

Nitin Gunwant Shah

v.

Indian Bank & Others

(Supreme Court Of India)

HON'BLE MR. JUSTICE GYAN SUDHA MISRA HON'BLE MR. JUSTICE J. CHELAMESWAR HON'BLE MR. JUSTICE ALTAMAS KABIR

Special Leave Petition (Civil) No. 22785 Of 2010 | 10-07-2012

Chelameswar, J.

1. Respondent No. 5 is the wife of respondent No.4. Both are said to be the residents of Florida, USA. It is asserted by all the parties to the present proceedings that the property in dispute, a flat in Amar Jyoti Cooperative Society, 28-C, Ridge Road, Malabar Hills, Mumbai, is owned by respondents 4 and 5 (hereinafter referred to as the property in dispute).

2. The petitioner claims that he entered into an agreement dated 6th May, 1989 styled as "Leave and License" Agreement by which the respondents 4 and 5 agreed to lease the property in dispute to the petitioner.

3. Admittedly, the petitioner was not put in possession of the property in dispute immediately on the execution of the abovementioned agreement. As regards the possession of the petitioner, it is stated by the petitioner in Writ Petition No. 1747/2009 from out of which the instant appeal arises as follows:

"At the time of execution of the said Agreement, the Respondent Nos. 4 & 5 informed the Petitioner that they intended to go to U.S.A. for an extended visit and they needed some time to make the necessary arrangements mainly for their furniture and articles. The Respondent Nos. 4 and 5, therefore, requested the Petitioner to allow them some time to do so before they would hand over the physical possession of the said premises. The Petitioner agreed to this, as he was helpless in the matter. Apparently, the Respondent Nos. 4 & 5 delayed their arrangements. Finally on or about 2nd February, 1990, the Petitioner was informed by one Yogesh M. Kamani and one Madhubai A. Gandhi, both the brothers-in-law of the Respondent No.4 that the Respondent Nos. 4 & 5 had removed their articles and the keys which were with them. They suggested that the Petitioner take the keys and take over the possession of the said premises. These two persons were known to the Petitioner and had been introduced to him by the Defendant No.4. They also told Petitioner that they were holding authority from the Respondent Nos. 4 & 5 and that the Respondent Nos. 4 & 5 had left for U.S.A. the previous day but had done so hurriedly and therefore had not contacted the

Petitioner before their departure. Accordingly on 23rd February 1990, they gave the keys of the flat to the Petitioner and the Petitioner shifted into the said premises with his family and articles and continues to reside there and be in exclusive possession, enjoyment, use and occupation thereof till today.”

(emphasis supplied)

4. It appears from the record that respondent No. 4 owed certain amounts to the 1st respondent bank on account of an over draft facility extended to him and certain other transactions (the details of which are not necessary for the present purpose). It appears that such liabilities were incurred for the benefit of the second respondent, a sole propriety concern owned by the HUF of which the fourth respondent is said to be the karta. It appears that respondents 4 and 5 executed several documents in favour of the 1st respondent in connection with the above transaction including a deed dated 27.09.1989 creating a mortgage over the property in dispute in favour of the 1st respondent Bank.

5. As the amounts due to the Bank under the above mentioned transaction were not repaid, the first respondent filed a suit No.3083/1992 in the High Court of Bombay against respondents 2 to 5 and also the petitioner herein for the recovery of an amount of Rs.33,71,862/- alongwith interest and various other reliefs. The first respondent, inter alia, sought a declaration that the amounts claimed and due to the first respondent are secured by “a valid and subsisting mortgage” of the property in dispute and further prayed that in the event of failure of the respondent 4 and 6 herein to repay the amount due to the first respondent Bank before the date of redemption to be fixed by the Court, “the property in dispute be sold and the sale proceeds be applied towards the satisfaction of the claim of the Bank”.

6. The petitioner herein is the fifth defendant in the said suit. In so far as the petitioner is concerned, the 1st respondent sought a declaration that the petitioner is a trespasser without any right, title or interest in the disputed property and further prayed for a decree for eviction of the petitioner.

“(g) that it be declared by the Hon’ble Court that defendant No.5 has no right, title or interest in the said flat described in Exhibit ‘A’ hereto or any party thereof and that the use, occupation and possession of Defendant No.5 of the said flat described in Exhibit ‘A’ hereto is wrongful and illegal and amounts to trespass.

(h) that defendant No.5 be ordered and decreed to quit, vacate and hand over quiet, vacant and peaceful possession of the said flat described in Exhibit ‘A’ hereto to Defendants Nos. 3 and/or the plaintiffs.”

7. In the abovementioned suit, the first respondent Bank obtained an ex parte ad interim order dated 1st October, 1992. By the said order, the Court took note of the fact that the petitioner herein is residing in the disputed premises but under doubtful authority and therefore appointed a receiver. The relevant portion of the order reads as follows:-

“Malabar Hill, Bombay, which is under mortgage under indenture dated 27th September 1989. The said indenture says that the mortgagors viz. Defendants Nos. 3 and 4 are residing in the said flat. Again in a writ petition filed by defendants Nos. 3 and 4 on 8th February 1990, there is a mention that defendants Nos. 3 and 4 are residing therein. Through the correspondence the plaintiffs have come to know that the 5th Defendant is occupying the said flat under the leave and licence agreement dated 6th May, 1989. According to plaintiffs this is a sham and bogus document. At the same time writ petition does not mention that defendants Nos. 3 and 4 have not been residing in the suit flat. Prima facie case made out. Ad-interim in terms of prayer (a) except the bracketed portion. Court Receiver is directed to allow the 5th defendant to occupy the flat only if the 5th defendant is ready and willing to occupy the same as the Receiver's agent on usual terms and conditions. Ad-interim relief also in terms of prayer (b) of the Draft Notice of Motion except the bracketed portion.

Court Receiver to act on the ordinary copy of this order certified by the Associate as true copy.

Certified copy expedited.”

8. Pursuant to the said order, the receiver appointed by the Court visited the disputed property on 23rd October, 1992, took formal possession of property in dispute and allowed the petitioner herein to continue in possession of the property after obtaining an undertaking from him in terms of the order of the Court (dt. 1.10.1992).

9. The petitioner further executed an agreement dated 7.1.1997 containing various terms and conditions subject to which he would continue in possession of the property in dispute as an agent of the receiver. The ex parte interim order dated 1.10.1992 appointing the Receiver came to be confirmed by an order dated 13th June, 1997.

10. The recovery of Debts due to Banks and Financial Institutions Act, 1993 hereinafter referred to as the 1993 Act for the sake of convenience, made by the Parliament came into force w.e.f. 24.06.1993. The abovementioned Suit No.3083/1992 was transferred to the Debts Recovery Tribunal, Mumbai (constituted under Section 3 of the said Act) in compliance of

the requirement of law under Section 31 and the same was renumbered as OA No.3585/2000. The petitioner herein filed his written statement before the Debts Recovery Tribunal and questioned the Tribunal's jurisdiction to grant any relief against the petitioner. However, respondents 4 and 5 did not appear and contest the proceedings before the Debts Recovery Tribunal. As a result, the claim of the Bank came to be allowed by an order dated 19.6.2002 declaring that the defendants 1 to 4 (respondents 2 to 5 herein) are jointly and severally liable to pay the amount claimed by the Bank with interest and such payment is secured by a valid mortgage of the property in dispute and further directed the respondents 2 to 5 to make the payment "within a period of three months for avoiding the sale of the mortgaged property". The Tribunal, however, dismissed the abovementioned OA in so far as the petitioner herein is concerned, holding in substance that it lacked jurisdiction to adjudicate the dispute between the petitioner and the respondent-Bank.

11. Aggrieved by the dismissal of the said OA in so far as the petitioner is concerned, the first respondent Bank preferred an appeal No. 76/2002 before the Debt Recovery Appellate Tribunal, Mumbai which was also dismissed by an order dated 5.4.2004. The matter was further carried by the first respondent Bank in Writ Petition No.9337/2004 before the High Court of Bombay which also came to be dismissed by an order dated 14.2.2005 of a Division Bench.

12. Pursuant to the order of the Debts Recovery Tribunal dated 19.6.2002 against respondents 2 to 5 herein, the first respondent Bank initiated proceedings for recovery of the amount specified in the recovery certificate issued under Section 19(22) dated 16.09.2002.

13. Though the petitioner claims to have taken possession of the property in dispute on 23rd February, 1990, within a couple of weeks thereafter, he filed a suit bearing RAD Suit No.1719/1990 on the file of the Small Causes Court, Mumbai against respondents 4 and 5 herein for a declaration that the petitioner is a monthly tenant in respect of the property in dispute and other reliefs. During the pendency of the said suit, he also sought an interim injunction restraining respondents 4 and 5 and their servants, agents etc. from dispossessing him from the disputed property. The Small Cause Court issued an ad interim order dated 9.3.1990 directing both the parties to maintain status quo till 14.3.1990. However, the said RAD Suit No.1719/1990 came to be dismissed on 19.2.1993 for non-prosecution. The petitioner allowed the said dismissal order to become final and 13 years thereafter filed a fresh RAD Suit No.1389/2006 against respondents 4, 5 and also the 1st respondent Bank once again for a declaration that he is a monthly tenant of the disputed property and respondents 4 and 5 herein and their servants, agents and persons claiming through them be restrained from dispossessing the petitioner. In the said suit, the petitioner no doubt disclosed the filing of the earlier suit, i.e. RAD Suit No.1719/1990 and dismissal of the same for default. However, the burden of the song in the fresh plaint is that such a default occurred earlier on an erroneous legal advice by his erstwhile counsel who appeared in the earlier suit. The petitioner herein also filed an application in the RAD Suit No.1389/2006 seeking an interim injunction restraining the defendants from disturbing his possession over the disputed

premises. The said application was dismissed by an order dated 21st August, 2010. Consequent upon the said dismissal, the first respondent Bank filed an application dated 26.8.2010 (in OA No.3583/2000) before the Debts Recovery Tribunal-II, Mumbai seeking a direction to the petitioner herein to deliver physical possession of the disputed premises. In the meanwhile, this Court granted an interim order in favour of the petitioner on 7.9.2010 directing the parties to maintain status quo for a period of six weeks or until further orders whichever is earlier.

14. The property in dispute is brought to sale for the recovery of amount found due by the Debt Recovery Tribunal's order dated 19.6.2002 and consequent recovery certificate. An attachment warrant came to be issued by the Recovery Officer on 4th September, 2005 attaching the property in dispute. The petitioner herein filed objections. The substance of the objection is that the 1st respondent Bank has no right to secure vacant possession of the property in dispute from the petitioner herein. Consequently the respondent Bank cannot sell the property free from all incumbrances. He, therefore, prayed that the fact that an incumbrance by way of tenancy exist on the property in dispute should be notified in the sale proclamation.

15. The first respondent Bank filed its reply. The matter was listed before the Recovery Officer on more than one occasion and finally the application of the petitioner herein was dismissed for default on 20th July, 2007. The petitioner thereafter filed a miscellaneous application before the Recovery Officer praying that the order dated 20.7.2007 be set aside with a further prayer that during the pendency of the said application, the terms of the sale of the property in dispute shall not be finalised. The said application was dismissed by the order of the Recovery Officer dated 9th January, 2008.

16. Aggrieved by the same, the petitioner herein carried the matter in appeal (Appeal No.11/2008). By an interim order dated 14th March, 2008, the Tribunal directed as follows:

“ORDER

A) The Recovery Officer is directed not to evict Appellant from suit property till further order.

B) The Recovery Officer is permitted to sale suit property subject to occupancy rights of the Appellant till further order.”

17. By a final order dated 10th June, 2009, the said appeal came to be dismissed.

18. Aggrieved by the said dismissal, the petitioner herein carried the matter in a further appeal before the Debts Recovery Appellate Tribunal, Mumbai in Appeal No. 186/2009. The said appeal was also dismissed by an order dated 21st July, 2009 which was in turn challenged by the petitioner in a writ petition No. 1747/2009 before the Bombay High Court.

19. By the order under appeal before us dated 30th June, 2010, the Bombay High Court disposed of the writ petition. The operative portion of the order reads as follows:-

“11. Considering the peculiar facts of the case, we direct that the Court of Small Causes should dispose of applications at Exhibit-19 and 21 in R.A.D. Suit No.1389 of 2006 pending before it as expeditiously as possible and within a period of eight weeks from today. Till the application is disposed of, the 1st respondent/bank will not dispossess the petitioner to unable to secure any interim protection in the pending suit, he can be dispossessed in execution of the Recovery certificate by the 1st respondent/bank and the Recovery Officer will be entitled to enforce the certificate and sell the property/flat for recovery of the dues mentioned therein.

12. The petition stands disposed of in the above terms. All concerned to act on the authenticated copy of this order.”

20. Aggrieved by the order dated 13th June, 2010 of the Bombay High Court, the petitioner herein approached this Court by way of the instant special leave petition. On 7.9.2010, this Court passed an interim order which has already been taken note of at para 11. Since the order was limited for a specified period in operation and as there was no further extension of the interim order, the respondent Bank filed an application on 13th December, 2011 before the Debts Recovery Tribunal-II, Mumbai once again seeking a direction to the petitioner herein to deliver the possession of the property in dispute. The said application was allowed by an order of the Debts Recovery Tribunal-II, Mumbai dated 4.1.2012 directing the petitioner to hand over possession of the portion of the dispute property. Thereupon the petitioner moved this Court in I.A. No.3/2011 and this Court by an order dated 6th January, 2012 directed that “till 6th February, 2012, the parties are once again directed to maintain status quo with regard to the flat in question”.

21. It is argued by Mr. Bhaskar P. Gupta, learned senior counsel for the petitioner –

(i) that the petitioner is a tenant of the property in dispute and, therefore, he cannot be evicted except in accordance with the procedure established by law;

(ii) that the petitioner is not either a debtor or a guarantor of any debt due to the 1st respondent Bank and, therefore, the Debts Recovery Tribunal would be without any

jurisdiction (as rightly held by the tribunal) to order the eviction of the petitioner. Consequently, the Recovery Officer cannot evict the petitioner in the purported exercise of the recovery certificate;

(iii) that the petitioner acquired the tenancy rights in the property in dispute at a point of time prior to which the landlord of the petitioner incurred the liabilities due to the bank and the mortgage created by the landlord is much later than the tenancy agreement between the petitioner and his landlord (respondent No.4). Therefore, it cannot be said that the petitioner's tenancy is subject to the rights of the mortgagee (the respondent Bank);

(iv) assuming for the sake of arguments that the petitioner is not a tenant but only a trespasser, as contended by the respondent Bank, even then the petitioner is required to be evicted from the property in dispute by the procedure established by law. The recovery certificate issued by the Debts Recovery Tribunal is not a procedure established by law for evicting 'a trespasser' (petitioner);

(v) that in view of the pendency of his suit RAD No.1389/2006, the petitioner cannot be evicted until the said suit is adjudicated upon.

22. On the other hand, it is argued by learned counsel for the respondent Bank:

(i) that the conduct of the petitioner in allowing his Suit RAD No.1719/1990 to be dismissed for non-prosecution and filing a fresh Suit for the same relief 13 years thereafter while he is comfortably squatting in the property would disentitle the petitioner from raising an objection that until the fresh suit RAD No.1389/2006 is decided, his possession cannot be disturbed;

(ii) the registered mortgage in favour of the respondent Bank for the property in dispute was created on 27.9.1989 whereas the petitioner entered possession of the property, even according to his own assertion, on 23rd February, 1990, i.e. after a lapse of four months after the mortgage is created.

(iii) the alleged Leave and License Agreement itself is a bogus and sham transaction.

(iv) the petitioner's possession is clearly that of a trespasser.

(v) The mortgage in question is in the nature of an English mortgage. In the mortgage deed the respondent No.4 clearly asserted that he was in the possession of the property in dispute.

Therefore, he could not have legally inducted any person into possession of the property in dispute after the execution of the mortgage.

(vi) Lastly, the learned counsel submitted that in view of the language and Scheme of the 2nd Schedule to the Income Tax Act, which are made applicable to the recovery proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, more specifically Rule 40 therein, the Recovery Officer is entitled to evict the petitioner, though the petitioner is not either a debtor to the bank or a guarantor to any debtor to the bank irrespective of the fact whether he is a trespasser or a tenant to the property in dispute.

23. In our opinion, this is a typical case of the abuse of the process of the legal system by unscrupulous litigants. The petitioner claims to be a tenant in the property in dispute. No doubt, the petitioner is in possession of the property in dispute. However, the nature of his right to be in possession, the mode of his acquiring the possession and the legal character of his possession are yet to be ascertained.. The only certain fact is that the petitioner has been in possession of the property in dispute as on the date of the filing of the original suit No.3038 of 1992 in the High Court of Bombay by the first respondent Bank. Of course, the petitioner asserts that he was inducted into possession of the property in dispute on 23rd February, 1990 by one Yogesh M. Kamani and Madhubai A. Gandhi, allegedly the brothers-in-law of the fourth respondent. No forum so far examined the accuracy of such an assertion, both regarding the date, the alleged delivery of possession and also regarding the alleged relationship of the persons who are said to have given possession to the petitioner.

24. On the other hand, the case of the petitioner regarding the legal character of the possession of the property in dispute itself is not consistent. The agreement dated 6th May, 1989 alleged to have been executed by respondents 4 and 5 in favour of the petitioner (whose authenticity is yet to be established) the document is styled as an Agreement of “Leave and Licence”. It purports to grant a “licence” in favour of the petitioner of the property in dispute to use and occupy the same on a “monthly compensation” of Rs.2000/- and for a period not exceeding “11 months commencing from 15th day of August, 1989” with a further specific stipulation which reads (in the copy filed before this Court) as follows:

“... this writing shall only be construed as a tenancy agreement or lease nor otherwise creating any other right or interest in the said premises in favour of the Licencee. It is not at all the intention of the parties hereto who on the contrary merely a leave and Licence Agreement and/or arrangement so as to allow the licensee for the purpose of residential accommodation.”

The above extract, as it is, does not convey any meaning to us. Whether the extract is an accurate copy of the original document or not is doubtful. On the other hand, reading the

document as a whole gives an impression that the parties did not intend the document to be creating any tenancy or a lease. However, right from the plaint in RAD Suit No.1719/1990, the petitioner started describing himself as a tenant of the property. But the case of the Bank has been consistent from the beginning that the petitioner is a trespasser. Ultimately, these are all questions to be determined on an examination of all the material by an appropriate forum in an appropriate proceeding. Whether a person in possession of immovable property is a tenant or a licensee or a trespasser, he cannot be evicted except in accordance with the procedure established by law.

25. Adjudication of Civil disputes and enforcement of the rights of the parties to the dispute in terms of the adjudication are matters provided for under the Code of Civil Procedure— procedure established by law. The person entitled in law to the possession of any immovable property, which is in the occupation of some other persons whether a tenant, licensee or trespasser can evict such tenant, licensee or trespasser by obtaining a decree for eviction from a competent civil court.

26. Attachment and sale of immovable properties of a person, who is adjudged to be owing some amount to another person is one of the modes of securing the repayment of such judgment debt. (see Section 51 Order 21 of Civil Procedure Code). When an immovable property of the judgment debtor is brought to sale in order to recover the amounts adjudicated to be due, the possibility of such a property being in the possession of a third party either pursuant to some legal right or otherwise is recognised by law. Law also recognises the possibility of such a third party objecting to or resisting his dispossession in the process of delivering the possession of the property to the purchaser in the execution proceedings. When such resistance is offered, law also contemplates an examination whether the resistance is justified or not. Depending upon the conclusion arrived at such an examination, the third party's possession is either protected or he is evicted. Elaborate provisions have been made in this regard under Order 21 of Code of Civil Procedure. However, the legislature can create special/alternative procedure for the eviction of either a judgment debtor or a third party such as the one discussed above from immovable property.

27. The first respondent Bank initially chose to seek a decree of eviction against the petitioner on the ground that he is a trespasser in the property in dispute by filing OS No.3038/1992 apart from seeking various other reliefs against respondents 4 and 5 in the said suit. However, such a suit came to be transferred in its entirety by an act of the Bombay High Court relying upon Section 31 of the Act 51 of 1993 to the tribunal constituted under the abovementioned Act while allowing the claim of the respondent Bank for recovery of the amount due from respondents 4 and 5, the tribunal reached the conclusion that the suit, insofar as the petitioner herein is concerned, is not amenable to the jurisdiction of the tribunal. In which case, in the normal course, that part of the suit insofar as it pertains to the relief against the petitioner shall be deemed to be pending before the Bombay High Court. Unfortunately, this legal position was not examined either by the counsel appearing for the Bank nor the tribunal or for that matter even the Bombay High Court before transferring the abovementioned suit. The

result is that the exact legal status of the petitioner vis-à-vis the property in dispute is not examined by any court so far. All submissions made before us seek an examination of the issue. We are of the opinion such an examination is not permissible in this Court for the first time in exercise of the jurisdiction under Article 136 of the Constitution of India. It requires the establishment of basic facts which requires the framing of evidence.

28. Be that as it may. The fact situation as on today is that the findings of the tribunal established under the abovementioned Act is that the respondent Bank is entitled to recover the amounts claimed by it in the abovementioned suit (which came to be renumbered as OA No. 3583/2000 or transfer from the High Court to the tribunal). The operative portion of the tribunal's order in so far as it is relevant for this purpose reads as follows:

“A. The application is allowed with costs against Defendant no.1 to 4 and is rejected with costs against Defendant No.5.

A) The Defendant No.1 to 4 do jointly and severally pay to the applicant an amount of Rs. 33,62,694.76 (Rs. Thirty Three Lacs Sixty Two Thousand Six Hundred Ninety Four and paise Seventy Six only) with interest @ 18% p.a. with quarterly rest on Rs. 33,09,797.59 paise (Rs. Thirty Three Lacs Nine Thousand Seven Hundred Ninety Seven and Paise Fifty Nine only) from the date of filing original application till full realisation.

B) It is declared that the above outstandings are secured by validly and legally created mortgage of flat No.14 aadmg.683 sq.ft. on IIIrd floor of building known as Amar Jyoti CS No. 255 of Malabar Hill, Mumbai-6. The mortgagor may pay the outstanding amount within three months for avoiding the sell of the mortgaged property.

C) xxxx xxxx xxxx xxxx

D) Issue recovery certificate as per above terms and serve copies of judgment on the parties.”

29. Once such a determination is made, the Presiding Officer of the tribunal is required to issue a certificate under Section 19(22) [Sec.19(22) The Presiding Officer shall issue a certificate under his signature on the basis of the order of the Tribunal to the Recovery Officer for recovery of the amount of debt specified in the certificate.] for the recovery of the amount of debt specified in the said certificate addressed to the Recovery Officer [2. Sec.2(k) - "Recovery Officer" means a Recovery Officer appointed by the Central Government for each Tribunal under sub-section (1) of section 7]. Such a certificate, as we have already taken note of, came to be issued. Thereafter the amounts due are required to be recovered by

following an appropriate procedure established by law. The question is what is that procedure established by law.

30. Section 25 of the Act 51 of 1993 prescribes various modes of recovery of the amounts indicated in the certificate. One of them is attachment and sale of immovable property of the judgment debtor.

“S.25. The Recovery Officer shall, on receipt of the copy of the certificate under sub-section (7) of section 19, proceed to recover the amount of debt specified in the certificate by one or more of the following modes, namely:-

(a) attachment and sale of the ***immovable property of the defendant:”

Section 29 of the Act 51 of 1993 declares that the provisions of the Second and Third Schedule of Income Tax Act, 1961 apply with necessary modifications for the recovery of the amounts due under the Act 51 of 1993.

1 “29 Application of certain provisions of Income-tax Act

The provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962 , as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income-tax:

Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act.”

31. The Second Schedule of the Income Tax Act read with the Income Tax Certificate Proceedings Rules, 1962, for short ‘the 1962 Rules’, prescribe the procedure for recovery of the amounts due pursuant to a certificate issued under Section 222 of the Income Tax Act. Part III of the Second Schedule prescribes the procedure for the attachment and sale of immovable property. Rule 92 thereof enables the making of the Rules. In the purported exercise of the powers granted thereunder, the Income Tax Certificate Proceedings Rules, 1962 were made.

32. Rules 39 [39. Delivery of immovable property in occupancy of defaulter:-

(1) Where the immovable property sold is in the occupancy of the defaulter or of some person on his behalf or of some person claiming under a title created by the defaulter subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 65 of the principal rules, the Tax Recovery Officer shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom the purchaser may appoint to receive delivery on his behalf in possession of the property, and if need be, by removing any person who refuses to vacate the same.

(2) For the purposes of sub-rule (1), if the person in possession does not afford free access, the Tax Recovery Officer may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the purchaser, or any person whom the purchaser may appoint to receive delivery on his behalf, in possession.] and 40 [40. Delivery of immovable property in occupancy of tenant:- Where the immovable property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 65 of the principal rules, the Tax Recovery Officer shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the defaulter has been transferred to the purchaser.] of the 1962 Rules recognise that the property which is brought to sale towards the recovery of the amounts due under the certificate could be in the occupation of either the defaulter or persons other than the defaulter either claiming through the defaulter or independently. Rule 40 more specifically deals with the property brought to sale being in the occupation of “a tenant or other person entitled to occupy”.

33. Rule 41 [41. Resistance or obstruction to possession of immovable property:-

(1) Where the purchaser of immovable property sold in execution of a certificate is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Tax Recovery Officer complaining of such resistance or obstruction within thirty days of the date of such resistance or obstruction.

(2) The Tax Recovery Officer shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.] deals with resistance to the delivery of possession of the property in execution of the recovery certificate. It stipulates that the purchaser is entitled to make an application to the Tax Recovery Officer complaining of resistance. Thereupon the Recovery Officer is obliged to investigate the matter and adjudicate whether the resistance was justified or not.

34. Both Rule 39 and Rule 42 stipulate that where the Recovery Officer is satisfied that the resistance is not justified he shall take necessary steps for putting the purchaser in possession of the property. On the other hand, under Rule 43 [43. Resistance or obstruction by bona fide claimant:-

"Where the Tax Recovery Officer is satisfied that the resistance or obstruction was occasioned by any person (other than the defaulter) claiming in good faith to be in possession of the property on his own account or on account of some person other than the defaulter, the Tax Recovery Officer shall make an order dismissing the application.], if the Recovery Officer comes to the conclusion that the resistance is justified, the application of the purchaser is required to be dismissed."

35. Rule 47 [47. Right to file a suit:-

Any party not being a defaulter against whom an order is made under rule 42 or rule 43 or rule 45 may institute a suit in a civil court to establish the right which he claims to the present possession of the property.] stipulates that any person other than the defaulter against whom an order under Rule 42 is passed is entitled to file a civil suit to establish his right for possession of the property.

36. The scheme of the above provisions clearly establishes an alternative procedure for the eviction of a person (3rd party to the proceedings) in occupation of a property which is brought to sale pursuant to a Recovery certificate issued under the 1993 Act. We have already taken note that there is a possibility of a person other than the judgment debtor being in possession of the property of the judgment debtor is recognised even under Order 21 of the Civil Procedure Code and under Rule 98. It provides for the eviction of such persons in an appropriate case where it is found that the person in possession is not legally entitled for the same [O.XXI R.98. Orders after adjudication --

(1) Upon the determination of the questions referred to in rule 101, the court shall, in accordance with such determination and subject to the provisions of sub-rule (2),--

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit,

(2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into

possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.].

The Rules under the Income Tax Act which are adopted for the purpose of the Recovery of debts due to the financial institution and Banks under the 1993 Act also provide a similar authority of law. The law further provides under Rule 47 that any person so evicted is entitled to file a separate suit to establish his legal claim. Obviously, such a right is acknowledged in recognition of the fact that an enquiry of the claim of the third party under the Rules is summary in nature by a Quasi Judicial Forum and therefore, an examination of the issue by a Judicial Forum would adequately protect the interests of such third party or the purchaser, as the case may be.

37. Coming to the facts of the case on hand, it is in pursuance of the above mentioned procedure established by law the property of the judgment debtors (respondents 4 & 5) is sought to be sold. The petitioner insists that such a sale should be subject to his rights of the alleged tenancy. The petitioner herein is not resisting the delivery of possession but hindering the process of the sale itself. His application before the Recovery Officer praying that the proclamation of sale should indicate that the sale of the property in dispute would be subject to the tenancy rights of the petitioner, in our view is ill-conceived. The rules no doubt enable the petitioner to object to his dispossession on whatever grounds he believes are available to him. The recovery officer is obliged to examine the tenability of such objections and take an appropriate decision. If such a decision is adverse to the interests of the petitioner, the petitioner is entitled to file a suit and seek an adjudication of his right to protect his interest. Whether the petitioner is a tenant of a trespasser is a matter to be decided in such a suit. The petitioner had already approached the Bombay High Court by filing RAD Suit No. 1389 of 2006, wherein one of the prayers is for a declaration that the petitioner herein is a monthly tenant of respondents 4 and 5 herein of the property in dispute.

38. The issue whether the petitioner is a tenant or a trespasser is to be examined in the said suit. As of today, his assertion that he is a tenant is refuted by the statutory authority. Admittedly, the Interlocutory Application filed by the petitioner in RAD Suit No. 1389 of 2006 seeking interim protection of his possession of the property in dispute was dismissed. The objections of the petitioner were considered and refuted by the Recovery Officer and the tribunal in exercise of the statutory powers and confirmed by the High Court. Even if such a conclusion is an erroneous conclusion, the same can be corrected in the suit No. 1319/1990 subject, of course, to the maintainability of the suit on any one of the grounds available to the respondent bank.

39. For the above-mentioned reasons, interference in exercise of the jurisdiction under Article 136 with the judgment under appeal and protecting the petitioner's possession in the property in dispute would only delay the sale of the property in dispute thereby effectively postponing the recovery of the amounts due to the respondent-bank indefinitely. The first respondent-bank is a Nationalised Bank dealing with the moneys of the general public.

40. On the other hand, the petitioner is not absolutely remediless even if he loses the possession of the property in dispute pursuant to the recovery proceedings initiated by the respondent-bank. The petitioner can always seek restitution of the possession of the property in dispute in the event of his success in RAD Suit No. 1389 of 2006.

41. We, therefore, see no reason to interfere in the judgment under appeal. The special leave petition is dismissed. The respondents are at liberty to proceed with the sale of the property in dispute and handover the possession of the property to the purchaser after evicting the petitioner herein.

42. We make it clear that the petitioner can seek restitution in the event of his success in RAD Suit No. 1389/2006.

ALTAMAS KABIR, J.

1. I have had the privilege of going through the judgment prepared by my learned brother Chelameswar, J., and I entirely agree with the reasoning and the conclusion arrived at therein. However, in my view, two aspects of the matter relating to the second suit filed by the petitioner herein need to be highlighted.

2. There is no denying the fact that the status of the petitioner in regard to the suit premises is yet to be decided, but, as has been indicated by my learned brother, the petitioner cannot take advantage of the fact that he has been in possession of the same, without his status being determined. The petitioner had filed a suit, inter alia, for declaration of his status as a monthly tenant in respect of the suit property, being R.A. No.1719 of 1990, in the Small Causes Court, Mumbai, against the Respondent Nos. 4 and 5 herein. He also obtained an interim order on 9th March, 1990, directing the parties to maintain status-quo till 14th March, 1990. The said suit came to be dismissed on 19th February, 1993, for non-prosecution. The petitioner allowed the said dismissal to become final and 13 years later filed a fresh suit, being RAD Suit No.1389/2006, against the Respondent Nos. 4 and 5 and the respondent Bank, for the same declaration that he was a monthly tenant of the disputed property. As indicated by my learned brother, in the plaint of the second suit, the petitioner had disclosed the fact regarding the filing of the earlier suit and the dismissal thereof on ground of default. Prima facie, the

second suit is barred under Order XXIII Rule 1 Sub-rule(4) of the Code of Civil Procedure, which, inter alia, provides as follows:

"(4) Where the plaintiff-

a) abandons any suit or part of claim under sub-rule (1), or b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject- matter or such part of the claim."

3. The said question will no doubt be considered when the second suit is taken up for hearing, but the same, in my view, has a definite bearing on the grant of an interim order, as prayed for by the petitioner.

4. In addition to the above, it has also to be noted that on account of the failure of the Respondent Nos. 4 and 5 to pay the dues of the Bank, the Bank brought a suit for recovery of the said amount, along with interest, being Suit No.3083 of 1992, in the Bombay High Court, against the Respondent Nos. 2 to 5 and prayed for an order to be passed for the property in dispute to be sold and for the sale proceeds to be applied to the satisfaction of the claim of the Bank.

5. Furthermore, in the said suit, the Bank also sought a declaration against the petitioner herein, as the fifth defendant in the suit, that he was a trespasser in the suit premises without any right, title or interest and also prayed for a decree for his eviction therefrom. Unfortunately, with the enactment of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the suit filed by the Bank came to be transferred to the Debt Recovery Tribunal, Bombay, in terms of Section 31 of the new Act and the same was numbered as OA No.358 of 2000. The Court and the parties appear to have overlooked the fact that in the suit relief had also been prayed for against the petitioner for declaring him as a trespasser in the suit property and for his eviction therefrom, which relief the Debts Recovery Tribunal was not competent to give.

6. On account of such a lapse on the part of all concerned, the relief sought by the Bank against the petitioner for declaration of his status vis-à-vis the suit property and his eviction therefrom, remained undecided. The petitioner, who abandoned his suit for declaration that he was a tenant of the suit premises, cannot at this stage of the proceedings, be allowed to take advantage of such lapse, in view of the provisions of Sub-rule (4) of Order XXIII Rule 1 CPC, and I fully agree with my learned brother that no interference is called for with the judgment under scrutiny.

7. The Special Leave Petition is accordingly dismissed, with the directions given by my learned brother.