JM Financial Asset Reconstruction Company Pvt. Ltd. Vs. The Board of Trustees of the Port of Mumbai and Others

JM Financial Asset Reconstruction Company Pvt. Ltd. Vs. The Board of Trustees of the Port of Mumbai and Others

SooperKanoon Citation : sooperkanoon.com/1183998

Court : Mumbai

Decided On : Aug-24-2016

Judge : S.C. Dharmadhikari &Amp; B.P. Colabawalla

Appeal No. : Writ Petition No. 17 of 2014

Appellant : JM Financial Asset Reconstruction Company Pvt. Ltd.

Respondent : The Board of Trustees of the Port of Mumbai and Others

Judgement :

B.P. Colabawalla, J.

1. Rule. By consent of parties, rule made returnable forthwith and heard finally.

2. This Writ Petition is filed under Article 226 of the Constitution of India, inter alia challenging (i) the termination letter dated 27 September, 2012 issued by Respondent No.1 to Respondent No.2 terminating the lease dated 29 October, 1935; and (ii) the Show Cause Notices (**SCNs**) both dated 18 February, 2013, issued by Respondent No.4 under Sections 4 and 7 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (for short the **PP Act**)**.**

3. The property in question is all that piece and parcel of land admeasuring approximately 1036.71 sq. mtrs. bearing plot No.26 (old RR No.1245) and cadestral Survey No. 10/384 of Colaba division together with the building standing thereon consisting of ground + four floors, two garages and a pump-house (hereinafter referred to as **said property**). At the outset, we must mention here that it is not in dispute before us that the 1st Respondent is a statutory authority as defined in section 2(fa)(iv) of the PP Act and the said property are public premises as defined in section 2(e)(2)(v) of the said Act. It is also not in dispute that Respondent No.1 is the owner / landlord of the said property.

4. In a nutshell, in this Petition, the Petitioner has challenged the jurisdiction of Estate Officer (Respondent No.4) to issue the impugned SCNs (both dated 18 February, 2013) on the ground that the Petitioner, being an Asset Reconstruction Company (**ARC**), and having taken possession of the said property under Section 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short the **SARFAESI Act**), could not be evicted under the provisions of the PP Act. To put it simply, it is the case of the Petitioner that the provisions of the SARFAESI Act override the provisions of the PP Act, and therefore, if the 1st Respondent wanted to evict and get possession of the said property from the Petitioner, the same could be done only by approaching the Debt Recovery Tribunal (**DRT**) under Section 17 of the SARFAESI Act. It is in these circumstances, that the termination letter dated 27 September, 2012 as well as the SCNs, both dated 18 February, 2013, have been challenged in the present Writ Petition.

5. The brief facts giving rise to the present controversy are as follows:

(a) The Petitioner before us is a company incorporated under the provisions of the Companies Act, 1956 and registered as a securitisation and reconstruction company under Section 3 of the SARFAESI Act. The Petitioner claims that it is in exclusive possession of the said property since 6 August, 2012 pursuant to measures taken under Section 13(4) of the SARFAESI Act. Respondent No.1 is the Board of Trustees of the Port of Mumbai, a statutory corporation constituted under the provisions of Section 5 of the Major Port Trusts Act, 1963. Respondent

No.1 is the successors-in-title to the Trustees of the Port of Bombay, constituted under the provisions of the Bombay Port Trust Act, 1879 (since repealed). Respondent No.2 is a company incorporated under the provisions of the Companies Act, 1956 and is the assignee of the leasehold rights in the said property as more particularly set out hereinafter. Respondent No.3 is the Bank of India, who claims to be a mortgagee of the said leasehold rights of Respondent No.2 for a loan granted by Respondent No.3 to Respondent No.2. Subsequently, Respondent No.3 has assigned the debts owed by Respondent No.2 to Respondent No.3 together with the underlying security interest, in favour of the Petitioner. Respondent No.4 is the Estate Officer, appointed by the Central Government in exercise of the powers conferred under Section 3 of the PP Act and is the authority that has issued the impugned SCNs against Respondent No.2, Respondent No.3 and the Petitioner respectively.

(b) By and under a lease deed dated 29 October, 1935 (**the said Lease**) executed between the successors-in-title of Respondent No.1 of the first part and Phirozshaw Cowasji Lentin and Banoo Phirozshaw Lentin of the second part and Rao Bahadur Dadasahib A. Surve of the third part, demised unto the said Rao Bahadur Dadasahib A. Surve, the said property for a period of 99 years. It is the case of the Petitioner that under the terms of said lease, there was no prohibition for creation of a mortgage by deposit of a title deeds. The only restriction was for creating a mortgage by way of an under-lease.

(c) Thereafter, pursuant to diverse assignments which were duly permitted by the predecessors of Respondent No.1, the leasehold rights in respect of the said property stood vested in favour of one Balwant Rai Shelley. Under a Deed of Variation dated 8 February, 1977, the said Balwant Rai Shelley was allowed to use the said garage in the said building for storage of non-hazardous material and the lease rentals were revised in the manner provided therein.

(d) On 23 July, 1993, the said Balwant Rai Shelley expired leaving behind his last Will and testament dated 27 January, 1993. Under the said Will, Balwant Rai Shelley gave, devised and bequeathed all his right, title and interest in respect of the said property in favour of his daughter Pramila Ramnikrai Wadhwan. This Will

has been probated in 1995.

(e) Many years later, in the year 2006 the said Pramila Ramnikrai Wadhwan sought permission of Respondent No.1 to further assign the leasehold rights in respect of the said property in favour of Respondent No.2, which permission was granted by Respondent No.1 by its letter dated 4 September, 2006. Pursuant to the aforesaid permission, by and under a Deed of Assignment dated 22 December, 2006, executed between said Pramila Ramnikrai Wadhwan of the one part and Respondent No.2 of the other part, the said Pramila Ramnikrai Wadhwan assigned and transferred the leasehold rights in respect of the said property in favour of Respondent No.2.

(f) In the interregnum, Respondent No.2 intended to take financial assistance for carrying out its business, and accordingly, approached Respondent No.3. It is the case of the Petitioner that in this regard, Respondent Nos.2 and 3 had a meeting on 10 October, 2006 with Respondent No.1, at which time Respondent No.3 was advised by the representative of Respondent No.1 (Mr Patil) that since only a mortgage by way of an under-lease was prohibited under the terms of the lease, a mortgage by deposit of title-deeds could be created by Respondent No.2 in favour of Respondent No.3. Accordingly, by and under a Term Loan Agreement dated 5 November 2006, Respondent No.2 availed of a loan of Rs.43.50 Crores from Respondent No.3. For securing repayment of the said loan, Respondent No.2 created a mortgage by deposit of title-deeds in respect of the leasehold interest in the said property in favour of Respondent No.3. It is the case of the Petitioner that creation of this equitable mortgage was intimated to Respondent No.1 by Respondent No.3 vide its letter dated 5 January, 2007. Thereafter, since according to Respondent No.2 the building constructed on the said property required urgent repairs, Respondent No.2, by its letter dated 8 March, 2007 informed Respondent No.1 that it would be undertaking the said repairs.

(g) Thereafter, on 2 January, 2009, Respondent No.3 once again informed Respondent No.1 about creation of the said mortgage. In response thereto, Respondent No.1 by and under their letter dated 18 February, 2009 stated that the creation of the said mortgage was without the prior sanction of Respondent No.1

and was inter alia in violation of the terms of said lease and called upon Respondent No.2 to clarify inter alia, why no prior consent was taken before creating said mortgage.

(h) In reply thereto, Respondent No.3, by its letter dated 28 February, 2009 inter alia made a reference to the meeting held on 10 October, 2006 and stated that pursuant to the said meeting, Respondent No.3 was advised that a valid mortgage by way of deposit of title-deeds could be created without the consent of Respondent No.1. It is in these circumstances, that the mortgage was created. Thereafter, another letter dated 1 March, 2009 was addressed by Respondent No.2 to Respondent No.1 inter alia stating that the said equitable mortgage was created as per the discussion and procedure suggested by the Estate Manager of Respondent No.1, namely, Mr Patil, and that the entire transaction entered into was transparent.

(i) Be that as it may, since Respondent No.2 was in arrears of the lease rentals, Respondent No.1 under their demand notice dated 23 March, 2009 called upon Respondent No.2 to make payment of the bills attached to the said letter failing which legal proceedings would be initiated against Respondent No.2. In reply thereto, Respondent No.2 informed Respondent No.1 that it shall shortly comply with the said demand notice and that they had already put a deposit of Rs.2.05 Crores towards advance rent, with Respondent No.1.

(j) Unconnected with the aforesaid demand, on 28 May, 2009 Respondent No.3 addressed a letter to Respondent No.1 and called upon Respondent No.1 to confirm having noted its lien in respect of the said property in their books and sought their co-operation in the matter. Thereafter, Respondent No.3 by and under a Deed of Assignment dated 18 August, 2009 (which was modified by a Deed of Rectification dated 2 February, 2012) along with the security interest therein, assigned the debts (along with the security interest) owed by Respondent No.2, in favour of the Petitioner.

(k) Be that as it may, by a letter dated 3 September, 2010, Respondent No.1 once again informed Respondent No.2 that it had committed breaches of the terms of said lease by creating a mortgage in favour of Respondent No.3 without the prior

consent of Respondent No.1. In reply thereto, Respondent No.2 by its letter dated 29 September, 2010 informed Respondent No.1 that it was under a bonafide belief that Respondent No.1 was satisfied by the reply given by Respondent No.2 vide its letter dated 1 March, 2009. Respondent No.2, further stated that they shall comply with the conditions and sought a cure period of six months to arrange the dues owed to Respondent No.1.

(l) Since, the dues of Respondent No.1 were not paid, on 21 January, 2011, Respondent No.1 inter alia informed Respondent No.2 that since there were breaches committed by Respondent No.2, action under the PP Act would be initiated against Respondent No.2. As mentioned earlier, Respondent No.2 had undertaken the work of re-plastering/ repairing the said property. In these circumstances, Respondent No.1, by their letter dated 12 June, 2012 informed Respondent No.2 that the said work was done without prior approval of Respondent No.1, which also amounted to a breach of the said lease.

(m) Be that as it may, in the meanwhile, since Respondent No.2 had defaulted in servicing the loan availed of by it from Respondent No.3 (which was subsequently assigned to the Petitioner), the Petitioner initiated proceedings under the provisions of the SARFAESI Act, which finally culminated in the Petitioner taking possession of the said property on 6 August, 2012. It is the case of the Petitioner that this possession was taken pursuant to orders passed under Section 14 of the SARFAESI Act.

(n) Independent of this, since Respondent No.2 had not complied with the requisitions of Respondent No.1, by their letter dated 17 September, 2012, Respondent No.1 informed Respondent No.2 (with a copy marked to the Petitioner) that Respondent No.1 had sealed the said property. Thereafter, Respondent No.1 through their Advocates letter dated 27 September, 2012, terminated the said lease for the reasons more particularly set out therein. A copy of this termination letter was also forwarded to the Petitioner.

(o) In reply to this termination letter, the Petitioner through their Advocates letter dated 10 October, 2012, inter alia contended that in the said lease there was no restriction for creating a mortgage by deposit of title deeds, as well as for the

enforcement thereof. In the said letter the Petitioner informed the 1st Respondent that the leasehold rights in the said property would be sold by the Petitioner under the SARFAESI Act. Thereafter, the 1st Respondent, by its letter dated 18 January, 2013, informed the Petitioner that the entire exercise of mortgage and the consequent action of the Petitioner was unauthorized and holding of any auction by the Petitioner to sell the leasehold rights of Respondent No.2 would be illegal and highly objectionable to Respondent No.1.

(p) Thereafter, further correspondence ensued between the parties and finally the Petitioner received the said two SCNs, both dated 18 February, 2013, issued by Respondent No.4 (Estate Officer) under the provisions of Sections 4 and 7 of the PP Act. It is in these circumstances that the termination letter dated 27 September, 2012 and these two SCNs are impugned in this Writ Petition.

(q) For the sake of completeness, we must also mention that the 1st Respondent herein had filed Writ Petition (L) No. 375 of 2013 (subsequently numbered as Writ Petition No. 502 of 2013) inter alia seeking a Mandamus against the Petitioner herein (i) to revoke the equitable mortgage; and (ii) to cancel the said Assignment Agreement dated 18 August, 2009 (entered into between Respondent No.3 and the Petitioner) and for other reliefs as more particularly set out therein. The said Writ Petition was finally disposed of by an order dated 25 March, 2013. We are not referring to this order in further detail as it does not have a bearing in deciding the issues raised before us.

6. In this factual backdrop, Mr Kamdar, learned Sr. Counsel appearing on behalf of the Petitioner, submitted that admittedly the Petitioner was an ARC as contemplated under the provisions of the SARFAESI Act. It had, by virtue of the Deed of Assignment dated 18 August, 2009, taken over the debts owed by Respondent No.2 to Respondent No.3. Since Respondent No.2 had defaulted in repaying its loans, the Petitioner had taken recourse to the provisions of the SARFAESI Act to recover its dues and pursuant to which the Petitioner had taken possession of the said property on 6 August, 2012. He submitted that the Petitioner, therefore, to recover its dues, were entitled to sell the leasehold rights in the said property and which were mortgaged in their favour, under the

provisions of the SARFAESI Act.

7. Mr Kamdar submitted that the provisions of the SARFAESI Act are a code in itself. The entire mechanism of taking possession and thereafter selling the secured assets without the intervention of the Court have been provided for in the said Act. He submitted that the SARFAESI Act being a special Legislation, overrides the provisions of the PP Act. It was submitted by Mr Kamdar that if the 1st Respondent wanted to evict the Petitioner from the said property (the possession of which was with the Petitioner pursuant to the measures taken under the SARFAESI Act), the same could be done by the 1st Respondent only by approaching the DRT under Section 17 of the SARFAESI Act. The Petitioner having taken measures under the provisions of the SARFAESI Act, could not be evicted by the 1st Respondent by taking recourse to the provisions of the PP Act, was the submission. In this regard, Mr Kamdar drew our attention to the definition of the words **security interest** [section 2(zf)] to mean the right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and included any mortgage, charge, hypothecation or assignment, other than those specified in Section 31 of the SARFAESI Act. He also placed reliance on Section 17 of the Act which inter alia gives a right to any person aggrieved by any of the measures taken by the secured creditor under Section 13(4) of the SARFAESI Act, to approach the DRT. He submitted that Section 17(3) itself provides that if the DRT, after examining the facts and circumstances, comes to the conclusion that any of the measures referred to in Section 13(4) of the SARFAESI Act are not taken in accordance with the provisions of the Act or the rules framed thereunder, the restoration of possession and or management of the secured assets can be ordered by the DRT. He submitted that Section 17(4) provides that if the DRT declares that the recourse taken by the secured creditor under Section 13(4) was in accordance with the provisions of the SARFAESI Act, then notwithstanding anything contained in any other law for the time being in force, the secured creditor would be entitled to take recourse to one or more measures specified in sub-section (4) to Section 13 of the SARFAESI Act, to recover its debt. Thereafter, he also placed reliance on Section 34 to contend that that the Civil Court was barred from entertaining any suit or proceeding, in respect of any matter which the DRT or the DRAT, was empowered by or under the Act to determine. He also

placed reliance on Section 35 which inter alia stipulates 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 or any instrument having effect by virtue of any such law. Placing reliance on all these provisions, Mr. Kamdar submitted that the SARFAESI Act is a code in itself and its provisions shall override the provisions of the PP Act. To put it simply, it was submission of Mr Kamdar that before the Estate Officer adjudicates the SCNs issued by him, he will have to inquire into whether the actions taken by the Petitioner under Section 13(4) of the SARFAESI Act are valid or otherwise. This adjudication, according to Mr Kamdar, can be done only by the DRT under Section 17 of the SARFAESI Act and not by the Estate Officer under the provisions of the PP Act. This being the position, according to Mr Kamdar, the Estate Officer had no jurisdiction to issue the impugned SCNs (both dated 18 February, 2013), and therefore, sought our interference under Article 226 of the Constitution of India. In support of the proposition that the provisions of the SARFAESI Act would override the provisions of the PP Act, Mr Kamdar relied upon the following decisions:

(i) Indian Overseas Bank and Anr. Vs. Ashok Saw Mills. (2009) 8 SCC 366)

(ii) Kanaiyalal Lalchand Sachdev Vs. State of

Maharashtra. (2011) 2 SCC 782)

(iii) United Bank of India Vs. Satyawati Tandon and Ors. (2010) 8 SCC 110)

(iv) Transcore Vs. Union of India and Anr. (2008) 1 SCC 125)

(v) Vishal N. Kalsaria Vs. Bank of India and Ors. (2016) 3 SCC 762)

(vi) Madras Petrochem Ltd. and Anr. Vs. Board for Industrial and Financial Reconstruction and Ors. (2016) 1 SCC 1).

8. Relying on the aforesaid decisions, Mr Kamdar submitted that the provisions of the SARFAESI Act would override the provisions of the PP Act and consequently the issuance of the SCNs by Respondent No.4 seeking to evict the Petitioner from the said property were wholly without jurisdiction.

9. On the other hand, Mr Bharucha, learned Sr. Counsel appearing on behalf of the 1st Respondent, submitted that the question of whether the provisions of the SARFAESI Act override the provisions of the PP Act would arise only if there was anything inconsistent between two Acts. He submitted that this is clear from Section 35 of the SARFAESI Act which inter alia stipulates that the provisions of the SARFAESI Act shall prevail notwithstanding anything inconsistent therewith contained in any other law for the time being in force. He submitted that in the facts of the present case, there was no conflict or inconsistency between the provisions of the PP Act and the provisions of the SARFAESI Act for this Court to hold that the provisions of the SARFAESI Act would override the provisions of the PP Act.

10. Mr Bharucha submitted that admittedly the 1st Respondent is the owner of the said property and which are the public premises within the meaning of the PP Act. Since, the 2nd Respondent (in whose favour the leasehold rights are created) had breached the terms of the lease, Respondent No.1, as the lessor, had exercised its right to terminate the lease. As the lease stood terminated, consequently, the possession of Respondent No.2 as well as of the parties claiming through them, had been rendered unauthorized.

11. He submitted that in the facts of the present case, it is not in dispute that what has been mortgaged with the Petitioner is only the leasehold interest in the said property. The 1st Respondent's ownership rights in the said property have not been mortgaged with the Petitioner. In these circumstances, he submitted that the provisions of the SARFAESI Act do not and cannot take away the rights of the owner in the said property. The right of the 1st Respondent, as the owner/ lessor of the said property, therefore, remain intact including the right to terminate the lease and evict the lessee, in case the lessee breaches the terms of the lease. He submitted that looking to all these facts it is absolutely clear that there is no conflict between the provisions of the SARFAESI Act and the PP Act. He submitted that the leasehold rights of the 2nd Respondent are subject to termination as per the provisions of the said lease, which lease has been terminated. The validity of this termination is the subject matter of the proceedings before Respondent No.4 (the Estate Officer) under the provisions of the PP Act. Mr. Bharucha submitted that the

Petitioner cannot get any higher right than what Respondent No.2 had in the said property. If the 2nd Respondent breached the terms of the said lease, the 1st Respondent was well within its rights to terminate the lease notwithstanding the fact that the 2nd Respondent had mortgaged its leasehold rights in favour of the Petitioner. If the Petitioner cannot get a better right and/or title than the lessee (Respondent No.2) and the same would be subject to all the rights, obligations and liabilities of the said lease, then the Petitioner would suffer the same consequences that Respondent No.2 suffered, if it is found that Respondent No.2 had committed breaches of the terms of the said lease, was the submission of Mr Bharucha. In support of this proposition, Mr Bharucha relied upon the decisions of the Supreme Court in the case of **Harshad Govardhan Sondagar Vs International Assets Reconstruction Co. Ltd and Anr.** (2014) 6 SCC 1)and **Vishal N. Kalsaria** (2016) 3 SCC 762)**.** He submitted that in these cases, the Supreme Court had clearly held that even though the landlord had created a mortgage of his property in favour of a bank or financial institution (as defined in the SARFAESI Act), the same cannot destroy the rights of the tenants in the said property, which tenancy was created prior to the mortgage. In other words, the rights of pre-exisisting tenants were unaffected by the provisions of the SARFAESI Act and merely because the landlord had mortgaged its ownership rights, the tenants could not be thrown out of the property by exercising powers under the SARFAESI Act. He submitted that the converse would equally apply, and similarly in the facts of the present case, where admittedly the 1st Respondent had not mortgaged its rights with the Petitioner, the provisions of the SARFAESI Act cannot destroy the rights of the 1st Respondent (as the lessor) to terminate the lease in case the lessee (Respondent No.2) had breached the terms of the lease. Relying upon Sections 2(g), 4, 7 and 15 of the PP Act, Mr Bharucha contended that the PP Act is a self contained code governing the relationship between public undertakings and the occupants of their buildings, to the extent that they provide for eviction of unauthorized occupants from public premises and matters incidental thereto. To put it simply, it was the submission of Mr Bharucha, that the 1st Respondent's right to terminate the lease and evict the lessee remained intact despite the provisions of the SARFAESI Act. The SARFAESI Act cannot be construed in a manner that would destroy these statutory or contractual rights

vested with the 1st Respondent. This being the case, and considering the fact that whether the termination of the lease was valid or otherwise is something that will be adjudicated upon under the provisions of the PP Act, there is no doubt that the Estate Officer was well within his jurisdiction to issue the SCNs impugned herein.

12. Additionally and without prejudice to the aforesaid arguments, Mr Bharucha submitted that the present Writ Petition was also premature and not maintainable. He submitted that, in the present Petition what has inter alia been challenged are the two SCNs issued by the 4th Respondent. These SCNs do not per se decide any rights of the Petitioner, but merely call upon the noticees to show cause before the Estate Officer as to why they ought not to be evicted. He submitted that the practice of challenging SCNs by way of a Writ Petition, has been deprecated by the Courts on a number of occasions. In this regard, Mr Bharucha placed reliance on a decision of the Supreme Court case in the case of **Union of India and Anr. Vs. Kunisetty Satyanarayana** (AIR 2007 Supreme Court 906(1). He submitted that the Supreme Court has in clear terms stated that the issuance of a mere SCN does not give rise to any cause of action because it does not amount to an adverse order which affects the right of the party. The only the possible ground of challenge could be in a case where the SCN is issued by a person having no jurisdiction. In the facts of the present case, Mr Bharucha submitted that the Estate Officer clearly had jurisdiction to issue the impugned SCNs, and therefore, the challenge to the same was premature at this stage. For all the aforesaid reasons, Mr Bharucha submitted that there is no merit in this Writ Petition and the same ought to be dismissed with costs.

13. We have heard the learned Advocates at length and perused the papers and proceedings in the Writ Petition along with the annexures thereto. Before we deal with the rival contentions, it would be necessary to understand the purpose for which both the enactments, namely the SARFAESI Act and the PP Act, were brought into force. The statements of object and reasons of the SARFAESI Act indicate that the financial sector, being one of the key drivers in India's efforts to achieve success in rapidly developing its economy, did not have a level playing field as compared to other participants in the financial markets of the world. There was no legal provision for facilitating securitisation of financial assets of banks and

financial institutions, and unlike international banks, the banks and financial institutions in India did not have the power to take possession of securities and sell them. The Legislature felt that our existing legal framework had not kept pace with the changing commercial practices and financial sector reforms, which resulted in delays in recovery of defaulting loans. This in turn had the effect of mounting levels of non-performing assets of banks and financial institutions. In order to bring the Indian Banking Sector on par with International Standards, the Government set up two Narasimhan Committees and the Andhyarujina Committee for the purposes of examining banking sector reforms. These Committees inter alia suggested enactment of a new legislation for securitization and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the Court. Accepting these recommendations, the SARFAESI Act was brought into force with w.r.e.f. 21-06-2002.

14. On the other hand, the PP Act was brought into force to provide for eviction of unauthorized occupants from public premises and for certain other incidental matters. Originally, the Public Premises (Eviction of Unauthorized Occupants) Act, 1958 was enacted to provide for a speedy machinery for eviction of unauthorized occupants of public premises. Section 5 of the Act provided for taking possession of public premises which were in unauthorized occupation and Section 7 provided for recovery of rent or damages in respect of public premises from persons who were in unauthorized occupation thereof. The vires of certain provisions of the 1958 Act were challenged in different Courts all over country as being unconstitutional, and which challenges were upheld. Since, these Court decisions had created serious difficulties for the Government and it had become impossible for the Government to take expeditious action, even in flagrant cases of unauthorized occupation of public premises, it was therefore considered imperative to restore a speedy machinery for eviction of persons who were in unauthorized occupation of public premises. Accordingly, it was proposed to re-enact the Public Premises Eviction (Unauthorized Occupants) Act, 1958, as amended from time to time, after removing the vice which led to it having been declared as void. This is how the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (the PP Act) came on the Statute Book. There have been several amendments to the PP Act thereafter which are not really germane to

decide the issues raised in this Writ Petition.

15. Having noted the purposes of the two Acts, it is quite clear that both operate in different fields. As far as the SARFAESI Act is concerned, it provides a mechanism for a secured creditor to recover its secured debt by selling the securities without the intervention of the Court. It does not, in any way, destroy the rights that were created in favour of a third party prior to the security being created in favour of the secured creditor. On the other hand, the PP Act provides a mechanism for evicting unauthorized persons from public premises. If a statutory authority (as defined under the PP Act) finds that any of its public premises are in unauthorized occupation of any person, that statutory authority can put in motion, proceedings for evicting that person under the provisions of the PP Act.

16. Coming to the facts of the present case, we find considerable force in the arguments of Mr Bharucha that there is no conflict between the provisions of the SARFAESI Act and the PP Act. It is an admitted fact that what has been mortgaged with the Petitioner are only the leasehold rights of Respondent No.2. It is not the case of the Petitioner that the ownership rights of the 1st Respondent in the said property have been mortgaged with the Petitioner. These ownership rights, including the right to terminate the lease, cannot be affected by the provisions of the SARFAESI Act. In the facts of the present case, the 1st Respondent, as a lessor has a right to terminate the lease on the grounds more particularly set out in the said lease deed. Whether that termination is valid or otherwise, is the subject matter of the proceedings before the 4th Respondent. To our mind, the DRT under Section 17 of the SARFAESI Act can never decide this issue. All that the DRT is supposed to decide (under Section 17) is whether the measures taken under Section 13(4) of the SARFAESI Act by the secured creditor is in accordance with the provisions of the said Act or otherwise. The question whether the 1st Respondent has validly terminated the lease granted in favour of Respondent No.2, can only be decided under the provisions of the PP Act. This is also clear from Section 15 of the PP Act which stipulates that no Court shall have jurisdiction to entertain any suit or proceeding in respect of (a) the eviction of any person who is in unauthorized occupation of any public premises, or (b) the removal of any building, structure or fixture or goods, cattle or other animal from

any public premises under Section 5-A, or (c) the demolition of any building or other structure made, or ordered to be made, under Section 5-B, or (d) the sealing of any erection or work or of any public premises under Section 5-C, or (e) the arrears of rent payable under sub-section (1) of section 7 or damages payable under sub-section (2), or interest payable under sub-section (2-A), of that section, or (f) the recovery of (i) costs of removal of any building, structure or fixture or goods, cattle or other animal under section 5-A, or (ii) expenses of demolition under section 5-B, or (iii) costs awarded to the Central Government or statutory authority under sub-section (5) of section 9, or (iv) any portion of such rent, damages, costs or removal expenses of demolition or costs awarded to the Central Government or the statutory authority. This being the case, we are unable to agree with the submission of Mr Kamdar that in the facts of the present case, the provisions of the SARFAESI Act override the provisions of the PP Act, and consequently the 4th Respondent (the Estate Officer) had no jurisdiction to issue impugned show cause notices.

17. The proposition that the SARFAESI Act does not destroy the pre- existing rights that were created prior to the creation of the mortgage/ security is clearly laid down by the Supreme Court in the cases of **Harshad Govardhan Sondagar** (2014) 6 SCC 1)and **Vishal N. Kalsaria** (2016) 3 SCC 762).Both these decisions take the view that the SARFAESI Act does not destroy the rights of the tenant, which tenancy was created prior in point of time to the mortgage / security being created in favour of the secured creditor. Paragraphs 26 to 30 in the case of **Vishal N. Kalsaria (supra)** are very instructive in this regard and read as follows:

26. Providing a smooth and efficient recovery procedure to enable the banks to recover the non-performing assets is a laudable object indeed, which needs to be ensured for the development of the economy of the country. What has complicated the matters, however, is the clash of this laudable object with another laudable object, namely, to secure the rights of the tenants under the various Rent Control Acts. The history of these Rent Control Acts can be traced to as far back as the Second World War. At that time, due to the massive inflation and shortage of commodities, not only had the cost of living risen exponentially, the tenants were also often left to the mercy of the landlords as far as evictions or prices of rent

were concerned. The Rent Control Acts have been enacted by the different State Legislatures to secure the rights of the weaker sections of the society viz. the tenants. Krishna Iyer, J. aptly observed in **Santosh Mehta v. Om Prakash [Santosh Mehta v. Om Prakash, (1980) 3 SCC 610]** : (SCC p. 611, para 2)

2. Rent control laws are basically designed to protect tenants because scarcity of accommodation is a nightmare for those who own none and, if evicted, will be helpless.

27. The Preamble of the Rent Control Act reads as under:

An Act to unify, consolidate and amend the law relating to the control of rent and repairs of certain premises and of eviction and for encouraging the construction of new houses by assuring a fair return on the investment by landlords and to provide for the matters connected with the purposes aforesaid.

It becomes clear from a perusal of the Preamble of the Act that the ultimate object behind the enactment of this legislation is to control and regulate the rate of rent so that unnecessary hardship is not caused to the tenant, and also to provide protection to the tenants against arbitrary and unreasonable evictions from the possession of the property.

28. The protection of the tenants against unjust evictions becomes even more pronounced when examined in the light of Section 15 of the Rent Control Act, which reads as under:

15. No ejectment ordinarily to be made if tenant pays or is ready and willing to pay standard rent and permitted increases.

(1) A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, insofar as they are consistent with the provisions of this Act.

Section 15, thus, restricts the right of a landlord to recover possession of the tenanted premises from a tenant.

29. When we understand the factual matrix in the backdrop of the objectives of the above two legislations, the controversy in the instant case assumes immense significance. There is an interest of the Bank in recovering the non-performing asset on the one hand, and protecting the right of the blameless tenant on the other. The Rent Control Act being a social welfare legislation, must be construed as such. A landlord cannot be permitted to do indirectly what he has been barred from doing under the Rent Control Act, more so when the two legislations, that is the SARFAESI Act and the Rent Control Act operate in completely different fields. While the SARFAESI Act is concerned with non-performing assets of the banks, the Rent Control Act governs the relationship between a tenant and the landlord and specifies the rights and liabilities of each as well as the rules of ejectment with respect to such tenants. The provisions of the SARFAESI Act cannot be used to override the provisions of the Rent Control Act. If the contentions of the learned counsel for the respondent Banks are to be accepted, it would render the entire scheme of all Rent Control Acts operating in the country as useless and nugatory. Tenants would be left wholly to the mercy of their landlords and in the fear that the landlord may use the tenanted premises as a security interest while taking a loan from a bank and subsequently default on it. Conversely, a landlord would simply have to give up the tenanted premises as a security interest to the creditor banks while he is still getting rent for the same. In case of default of the loan, the maximum brunt will be borne by the unsuspecting tenant, who would be evicted from the possession of the tenanted property by the Bank under the provisions of the SARFAESI Act. Under no circumstances can this be permitted, more so in view of the statutory protections to the tenants under the Rent Control Act and also in respect of contractual tenants along with the possession of their properties which shall be obtained with due process of law.

30. The issue of determination of tenancy is also one which is well settled. While Section 106 of the Transfer of Property Act, 1882 does provide for registration of leases which are created on a year-to-year basis, what needs to be remembered is the effect of non-registration, or the creation of tenancy by way of an oral

agreement. According to Section 106 of the Transfer of Property Act, 1882, a monthly tenancy shall be deemed to be a tenancy from month to month and must be registered if it is reduced into writing. The Transfer of Property Act, however, remains silent on the position of law in cases where the agreement is not reduced into writing. If the two parties are executing their rights and liabilities in the nature of a landlord-tenant relationship and if regular rent is being paid and accepted, then the mere factum of non-registration of deed will not make the lease itself nugatory. If no written lease deed exists, then such tenants are required to prove that they have been in occupation of the premises as tenants by producing such evidence in the proceedings under Section 14 of the SARFAESI Act before the learned Magistrate. Further, in terms of Section 55(2) of the special law in the instant case, which is the Rent Control Act, the onus to get such a deed registered is on the landlord. In the light of the same, neither can the landlord nor the banks be permitted to exploit the fact of non-registration of the tenancy deed against the tenant.

18. While deciding the case of **Vishal N. Kalsaria (supra)**, the Supreme Court was called upon to decide as to what would be the rights of the tenants that existed in the property prior to the same being mortgaged in favour of the secured creditor. The Supreme Court (in paragraph 29) held that the two legislations, namely, the SARFAESI Act and the Rent Control Act operate in completely different fields. While the SARFAESI Act is concerned with nonperforming assets of the banks, the Rent Control Act governed the relationship between a tenant and the landlord and specified the rights and liabilities of each, as well as the rights of ejectment with respect to such tenants. The Supreme Court, therefore, held that the provisions of the SARFAESI Act cannot be used to override the provisions of the Rent Control Act. Applying this ratio to the facts before us, we have no hesitation in holding that even the provisions of the SARFAESI Act and the PP Act operate in completely different fields. The SARFAESI Act is concerned with non-performing assets of banks whereas the PP Act governs the relationship between the statutory authority (as defined under the PP Act) which owns public premises, on the one hand, and the occupants of those public premises on the other. On the same parity of reasoning as given by the Supreme Court, the provisions of the SARFAESI Act cannot be used to override the provisions of the PP Act. If the

contentions of Mr Kamdar were to be accepted, it would render the entire scheme of the PP Act useless and nugatory. We, therefore, have no hesitation in holding that the provisions of the SARFAESI Act cannot destroy the rights of the 1st Respondent (landlord in the present case) who has admittedly not mortgaged its ownership rights in favour of the Petitioner (the secured creditor). In other words, if the 1st Respondent (landlord) has a right to terminate the lease, that right cannot be destroyed and remains unaffected by any action taken by the Petitioner (the secured creditor) for selling the leasehold interest in said property and which was mortgaged in its favour. In the facts of the present case, it is this very right that the 1st Respondent has sought to exercise by terminating the lease granted in favour of Respondent No.2. Merely because Respondent No.2 has mortgaged its leasehold rights in favour of the Petitioner, cannot take away the right of the landlord (the 1st Respondent herein) to terminate the lease, if Respondent No.2 has breached the terms thereof. At the cost of repetition, we must state that whether this termination is valid or otherwise will be the subject matter of the proceedings under the PP Act. We have not opined one way or the other, as to whether the said termination is valid or otherwise and consequently rendering the occupation of the said property unauthorized. That is an issue that will be inquired into by the Estate Officer after hearing all the parties concerned and after allowing the parties to lead their respective evidence. To our mind, in the facts of the present case, there being no conflict between the provisions of the SARFAESI Act and the PP Act, there is no question of the provisions of the SARFAESI Act overriding the provisions of the PP Act. We, therefore, have no hesitation in holding that Respondent No.4 (the Estate Officer) was well within his jurisdiction to issue the impugned SCNs.

19. Having held so, we also find considerable force in the argument of Mr Bharucha that the present Petition is premature and not maintainable. In the present case, what has been challenged are the 2 SCNs issued by the 4th Respondent. These SCNs do not per se decide any rights of the Petitioner, but merely call upon noticees to show cause before the Estate Officer (4th Respondent) as to why they ought not to be evicted. The practice of challenging SCNs by way of a Writ Petition has been deprecated time and again as clearly spelt out by the Supreme Court in the case of **Kunisetty Satyanarayana** (2006)

12 SCC 28 : AIR 2007 Supreme Court 906(1)**.** Paragraphs 13 to 16 (SCC Report) of this decision read thus:

13. It is well settled by a series of decisions of this Court that ordinarily no writ lies against a charge-sheet or show-cause notice vide **Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh [(1996) 1 SCC 327 : JT (1995) 8 SC 331], Special Director v. Mohd. Ghulam Ghouse [(2004) 3 SCC 440 : 2004 SCC (Cri) 826 : AIR 2004 SC 1467], Ulagappa v. Divisional Commr., Mysore [(2001) 10 SCC 639], State of U.P. v. Brahm Datt Sharma [(1987) 2 SCC 179 : (1987) 3 ATC 319 : AIR 1987 SC 943]**, etc.

14. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ petition lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of anyone. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.

15. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.

16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter.

(emphasis supplied)

20. As can be seen from the aforesaid decision, the Supreme Court has in clear terms stated that ordinarily no writ lies against an issuance of a SCN. The reason why ordinarily a writ petition should not be entertained against the issuance of a mere SCN is that at that stage, the writ petition may be premature. A mere SCN does not give rise to any cause of action, because it does not amount to an adverse order which affects the right of any party, unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the SCN or after holding an inquiry, the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ petition lies when some right of any party is infringed. A mere SCN does not infringe the right of any one. It is only when a final order imposing some punishment or penalty adversely affecting a party is passed, that the said party is said to be having some grievance. This being the clear enunciation of the law, we have no hesitation in holding that the present Petition is clearly premature as it merely challenges the SCNs issued by the 4th Respondent (the Estate Officer).

21. Having come to this conclusion, we do not see any useful purpose in individually dealing with the decisions cited by Mr Kamdar and unnecessarily burdening this judgment. None of these decisions hold that the provisions of the SARFAESI Act override the provisions of the PP Act. These judgments, in the factual matrix before us, are wholly irrelevant.

22. For all the aforesaid reasons, we find no merit in this Writ Petition. Rule is accordingly discharged and the Writ Petition is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.