notice, without prior written consent of the secured creditor. He submitted that if the borrower makes a lease of the secured assets after receipt of a notice under sub-section (2) of Section 13 of the SARFAESI Act without the prior written consent of the secured creditor, the lease would accordingly be void and the possession of the secured asset of the lessee is not protected by law.
8. In support of these submissions, Mr. Vikas Singh relied on the decision of the Delhi High Court in *Shri Sanjeev*

Bansal v. Oman International Bank SAOG & Anr. 131 (2006) DLT 729 and the decision of the Madras High Court in *Sree Lakshmi Products v. State Bank of India* (AIR 2007 Madras 148) in which the two High Courts have held that tenancies created in contravention of Section 65A of the Transfer of Property Act are not binding on the secured creditor and cannot come in the way of the secured creditor taking possession of the tenanted premises under the SARFAESI Act. He also cited the decision of this Court in *Sunita Jugalkishore Gilda v. Ramalal Udhoji Tanna (dead) through LRs. & Ors.* [(2013) 10 SCC 258] in which this Court has held that the rule of *lis pendens* in Section 52 of the Transfer of Property Act, 1882 applies to a suit on a mortgage/by mortgagee as well and, therefore, if a mortgagor grants a lease during the pendency of a suit for sale by the mortgagee, the lessee is bound by the result of the suit. Relying on this decision, he submitted that once the secured creditor issues a notice to a borrower to take possession of a secured asset and the borrower despite such notice,

transfers the possession of the secured asset by way of lease to a lessee without prior consent of the secured creditor, the lessee of such a lease is bound to surrender possession of the secured asset to the secured creditor.

9. Mr. Vikas Singh submitted that though the SARFAESI Act is silent on the remedies available to a lessee who is in lawful possession of a secured asset, in the case of the aforesaid two categories of leases created prior to the mortgage and created after the mortgage in accordance with Section 65A of the Transfer of Property Act, the lessee has a remedy of filing an application under Section 17(1) of the SARFAESI Act as the application under Section 17(1) of the SARFAESI Act can be filed by “any person” and not just the borrower. He submitted that the SARFAESI Act has been enacted to enable the secured creditors to recover the secured debts without the intervention of courts and tribunals and third-parties claiming to be lessees but not bonafide lessees under leases which are not in accordance with Section 65A of the Transfer

of Property Act should not be allowed to frustrate this laudable object of the Act by preventing the secured creditors from taking the possession of the secured assets and realizing the secured debts. In support of this submission, he referred to the observations of this Court in *Central Bank of India v. State of Kerala and Others* [(2009) 4 SCC 94], *Authorised Officer, Indian Overseas Bank and Another v. Ashok Saw Mill* [(2009) 8 SCC 366] and *United Bank of India v. Satyawati Tondon & Others* [(2010) 8 SCC 110]. He submitted that the remedy of a bonafide lessee is, therefore, to surrender 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 before the Debts Recovery Tribunal 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, the Debts Recovery Tribunal will restore possession of the secured asset.

The other counsel appearing for the respondents adopted the aforesaid arguments of Mr. Vikas Singh and further submitted that the appellants, who have not filed documents to show that they are bonafide lessees, should not be afforded the protection against the action initiated by the secured creditors to take possession of the secured asset under Section 13 of the SARFAESI Act.

10. Mr. Shrish Kumar Mishra, learned counsel appearing for the Oriental Bank of Commerce in Civil Appeal arising out of S.L.P. (C) No.6639 of 2012, however, made a departure from the submissions made by Mr. Vikas Singh. He submitted that under sub-section (4) of Section 13 of the SARFAESI Act, the secured creditor has a right to take over the possession of the secured assets and since Section 35 of the SARFAESI Act provides that the provisions of the SARFAESI Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force, sub-section (4) of Section 13 of the SARFAESI Act will override the rights of the lessee

to remain in possession of the secured assets. He relied on a decision of this Court in *Raghunath Rai Bareja and Another v. Punjab National Bank and Others*. [(2007) 2 SCC 230] for the proposition that the court must in accordance with the mischief rule of interpretation give a purposive interpretation to the provisions of the statute. He argued that if this mischief rule of interpretation is adopted by this Court, then the correct interpretation of sub-section (4) of Section 13 read with Section 35 of the SARFAESI Act would be that a lease will stand terminated on the secured creditor deciding to take the measures contemplated under sub-section (4) of Section 13 of the SARFAESI Act.

Opinion of the Court on the questions of law raised in these Appeals:

11. The first question that we have to decide is whether the provisions of the SARFAESI Act have in any way affected the right of a lessee to remain in possession of the secured asset during the period of a lease. A 'secured asset' has been defined in Section 2(zc) of the

SARFAESI Act to mean the property on which the security interest is created. In case of an immovable property, a security interest is created in a secured asset by way of a mortgage in favour of the secured creditor. There may be cases where before the mortgage is created in respect of an immovable property, the borrower had already leased out the immovable property in favour of a lessee either as the owner or as a person competent or authorised to transfer the immovable property in accordance with Section 7 of the Transfer of Property Act. If such a lease is made, by virtue of Section 8 of the Transfer of Property Act, the lessee will have the right to enjoy the leased property in accordance with the terms and condition of the lease irrespective of whether a subsequent mortgagee of the immovable property has knowledge of such a lease or not.

12. After the mortgage of an immovable property is created by the borrower in favour of a secured creditor, the right of the borrower to lease a mortgaged property is regulated by Section 65A of the Transfer of Property

Act. Section 65A of the Transfer of Property Act is extracted hereinbelow:

“65A. 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.

Thus, sub-section (1) of Section 65A of the Transfer of Property Act states that the mortgagor has the power to make lease of a mortgaged property while he is in lawful possession of the same subject to the provisions of sub-section (2) of Section 65A of the Transfer of Property Act and such lease is binding on the mortgagee. Sub-section (3) of Section 65A further provides that such a power is available with the mortgagor to make a lease of the mortgage property only if and as far as a contrary intention is not expressed in the mortgage-deed. Thus, so long as the mortgage-deed does not prohibit a mortgagor from making a lease of the mortgaged property and so long as the lease satisfies the requirements of sub-section (2) of Section 65A, a lease made by a borrower as a mortgagor will not only be valid but is also binding on the secured creditor as a mortgagee.

13. We may now consider whether the provisions of the SARFAESI Act have the effect of terminating these

valid leases made by the borrower or the mortgagor made in accordance with the provisions of the Transfer of Property Act. Section 35 of the SARFAESI Act , on which the High Court has placed reliance in the case of *M/s Trade Well* (supra) as well as in the impugned judgment is reproduced hereinbelow:

“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.”

Section 35 of the SARFAESI Act, therefore, provides that the provisions of the SARFAESI Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Thus, if there is any provision in the SARFAESI Act and if there is any provision in any other law which is inconsistent therewith, the provision of the SARFAESI Act will have effect and not the provision of any other law. The only section in the SARFAESI Act which confers a statutory right on the secured creditor to take possession of the secured asset and enforce the secured asset for the realization of the secured

debt is Section 13. We will, therefore, have to find out whether there is any provision in Section 13 of the SARFAESI Act which is inconsistent with the right of a borrower or a mortgagor to make a lease in accordance with the provisions of the Transfer of Property Act and the corresponding right of a lessee to remain in possession of the property leased out to him during the period of a lease.

14. Section 13 of the SARFAESI Act is extracted hereinbelow:

“13. Enforcement of security interest.-

(1). Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be

entitled to exercise all or any of the rights under sub-section (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within 15 days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17A.

(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;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt.

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such

person a valid discharge as if he has made payment to the borrower.

(5A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for what of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorised by the secured creditor in this behalf, to bid for immovable property on behalf of the secured creditor at any subsequent sale.

(5B) Where the secured creditor, referred to in sub-section (5A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of section 13.

(5C) The provisions of section 9 of the Banking Regulation Act, 1949 (10 of 1949) shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5A).

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of

sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than sixty percent in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation.-For the purposes of this sub-section,-

(a) record date means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

(b) amount outstanding shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.”

15. When we read the different provisions of Section 13 of the SARFAESI Act extracted above, we find that sub-section (4) of Section 13 provides that in case the borrower fails to discharge his liability in full within sixty days from the date of notice provided in sub-section (2) of Section 13 of the SARFAESI Act, the secured creditor may take recourse to one or more of the measures mentioned therein to recover his secured debt. 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.

16. We may now consider the nature of the right of the lessee and as to when the lease under the Transfer of Property Act gets determined. Sections 105 and 111 of the Transfer of Property Act, which are relevant in this regard, are quoted hereinbelow:

“105. Lease defined:- A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined:- The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

111. Determination of lease:- A lease of immovable property determines-

- (a) by efflux of the time limited thereby,
- (b) where such time is limited conditionally on the happening of some event-by the happening of such event,

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event-by the happening of such event,

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right,

(e) by express surrender, that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them,

(f) by implied surrender,

(g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease,

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Section 105 thus provides that a lessee of an immovable property has a right to enjoy such property, for a certain

time or in perpetuity when a lessor leases an immovable property transferring his right to enjoy such property for a certain time or in perpetuity. Section 111 of the Transfer of Property Act, 1882 provides the different modes by which a lease gets determined. Thus, so long as a lease of an immovable property does not get determined, the lessee has a right to enjoy the property and this right is a right to property and this right cannot be taken away without the authority of law as provided in Article 300A of the Constitution. As we have noticed, there is no provision in Section 13 of the SARFAESI Act that a lease in respect of a secured asset shall stand determined when the secured creditor decides to take the measures mentioned in Section 13 of the said Act. Without the determination of a valid lease, the possession of the lessee is lawful and such lawful possession of a lessee has to be protected by all courts and tribunals.

17. We may now look at the provisions of Section 14 of the SARFAESI Act to find out whether it confers any power on the Chief Metropolitan Magistrate or the District Magistrate to assist the secured creditor in

taking possession of the secured asset which is in lawful possession of the lessee under a valid lease.

Section 14 of the SARFAESI Act is extracted hereinbelow:

“14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset (1)

Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him—

(a) take possession of such asset and documents relating thereto; and

(b) forward such assets and documents to the secured creditor.

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that—

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to

take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets:

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.]

[1A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him,--

- (i) to take possession of such assets and documents relating thereto; and
- (ii) to forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority. “

18. The opening words of sub-section (1) of Section 14 of the SARFAESI Act make it clear that where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor “under the provisions of the Act”, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof. Thus, only if possession of the secured asset is required to be taken under the provisions of the SARFAESI Act, the secured creditor can move the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset. We have already held that Section 13 of the SARFAESI Act does not provide that the lease in respect of a secured asset will get determined when the secured creditor decides to take the measures in the said section. 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. When, therefore, a secured creditor moves the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset, he must state in the affidavit accompanying the application that the secured asset is not in possession of a lessee under the valid lease made prior to creation of the mortgage by the borrower or made in accordance with Section 65A of the Transfer of Property Act prior to receipt of a notice under sub-section (2) of Section 13 of the SARFAESI Act by the borrower. We would like to clarify that even in such cases where the secured creditor is unable to take possession of the secured asset after expiry of the period 60 days of the notice to the borrower of the intention of the secured creditor to enforce the secured asset to realize the secured debt, the secured creditor will have the right to receive any

money due or which may become due, including rent, from the lessee to the borrower. This will be clear from clause (d) of sub-section (4) of Section 13, which provides that in case the borrower fails to discharge his liability in full within the notice period, the secured creditor may require, at any time by notice in writing, any person who has acquired any of the assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

19. The opening words of sub-section (1) of Section 14 of the SARFAESI Act also provides that if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of the Act, the secured creditor may take the assistance of the Chief Metropolitan Magistrate or the District Magistrate. Where, therefore, such a request is made by the secured creditor and the Chief Metropolitan Magistrate or the District Magistrate finds that the secured asset is in possession of a lessee but the lease under which the lessee claims to be in possession of the secured asset stands determined in accordance with

Section 111 of the Transfer of Property Act, the Chief Metropolitan Magistrate or the District Magistrate may pass an order for delivery of possession of secured asset in favour of the secured creditor to enable the secured creditor to sell and transfer the same under the provisions of the SARFAESI Act. Sub-section (6) of Section 13 of the SARFAESI Act provides that any transfer of secured asset after taking possession of secured asset by the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset. In other words, the transferee of a secured asset will not acquire any right in a secured asset under sub-section (6) of Section 13 of the SARFAESI Act, unless it has been effected after the secured creditor has taken over possession of the secured asset. Thus, for the purpose of transferring the secured asset and for realizing the secured debt, the secured creditor will require the assistance of the Chief Metropolitan Magistrate or the District Magistrate for taking possession of a secured asset from the lessee where the

lease stands determined by any of the modes mentioned in Section 111 of the Transfer of Property Act.

20. We may now deal with the remedies available to the lessee where he is threatened to be dispossessed by any action taken by the secured creditor under Section 13 of the SARFAESI Act. Sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 provide for a possession notice where the secured asset is an immovable property. Sub-rules (1) (2) and (3) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 as well as Appendix IV of the said Rules, which is the form of such possession notice, are extracted hereunder:

“8. Sale of immovable secured assets.- (1)

Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in sub-rule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspaper] one in vernacular language having sufficient

circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as an owner of ordinary prudence would, under the similar circumstances, take of such property.....”

“APPENDIX-IV
[See rule-8(1)]
POSSESSION NOTICE
(for Immovable property)

Whereas

The undersigned being the authorised officer of the _____ (name of the Institution) under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest [Act, 2002 (54 of 2002)] and in exercise of powers conferred under Section 13(12) read with rule 9 of the Security Interest (Enforcement) Rules, 2002 issued demand notice dated _____ calling upon the borrower Shri _____/M/s_____to repay the amount mentioned in the notice being Rs. _____(in words_____)

within 60 days from the date of receipt of the said notice.

The borrower having failed to repay the amount, notice is hereby given to the borrower and the public in general that the undersigned has taken possession of the property described herein below in exercise of

powers conferred on him/ her under Section 13(4) of the said 27[Act] read with rule 9 of the said rules on this _____ day of _____ of the year _____.

The borrower in particular and the public in general is hereby cautioned not to deal with the property and any dealings with the property will be subject to the charge of the _____ (name of the Institution) for an amount Rs. _____ and interest thereon.

Description of the Immovable Property

All that part and parcel of the property consisting of Flat No. _____/Plot No. _____ In Survey No. _____/City or Town Survey No. _____/Khasara no. _____ Within the registration Sub-district _____ and District _____.

Bounded;
On the North by
On the South by
On the East by
On the West by

Authorised Officer
(Name of the Institution)

Date:

Place:

”

A reading of sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 would show that the

possession notice will have to be affixed on the outer door or at the conspicuous place of the property and also published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer. At this stage, the lessee of an immovable property will have notice of the secured creditor making efforts to take possession of the secured assets of the borrower.

21. When, therefore, a lessee becomes aware of the possession being taken by the secured creditor, in respect of the secured asset in respect of which he is the lessee, from the possession notice which is delivered, affixed or published in sub-rule (1) and sub-rule (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, he may either surrender possession or resist the attempt of the secured creditor to take the possession of the secured asset by producing before the authorised officer proof that he was inducted as a lessee prior to the creation of the mortgage or that he was a lessee under the mortgagor in accordance with the provisions of Section 65A of the Transfer of

Property Act and that the lease does not stand determined in accordance with Section 111 of the Transfer of Property Act. If the lessee surrenders possession, the lease even if valid gets determined in accordance with clause (f) of Section 111 of the Transfer of Property Act, but if he resists the attempt of the secured creditor to take possession, the authorised officer cannot evict the lessee by force but has to file an application before the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the SARFAESI Act and state in the affidavit accompanying the application, the name and address of the person claiming to be the lessee. When such an application is filed, the Chief Metropolitan Magistrate or the District Magistrate will have to give a notice and give an opportunity of hearing to the person claiming to be the lessee as well as to the secured creditor, consistent with the principles of natural justice, and then take a decision. If the Chief Metropolitan Magistrate or District Magistrate is satisfied that there is a valid lease created before the mortgage or there is a valid lease created after the mortgage in accordance with the requirements of Section 65A of the Transfer of Property Act

and that the lease has not been determined in accordance with the provisions of Section 111 of the Transfer of Property Act, he cannot pass an order for delivering possession of the secured asset to the secured creditor. But in case he comes to the conclusion that there is in fact no valid lease made either before creation of the mortgage or after creation of the mortgage satisfying the requirements of Section 65A of the Transfer of Property Act or that even though there was a valid lease, the lease stands determined in accordance with Section 111 of the Transfer of Property Act, he can pass an order for delivering possession of the secured asset to the secured creditor.

22. Sub-section (3) of Section 14 of the SARFAESI Act provides that no act of the Chief Metropolitan Magistrate or the District Magistrate or any officer authorised by the Chief Metropolitan Magistrate or District Magistrate done in pursuance of Section 14 shall be called in question in any court or before any authority. The SARFAESI Act, therefore, attaches finality to the decision of the Chief Metropolitan Magistrate or the District Magistrate and this decision cannot be challenged before any court or any authority.

But this Court has repeatedly held that statutory provisions attaching finality to the decision of an authority excluding the power of any other authority or Court to examine such a decision will not be a bar for the High Court or this Court to exercise jurisdiction vested by the Constitution because a statutory provision cannot take away a power vested by the Constitution. To quote, the observations of this Court in *Columbia Sportswear Company v. Director of Income Tax, Bangalore* [(2012) 11 SCC 224]:

“17. Considering the settled position of law that the powers of this Court under Article 136 of the Constitution and the powers of the High Court under Articles 226 and 227 of the Constitution could not be affected by the provisions made in a statute by the Legislature making the decision of the tribunal final or conclusive, we hold that sub-section (1) of Section 245S of the Act, insofar as, it makes the advance ruling of the Authority binding on the applicant, in respect of the transaction and on the Commissioner and income-tax authorities subordinate to him, does not bar the jurisdiction of this Court under Article 136 of the Constitution or the jurisdiction of the High Court under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling of the Authority.”

In our view, therefore, the decision of the Chief Metropolitan Magistrate or the District Magistrate can be challenged

before the High Court under Articles 226 and 227 of the Constitution by any aggrieved party and if such a challenge is made, the High Court can examine the decision of the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, in accordance with the settled principles of law.

23. We may next consider whether a lessee has any remedy by way of an appeal under Section 17 of the SARFAESI Act when the secured creditor attempts to take over possession of the secured asset which is in possession of the lessee. Sub-sections (1), (2) and (3) of Section 17 of the SARFAESI Act are extracted hereinbelow:

“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 alongwith 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 measure had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation.--For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the

recourse taken by the secured creditor under sub-section (4) of section 13.”

24. When we read sub-section (1) of Section 17 of the SARFAESI Act, we find that under the said sub-section “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 the Chapter, may apply to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measures had been taken. We agree with the Mr. Vikas Singh that the words ‘any person’ are wide enough to include a lessee also. It is also possible to take a view that within 45 days from the date on which a possession notice is delivered or affixed or published under sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, a lessee may file an application before the Debts Recovery Tribunal having jurisdiction in the matter for restoration of possession in case he is dispossessed of the secured asset. But when we read sub-section (3) of Section 17 of the SARFAESI Act, we find that the Debts Recovery Tribunal has powers to restore

possession of the secured asset to the borrower only and not to any person such as a lessee. Hence, even if the Debt Recovery Tribunal comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor are not in accordance with the provisions of the Act, it cannot restore possession of the secured asset to the lessee. Where, therefore, the Debts Recovery Tribunal considers the application of the lessee and comes to the conclusion that the lease in favour of the lessee was made prior to the creation of mortgage or the lease though made after the creation of mortgage is in accordance with the requirements of Section 65A of the Transfer of Property Act and the lease was valid and binding on the mortgagee and the lease is yet to be determined, the Debts Recovery Tribunal will not have the power to restore possession of the secured asset to the lessee. In our considered opinion, therefore, there is no remedy available under Section 17 of the SARFAESI Act to the lessee to protect his lawful possession under a valid lease.

25. The High Court, however, has relied on *Transcore v. Union of India & Anr.* [(2008) 1 SCC 125] for holding that the

SARFAESI Act provides for recovery of possession by non-adjudicatory process and it removes all fetters on the right of the secured creditor and that the secured creditor is entitled to take recourse to any one or more of the measures specified in Section 13(4) of the SARFAESI Act to recover a secured debt, notwithstanding anything contained in any other law for the time being in force. The High Court has also relied on the aforesaid decision of this Court in the case of *Transcore* (supra) to record a finding that the scheme of Section 13(4) read with Section 17(3) of the SARFAESI Act shows that if the borrower is dispossessed not in accordance with the provisions of the SARFAESI Act, the Debts Recovery Tribunal is entitled to restore *status quo ante*. The High Court has also relied on the observations of this Court in *Transcore* (supra) that the disputes which are sought to be avoided by Rule 8 read with Rule 9 of the Security Interest (Enforcement) Rules, 2002 are those where third party interest is created overnight and third party takes up the defence of being a bona fide purchaser for value without notice. We have perused the aforesaid decision of this Court in *Transcore* (supra) and we find that

in that case, the question whether the secured creditor, in exercise of its rights under Section 13 of the SARFAESI Act, can take over possession of the secured asset in possession of a lessee under a valid lease was not considered nor was the question whether there is anything in the SARFAESI Act inconsistent with the right of a lessee to remain in possession of the secured asset under the Transfer of Property Act considered. In our view, therefore, the High Court has not properly appreciated the judgment of this Court in *Transcore* (supra) and has lost sight of the opening words of sub-section (1) of Section 13 of the SARFAESI Act which state that notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of the Act. The High Court has failed to appreciate that the provisions of Section 13 of the SARFAESI Act thus override the provisions of Section 69 or section 69A of the Transfer of Property Act, but does not override the provisions of the Transfer of Property Act

relating to the rights of a lessee under a lease created before receipt of a notice under sub-section (2) of Section 13 of the SARFAESI Act by a borrower. Hence, the view taken by the Bombay High Court in the impugned judgment as well as in *M/s Trade Well* (supra) so far as the rights of the lessee in possession of the secured asset under a valid lease made by the mortgagor prior to the creation of mortgage or after the creation of mortgage in accordance with Section 65A of the Transfer of Property Act is not correct and the impugned judgment of the High Court insofar it takes this view is set aside.

26. A further question of law raised in these appeals is whether the tenants have remedies under the concerned tenancy law. In the State of Maharashtra, the Maharashtra Rent Control Act, 1999 is in force and this Act applies to premises let for the purposes of residence, education, business, trade or storage specified in Schedule I and Schedule II of the Act as well as houses let out in areas to which the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 applied before the commencement of the Act.

Section 33 of the Maharashtra Rent Control Act is titled 'Jurisdiction of courts' and it provides that the courts named therein 'shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises and to decide any application made under the Act and the applications which are to be decided by the State Government or an officer authorised by it or the Competent Authority. The question of law that we have to consider is whether the appellants as tenants of premises in the State of Maharashtra including Mumbai will have any remedy to move these courts having jurisdiction under Section 33 of the Maharashtra Rent Control Act and obtain the relief of injunction against the secured creditor taking possession of the secured asset from the appellants. The answer to this question is in Section 34 of the SARFAESI Act, which is extracted hereinbelow:

“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).

A reading of the second limb of Section 34 of the SARFAESI Act would show that 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 the Act. Thus, when action is sought to be taken by the secured creditor under Section 13 of the SARFAESI Act or by the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the SARFAESI Act, the Court or the authority mentioned in Section 33 of the Maharashtra Rent Control Act cannot grant the injunction to prevent such action by the secured creditor or by the Chief Metropolitan Magistrate or the District Magistrate. Even otherwise, Section 33 of the Maharashtra Rent Control Act vests jurisdiction in the courts named therein to decide disputes between the landlord and the tenant and not

disputes between the secured creditor and the tenant under landlord who is a borrower of the secured assets.

27. We may now consider the contention of the respondents that some of the appellants have not produced any document to prove that they are bona fide lessees of the secured assets. We find that in the cases before us, the appellants have relied on the written instruments or rent receipts issued by the landlord to the tenant. Section 107 of the Transfer of Property Act provides that a lease of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made 'only by a registered instrument' and all other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Hence, if any of the appellants claim that they are entitled to possession of a secured asset for any term exceeding one year from the date of the lease made in his favour, he has to produce proof of execution of a registered instrument in his favour by the lessor. Where he does

not produce proof of execution of a registered instrument in his favour and instead relies on an unregistered instrument or oral agreement accompanied by delivery of possession, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, will have to come to the conclusion that he is not entitled to the possession of the secured asset for more than an year from the date of the instrument or from the date of delivery of possession in his favour by the landlord.

Orders and directions of this Court in the facts of the cases before the Court:

28. Having expressed our opinion on the different questions of law raised in these appeals, we may now pass orders and directions considering the broad facts of the three different categories of the case before us:

- (i) In Criminal Appeals arising out of Special Leave Petition (Criminal) Nos.9426 of 2012, 9170 of 2012, 9163 of 2012, 9253 of 2012, 9164 of 2012, 9160 of 2012, 379 of 2013, 1467 of 2013, 1782 of 2013, 3575 of 2013, 4062 of 2012, 4063

of 2012, 4053 of 2012, 4068 of 2012, 4119 of 2012, 4129 of 2012, 7835 of 2013, 8365 of 2013, 9217 of 2013, 10346 of 2013, 6587 of 2012, 6639 of 2012, 6523 of 2012, 6622 of 2012, 7731 of 2012, 7747 of 2012 and 4618 of 2012, the appellants claim that they are in possession of the secured asset under a lease made prior to the mortgage but the Chief Metropolitan Magistrate, Mumbai, has passed orders under Section 14 of the SARFAESI Act for delivery of possession of the secured asset to the respective secured creditors. These orders passed by the Chief Metropolitan Magistrate, Mumbai, are set aside and the matters are remitted to the Chief Metropolitan Magistrate to pass fresh orders in accordance with this judgment and any other law that may be relevant after giving an opportunity of hearing to the appellants and the secured creditors.

- (ii) In Criminal Appeals arising out of Special Leave Petition (Criminal) Nos.4064 of 2012, 4117 of

2012, 4114 of 2012, 4124 of 2012, 4052 of 2012, 4058 of 2012, 4061 of 2012, 4057 of 2012, 4620 of 2012, 6612 of 2012, 7722 of 2012, 7744 of 2012, 7749 of 2012, 7743 of 2012, 4130 of 2012 and 4125 of 2012 when the appellants filed the Special Leave Petitions under Article 136 of the Constitution of India, the applications of the secured creditors under Section 14 of the SARFAESI Act were pending. In case the applications are still pending, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, will consider the claims of the appellants that they were in possession of the secured asset under a lease made prior to the creation of the mortgage and decide the applications under Section 14 in accordance with this judgment and any other law that may be relevant. In case, during the pendency of these appeals, orders have been passed by the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the

SARFAESI Act, the orders so passed will stand quashed and the Chief Metropolitan Magistrate or the District Magistrate will pass fresh orders in accordance with this judgment and any other law that may be relevant after giving an opportunity of hearing to the appellants and the secured creditors.

- (iii) In the Criminal Appeals arising out of Special Leave Petition (Criminal) Nos.4619 of 2012, 6598 of 2012, 6522 of 2012, 7745 of 2012, 7746 of 2012 and 4120 of 2012, when the Special Leave Petitions were filed under Article 136 of the Constitution of India, no application under Section 14 of the SARFAESI Act had been filed by the secured creditors. In case such application under Section 14 of the SARFAESI Act has been filed in the meanwhile or is filed in future, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, will decide the applications in accordance with this judgment and any other law that may be

relevant after giving opportunity of hearing to the appellants and the secured creditors.

- (iv) In all these appeals, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, will pass final orders under Section 14 of the SARFAESI Act within four months from the date of filing of certified copy of this judgment by either the lessee/tenant or the secured creditor.
- (v) With the aforesaid directions and orders, the appeals are allowed. The parties shall bear their own costs.

.....J.
(A. K. Patnaik)

.....J.
(V. Gopala Gowda)

New Delhi,
April 03, 2014.