

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 20TH DAY OF JULY 2015/29TH ASHADHA, 1937

WA.No. 1466 of 2015 () IN WP(C).19221/2015

AGAINST THE ORDER/JUDGMENT IN WP(C) 19221/2015 of HIGH COURT OF
KERALA DATED 29-06-2015

APPELLANT(S) :

M/S.THREE LINE PROPERTIES
REPRESENTED BY ITS MANAGING PARTNER
A.A. AHAMMED KOYA, DOOR NO.7/813, OMASERY PANCHAYATH
KOZHAIKODE-673 572.

BY ADV. SRI.P.B.KRISHNAN

RESPONDENT(S) :

1. V.K.SREERAM MADHAVAN AGED 44 YEARS
6/875 J, YMCA INTERNATIONAL CULTURAL COMPLEX
YMCA CROSS ROAD, CALICUT-1.

2. V.K.MANORAM MADHAVAN
6/875H, YMCA INTERNATIONAL CULTURAL COMPLEX
YMCA CROSS ROAD, CALICUT-1.

3. P.M.KELUKUTTY
6/875 G, YMCA INTERNATIONAL CULTURAL COMPLEX
YMCA CROSS ROAD, CALICUT-1.

4. P.M.KELUKUTTY & BROTHERS
YMCA INTERNATIONAL CULTURAL COMPLEX, YMCA CROSS ROAD
CALICUT-1.

5. ABOOBACKER HAJI E.P.
6/875 A1, B, C
D & E, YMCA INTERNATIONAL CULTURAL COMPLEX
YMCA CROSS ROAD, CALICUT-1.

6. SHAHINA P.
6/875 A1, B & C, YMCA INTERNATIONAL CULTURAL COMPLEX
YMCA CROSS ROAD, CALICUT-1.

7. ABDULLA N.P.
6/875 A1, B, C
D & E, YMCA INTERNATIONAL CULTURAL COMPLEX
YMCA CROSS ROAD, CALICUT-1.V.K.ABDULLA HAJI
REPRESENTED BY HIS POWER OF ATTORNEY HOLDER

WA.No. 1466 of 2015

8. V.K.MUHAMMED ALI
6/875 C, YMCA INTERNATIONAL CULTURAL COMPLEX
YMCA CROSS ROAD, CALICUT-1.

9. V.K.MUHAMMED ALI
6/875 A1 & B, YMCA INTERNATIONAL CULTURAL COMPLEX
YMCA CROSS ROAD, CALICUT-1.

10. AMMED HAJI .P.
REPRESENTED BY HIS POWER OF ATTORNEY HOLDER
V.K.MUHAMMED ALI 6/875 D & E
YMCA INTERNATIONAL CULTURAL COMPLEX, YMCA CROSS ROAD
CALICUT-1.

11. RASHID V.K.
6/875 D E, YMCA INTERNATIONAL CULTURAL COMPLEX
YMCA CROSS ROAD, CALICUT-1.

12. GOPALAKRISHNAN @ UNNI
6/875 F, YMCA INTERNATIONAL CULTURAL COMPLEX
YMCA CROSS ROAD, CALICUT-1.

13. YOUNG MEN'S CHRISTIAN ASSOCIATION
REPRESENTED BY ITS SECRETARY, YMCA CROSS ROAD, CALICUT
KALATHIKUNNU AMSOM, DESOM, KZHIKODE.

14. UNITED BANK OF INDIA
KOZHIKODE BRANCH, C/940, SAIKEN CHAMBERS
KANNUR ROAD, KOZHIKODE-673 001
IN KASABA VILLAGE AND KALATHINKUNNU DESAM OF KOZHIKODE TALUK
REPRESENTED BY ITS AUTHORIZED OFFICER AND
CHIEF MANAGER (RECOVERY) SRI.V.P.ARUNIGIRI
S/O.PADMANABHAN, UNITED BANK OF INDIA
SOUTH REGIONAL OFFICER, MADAVELI, CHENNAI
TAMILNDU-600028.

15. AHAMMED KOYA
S/O.K.P.KHADER, AVATHODTTIL HOUSE, PATHIMANGALAM
KUNNAMANGALAM, KOZHIKODE.

16. NATIONAL COUNCIL OF YMCAS OF INDIA
BHARATH YUVAK BHAVAN, JAI SINGH ROAD, POST BOX NO.14
NEW DELHI-110 001.
REPRESENTED BY ITS NATIONAL GENERAL SECRETARY.

BY SRI.M.MOHAMED NAVAZ
R1 TO R12 BY SRI.A.SUDHI VASUDEVAN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 20-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

'C.R'

**ASHOK BHUSHAN, CJ
&
A.M.SHAFFIQUE, J**

W.A.No. 1466 of 2015

Dated this the 20th July, 2015

JUDGMENT

Ashok Bhushan, CJ.

This Writ Appeal has been filed against the judgment dated 29.6.2015 in W.P(C).No.19221 of 2015 filed by respondents 1 to 12. Appellant is the fourth respondent in the Writ Petition. The appellant shall hereinafter be referred to as 'the fourth respondent', whereas respondents 1 to 12 shall be referred to as 'the petitioners' and other respondents shall be referred to as described in the Writ Petition. Brief facts giving rise to the Writ Petition are:

2. The first respondent owns 93.44 cents of land consisting four storied commercial building and two storied shopping complex in the city of Calicut. The first respondent obtained a loan of ₹4 Crore from the United

Bank of India, the second respondent after mortgaging the aforesaid property in favour of the Bank. An agreement dated 27.12.2004 was entered into between respondents 1 and 2. The petitioners claim to be tenants of the property in question. The first petitioner claims that the first respondent has leased out a portion of the premises by registered lease dated 16.6.2004 for 99 years, whereas the second petitioner claims registered lease for 99 years on 22.5.2004. The first petitioner made a security deposit of ₹5 Lakhs, whereas the second petitioner made security deposit of ₹3 Lakhs. Petitioners 3 to 11 also claim registered leases for 99/51 years in the year 2005-2006. The first respondent defaulted in payment of the loan amount. Consequently, the Bank initiated proceedings under the Securitisation and Reconstruction of Financial Asset and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act, 2002'). The Bank invoked power under Section 13(4) of the SARFAESI Act, 2002. A sale notice dated 2.7.2009 was issued by the

Bank for sale of the mortgaged assets on “as is where is basis”. The sale notice mentioned an outstanding amount of ₹3,99,47,157/-. Private sale dated 3.12.2009 was made by the Bank in favour of the third respondent. There has been various litigations at the instance of the auction purchaser/Bank and the first respondent in context of sale, which does not require to be mentioned for the purposes of the present case.

3. The petitioners claiming to be lease holders filed S.A.No.18 of 2010 before the Debt Recovery Tribunal under Section 17 of the SARFAESI Act, 2002 challenging the sale as well as claiming relief of subrogation and redemption of mortgage. Certain other reliefs were also claimed in the Application. The Debt Recovery Tribunal by its order dated 29.10.2012 rejected the application. The Tribunal held that the applicants are not at all the aggrieved persons as of now and they have no locus standi to seek any remedy from the Tribunal at this juncture. The contention of the appellants regarding the

right of redemption of mortgage and subrogation were held not sustainable. The recourse taken by the Bank under Section 13(4) SARFAESI Act, 2002 was held to be in accordance with law. The second respondent filed an application on 11.9.2013 before the Chief Judicial Magistrate, Kozhikode under Section 14 of the SARFAESI Act, 2002 praying for an order for taking physical possession of the mortgaged assets. On 4.10.2013 the Chief Judicial Magistrate passed an order appointing an Advocate Commissioner to take possession. The applicants were not impleaded in the application. The applicants, after the order dated 4.10.2013, filed an application being CMP.No.2155 of 2013 dated 11.10.2013 praying recall of the order dated 4.10.2013. The Chief Judicial Magistrate by order dated 2.6.2015 rejected the application of the petitioners observing that the petitioners did not produce any legally recognisable lease deed or document whereby any right or interest is created in their favour in respect of any portion of the secured

asset, to convince the court, prima faice, that they are tenants. Challenging the order passed by the Chief Judicial Magistrate dated 2.6.2015 the petitioners filed W.P(C). No.19221 of 2015 praying for the following reliefs:

- “1. To call for the entire records relating to Exhibit P.20.*
- 2. Issue a writ of certiorari or other writ setting aside Exhibits P21, P22 and Exhibit P23.*
- 3. Issue a writ of prohibition or other writ interdicting the 2nd respondent any one claiming under them from interfering with the tenancy rights of the petitioners and enjoyment of the properties leased out to the petitioners.”*

4. Exhibit P20 was the application filed by the Bank being CMP.No.2087 of 2013, Exhibit P21 was the order passed by the Chief Judicial Magistrate dated 4.10.2013 and Exhibit P22 was the order dated 2.6.2015 passed by the Chief Judicial Magistrate. The learned Single Judge heard the learned counsel for the parties and disposed of the Writ Petition by issuing the following directions in paragraph 8:

“8. The petitioners shall produce all the documents relied by them before the Chief Judicial Magistrate on 14.07.2015. Thereafter, the Magistrate shall pass appropriate orders after verifying the records produced by the petitioners and after hearing the counsel for the petitioners as well as purchaser within a further period of four weeks. If the petitioner wants to raise written objection, the same shall also be placed before the Chief Judicial Magistrate on 14.07.2015 itself.”

The fourth respondent, aggrieved by the judgment of the learned Single Judge, has come up in this Appeal.

5. Sri.P.B.Krishnan, learned counsel for the appellant contended that the Chief Judicial Magistrate did not commit any error in rejecting the application filed by the petitioners, since they failed to produce any relevant documents to prove that they are lessees of the premises. It is submitted that the purchaser had paid an amount of ₹9 Crores in 2009 and he has not been allowed to get possession. It is submitted that the Chief Judicial Magistrate, after passing order dated 4.10.2013, had

stayed implementation of the order on account of the application filed by the petitioners and there was sufficient time for the petitioners to file all relevant documents and they having not filed the relevant documents, the order of the Chief Judicial Magistrate is perfectly justified. It is submitted that except for petitioners 1 and 2, who were granted lease by the first respondent before the date of mortgage, leases of the other petitioners are subsequent to the mortgage and they are not entitled for any protection of their possession. Sri.Krishnan further submits that S.A.No.18 of 2010 filed by the petitioners was dismissed by the Debt Recovery Tribunal holding that they have no right to resist the taking of possession by the auction purchaser.

6. Sri.A.Sudhi Vasudevan, learned counsel for the writ petitioners, refuting the submissions of learned counsel for the appellant, contends that the petitioners were not impleaded in the application filed by the Bank under Section 14 of the SARFAESI Act, 2002, nor any details of

their leases were mentioned in the application. He submits that in view of the law laid down by the Apex Court in ***Harshad Govardhan Sondagar v. International Assets Reconstruction Company Ltd.*** (2014(3) KLT 357(SC)), it was obligatory for the Bank to give details of all tenants in their affidavit along with the nature of tenancy and without giving details of the leases held by the petitioners, the application could not have been allowed. It is submitted that after the petitioners came to know about the order dated 4.10.2013, the petitioners themselves filed an application for intervention in the proceedings, which remained pending and was ultimately rejected by the Chief Judicial Magistrate. It is submitted that the Chief Judicial Magistrate committed error in rejecting the application of the petitioners without giving proper opportunity to file documents in support of their claim, especially when the Bank in its application has not given any details of various leases in favour of the petitioners. It is submitted that although the Debt

Recovery Tribunal rejected S.A.No.18 of 2010, the findings were recorded in favour of the petitioners in the said judgment that they are in possession of the premises the sale being "as is where is basis". It is submitted that the Tribunal rejected the S.A on the ground that the petitioners are not the aggrieved persons as on that date when the Bank has invoked power under Section 13(4) of the SARFAESI Act, 2002. It is submitted that the registered leases, which were issued in favour of respondents 3 to 12, were also fully protected under Section 65A of the Transfer of Property Act. On the basis of proceedings under the SARFAESI Act, 2002, the Bank cannot evict the petitioners, who are in possession of the premises on the basis of valid leases. It is submitted that in fact in the repayment schedule of the agreement entered into between the Bank and the first respondent dated 27.12.2004, it was contemplated that ₹150 Lakhs shall be repaid after receipt of the advance from prospective tenants within six months. It is submitted that

the learned Single Judge did not commit any error in directing the Chief Judicial Magistrate to give an opportunity to the petitioners and pass fresh orders.

7. We have considered the submissions of learned counsel for the parties and perused the records.

8. Before we proceed to consider the respective submissions of learned counsel for the parties, it is relevant to note certain observations made by the Debt Recovery Tribunal in its order dated 29.10.2012 while rejecting S.A.No.18 of 2010. It is useful to quote paragraphs 38.2, 49.1 and 49.2 of the order of the Tribunal, which read as under:

"38.2. That, the secured creditor had taken only symbolic possession and they did not take any measure under S.14 of the Act to take actual physical possession. Moreover, the property has also been sold on 'as is where is' basis (refer Annexure A1 sale notice dated 02.07.2009). That, as per settled legal position Securitization Act does not confer any rights of the secured creditor to trench upon the rights of the tenant inducted by the borrower/owner before security interest is created

and that the Securitization Act does not contemplate extinguishment of the vested rights of third parties. That, as per the Lease Deeds also the subsequent transferee is bound by the terms of the lease. Therefore as of now there is no cause of action to maintain this SA and the applicants cannot be said to be aggrieved at this stage of the measure initiated by the secured creditor.

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49.1. In the result, SA.No.18/2010 is hereby dismissed holding that the contentions of the applicants regarding their right of redemption of mortgage and subrogation are not legally sustainable and maintainable before this Tribunal.

49.2. The Tribunal also, after examining the facts and circumstances of the case and the evidence produced by the parties comes to the conclusion and declares that the recourse taken by the defendants 1 & 2, under sub-section (4) of S.1 is in accordance with the provisions of the SARFAESI Act, 2002 and the Rules made thereunder."

9. From the above observation it is clear that the application was rejected by the Tribunal on the ground that as of now there is no cause of action to maintain the application and the petitioners cannot be said to be

aggrieved persons. It was further noted that the Bank has not taken any measure under Section 14 of the SARFAESI Act, 2002 to take actual physical possession and the property has been sold on “as is where is basis”.

10. Learned counsel for both the parties have placed reliance on **Harshad Govardhan Sandagar's case** (supra), in which case the Apex Court had occasion to consider the provisions of the SARFAESI Act, 2002, Transfer of Property Act, 1882 and all aspects of the matter regarding taking possession from the lessees/tenants occupying the mortgaged assets. The Apex Court held in the above case that possession of the secured asset from a lessee in lawful possession under a valid lease is not required to be taken under the provisions of the SARFAESI Act. It was further held that whenever a secured creditor moves the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset, he must state in the affidavit accompanying the application that the secured

asset is not in possession of a lessee under the valid lease. The following was laid down in paragraphs 25 and 28 of the judgment:

“25. The opening words of sub-section (1) of S.14 of the SARFAESI Act make it clear that where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor “under the provisions of the Act”, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof. Thus, only if possession of the secured asset is required to be taken under the provisions of the SARFAESI Act, the secured creditor can move the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset. We have already held that S.13 of the SARFAESI Act does not provide that the lease in respect of a secured asset will get determined when the secured creditor decides to take the measures in the said Section. Hence, possession of the secured asset from a

lessee in lawful possession under a valid lease is not required to be taken under the provisions of the SARFAESI Act and the Chief Metropolitan Magistrate or the District Magistrate, therefore, does not have any power under S.14 of the SARFAESI Act to take possession of the secured asset from such a lessee and hand over the same to the secured creditor. When, therefore, a secured creditor moves the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset, he must state in the affidavit accompanying the application that the secured asset is not in possession of a lessee under the valid lease made prior to creation of the mortgage by the borrower or made in accordance with S.65A of the Transfer of Property Act prior to receipt of a notice under sub-section (2) of S.13 of the SARFAESI Act by the borrower.

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28.When, therefore, a lessee becomes aware of the possession being taken by the secured creditor, in respect of the secured asset in respect of which he is the lessee, from the possession notice which is delivered, affixed or published in sub-rule (1) and sub-rule (2) of R.8 of the Security Interest (Enforcement) Rules, 2002, he may either surrender possession or resist the attempt of the secured

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

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

11. The Apex Court further held that no remedy is available under Section 17 of the SARFAESI Act, 2002 to the lessee to protect his lawful possession under a valid lease. In paragraph 36 it was held that when the lessees claim that they are entitled to possession of a secured asset for any term exceeding one year from the date of the lease, the Chief Metropolitan Magistrate or the District Magistrate will have to come to the conclusion regarding

entitlement. Paragraph 36 of the judgment reads as under:

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

District Magistrate, as the case may be, will have to come to the conclusion that he is not entitled to the possession of the secured asset for more than a year from the date of the instrument or from the date of delivery of possession in his favour by the landlord."

12. From the order passed by the Debt Recovery Tribunal in S.A.No.18 of 2010 it is clear that the petitioners have produced their registered sale deeds before the Tribunal. In the appendix to the order of the Tribunal details of all registered leases executed by the first respondent in favour of petitioners 1 to 12 were mentioned with relevant dates. There were other relevant documents submitted by the petitioners before the Tribunal. Learned counsel for the appellants submits that there was ample time for the petitioners to submit their documents before the Chief Judicial Magistrate, Kozhikode in their application filed to recall the order dated 4.10.2013, but the petitioners failed to submit the relevant documents, hence, no error has been committed by the Chief Judicial Magistrate in rejecting the

application. It is relevant to note that the petitioners were not made parties to the proceedings under Section 14. The Chief Judicial Magistrate has passed an order dated 4.10.2013 appointing an Advocate Commissioner to take possession of the assets. At that stage the petitioners had come up with an application praying for recalling of the order. The Chief Judicial Magistrate proceeded to decide the application without recalling the order dated 4.10.2013. In view of the law laid down by the Apex Court in **Harshad Govardhan Sondagar's case** (supra), the Chief Judicial Magistrate has to examine the claim of each lessee and take a decision as to whether possession of secured assets from such lessee can be taken or not. The appropriate procedure for the Chief Judicial Magistrate was to recall the earlier order dated 4.10.2013 and thereafter give an opportunity to the parties to place the respective claim and thereafter to decide the matter.

13. The learned Single Judge, by the impugned judgment, has only granted an opportunity to the

petitioners permitting them to produce their documents on 14.7.2015 and directed the Magistrate to take a fresh decision within four weeks. Learned counsel for the petitioners submits that they have already filed documents on 14.7.2015 before the Chief Judicial Magistrate, Kozhikode. A perusal of the order of the Chief Judicial Magistrate, Kozhikode dated 2.6.2015 indicates that there is no proper consideration of the issues raised, although the judgment of the Apex Court in **Harshad Govardhan Sondagar's case** (supra) has been relied on by the petitioners, which has also been noted by the Chief Judicial Magistrate. We are of the view that appropriate opportunity was not given to the petitioners by the Chief Judicial Magistrate to place their case. Appropriate opportunity was necessary, since the Bank in its application under Section 14 had not given details of the lessees of the premises. In view of the judgment of the Apex Court relied on by the petitioners in **Harshad Govardhan Sondagar's case** (supra), it was obligatory

for the Bank to give details of the lessees in their application. That was another reason due to which the Chief Judicial Magistrate ought to have given opportunity to the petitioners as well as the Bank to bring relevant material on record.

We do not find any error in the judgment of the learned Single Judge directing the Magistrate to take a fresh decision after hearing learned counsel for the petitioners as well as the purchaser. The judgment of the learned Single Judge needs no interference in this appeal. The Writ Appeal is, thus, dismissed. The appeal being dismissed today, the Chief Judicial Magistrate may take a fresh decision as directed by the learned Single Judge within four weeks from today.

The parties shall bear their own costs.

**ASHOK BHUSHAN
CHIEF JUSTICE**

**A.M.SHAFFIQUE
JUDGE**

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