

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

MONDAY, THE 29TH DAY OF JUNE 2015/8TH ASHADHA, 1937

WP(C).No. 19221 of 2015 (C)

PETITIONER(S):

- 1. V.K. SREERAM MADHAVAN, 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,
REP. BY MANAGING PARTNER P.M. KELUKUTTY,
6/875 N, 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.**
- 8. V.K.MUHAMMED ALI, 6/875 C,
YMCA INTERNATIONAL CULTURAL COMPLEX,
YMCA CROSS ROAD, CALICUT-1.**
- 9. V.K. MOHAMMED 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. MOHAMMED 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.

BY ADVS.SRI.A.SUDHI VASUDEVAN,
SMT.K.PUSHPAVATHI,
SRI.JOSE JONES JOSEPH.

RESPONDENT(S):

1. YOUNG MEN'S CHRISTIAN ASSOCIATION,
REPRESENTED BY ITS SECRETARY,
YMCA CROSS ROAD, CALICUT,
KALATHINKUNNU AMSOM, DESOM, KOZHIKODE-673 001.

2. 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 OFFICE, MADAVELI, CHENNAI,
TAMILNADU-600 028.

3. AHAMMED KOYA,
S/O.P. KHADER, AVATHOTTIL HOUSE, PATHIMANGALAM,
KUNNAMANGALAM, KOZHIKODE-673 032.

4. M/S.THREE LINE PROPERTIES,
REPRESENTED BY ITS MANAGING PARTNER,
A. AHAMMED KOYA, DOOR NO.OP7/813,
OMASSERY PANCHAYATH, KOZHIKODE-673 572.

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**5. 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.**

**R4 BY ADV. SRI.P.B.KRISHNAN.
BY ADV. SRI.M.MOHAMED NVAZ.**

**THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 29-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

rs.

APPENDIX

PETITIONER'S EXHIBITS:-

- EXT.P1. A TRUE COPY OF THE INDENTURE OF TRUST REGISTERED AS PER DOCUMENT NO.3203/1930 DATED 22/05/1913 OF THE OFFICE OF THE REGISTRAR OF SOUTH MALABAR.
- EXT.P2. A TRUE COPY OF THE REGISTERED LEASE DEED DATED 16/06/2004 EXECUTED BY THE 1ST RESPONDENT IN FAVOUR OF THE 1ST PETITIONER IN RESPECT OF THE PREMISES ADMEASURING 477.96 SQ. FEET.
- EXT.P3. A TRUE COPY OF THE REGISTERED LEASE DEED DATED 22/05/2004 EXECUTED BY THE 1ST RESPONDENT IN FAVOUR OF THE 1ST PETITIONER IN RESPECT OF THE PREMISES AD MEASURING 477.96 SQ. FEET.
- EXT.P4. A TRUE COPY OF THE MEMORANDUM OF DEPOSIT OF TITLE DEEDS SAID TO HAVE BEEN MADE BY THE 1ST RESPONDENT AND UNITED BANK OF INDIA ON 31/12/2014.
- EXT.P5. A TRUE COPY OF THE AGREEMENT DATED 27/12/2004 EXECUTED BETWEEN THE 1ST RESPONDENT AND UNITED BANK OF INDIA.
- EXT.P6. A TRUE COPY OF THE REGISTERED LEASE DEED DATED 27/01/2005 EXECUTED BY THE 1ST RESPONDENT IN FAVOUR OF THE 3RD PETITIONER IN RESPECT OF THE PREMISES LOCATED IN THE 1ST FLOOR OF THE PROPOSED INTERNATIONAL CULTURAL COMPLEX BUILDING HAVING AN AREA OF 448.46 SQ. FEET MARKED IN THE PLAN APPENDED.
- EXT.P7. A TRUE COPY OF THE REGISTERED LEASE DEED DATED 27/01/2005 EXECUTED BY THE EXECUTED BY THE 1ST RESPONDENT IN FAVOUR OF THE 4TH PETITIONER FIRM REPRESENTED BY THE 3RD PETITIONER AS ITS MANAGING PARTNER FOR A PERIOD OF 99 YEARS IN IN RESPECT OF THE PREMISES HAVING AN AREA OF 546.72 SQ. FEET.
- EXT.P8. A TRUE COPY OF THE REGISTERED LEASE DEED DATED 30/06//2005 EXECUTED BY Y.M.C.A IN FAVOUR OF PETITIONERS 5 TO 8 AND V.KUNHABDULLA.
- EXT.P9. A TRUE COPY OF THE REGISTERED LEASE DEED DATED 17/12/2005 IN FAVOUR OF 5TH PETITIONER BY Y.M.C.A.

- EXT.P10. A TRUE COPY OF THE REGISTERED LEASE DEED DATED 24/12/2005 EXECUTED BY THE 1ST RESPONDENT IN FAVOUR OF THE PETITIONER 5 TO 7, 9 & V.KUNHABDULLA FOR A PERIOD OF 99 YEARS IN IN RESPECT OF THE PREMISES HAVING AN AREA OF 1920 SQ. FEET.
- EXT.P11. A TRUE COPY OF THE REGISTERED LEASE DEED DATED 30/05/2006 EXECUTED BY THE 1ST RESPONDENT IN FAVOUR OF THE PETITIONERS 5, 7, 10, 11 & V.KUNHABDULLA FOR A PERIOD OF 99 YEARS IN IN RESPECT OF THE PREMISES HAVING AN AREA OF 1920 SQ. FEET.
- EXT.P12. A TRUE COPY OF THE LEASE DEED DATED 02/04/2007 FOR A PERIOD OF 99 YEARS EXECUTED BY THE 1ST RESPONDENT IN FAVOUR OF THE PETITIONER 5 , 7, 8 & 10 ALONG WITH V.KUNHABDULLA IN IN RESPECT OF THE PREMISES HAVING AN AREA OF 3433.84 SQ.
- EXT.P13. A TRUE COPY OF THE LEASE DEED DATED 11/02/2008 IN FAVOUR OF THE 5TH PETITIONER AND HIS CHILDREN SAMEERA MOIDU, SABIRA ABOOBACKER IN RESPECT OF THE PREMISES FOR A PERIOD OF 99 YEARS HAVING HAVING AN AREA OF 3738.89 SQ. FEET.
- EXT.P14. A TRUE COPY OF THE REGISTERED SUB LEASE DATED 09/07/2009 EXECUTED BY THE 5TH PETITIONER.
- EXT.P15. A TRUE COPY OF THE AGREEMENT DATED 18/01/2000 EXECUTED BETWEEN THE 1ST RESPONDENT AND THE 12TH PETITIONER.
- EXT.P16. A TRUE COPY OF THE AGREEMENT DATED 01/11/2006 EXECUTED BETWEEN THE 1ST RESPONDENT AND THE 12TH PETITIONER.
- EXT.P17. A TRUE COPY OF THE ORDER DATED 09/10/2013 PASSED BY THE DEBTS RECOVERY TRIBUNAL IN IA. 2907/2012 IN SA NO.18/2010.
- EXT.P18. A TRUE COPY OF THE COMMON ORDER DATED 21/08/2014 PASSED BY THIS HONOURABLE COURT IN RP NO.957/2013 IN OP (DRT) 1982/2013 AND RP.983/2013 IN RP.659/2013 IN WP(C).NO.18362/2013.
- EXT.P19. A TRUE COPY OF THE FINAL ORDER DATED 29/10/2012 PASSED BY THE DEBTS RECOVERY TRIBUNAL IN SA.18/2010.
- EXT.P20. A TRUE COPY OF THE CMP NO.2087/2013 DATED 11/09/2013 FILED BY THE 2ND RESPONDENT BEFORE THE CJM COURT, KOZHIKODE.
- EXT.P21. A TRUE COPY OF THE ORDER DATED 04/10/2013 PASSED BY THE CHIEF JUDICIAL MAGISTRATE COURT, KOZHIKODE ON CMP NO.1087/2013.

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- EXT.P22. A TRUE COPY OF THE ORDER DATED 02/06/2015 IN CMP NO.2155/2013 IN CMP. 2087/2013 ON THE FILE OF THE CJM COURT, KOZHIKODE.**
- EXT.P23. A TRUE COPY OF THE ORDER DATED 02/06/2015 PASSED BY THE CHIEF JUDICIAL MAGISTRATE COURT, KOZHIKODE IN CMP NO.2087/2013.**
- EXT.P24. A TRUE COPY OF THE LETTER DATED 14/01/1975 ISSUED BY SRI.FRANK C.KIEHNE, EXECUTIVE DIRECTOR.**
- EXT.P25. A TRUE COPY OF THE DEED OF RECEIPT REGISTERED AS DOCUMENT NO.742/1997 DATED 29/10/1997 OF THE SUB REGISTRY, KOZHIKODE.**
- EXT.P26. A TRUE COPY OF THE SALE NOTICE DATED 02/07/2009 ISSUED BY THE 2ND RESPONDENT.**

RESPONDENT'S EXHIBITS:- NIL.

//TRUE COPY//

PA. TO JUDGE

rs.

A.MUHAMED MUSTAQUE, J.

W.P.(C) No.19221 of 2015

Dated this the 29th day of June, 2015

J U D G M E N T

The petitioners impugn the orders passed by the Chief Judicial Magistrate under Section 14 of the SARFAESI Act.

2. The petitioners claim to be the tenants of secured asset. According to them, their right is protected by virtue of an earlier order Ext.P19, passed by the Debts Recovery Tribunal, wherein it is observed that, the property is sold on 'as is where is basis'. It is submitted that, the petitioners having an interest in the property and their rights will be protected, even if property is sold. It is further submitted that, the mortgage deed is null and void and therefore, the sale is also void. The mortgage is created by a Trust without the concurrence of the parental organisation. The petitioners also submitted that, they are entitled for subrogation of the mortgaged amount as the petitioners being persons having interest in the property in terms of Section 92 of the Transfer of Property Act. The petitioners have a case that, the lease has been created with the permission of the mortgagee and therefore, lease satisfy the requirement of Sub Section 2 of Section 65A of Transfer of Property Act.

3. As seen from the impugned order, essentially the petitioners request for protection has been declined for the reason

that, the petitioners have not produced any piece of evidence before the Chief Judicial Magistrate to substantiate their pleas. It is noted in Ext.P22 at paragraph 8 as follows :

“8. Whereas the petitioners did not produce any legally recognizable deed or document whereby any right or interest is created in their favour in respect of any portion of the secured asset, to convince this court, prima facie, that they are tenants of R2. If the tenancy right claimed by the petitioners is not supported with registered deed then they cannot claim better right than R1 in whose favour a legally recognizable mortgage right is created. The petitioners cannot claim fixity of tenure or peremptory occupation of the respective room so as to defeat the better right of the secured creditor.”

4. The petitioners case is that, they were not impleaded in the original proceedings and they filed an application for intervening in the matter. Therefore, they could not produce all the documents. It is further submitted that, the application itself is bad in the light of the decision of the honourable Supreme Court in ***Harshad Govardhan Sondagar v. International Assets Reconstruction Company Ltd. [2014 (3) KLT 357 (SC)]***. Therefore it is submitted that, the order of delivery ought to have been recalled.

5. The learned counsel for the Bank and the purchaser of the secured asset would point out that, the application was filed as early as in the year 2013 and delivery was ordered in the year 2013. Thereafter, on account of intervening petition filed by the petitioners, the delivery was delayed. It is further submitted that,

the application was filed much before the law laid down by the honourable Supreme Court in ***Harshad Govardhan Sondagar's*** case. The learned counsel for the party respondent admitted that, leases in favour of petitioners 1 and 2 are prior to mortgage, however, they are not entitled for protection.

6. A reading of the above dictum would clearly indicate that, an opportunity has to be given to persons who are in possession of the property. In that view of the matter, non impleadment has no consequence, since the petitioners are on record through intervening petition and therefore they cannot raise any grievance against the maintainability in the light of judgment of honourable Supreme Court. The question whether the petitioner is entitled for protection or not, is a matter to be purely adverted by the Chief Judicial Magistrate with respect to the relevant facts. The fact now remains is that, the petitioners have not produced any documents before the Chief Judicial Magistrate, though an attempt is made before this Court to substantiate their case through the documents produced before this Court.

7. Considering the facts and circumstances of the case, I am of the view that, necessarily the tenancy rights, creation of mortgage and the lease which satisfies requirements of Sub Section 2 of Section 65A of the Transfer of Property Act, are all matters to be decided by the Chief Judicial Magistrate after adverting to the earlier order of the DRT in the application filed by the petitioners for

subrogation. I am also of the view that, interest of justice demand that an opportunity should be given to the petitioners to substantiate their contentions and produce documents. Therefore, the impugned orders are set aside.

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.

This writ petition is disposed of as above.

Sd/-

A.MUHAMED MUSTAQUE, JUDGE.

AV