

# Ashok Kumar Jaiswal vs State Of U.P. And 2 Others on 11 August, 2023

**Bench: Pritinker Diwaker, Ashutosh Srivastava**

HIGH COURT OF JUDICATURE AT ALLAHABAD

?Neutral Citation No. - 2023:AHC:163475-DB

Chief Justice's Court

Case :- WRIT - C No. - 26959 of 2023

Petitioner :- Ashok Kumar Jaiswal

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Vineet Kumar Sahu

Counsel for Respondent :- C.S.C.,Ashish Agrawal

Hon'ble Pritinker Diwaker,Chief Justice

Hon'ble Ashutosh Srivastava,J.

1. Heard Shri Vineet Kumar Sahu, learned counsel for the petitioner, Shri Sandeep Arora, learned counsel for respondent No. 3-Union Bank of India and learned Standing Counsel for State-respondent Nos. 1 & 2.

2. The writ petitioner claims to be a tenant of shop situate at 253A, Attarsuiya, Nagar Nigam, Food Safety Zone-05, Allahabad. The shop is part and parcel of the premises No. 334/253A Attarsuiya in front of Attarsuiya Police Station, Pargana and Tehsil Sadar, Prayagraj owned by one Vishal Kumar Singh son of late Shri Lalji Singh. The petitioner has approached this Court with a relief for quashing the order dated 20.2.2023 passed by the respondent No. 2 in proceedings under Section 14 of SARFAESI Act, 2002 and further praying that he may not be dispossessed from the shop in

question under the order dated 20.2.2023.

3. It is the case of the petitioner that he is a valid tenant of the shop and there is a regular suit, being Misc. Suit No. 574 of 2019 pending adjudication before the Civil Court between him and his landlord Vishal Kumar Singh. The petitioner is depositing the rent of the premises regularly. The impugned order is completely *exparte* and is not binding upon the petitioner yet the respondents are compelling the petitioner to vacate the shop from which the petitioner earns his livelihood.

4. Shri Sandeep Arora, learned counsel appearing for respondent No. 3 submits that the landlord of the petitioner, namely, Vishal Kumar Singh was advanced financial assistance by the Bank to run his proprietorship concern M/s A to Z Builder & Suppliers. The House No. 334/253A Attarsuiya including the shop under the tenancy of the petitioner had been mortgaged to secure the financial assistance. The landlord of the petitioner defaulted in repayment of the loan and consequently, the Bank has moved the District Magistrate to take possession of the mortgaged property under Section 14 of SARFAESI Act, 2002. The impugned order dated 20.2.2023 has been passed by the respondent No. 2. Shri Arora further submits that the landlord of the petitioner has already approached the Debt Recovery Tribunal under Section 17 of the SARFAESI Act, 2002 assailing the order dated 20.2.2023 and no indulgence has been granted by the Debt Recovery Tribunal. The petitioner has been set up to resist the proceedings of taking over possession by the Bank. It is contended that the petitioner being the tenant cannot resist the taking over possession of the property mortgaged which right the Bank enjoys under law owing to the default committed by the landlord of the petitioner borrower, particularly in view of the fact that the petitioner has shown his tenancy from 26.6.2020 when his shop has been registered under the Food Safety and Standards Act, 2006 after the financial assistance was availed by the landlord of the petitioner. Moreover, the petitioner has not established his tenancy rights over the shop in question which is part and parcel of the secured asset through any registered instrument and is relying simply on certain deposits made towards rent through Bank. Reliance is placed upon the decision of the Apex Court in the case of Hemraj Ratnakar Salian versus HDFC Bank Ltd. and others, reported in AIR 2021 SC 3880.

5. We have heard the learned counsel for the parties and have also perused the record as also the decision of the Apex Court cited at the Bar. The Apex Court in the decision cited was dealing with orders passed by the Chief Metropolitan Magistrate, Esplanade Mumbai rejecting the application filed by tenant restraining the HDFC Bank from taking possession of the property in his possession. The Apex Court taking note of a decision of the Trial Judge Bench in the case of Bajrang Shyamsunder Agarwal versus Central Bank of India and another, reported in 2019 (9) SCC 94 after considering almost all decisions in relation to the right of a tenant in possession of a secured asset held that if a valid tenancy under law is in existence even prior to the creation of the mortgage such tenant's possession cannot be disturbed by the secured creditor by taking possession of the property. If a tenancy under law comes into existence after the creation of a mortgage but prior to issuance of a notice under Section 13 (2) of the SARFAESI Act, it has to satisfy the conditions of Section 65-A of the Transfer of Property Act, 1882. If a tenant claims that he is entitled to possession of a secured asset for a term exceeding one year, it has to be supported by the execution of a registered instrument. If the tenant only relies upon an unregistered instrument or on oral agreement accompanied by delivery of possession, the tenant is not entitled to possession of the secured asset

for more than the period prescribed under the provisions of the Transfer of Property Act.

6. In the case at hand, in our opinion, there is serious doubt as to the bona fide of the petitioner to be a lawful tenant of the shop which is part and parcel of the secured asset. The petitioner has not brought on record any registered tenancy agreement executed in his favour. The rent deposits brought on record only demonstrate rent being deposited in Misc. Case No. 574 of 2019 from October, 2019 upto August, 2023 @ Rs.550/- per month. The documents brought on record by the petitioner to establish his tenancy over the secured asset does not inspire confidence. Moreover, it is not the case that the secured asset comprised of shops at the time of creation of the charge, which the counsel for the respondent-Bank has informed was 6.9.2016. In such circumstances, the tenancy if at all exists was created subsequent to the mortgage.

7. Learned counsel for the respondent-Bank has also drawn our attention to the provisions of Section 17 (4A) of the Act, 2002, which provides a forum to tenants to establish one's tenancy or lease hold rights upon the secured asset before the Debt Recovery Tribunal which has been empowered to examine the facts and evidence produced in relation to such claim and pass such orders, it deems fit in accordance with the provisions of the Act. The Section 17 (4A) of the Act, 2002 is being reproduced hereunder:-

"17 (4A) Where ?

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purpose of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy, ?

(a) has expired or stood determined; or

(b) is contrary to Section 65A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-Section (2) of Section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act."

8. In view of the above, we are not inclined to entertain the writ petition for the reliefs prayed for. The writ petition being devoid of merits, is dismissed leaving it open for the petitioner to invoke the

remedy available to him under the law.

Order Date :- 11.8.2023 Ravi Prakash (Ashutosh Srivastava, J.) (Pritinker Diwaker, CJ)