JUDICIAL ACADEMY JHARKHAND

SNIPPETS

OF

SUPREME COURT JUDGMENTS

(September 09-September 15, 2019)

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1. ***Surinder Kaur (D) Thr. Lr. Jasinderjit Singh (D) Thr. Lrs v. Bahadur Singh (D) Thr. Lrs. , (2019 SCC OnLine SC 1167)***

Decided on – 11.09.2019

Bench – (1) Hon'ble Mr. Justice Deepak Gupta

(2) Hon'ble Mr. Justice Aniruddha Bose

(Whether a vendee who does not perform one of his promises in a contract can obtain the discretionary relief of specific performance of that very contract)

Facts

Mohinder Kaur, predecessor in interest of the appellants entered into an agreement with Bahadur Singh, predecessor in interest of the respondents on 13.05.1964 whereby she agreed to sell the suit land to Bahadur Singh for a total sale consideration of Rs. 5605/-. Out of this, Rs. 1000/- was paid as earnest money at the time of execution of agreement to sell, and it was agreed that the balance amount would be paid at the time of registration of the sale deed. The possession of the land was handed over to the vendee on the date of agreement to sell itself. Since there was some litigation with regard to the property it was agreed between the parties that the sale deed would be executed within one month from the date of decision of civil appeal pending before the Punjab and Haryana High Court. Clauses 2 and 3 of the agreement to sell are important.[1]

It is not disputed that the litigation referred to in the agreement was decided on 17.01.1977, i.e., about 13 years after the agreement to sell was entered into. Bahadur Singh requested Mohinder Kaur to execute the sale deed but since she failed to do so, a suit for specific performance of the agreement was filed by Bahadur Singh. In the alternative, it was prayed that a decree be passed for a sum of Rs. 5605/-, i.e. Rs. 1000/- paid as earnest money and Rs. 4605/- as damages. This suit was contested on various grounds, in one of the grounds the defendant raised the plea that since Bahadur Singh had admittedly failed to pay the rent of

[1] 2) That an appeal in respect of the above-mentioned land is pending in the High Court and after decision in the said appeal, the First Party shall execute and register Sale Deed in favour of the Second Party in the month of July, 1965.

3) That the possession of the land has been handed today and in case the decision by the High Court in the appeal is after one year, then the sale deed shall be executed and registered after one month from the date of decision and in the circumstance, the Second Party shall pay to the First party the customary rent for the said land.

the land in terms of Clause 3 of the agreement, he was not entitled to a decree for specific performance. The suit has been decreed by all the courts below.

Decision and Observations

The Apex Court considered the issue whether the vendee Bahadur Singh who admittedly did not pay the rent is entitled to a decree of specific performance of the agreement dated 13.05.1964.

Section 51 of the Contract Act, 1872 provides that when a contract consists of reciprocal promises to be simultaneously performed, no promisor needs to perform his promise unless the promisee is ready and willing to perform his reciprocal promise. The aforesaid provisions have to be read along with Section 16(c) of The Specific Relief Act, 1963 which clearly lays down that the specific performance of a contract cannot be enforced in favour of a person who fails to prove that he has performed or was always ready and willing to perform the essential terms of the contract which were to be performed by him. The Apex Court considered that the specific performance of contract of an immovable property is a discretionary relief in terms of Section 20 of The Specific Relief Act as it stood at the time of filing of the suit.

Regarding the first issue, whether the promises were reciprocal promises or promises independent of each other, the Apex Court held that as far as the present case is concerned, the vendor, who was a lady received less than 20% of the sale consideration but handed over the possession to the defendant, probably with the hope that the dispute would be decided soon, or at least within a year. The land had been handed over to Bahadur Singh and he had agreed that he would pay rent at the customary rate. Therefore, the possession of the land was given to him only on this clear-cut understanding. This was, therefore, a reciprocal promise and was an essential part of the agreement to sell. Admittedly, Bahadur Singh did not even pay a penny as rent till the date of filing of the suit.

Even if this promise was not a reciprocal promise, as far as the agreement to sell is concerned, it would definitely mean that Bahadur Singh had failed to perform his part of the contract. There can be no manner of doubt that the payment of rent was an essential term of the contract. Explanation (ii) to Section 16(c) clearly lays down that the plaintiff must prove performance or readiness or willingness to perform the contract according to its true

construction. The only construction which can be given to the contract in hand is that Bahadur Singh was required to pay customary rent. The Court held that a party cannot claim that though he may not perform his part of the contract he is entitled to specific performance of the same. The Apex Court mentioned Explanation (ii) to Section 16(c) of The Specific Relief Act which lays down that it is incumbent on the party, who wants to enforce the specific performance of a contract, to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract. This the plaintiff miserably failed to do in so far as payment of rent is concerned.

Also, a perusal of Section 20 of The Specific Relief Act clearly indicates that the relief of specific performance is discretionary. Sub clause(c) of sub-section (2) of Section 20 provides that even if the contract is otherwise not voidable but the circumstances make it inequitable to enforce specific performance, the Court can refuse to grant such discretionary relief. Explanation (2) to the Section provides that the hardship has to be considered at the time of the contract, unless the hardship is brought in by the action of the plaintiff.

The Apex court concluded:

> **15.** In this case, Bahadur Singh having got possession of the land in the year 1964 did not pay the rent for 13 long years and even when he filed the replication in the year 1978, he denied any liability to pay the customary rent. Therefore, in our opinion, he did not act in a proper manner. Equity is totally against him. In our considered view, he was not entitled to claim the discretionary relief of specific performance of the agreement having not performed his part of the contract even if that part is held to be a distinct part of the agreement to sell. The vendee Bahadur Singh by not paying the rent for 13 long years to the vendor Mohinder Kaur, even when he had been put in possession of the land on payment of less than 18% of the market value, caused undue hardship to her. The land was agricultural land. Bahadur Singh was cultivating the same. He must have been earning a fairly large amount from this land which measured about 9½ acres. He by not paying the rent did not act fairly and, in our opinion, forfeited his right to get the discretionary relief of specific performance.

2. *Raja Ram v. Jai Prakash Singh and Others, (2019 SCC OnLine SC 1165)*

Decided on – 11.09.2019

Bench – (1) Hon'ble Mr. Justice Navin Sinha
(2) Hon'ble Ms. Justice Indira Banerjee

(The original defendants were in a fiduciary relationship with the deceased. Their conduct in looking after the deceased and his wife in old age may have influenced the thinking of the deceased. But that per se cannot lead to the only irresistible conclusion that the original defendants were therefore in a position to dominate the will of the deceased or that the sale deed executed was unconscionable.)

Facts

The plaintiff and defendant no. 2 are brothers. Defendant no. 1 was the wife of defendant no. 2. Respondents nos. 1 to 3 are sons of deceased defendant no. 1. Original plaintiff no. 2, another brother, has chosen not to pursue the appeal. The plaintiffs alleged that the original defendants obtained the sale deed dated 02.03.1970 from their father Vaijai, since deceased, in favour of defendant no. 1, fraudulently, by deceit and undue influence because of old age and infirmity of the deceased and who was living with the defendants. The suit was dismissed. The appellate court allowed the appeal holding that the defendants had failed to discharge their burden of being in a position to dominate the will of the deceased by undue influence. The High Court reversed the order of the first appellate court and restored the dismissal of the suit. The appellant is aggrieved by the order allowing the second appeal preferred by the defendants. The High Court set aside the order of the First Appellate Court which had allowed the appeal of the appellant and set aside the order dismissing the appellants suit.

Decision and Observations

The Apex Court considered two questions in this case:

(1) the physical condition of the deceased and his capacity to execute the sale deed.
(2) if the original defendants nos. 1 and 2 exercised undue influence over the deceased in having the sale deed executed in favour of defendant no. 1 because of the physical infirmity of the deceased on account of his old age.

The Apex Court then mentioned Section 14[2] of the Indian Contract Act, 1872 which defines 'free consent' and section 16[3] of the same Act which defines 'undue influence'.

Further, Section 111[4] of the Indian Evidence Act, 1872, explains good faith in transactions.

The Apex Court noted that the deceased undisputedly was over 80 years and above in age. The Advanced Law Lexicon by P. Ramanatha Aiyar, third edition reprint, 2009 defines impairment in relation to a human being as total or partial loss of a body function, total or partial loss of a part of the body, malfunction of a part of the body and malfunction or disfigurement of a part of the body. There can be no presumption with regard to the same only because of old age to equate it with complete loss of mental faculties by senility or dementia.

The deceased on account of his advanced age may have been old and infirm with a deteriorating eye sight, and unable to move freely. It is an undisputed fact that the deceased appeared before the sub-registrar for registration. It demolishes the entire case of the plaintiff that the deceased was bed ridden. He had put his thumb impression in presence of the sub-registrar after the sale deed had been read over and explained to him. The deceased had

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[2] "14. 'Free consent' defined - Consent is said to be free when it is not caused by -
(1) xxxxx
(2) Undue influence, as defined in section 16,…"

[3] "16. 'Undue influence' defined—
(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—
(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.
Nothing in the sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872)."

[4] "111. Proof of good faith in transactions where one party is in relation of active confidence.—Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

acknowledged receipt of the entire consideration in presence of the sub-registrar only after which the deed was executed and registered. The wife of the deceased had accompanied him to the office of the sub-registrar. The sale deed being a registered instrument, there shall be a presumption in favour of the defendants. The onus for rebuttal lay on the plaintiff which he failed to discharge. DW-1, though related was a witness to the sale deed. His evidence in support of the events before the sub-registrar therefore has to be accepted

With regard to the question of undue influence, the pleadings in the plaint are completely bereft of any details or circumstances with regard to the nature, manner or kind of undue influence exercised by the original defendants over the deceased. There can be no doubt that ***the original defendants were in a fiduciary relationship with the deceased. Their conduct in looking after the deceased and his wife in old age may have influenced the thinking of the deceased. But that per se cannot lead to the only irresistible conclusion that the original defendants were therefore in a position to dominate the will of the deceased or that the sale deed executed was unconscionable. The onus would shift upon the original defendants under Section 16 of the Contract Act read with Section 111 of the Evidence Act, as held in Anil Rishi v. Gurbaksh Singh[5] only after the plaintiff would have established a prima facie case.*** The wife of the deceased was living with him and had accompanied him to the office of the sub-registrar. The plaintiff has not pleaded or led any evidence that the wife of the deceased was also completely dominated by the original defendants.

On this point the Apex Court referred to its decision in ***Bishundeo Narain v. Seogeni Rai and Jagernath***[6] and ***Subhas Chandra Das Mushib v. Ganga Prosad Das Mushib***.[7] In the later case, the Court has distinguished between influence and undue influence.

The Apex Court did not interfere with the concurrent findings arrived at by two courts.

[5] (2006) 5 SCC 558
[6] 1951 SCR 548
[7] 1967 (1) SCR 331

3. ***Bajarang Shyamsunder Agarwal v. Central Bank of India and Another, (2019 SCC OnLine SC 1173)***

Decided on – 11.09.2019

Bench – (1) Hon'ble Mr. Justice N. V. Ramana
(2) Hon'ble Mr. Justice Mohan M. Shantanagoudar
(3) Hon'ble Ms. Justice Indira Banerjee

(The operation of the Rent Act cannot be extended to a 'tenant-in-sufferance' vis-a-vis the SARFAESI Act, due to the operation of Section 13(2) read with Section 13(13) of the SARFAESI Act.)

Facts

The present appeal arises out of the impugned order dated 31.12.2014 in Case No. 42/SA/2012 of the Chief Metropolitan Magistrate, Esplanade, Mumbai rejecting the application of the intervenor who is the appellant-*tenant* herein seeking to stay the execution of order passed under Section 14 of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [*for short, referred to as the* '**SARFAESI Act**'] for taking possession of the property in question.

The property in question is a residential flat admeasuring about 1020 sq. ft., situated in Andheri (West), Mumbai (hereinafter referred to as the "**secured asset**"). The secured asset was mortgaged by respondent no. 2-*borrower/landlord* with the respondent no. 1-*bank* in equitable mortgage, by depositing title deeds on 20.05.2000, with an intention to secure the credit facility. When the respondent no. 2-*borrower/landlord* failed to make the due repayment of the said credit facilities, the respondent no. 1-*bank* classified the debt as a "*Non-Performing Asset* (NPA)". Thereafter, on 30.04.2011 a statutory Demand Notice under Section 13(2) of the SARFAESI Act was issued to respondent no. 2-*borrower/landlord* demanding payment of Rs. 10,72,10,106.73 (Rupees Ten Crores Seventy-Two Lacs Ten Thousand One Hundred Six and Seventy Three Paisa Only) which was due as on 30.04.2011. When the respondent no. 2-borrower, failed to repay the outstanding loan amount, the respondent no. 1-*bank* made an application under Section 14 of the SARFAESI Act seeking directions to take physical possession of the secured asset. This application was allowed by the Chief Metropolitan Magistrate, Esplanade, Mumbai by his order dated 09.03.2012. In this order, the Magistrate directed the Assistant Registrar to take possession of the secured asset and handover the same to the respondent no. 1-bank.

The appellant, who claimed to be the *tenant*, asserted that the secured asset was let out to him by respondent no. 2-*borrower/landlord* in January, 2000 and he has been paying rent since then. Admittedly, the tenancy was based on an oral agreement. The appellant-*tenant* received a legal notice dated 25.07.2012, from respondent no. 2-*borrower/landlord* directing the appellant-*tenant* to vacate the premises within 15 days. The appellant-*tenant* preferred a suit being R.A.D Suit No. 652 of 2012 before the Court of Small Causes at Mumbai against the respondent no. 2-*borrower/landlord*. On 18.09.2012, the Small Causes Court allowed the application for interim injunction of the appellant-*tenant* filed in the above suit and respondent no. 2-*borrower/landlord* was restrained from disturbing the possession of the appellant-tenant.

Meanwhile, the High Court of Bombay, in Criminal Public Interest Litigation No. 24 of 2011, held that a Magistrate has the power to pass an order of eviction without giving an opportunity of hearing to the tenant under SARFAESI proceedings. An appeal against the aforesaid order along with a batch of other appeals was heard by this Court in ***Harshad Govardhan Sondagar* v. *International Assets Reconstruction Co. Ltd***.,[8] [*hereinafter referred to as* '**Harshad Govardhan Case**']. The Apex Court directed the Magistrate to decide the applications after giving the tenants an opportunity of hearing.

The *appellant-tenant* preferred an application in Case No. 42/SA/2012 before the Chief Metropolitan Magistrate, Esplanade, Mumbai. By the impugned order dated 31.12.2014, the Chief Metropolitan Magistrate after hearing the *appellant-tenant*, rejected the application holding that the *appellant-tenant* being a tenant without any registered instrument is not entitled for the possession of the secured asset for more than one year from the date of execution of unregistered tenancy agreement in accordance with the law laid down in *Harshad Govardhan Case* .Aggrieved by the same, *appellant-tenant* filed the appeal by way of Special Leave.

[8] (2014) 6 SCC 1

Decision and Observations

The Apex court referred to Section 13 of the SARFAESI Act which provides for the enforcement of security interest. Crucially, sub-Section (2) of Section 13 of the SARFAESI Act envisages a notice, which acts as the trigger point for initiation of the recovery process under the SARFAESI Act. In the aforesaid notice, the secured creditor is required to disclose information on the amount payable by the borrower and the secured interest intended to be enforced by the secured creditor in the event of non-payment of the secured debt. If the borrower fails to discharge the liability, the secured creditor has four options including taking possession of the secured assets of the borrower (Section 13(4) of the SARFAESI Act). Critically for this case, once a notice is served on the borrower, he cannot further enter into any contract to create any encumbrance on the property (Section 13(13) of the SARFAESI Act). This extinguishes the right of the mortgagor to lease the property under Section 65-A of the Transfer of Property Act [*hereinafter referred to as the* '**T.P. Act**'].

Section 14 of the SARFAESI Act provides for the procedural mechanism for taking possession of property and documents with respect to the secured assets, from the borrower.

Section 17 of the SARFAESI Act, dealing with the Right to Appeal has been amended in the year 2016[9]. However, what is important for the case is the earlier law.[10]

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[9] The Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 (44 of 2016).

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

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

……

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in subsection (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.

The Apex Court then referred to Section 35 of the SARFAESI Act which provides an overriding effect over "anything inconsistent contained in any other law".[11]

The Apex Court noted that the interplay between the SARFAESI Act and the right of the tenant was first examined by the Apex Court in ***Harshad Govardhan Case***. The Court was confronted with the question as to whether the provisions of the SARFAESI Act affect the right of a lessee to remain in possession of the secured asset during the period of the lease. After noticing the scheme of the Act, the Court held that if the lawful possession of the secured asset is not with the borrower, but with a lessee under a valid lease, the secured creditor cannot take possession of the secured asset until the lawful possession of the lessee gets determined and the lease will not get determined if the secured creditor chooses to take any of the measures specified in Section 13 of the SARFAESI Act. Accordingly, the Apex Court concluded that the Chief Metropolitan Magistrate/District Magistrate can pass an order for delivery of possession of secured asset in favour of secured creditor only when he finds that the lease has been determined in accordance with Section 111 of the T.P. Act. The Court further held that if the Chief Metropolitan Magistrate/District Magistrate is satisfied that a valid lease is created before the mortgage and the lease has not been determined in accordance with Section 111 of the T.P. Act, then he cannot pass an order for delivery of possession of the secured asset to the secured creditor. In case, he comes to the conclusion that there is no valid lease either before the creation of mortgage or after the creation of the

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(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under subsection (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under subsection (1).

(6) ……..

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.

(**emphasis supplied**)

[11] **"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."

mortgage satisfying the requirements of Section 65-A of the T.P. Act or even though there is a valid lease the same stands determined in accordance with Section 111 of the T.P. Act, he can pass an order for delivery of possession of the secured asset to the secured creditor. The Court also recognised the inconsistency between Section 13(13) of the SARFAESI Act and Section 65-A of the Transfer of Property Act. While Section 13(13) of SARFAESI prohibits a borrower from leasing out any of the secured assets after receipt of a notice under Section 13(2) without the prior written consent of the secured creditor, Section 65-A of the T.P. Act enables the borrower/mortgagor to lease out the property. This inconsistency was resolved by holding that the SARFAESI Act will override the provisions of the T.P. Act. Before concluding, the Court in ***Harshad Govardhan Case***, distinguished the implications of a registered and an unregistered instrument/oral agreement.[12]

The Apex Court then referred to ***Vishal N. Kalsaria v. Bank of India***,[13] in which the Court was concerned with the question - Whether a "protected tenant" under the Maharashtra Rent Control Act, 1999 can be treated as a lessee and whether the provisions of the SARFEASI Act, will override the provisions of the Rent Act? After examining the legal and constitutional position, the Court held that while the SARFAESI Act has a laudable objective of providing a smooth and efficient recovery procedure, it cannot override the objective of Rent Acts to control the rate of rent and provide protection to tenants against arbitrary and unreasonable evictions.[14]

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[12] "36. …..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 a year from the date of the instrument or from the date of delivery of possession in his favour by the landlord."

[13] (2016) 3 SCC 762

[14] The Court held that-

a) The provisions of the SARFAESI Act cannot be used to override the provisions of the Rent Act. The landlord cannot be permitted to do indirectly what he has been barred from doing under the Rent Act.
b) While a yearly tenancy requires to be registered, oral tenancy can still be proved by showing that the tenant has been in occupation of the premises before the Magistrate under Section 14 of the SARFAESI Act.
c) The non-registration of the tenancy deed cannot be used against the tenant. For leasehold rights being created after the property has been mortgaged to the bank, the consent of the creditor needs to be taken.

In this regard, the Apex Court held:

> **"25.** While we agree with the principle laid out in *Vishal N. Kalsaria Case* (supra) that the tenancy rights under the Rent Act need to be respected in appropriate cases, however, we believe that the holding with respect to the restricted application of the non obstante clause under section 35 of SARFAESI Act, to only apply to the laws operating in the same field is too narrow and such a proposition does not follow from the ruling of this Court in *Harshad Govardhan Case* (supra).
>
> **26.** In our view, the objective of SARFAESI Act, coupled with the T.P. Act and the Rent Act are required to be reconciled herein in the following manner:

a) If a valid tenancy under law is in existence even prior to the creation of the mortgage, the tenant's possession cannot be disturbed by the secured creditor by taking possession of the property. The lease has to be determined in accordance with Section 111 of the TP Act for determination of leases. As the existence of a prior existing lease inevitably affects the risk undertaken by the bank while providing the loan, it is expected of Banks/Creditors to have conducted a standard due diligence in this regard. Where the bank has proceeded to accept such a property as mortgage, it will be presumed that it has consented to the risk that comes as a consequence of the existing tenancy. In such a situation, the rights of a rightful tenant cannot be compromised under the SARFAESI Act proceedings.

b) If a tenancy under law comes into existence after the creation of a mortgage, but prior to the issuance of notice under Section 13(2) of the SARFAESI Act, it has to satisfy the conditions of Section 65-A of the T.P. Act.

c) In any case, if any of the tenants claim that he is entitled to possession of a secured asset for a term of more than a year, it has to be supported by the execution of a registered instrument. In the absence of a registered instrument, if the tenant relies on an unregistered instrument or an oral agreement accompanied by delivery of possession, the tenant is not entitled to possession

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d) Even though Section 35 of the SARFAESI Act has a *non obstante* clause, it will not override the statutory rights of the tenants under the Rent Control Act. The *non obstante* clause under Section 35 of the SARFAESI Act only applies to laws operating in the same field.

> of the secured asset for more than the period prescribed under Section 107 of the T.P. Act."

Then the Apex Court noted that in the present case, the *bona fides* of the tenant was highly doubtful, as there was no good or sufficient evidence to establish the tenancy in the first place. The claim of tenancy made by the appellant-*tenant* is not supported by a registered instrument. However, as laid out in the ***Vishal N. Kalsaria Case*** ,that in the absence of a written lease deed the tenant may prove his existing rights by producing other relevant evidence before the Magistrate. The appellant-*tenant* has to produce evidence of payment of rent, property taxes, etc. Furthermore, if the rent and permitted increases were payable, then the quantum ought to have been mentioned. In addition to the above, the claim of tenancy could have been substantiated by relying upon other tax receipts such as BMC tax, water tax, electricity charges consumed by the tenant, etc. However, the appellant-*tenant* has only submitted xerox copies of rent receipts. It is pertinent to note that at the time when the SARFAESI Act proceedings were pending, the factum of tenancy was never revealed by the parties.

The Apex Court said that as the notice under Section 13(2) SARFAESI Act was issued on 30.04.2011, subsequent reckoning of the tenancy is barred. Such person occupying the premises, when the tenancy has been determined, can only be treated as a 'tenant in sufferance' who do not have any legal rights and are akin to trespassers.

In this regard, the Apex Court referred to ***R.V. Bhupal Prasad* v. *State of A.P.,***[15] wherein it was stated:

> "8. Tenant at sufferance is one who comes into possession of land by lawful title, but who holds it, by wrong after the termination of the term or expiry of the lease by efflux of time. The tenant at sufferance is, therefore, one who wrongfully continues in possession after the extinction of a lawful title. There is little difference between him and a trespasser."

The Apex Court concluded that ***the operation of the Rent Act cannot be extended to a 'tenant-in-sufferance' vis-a-vis the SARFAESI Act, due to the operation of Section 13(2) read with Section 13(13) of the SARFAESI Act. A contrary interpretation would violate the***

[15] (1995) 5 SCC 698

intention of the legislature to provide for Section 13(13), which has a valuable role in making the SARFAESI Act a self-executory instrument for debt recovery. Moreover, such an interpretation would also violate the mandate of Section 35, SARFAESI Act which is couched in broad terms.

The lower Courts were found to be correct in ordering delivery of possession to the respondent no. 1-*bank* as the tenancy stood determined. However, the Court noted that they have not interpreted the new amendment *per se* or the law with respect to other categories of tenants, which may be taken up in appropriate cases.

4. *State of Rajasthan and Others v. Trilok Ram, (2019 SCC OnLine SC 1175)*

Decided on – 12.09.2019

Bench – (1) Hon'ble Mr. Justice Sanjay Kishan Kaul
(2) Hon'ble Mr. Justice K.M. Joseph

(An amendment which brings about substitution of a provision essentially does two things. In the first place, the provision which is substituted undergoes a repeal. At the same time, there is a re-enactment through the newly inserted provisions. Since Rule 266(3) came to be substituted, having regard to the legal consequences of the same, the proviso could not survive.)

Facts

The appellant issued an advertisement on 11.8.2013 for recruiting Teachers Grade III (Level I and II) in the various Zila Parishads in the State of Rajasthan. The advertisement stipulated the last date for submission of the application form as 4.9.2013. The applicants were to fulfil the requisite educational qualifications as on the last date of the submission of the application form. The writ petitioner who is the respondent (hereinafter referred to as "the respondent") was undergoing the B.S.T.C. Course (B.S.T.C. is an essential qualification stipulated). He, however, applied pursuant to the advertisement. The appellant discovered during the process of verification that the respondent was not holding the requisite qualification of B.S.T.C. as on the last date for submission of application form. The respondent appeared on the basis of an order passed by the High Court permitting him and others to submit their application however, it was subject to the decision in SBCWP No. 10845/2013. Thereafter, he completed his B.S.T.C. second year course and the results were also declared. The result of the recruitment examination was declared on 17.5.2014. Finding that the result of the examination in regard to the respondent and another was not uploaded on the official website, they filed writ petition No. 244/2015. An interim order was passed in the said writ petition to bring the result of the petitioner in a sealed cover before the Court. The High Court further directed that the results to be declared. The respondent secured 158.41 marks. The respondent was called for verification of documents. Though the respondent secured marks which was more than the cut-off, his name was not found in the Select List dated 16.3.2015. After representing and not eliciting the required response, the writ petition which led to the present appeal (W.P. No. 2801/2015) came to be filed seeking to quash final select list dated 16.3.2015 and to direct the appellants to declare the selection list of the respondent as marks secured were higher than the cut-off in the respective

category. Finally, direction to appoint the respondent to the post of Teacher Grade III (Level I) with all consequential benefits was sought. The appellant filed counter affidavit. The Single Judge dismissed the writ petition. In appeal filed by the respondent, by the impugned order, however, the division Bench allowed the writ petition.

Decision and Observations

The controversy which falls to be resolved by us is whether the High Court was right in holding that the proviso to Rule 266(3) of the Rajasthan Panchayati Raj Rules, 1996 (hereinafter referred to as "the Rules") which was relied upon by the respondent remained intact despite the substitution of Rule 266(3) by Notification dated 11.5.2011. The proviso read as follows:

> "Provided further that the person who has appeared in the B.Ed./B.S.T.C. examination shall be eligible to apply for the post of primary and upper primary school teacher but he shall have to submit proof of having acquired the said educational qualification to the District Establishment Committee before the declaration of result of the said examination."

In short, if the proviso held the field, the respondent would become eligible and qualified for selection and appointment based on merit. If the proviso on the other hand was not available, the respondent would not be eligible for the reason that as contended by the appellants, as on the last date for filing application the respondent had admittedly not passed the B.S.T.C. examination. The respondent had actually appeared for the examination and taking shelter under the proviso, the respondent claimed to be qualified on the terms thereof.

The proviso was introduced for the first time on 1.7.2004 (though with variation not relevant to the enquiry) in the rules. Rule 266 is a part of Rajasthan Panchayat Raj Rules. The qualifications for teachers for the category we are concerned with, is undoubtedly, laid down by the National Council for Teachers Education (NCTE). This is done by virtue of the provisions of Section 23 of Right of Children to Free and Compulsory Education Act, 2009. After the proviso was inserted in 2004 by virtue of the amendment carried out in Rule 266 (3) dated 28.6.2006, the qualifications in clause (3) of Rule 266 came to be changed and new qualifications came to be introduced through the amendment. It purported to be a

substitution of clause (3). It must be remembered that the proviso had been earlier inserted in clause (3) of Rule 266 by virtue of Rajasthan Panchayati Raj (Fourth Amendment) Rules 2004.

Thereafter again on 11.5.2011, Rule 266(3) came to be substituted. Qualifications as stipulated by NCTE, were inserted.[16]

The Apex Court noted that the High Court has taken the view that when the substitution was effected on 11.5.2011, all that happened was one set of qualifications were replaced by another set of qualifications. The domain of clause (3) of Rule 266 was the declaration as to the qualifications to be possessed by the candidates for appointment as teachers at different levels. The proviso which was inserted on 1.7.2004 did not add to or take away from the qualifications which were declared in the main provision. All that the proviso purported to achieve was to give an opportunity to those candidates who had not acquired the qualifications as on the last date for making application but who had appeared for the

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[16] "In exercise of the powers conferred by Section 102 of the Rajasthan Panchayati Raj Act, 1994 (Act No. 13 of 1994) and all other powers enabling it in this behalf, the State Government hereby makes the following rules further to amend the Rajasthan Panchayati Raj Rules, 1996, namely:—

1. Short title and commencement.- (1) These rules may be called the Rajasthan Panchayati Raj (Second Amendment) rules, 2011.

2. Amendment of rule 266.-The existing clause (3) of rule 266 of the Rajasthan Panchayati Raj Rules, 1996, hereinafter referred to as the said rules, shall be substituted by the following, namely:—

(3) Primary and Upper Primary School Teacher (100% by direct Recruitment)

(a) General Education

Level-(i) Classes I to V	Qualification as laid down by National Council for Teacher Education (NCTE) under the provisions of subsection (1) of Section 23 of the Right of Children to Free and compulsory Education Act, 2009 (Central Act No. 35 of 2009) from time to time.
Level-(ii) Classes VI to VIII	Qualifications as laid down by National Council for Teacher Education (NCTE) under the provisions of subsection (1) OF Section 23 of the Right of Children to Free and Compulsory Education Act, 2009 (Central Act No. 35 of 2009) from time to time.

(b) Special Education

Level-(i) Classes I to V	Qualifications as laid down by National Council for Teacher Education (NCTE) under the provisions of subsection (1) OF Section 23 of the Right of Children to Free and Compulsory Education Act, 2009 (Central Act No. 35 of 2009) from time to time.
Level-(ii) Classes VI to VIII	Qualifications as laid down by National Council for Teacher Education (NCTE) under the provisions of subsection (1) OF Section 23 of the Right of Children to Free and Compulsory Education Act, 2009 (Central Act No. 35 of 2009) from time to time."

concerned examination, to apply for the post. Thus, the proviso was indeed a beneficial provision as it provided a window of opportunity to those while not being qualified as such, were in the process of acquiring qualification by having appeared in the examination. This is no doubt subject to the conditions in the proviso.The Apex Court agreed with this view that the proviso was intended to have a different area of operation from the main provision whose function was only to enunciate the requisite qualifications.

In this case, the Apex Court was concerned with the effect of amending Act which brought about the substitution of a provision. ***An amendment which brings about substitution of a provision essentially does two things. In the first place, the provision which is substituted undergoes a repeal. At the same time, there is a re-enactment through the newly inserted provisions.*** On this point the Apex Court referred to its decision in ***State of Rajasthan v. Mangilal Pindwal*** wherein it has been held that :[17]

> "12. This means that as a result of repeal of a statute the statute as repealed ceases to exist with effect from the date of such repeal but the repeal does not affect the previous operation of the law which has been repealed during the period it was operative prior to the date of such repeal."

Therefore, the Apex Court stated that when a substitution was carried out initially on 28.6.2006, all the provisions of clause(3) of Rule 266, as it stood, suffered a repeal and in its place a new avtaar was born. It must be at once remembered that the proviso was inserted on 1.7.2004 in clause (3) of Rule 266. Therefore, when the rule making authority substituted clause (3) of Rule 266 by the amendment dated 28.6.2006, the inevitable result would be the repeal of entire clause (3) of Rule 266 including the proviso. It is crucial to bear in mind that the amendment to Rule 266(3) by substitution did not expressly save the proviso. It is equally important to be not oblivious to the fact that the proviso was an integral part of clause(3) of Rule 266. ***Since Rule 266(3) came to be substituted, having regard to the legal consequences of the same, the proviso could not survive.***

[17] (1996) 5 SCC 60

The fact that the proviso had ceased to exist as a result of the substitution dated 28.6.2006 is unambiguously demonstrated, by the fact the rule making authority chose to step in by issuing notification dated 29.11.2006 by inserting again the proviso to Rule 266(3).[18]

Rule 266 (3) as was brought into life by the amending Act dated 28.6.2006 continued to hold the field till it suffered substitution by notification dated 11.5.2011. Apparently, consequent upon the need to change the qualifications, Rule 266(3) came to be substituted. However, it is not in dispute that after the substitution dated 11.5.2011, the proviso relied upon by the respondent has not been brought back into existence as was done in the year 2006.

The legislative intention is clear that when rule maker substituted the provisions of clause (3), it intended that the entirety of clause (3) would stand obliterated as indeed is the effect of a repeal and a new set of provisions taking its place. It is on this understanding that the rule making authority, when it intended that the proviso must govern, it expressly did so, and it issued the notification dated 29.11.2006. Admittedly after 11.5.2011, the proviso has not been brought back to life. Apparently, the notification dated 29.11.2006 bringing the proviso back to life after the substitution of clause (3) to Rule 266 in 2006 was not brought to the notice of the High Court.

The Apex Court concluded:

> **"25.** The candidates must possess the qualifications on the last date when applying under the advertisement when it is so provided. In view of our finding that the proviso had ceased to exist after substitution of Rule 266(3) by notification dated 11.5.2011, there can be no question of the advertisement being opposed to the statutory rule.
>
> **26.** The upshot of the above discussion is that the appeal is only to be allowed. We allow the appeal and the impugned judgment of the High Court in Writ Appeal No. DBCSAW NO. 667/2015 shall stand set aside."

[18] It read as follows:

> "Provided that the person who has appeared or is appearing in the B.Ed./B.S.T.C./DSE/B.Ed.(Special Education) Examination shall be eligible to apply for the post of primary and upper primary school teachers (General Education/Special Education) but he shall have to submit proof of having acquired the said educational qualification to the Rajasthan Public Service Commission before the declaration of result of the competitive examination."

5. ***Shree Vishal Printers Ltd., Jaipur v. Regional Provident Fund Commissioner, Jaipur and Another, (2019 SCC OnLine SC 1179)***

Decided on – 12.09.2019

Bench – (1) Hon'ble Mr. Justice Sanjay Kishan Kaul

(2) Hon'ble Mr. Justice K.M. Joseph

(There may be different legal entities, an arrangement may have been made to have different directors and shareholders, but the nature of control and integrality of functionality, between the three entities is quite apparent from the facts set out.)

Facts

In order to diffuse benefits in establishments across the market, the legislature promulgated the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the 'said Act'). The said Act was enacted with the avowed object of providing for the security of workers in organised industries, in the absence of any social security scheme prevalent in our country. To avoid any hardship to new establishments, a provision was made for exempting them from the aegis of the said Act, for a period of five years. This period was reduced to three years in 1988 and the exemption provision was completely removed from 22.9.1997.

2. The relevant provision of the said Act is reproduced hereinunder:

"**16. Act not to apply to certain establishments. -** (1) This Act shall not apply-

……

(d) to any other establishment newly set up, until the expiry of a period of three years from the date on which such establishment is, or has been, set up.

Explanation: For the removal of doubts, it is hereby declared that an establishment shall not be deemed to be newly set up merely by reason of a change in its location."

The present appeals are concerned with this exemption provision as the three establishments in question claimed exemption in respect of application of this provision of the said Act.

The three appeals filed before the Apex Court are by three limited companies (two separate legal entities and one, an establishment of the parent company), though the question of their exemption has been dealt with by a common order of the Regional Provident Fund

Commissioner, Rajasthan (for short 'RPFC'). This is so, as all the three establishments are sought to be denied exemption on the ground that they are effectively part of the same parent establishment, being M/s. Bennett, Coleman & Company Limited (for short 'BCCL'), Mumbai. Civil Appeal No. 4475/2010 is by BCCL, Jaipur. Civil Appeal No. 4476/2010 is by M/s. Times Publishing House Limited, Jaipur (for short 'TPHL, Jaipur') while Civil Appeal No. 4474/2010 is by M/s. Shree Vishal Printers Limited, Jaipur (for short 'SVPL, Jaipur').

On all the three establishments being called upon to comply with the provisions of the said Act, all three of them sought exemption under Section 16(1)(d) of the said Act. In view thereof, the RPFC initiated proceedings under the said Act, and issued a notice under Section 7A of the said Act, dated 28.10.1987. The proceedings were held thereafter, and the RPFC passed a common order in respect of all the three establishments on 4.10.1990 opining that they were not entitled to the exemption. The appeal filed before the Employees' Provident Fund Appellate Tribunal by all the three establishments also failed, as it was dismissed on 10.10.1997. The same fate befell all three in the proceedings before the learned Single Judge, *vide* order dated 20.12.2006 and the Division Bench of the High Court, on 11.4.2008. Thus, practically four forums have scrutinised the cases *qua* all these three establishments.

Decision and Observations

Before delving into the factual matrix, the Apex Court delineated the countors of the present matter. The Apex court took note of the provision , Section 2A[19] of the said Act, which was inserted by Act 46 of 1960, w.e.f. 31.12.1960. There is no definition of an "establishment" under the said Act, and thus, the jurisprudence that developed resorted to the provisions of the Industrial Disputes Act, 1947 (for short 'ID Act') for the said purpose.[20] The aforesaid

[19] "**2A. Establishment to include all departments and branches.** -For the removal of doubts, it is hereby declared that where an establishment consists of different departments or has branches, whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment."

[2020] The first judgment is in ***Management of Pratap Press, New Delhi* v. *Secretary, Delhi Press Workers' Union, Delhi & Its Workmen*(AIR 1960 SC 1213).** The dispute was one under the ID Act and also dealt with the publication of a newspaper as in the present case. Pratap Press was sought to be treated as part of the same industrial unit as Vir Arjun and Daily Pratap. The tests are taken from an earlier judgment, in ***Associated Cement Companies Limited, Chaibassa Cement Works, Jhinkpani* v. *Workmen*(AIR 1960 SC 56).** The second judgment relied upon for this purpose is **in *L.N. Gadodia & Sons* v. *Regional Provident Fund***

provision was introduced so as to obviate the chances of creation of different departments and branches by an establishment and then seek exemptions on the basis of the same being new establishments.

Commissioner,(2011) 13 SCC 517. This case dealt with the said Act and the question which arose was whether two sister concerns, having different dates of incorporation, could be treated as two separate establishments. The judgments in *Associated Cement Companies Limited* and *Management of Pratap Press, New Delhi* were referred to for the said purpose. In para 16 of this case, the observations *qua* the *Associated Cement Companies* in para 11, insofar as relevant is extracted as under:

> "…11. … What then is 'one establishment' in the ordinary industrial or business sense? … It is, perhaps, impossible to lay down any one test as an absolute and invariable test for all cases. The real purpose of these tests is to find out the true relation between the parts, branches, units, etc. If in their true relation they constitute one integrated whole, we say that the establishment is one; if on the contrary they do not constitute one integrated whole, each unit is then a separate unit. How the relation between the units will be judged must depend on the facts proved, having regard to the scheme and object of the statute which gives the right of unemployment compensation and also prescribes a disqualification therefor. Thus, in one case the unity of ownership, management and control may be the important test; in another case functional integrality or general unity may be the important test; and in still another case, the important test may be the unity of employment. Indeed, in a large number of cases several tests may fall for consideration at the same time. The difficulty of applying these tests arises because of the complexities of modern industrial organization; many enterprises may have functional integrality between factories which are separately owned; some may be integrated in part with units or factories having the same ownership and in part with factories or plants which are independently owned."

10. Thereafter, while discussing some subsequent judgments, the following observations were made:

> "18. Accordingly, depending upon the facts of the particular case, in some cases the units concerned were held to be the part of one establishment whereas, in some other cases they were held not to be so. *Regl. Provident Fund Commr.* v. *Dharamsi Morarji Chemical Co. Ltd.* reported in [(1998) 2 SCC 446] and *Regl. Provident Fund Commr.* v. *Raj's Continental Exports (P) Ltd.* reported in [(2007) 4 SCC 239] are cases where the two units were held to be independent. In *Dharamsi Morarji* (supra), the appellant company was running a factory manufacturing fertilizers at Ambarnath in District Thane, Maharashtra since 1921. The appellant established another factory at Roha in the adjoining district in the year 1977 to manufacture organic chemicals with separate set of workers, separate profit and loss account, separate works manager, plant superintendents and separate registration under the Factories Act. The two were held to be separate for the purposes of coverage under the Provident Funds Act. In *Raj's Continental Export* (supra), *Dharamsi Morarji* was followed since the two entities had separate registration under the Factories Act, 1948, Central Sales Tax Act, 1956, Income Tax Act, 1961, Employees' State Insurance Act, 1948 separate balance sheets and audited statements and separate employees working under them.
>
> 19. As against that in *Rajasthan Prem Krishan Goods Transport Co.* v. *Regl. Provident Fund Commr.* reported in [(1996) 9 SCC 454] and *Regl. Provident Fund Commr.* v. *Naraini Udyog* reported in [(1996) 5 SCC 522] the concerned units were held to be the units of the same establishment. In *Rajasthan Prem Krishan Goods Transport Co.* (supra) the trucks plied by the two entities were owned by their partners, ten out of thirteen partners were common, the place of business was common, the management was common, the letterheads bore the same telephone numbers. In *Naraini Udyog* (supra) the two entities were located within a distance of three kilometers as separate small-scale industries but were represented by the members of the same Hindu Undivided Family. They had a common head office at New Delhi, common branch at Bombay and common telephone at Kota. The accounts of the two entities were maintained by the same set of clerks. Separate registration under the Factories Act, the Sales Tax Act and the ESI Act were held to be of no relevance and the two units were held to be one establishment for the purpose of the Provident Funds Act."

Regarding Civil Appeal No. 4475/2010 the Apex court said that as BCCL, Jaipur was not a separate legal entity, but, part of the parent company directly. The case would, thus, be fully covered by the provisions of Section 2A of the said Act and mere location of departments and branches in other cities would not have extended the benefit of the exemption to this company. Thus, the appeal, in any case, had to fail.

Insofar as Civil Appeal No. 4476/2010 is concerned, the Apex Court noted the fact that the counsel sought to refer to the provisions of the agreement in question, between the two parties, which gave rise to the Provident Fund Commissioner to initiate proceedings. This agreement was dated 25.7.1986. It appeared that the agreement was in supersession of an earlier agreement dated 13.12.1985. The business reason stated for entering into this agreement was the commencement of publication of the Jaipur edition of the daily newspapers of BCCL, Mumbai, i.e., The Times of India and Navbharat Times.

The agreement recorded that TPHL had opened an office at 8-9, Anupam Chambers, Tonk Road, Jaipur, where it had equipped itself with trained and experienced staff and all infrastructural, secretarial, administrative and marketing facilities. Since 23.9.1985, it had been providing various services to BCCL, Mumbai, including office space for use and occupation, accounting facilities, stenographers, typing, and so on. The services which were now further sought to be provided to BCCL, Mumbai included marketing, development work, realisation of dues, adequate office space, accounting facilities, infrastructure, packing/bundling of daily newspapers (at the cost of BCCL, Mumbai), etc. Clause 1(g) of the agreement states as under:

> "1. "TPH" shall render the following services effective from 1st August, 1986 to "Bennett":—
>
> xxxxxxxxxxxxxxxxxxx
>
> (g) All staff employed by "TPH" will carry out the instructions given by "Bennett" and in case of working problems; "TPH" shall at the request of "Bennett" remove the problems. The staff employed by TPH shall not be considered as employees of "Bennett" but they will remain the staff of "TPH" and "TPH" shall be responsible to the employees."

BCCL, Mumbai was to pay to TPHL an amount calculated @ 5% as commissions on Net Advertisement Revenue and Net Circulation Revenue.

If the aforesaid factual matrix is analysed within the principles of what would constitute one establishment, as set out in the ***Associated Cement Company case*** it is obvious that there are various parameters dependent on the factual matrix of each case, which have to be examined. In this case, ***the Court was not dealing with a branch or a unit of BCCL, Mumbai. Thus, a test of unity of ownership, management and control may not really be applicable, but the test would be of functional integrality or general unity of purpose, in the given factual situation.*** There is no direct unity of employment. ***In any case, it is the test of functional integrality or general unity of purpose which would have to be applied in the present facts if the two establishments have to be clubbed for the purposes of the provisions of the said Act.***

However, what is also emphasised is that the executive of TPHL was using the letterpad of BCCL, Mumbai. The important aspect was the nature of the agreement which provided for both the space and the staff to be made available by TPHL for the benefit of BCCL, Mumbai. The expenses of the establishment, for example, electricity bill, maintenance costs, etc., were to be borne by TPHL.

After analysing the aforesaid facts on the touchstone of functional integrality or general unity of purpose, the Apex Court found it difficult to disagree with the reasoning of four forums. While rejecting the case of TPHL , the Apex court held:

> **"27.** We are, however, not able to persuade ourselves to agree with the submission of the learned senior counsel for the appellant for the reason that what has effectively been done in the present case, under the agreement in question, is that TPHL has handed over its office space, employees and control to BCCL, Mumbai, for all practical purposes, to the extent that the letter pads are also being used without any due regard as to which entity the instructions are being issued from. This is not a case of a singular document being issued, but a number of documents where this practice has been followed. Just to make an endeavour on paper to somehow keep these two segregated for various labour law ramifications would not be an appropriate principle to accept, more

so taking into consideration the very purpose for which the said Act was enacted."

Regarding the Civil Appeal No. 4474/2010 of SVPL, the common factor, again, is of BCCL, Mumbai issuing orders on the letter pad of SVPL. In fact, the nature of communications and orders issued do suggest that all three were working towards the common object of bringing out a newspaper. The aforesaid would not have been sufficient by itself, but for the application of the functional integrality test, which linked them to be part of the same establishment.

The Apex Court held:

"**40.** Despite the aforesaid, in the complete conspectus of facts, after divorcing different aspects of the three establishments, we are unable to come to a conclusion different from the one which we have come to for TPHL. We believe that the very nature of the working of SVPL and the other two entities show the functional integrality test to be satisfied. ***They may be different legal entities, an arrangement may have been made to have different directors and shareholders, but the nature of control and integrality of functionality, between the three entities is quite apparent from the facts set out hereinabove***. Each one of the facts by itself may not be conclusive, but taken as a whole, there can be no other conclusion, than the one arrived at by the RPFC. We are doing so, quite conscious of the fact that there is undoubtedly some jumbling which has arisen in the order of the RPFC, which has been affirmed throughout. But then, the case of the appellants was built on the principle that all these three entities have really no functional integrality vis-à-vis BCCL, Mumbai. As it emerged subsequently, and was conceded before us; there is little doubt that BCCL, Jaipur is a unit of BCCL, Mumbai, and the other two units have linkages and are controlled by BCCL, Jaipur in a manner which would satisfy the functional integrality test.

41. The said Act being a beneficial legislation, the object of excluding the infancy period of five years (later reduced to three years) from the rigours of the Act, was only to provide to new establishments, a period to establish their business, and not to permit different kinds of routes to be created to evade the liability under the said Act."

The Apex Court concluded that:

> **"42.** We have, thus, no hesitation in coming to the conclusion that the findings *qua* all the three appellants satisfy the functional integrality and the general unity of purpose test, and the same are met in the facts of the present case.

6. *Serious Fraud Investigation Office v. Nittin Johari and Another, (2019 SCC OnLine SC 1178)*

Decided on – 12.09.2019

Bench – (1) Hon'ble Mr. Justice N. V. Ramana
(2) Hon'ble Mr. Justice Mohan M. Shantanagoudar
(3) Hon'ble Mr. Justice Ajay Rastogi

(Even as per Section 212(7) of the Companies Act, the limitation under Section 212(6) with respect to grant of bail is in addition to those already provided in the Cr.P.C.)

Facts

The present appeal challenges the grant of bail to Respondent No. 1 by the High Court of Delhi in Bail Application No. 1971/2019 in C.C. No. 770/2019, vide the order dated 14.08.2019.

The case of the prosecution primarily hinges on the commission of fraud punishable under Section 447 of the Companies Act, 2013 (for short "the Companies Act"), though several other offences under the Companies Act and the Indian Penal Code, 1860 have also been alleged. Briefly put, it is alleged that from FY 2009-10 to FY 2016-17, Brij Bhushan Singal and Neeraj Singal, promoters of Bhushan Steel Ltd. (for short "BSL"), assisted by employees and close associates, used a complex web of 157 companies to siphon off funds from BSL for various purposes, and also fraudulently availed of credit from various lender banks and manipulated the books of accounts and financial statements of BSL, causing wrongful loss to banks and financial institutions amounting to Rs. 20,879 crores and causing wrongful gain to the promoters and their family members, amounting to around Rs. 3500 crores. Respondent No. 1 herein, Nittin Johari, who was the Chief Financial Officer and Whole Time Director (Finance) of BSL, as well as a member of the Committee of the Board of Directors on Borrowing, Investment and Loans during the relevant period, was alleged to have been a close associate of the promoters and to have played a central role in perpetrating these frauds. In particular, it is alleged that Respondent No. 1 played an active role in using fraudulent letters of credit to avail of credit from lender banks, in inflating Stock-in-Transit figures to avail of greater Drawing Power from banks, and in manipulating statements of accounts and other financial statements of BSL in the garb of adopting the Indian Accounting Standards.

Investigation into the affairs of BSL and certain associated companies had been initiated by the Serious Fraud Investigation Office (for short "the SFIO"), the Appellant herein, pursuant to the order dated 03.05.2016 issued by the Ministry of Corporate Affairs (for short "the MCA") under Section 212(1)(c) of the Companies Act. Gradually, the scope of investigation expanded to 157 companies and 130 individuals.

Respondent No. 1 came to be arrested on 02.05.2019, and was remanded to the Appellant's custody on 03.05.2019. He has been in judicial custody since 08.05.2019. It is also pertinent to note that previously, co-accused Neeraj Singal had been granted certain interim reliefs (including interim bail) by the High Court of Delhi vide order dated 29.08.2018 in W.P. (Crl.) No. 2453/2018, in which he had challenged the constitutionality of Section 212(6)(ii), (7) and (8) of the Companies Act. The operation and effect of this order (save for his interim release) had been stayed by this Court in appeal, vide order dated 04.09.2018.

Respondent No. 1 applied for regular bail under Section 439 of the Code of Criminal Procedure, 1973 (for short "the Cr.P.C."), which was dismissed by the Special Judge (Companies Act), Delhi, vide order dated 06.06.2019. The Investigation Report was submitted by the Appellant to the MCA on 27.06.2019, and after obtaining sanction from the MCA, the Petitioner filed the Complaint before the Special Court on 01.07.2019. It may be pertinent to note that as per Section 212(15) of the Companies Act, the Investigation Report filed under Section 212(12) of the Companies Act is deemed to be a report filed by a police officer under Section 173 of the Cr.P.C. (i.e. the chargesheet).

Respondent No. 1 filed another application under Section 439 of the Cr.P.C. before the Special Judge, which was dismissed vide order dated 02.08.2019. It is pertinent to note that both these orders take note of the mandatory nature of Section 212(6)(ii) of the Companies Act pertaining to the grant of bail for offences, as well as of the gravity of the economic offence committed, the deep-rooted nature of the conspiracy, and the huge loss of public funds involved.

Bail Application No. 1791/2019 was subsequently filed before the High Court of Delhi, which came to be allowed vide the impugned order, giving rise to the present appeal. The impugned order was stayed by the Apex Court on 16.08.2019. Respondent No. 1 therefore continues to be in custody.

Decision and Observations

The Apex Court began its discussion by referring to the mandatory conditions imposed under Section 212(6)(ii) for the grant of bail in connection with offences under Section 447 of the Companies Act. Sub-clause (ii) of Section 212(6) which reads as follows:[21]

> "(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), offence covered under section 447 of this Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless—
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail"

The Apex Court noted that even as per Section 212(7) of the Companies Act, the limitation under Section 212(6) with respect to grant of bail is in addition to those already provided in the Cr.P.C. Thus, it is necessary to advert to the principles governing the grant of bail under Section 439 of the Cr.P.C. Specifically, heed must be paid to the stringent view taken by the Apex Court towards grant of bail with respect of economic offences. In this regard, the Apex Court referred to its decision in ***Y.S. Jagan Mohan Reddy v. Central Bureau of Investigation***[22]***:***

> "**34.** Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

[21] Although arguments have been advanced touching upon the scope and validity of the above provision, particularly in the aftermath of the decision of the Apex Court in *Nikesh Tarachand Shah* v. *Union of India*, (2018) 11 SCC 1 pertaining to a similar provision in the PMLA, the Apex court refrained from making any observations in this regard in light of the pendency of the challenge to the constitutionality of the said provision of the Companies Act before the Apex Court.

[22] (2013) 7 SCC 439

> 35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations."

Similar position was adopted in decision including ***Gautam Kundu* v. *Directorate of Enforcement (Prevention of Money Laundering Act), Government of India***,[23] and ***State of Bihar* v. *Amit Kumar***.[24] Thus, it is evident that the above factors must be taken into account while determining whether bail should be granted in cases involving grave economic offences.

The Apex Court stated that the High Court went on to grant bail to Respondent No. 1 by observing that bail was justified on the "broad probabilities" of the case. The Apex Court opined that this vague observation demonstrates non-application of mind on the part of the Court even under Section 439 of the Cr.P.C., even if the question of satisfaction of the mandatory requirements under Section 212(6)(ii) of the Companies Act was kept aside.

The Apex Court concluded:

> " In the interest of justice, we deem it fit to remand the matter to the High Court to reconsider Bail Application No. 1971/2019 filed by Respondent No. 1 in light of the principles governing the grant of bail under Section 439 of the Cr.P.C, while also keeping in mind the scope and effect of the twin mandatory conditions for grant of bail laid down in Section 212(6)(ii) of the Companies Act. Needless to say, Respondent No. 1 shall continue to remain in custody subject to the order of the High Court in the said bail application."

[23] (2015) 16 SCC 1
[24] (2017) 13 SCC 751

7. ***Ganpati Babji Alamwar (D) by Lrs. Ramlu and Others v. Digambarrao Venkatrao Bhadke and Others ,(2019 SCC OnLine SC 1180)***

Decided on – 12.09.2019

Bench – (1) Hon'ble Mr. Justice Navin Sinha

(2) Hon'ble Ms. Justice Indira Banerjee

(An ostensible sale with transfer of possession and ownership, but containing a clause for reconveyance in accordance with Section 58(c) of the Transfer of Property Act, will clothe the agreement as a mortgage by conditional sale.)

Facts

The plaintiffs purchased daily necessities from the shop of defendant no. 1 on credit. A sum of Rs. 10,500/- became outstanding after verification of accounts. On 26.04.1970, the plaintiffs executed an instalment bond, Exhibit 53, to pay the dues in three yearly instalments on the occasion of *Gudi Padwa* in 1971, 1972 and 1973. The plaintiffs defaulted in payment of the first instalment itself. On 29.04.1971, Exhibit 52, the plaintiffs executed a conditional sale deed for sale of their agricultural lands measuring 2½ acres in favour of defendant no. 1 for a sum of Rs. 11,000/-. The earlier dues of Rs. 10,500/- formed part of the consideration. The plaintiffs admitted having received a sum of Rs. 500/- earlier. The agreement provided that the plaintiffs upon repayment of the dues by *Gudi Padwa* of 1973 shall be entitled to reconveyance of the lands. In the event of their failure to do so, the sale would become absolute. The plaintiffs having failed to repay the dues, defendant no. 1 obtained mutation of the lands in his name on 13.05.1976 and sold the lands to defendant no. 2 by a registered sale deed dated 13.02.1978. The plaintiffs thereafter filed the suit for redemption in the year 1980.

The Civil Judge held that the nature of the document coupled with the recitals therein and conduct of the plaintiff, left him in no doubt that the document was a sale deed. The First Appellate Court and the High Court on an interpretation of the document held it to be a mortgage by conditional sale, opining that their existed the relationship of a debtor and a creditor, and not that of a transferor or transferee. The appellants, who were the original defendants are aggrieved by the dismissal of their second appeal, affirming the judgment of the First Appellate Court, which reversed the dismissal of the suit for redemption of mortgage filed by the plaintiffs. Thus, the present appeal.

Decision and Observations

The appeal raised a singular question of law as to whether the agreement[25] dated 29.04.1971, Exhibit 52, was a mortgage by conditional sale or it was a sale with an option to repurchase.

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25 "Exh.52

Stamp

Sub-Registrar, Degloor.

Conditional Sale Deed

The Conditional Sale deed of land out of Taulka Degloor, Dist; Nanded, Muncipal Council, Degloor, agricultural land bearing Survey No. 156/A) Admeasuring 99 Arrs, assessment Rs. 5-14 paise. Consideration Rs. 11.000/-.

date: 29.04.1971

Purchasers: Dukan "Sadasaukh Jankidash" Degloor owners:—

1- Gangadas s/o Satnarayanlal Daga

2- Haridas s/o Satnarayanlal Daga

3- Sridas s/o Satnarayanlal Daga

4- Jagmohandas s/o Satnarayanlal Daga Age: 17 years Minor through Guardian Mother Chanddevi w/o Satnarayanlal Daga

5- Shelabai w/o Ajay Kumar

6- Sundrabai d/o Satnarayanlal

7- Chanddevi w/o Satnarayanlal

8- Laxmibai w/o Kedarnath

All R/o Hyderabad Andhra Pradesh (A.P.) Through General Power of Attorney Ramnivas s/o Bankatlal Jhawar Age: 55 Years,

Occ. Agriculture & Private Service, R/o Degloor, Tq: Degloor.

Transferors: 1) Venkat Nagorao Bhadke

2) Keshavrao

3) Digamberrao

4) Dattatryarao

5) Suryakant Father of all Venkatrao Bhadke Age: 71, 36, 33, 31, 29 respectively.

Occupation of all: Agri.

Residents of Degloor.

For the reasons the conditional sale deed is executed, that in District Nanded, Taluka Degloor, at Degloor proper we own & possess agricultural land survey no. 156/1 admeasuring 99 Arrs, assessment Rs. 5.14 paise, having four boundaries towards East: Agri Land of Nagnath Devji Motewar, West: Road, North: Agri Land of Tukaram Nagorao, South : Agri. Land of Ramrao Nagorao, this agricultural land today on 29.04.1971 is given to you till the Gudi Padwa of the year 1973 by this deed for consideration of Rs. 11,000/- (In words Eleven Thousand Only) by this conditional sale and the possession of said agricultural land is handed over to you.

That we will pay the above consideration on expiry of the above term and then will seek the possession of our agricultural land. If we fail to make the payment after the expiry of said period then you can consider this as permanent sale deed and can cultivate the property for perpetuity. If anyone objects your cultivation then we will make redressal of the same. If any private or government encumbrance is found on the land then we will be solely responsible for the same. That in all there are total dues of Rs. 10,500/- (Ten thousand five hundred only) to be paid by us to you. That we have examined & confirmed the accounts & have executed instalment bond on 26.04.1970. That amount & Rs. 500/- which we have received earlier in cash from you. Accordingly there is no objection or grievance for receiving Rs. 11,000/- (in words Rs. Eleven thousand only) & giving possession. The purchasers are agriculturists. Even after purchase of this land their land holding will not be excess than the ceiling limits as per the provisions of Maharashtra Agricultural Lands (Ceiling & Holdings) Act, 1961 & not more than 2/3 of minimum holding prescribed under the Act. Therefore for this transaction there is no need to seek permission of Deputy Collector as

The Apex Court then referred to Section 58, clause (c) of the Transfer of Property Act which defines mortgage by conditional sale.[26]

The Apex court stated that whether an agreement is a mortgage by conditional sale or sale with an option for repurchase is a vexed question to be considered in the facts of each case. ***An ostensible sale with transfer of possession and ownership, but containing a clause for reconveyance in accordance with Section 58(c) of the Act, will clothe the agreement as a mortgage by conditional sale***. The execution of a separate agreement for reconveyance, either contemporaneously or subsequently, shall militate against the agreement being mortgage by conditional sale. There must exist a debtor and creditor relationship. The valuation of the property, and the transaction value, along with the duration of time for reconveyance, are important considerations to decide the nature of the agreement. There will have to be a cumulative consideration of these factors, along with the recitals in the agreement, intention of the parties, coupled with other attendant circumstances, considered in a holistic manner. The language used in the agreement may not always be conclusive.

The Apex court then referred to ***Bhaskar Waman Joshi (deceased) v. Shrinarayan Rambilas Agarwal (deceased),***[27] wherein the principles for determination of the nature of the document were explained.[28]

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required under Hyderabad Tenancy & Agricultural Lands (Amendment) Act, 1965. The executants of this deed are not from Scheduled Caste and Scheduled Tribes. Hence this Conditional Sale deed is executed by us with free will & satisfaction & signed on 29 April 1971."

[26] "Where the mortgagor ostensibly sells the mortgaged property—
on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or
on condition that on such payment being made the sale shall become void, oron condition that on such payment being made the buyer shall transfer the property to the seller,
the transaction is called a mortgage by conditional sale and the mortgagee, a mortgagee by conditional sale;
Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

[27] AIR 1960 SC 301

[28] "7…The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of surrounding circumstances. If the words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts."

The Apex Court stated that it was not a sale deed with an option for repurchase but a document of mortgage by conditional sale. The Apex Court held:

> "An agriculturist will normally not so easily dispose his agricultural land, the source of his survival and livelihood merely for purchases made by him on credit. The dire financial straits of the plaintiffs is evident from the fact that they were left with no option but to mortgage 2½ acres of their agricultural lands for credit purchase of daily necessities. The financial stringency of the plaintiffs is apparent from their failure to repay anything even after execution of the instalment bond. Given the limitations of the plaintiffs because of their poor financial status, the fact that they may not have objected to the mutation so done three years later cannot be considered as sufficient for a contrary interpretation of the agreement dated 29.04.1971, especially when the Appellate Court held that the plaintiffs were in possession of the lands. In the facts of the case, a debtor and creditor relationship stands clearly established and hardly needs further elucidation. The limitation for the right to redeem, under Article 61(a) of the Limitation Act 1963, is 30 years. The suit for redemption was therefore within limitation. In the facts of the present case, we do not consider the delay of seven years in filing the suit so fatal, as to disinherit the plaintiff from his agricultural lands."