HON'BLE SRI JUSTICE R. SUBHASH REDDY

AND

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

WRIT PETITION No.27225 OF 2015

ORDER: (Per Hon'ble Sri Justice A. Shankar Narayana)

Seeking Writ of *Mandamus* to declare the tender - cum - public notice, dated 24-08-2011, issued by respondent No.1 - Indian Overseas Bank, Hyderabad Main Branch, Hyderabad, and the consequent auction conducted on 29-09-2011, concerning leased property viz., Grand Festival Palace Function Hall including office, parking and open area bearing Municipal House No.17-1-211/1/A on
Plot Nos.4, 5 and 6, admeasuring 1729.70 square yards with ground + first floor with built up area of 5480.62 square feet situated at Madannapet, Saidabad, Hyderabad, as arbitrary and illegal, the instant Writ Petition is filed.

2 (a) The petitioner claims that respondent Nos.2 and 3 have let out the subject property on a monthly rent of Rs.10,65,600/- under a registered lease deed document No.3867 of 2011, dated 17.03.2011, in his favour, initially for a period of eighteen (18) years with effect from 17-03-2011 itself, and since then he has been managing the business of function hall by entertaining

bookings of marriages and other functions therein.

(b) The petitioner states, recently he learnt that respondent Nos.2 and 3 have mortgaged the subject property in favour of respondent No.1 and availed a loan to meet their personal necessities and committed default in discharging the loan, and, therefore, respondent No.1 sold the subject property in public auction on 29-09-2011 by accepting the offer of two bidders and even confirmed the sale for the highest price of Rs.310.00 lakhs without delivery of possession thereof.

(c) It is according to the petitioner that he is entitled to protect his leasehold rights till expiry of valid lease under the provisions of Transfer of Property Act 1882, but apprehends, every possibility of dispossession by virtue of the orders of the Debts Recovery Tribunal (DRT) under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act'). He states that since the valid lease is existing in his favour, the tender - cum - public auction notice, dated 24-08-2011, is illegal in view of the decision of the Hon'ble Apex Court in **Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and others**[1] and stating that the lease has not been determined and the movables belonging to him such as chairs, dining tables, crockery and electrical decoration articles, cooking vessels are still lying in the subject property/function hall and that he has taken advance from the marriage parties for two months prior to filing of the instant writ petition, sought to quash the notice issued by respondent No.1.

3. This Court while directing 'notice before admission' on
01-09-2015, directed both parties to maintain *status quo* with regard to possession of the secured asset pending further orders.

4 (a) Respondent No.1, on appearance, filed counter resisting the request of the petitioner. According to respondent No.1, the petitioner has approached this Court with unclean hands by suppressing material facts, such as, the DRT at Hyderabad is seized off the matter in S.A. No.263 of 2011. It contends that respondent Nos.2 and 3, who are husband and wife, mortgaged the secured asset on 28.03.2007 to secure a loan of Rs.295.00 lakhs and since they failed to repay the same, it has invoked the provisions of Section 13(2) of the SARFAESI Act.

(b) Concerning the lease deed, respondent No.1 contends that Clause - 3 thereof clarifies that the same is fictitious and intended to cheat it which had already recalled the loan on 15.07.2009 and possession of the property was taken on 06.02.2010 and the secured asset was put on auction on 29.09.2011/31.03.2011.

Respondent No.1 also states that it has forced to classify the loan account of respondent Nos.2 and 3 as 'Non-Performance Account' (NPA) on 30-06-2008, as per the guidelines issued by the Reserve Bank of India, and, therefore, notice under Section 13(2) of the SARFAESI Act, dated 15-07-2009, was issued and the same stood unanswered.

(c) Respondent No.1 specifically states that it has taken physical possession of the secured asset through the Advocate-Commissioner appointed by the Chief Metropolitan Magistrate at Hyderabad, as per the orders in Criminal M.P. No.4686 of 2009, dated 06-02-2010. Respondent No.1 also says that when respondent No.2 approached it on 29.04.2010 for one time settlement, the same was considered and restored possession of the secured asset to respondent No.2 on 19.06.2010 as an agent of respondent No.1 to run the function hall and to remit Rs.1.00 crore on or before 30.09.2010, but the said condition was also breached. Later, auction was held on 29.09.2011 with a reserve price of Rs.2,76,06,000/-, and the highest bidder has bid for Rs.3.11 crores and has deposited Rs.77.00 lakhs as initial bid amount as per the terms of the auction.

(d) Respondent No.1 also states that respondent Nos.2 and 3 approached the DRT under Section 17 of the SARFAESI Act and on 05-10-2011, the DRT has stayed

the sale proceedings until further orders on condition of depositing a sum of Rs.75.00 lakhs within four (4) weeks from the date of the order. It states that respondent Nos.2 and 3 created third party interest by way of registered mortgage, dated 02.11.2011, in favour of one M. Buchi Reddy, son of Balvanth Reddy, and, thus, created mortgage deed and the lease deed, though, respondent Nos.2 and 3 were holding the property as its agents. Respondent No.1 also states that the petitioner filed a civil suit in
O.S. No.2350 of 2012 on the file of XIX Junior Civil Judge, City Civil Court, Hyderabad, against respondent Nos.2 and 3 claiming perpetual injunction on the ground that he had lent money to respondent Nos.2 and 3, but did not return, and instead gave the subject property for lease for a period of eighteen years. Respondent No.1 had also alleged certain facts which are unnecessary to refer to for the purpose of disposal of this writ petition. Thus, respondent No.1 sought to dismiss the writ petition.

5. Heard Sri R. Satyanarayana Reddy, learned counsel for the petitioner, and M/s. M.V. Kini and Company for respondent No.1, and perused the material on record.

6. Learned counsel for the petitioner submits that since a valid lease is existing in favour of the petitioner executed by the borrowers, the petitioner is entitled to

protect his possession by virtue of the provisions of Section 65-A of the Transfer of Property Act as the lease is for a period of eighteen years commenced in the year 2011 and the respondent No.1 is not entitled to dispossess him from the subject property.

7. Learned counsel for respondent No.1 submits that the alleged lease is a created document to defeat the rights of the Bank to recover the loan amount and since the lease deed is subsequent to issuance of notice under Section 13(2) of the SARFAESI Act and further measures taken including issuance of e-auction notice, and even the auction was conducted on 29-09-2011, and that the successful bidder deposited the initial amount of Rs.77.00 lakhs, the petitioner is not entitled to protect his possession.

8. The controversy in the instant writ petition is very short.

The petitioner, on the strength of the registered lease deed, dated 17.03.2011, executed by respondent Nos.2 and 3 in his favour, seeking *mandamus* to declare the auction notice and also the sale that has taken place on 29.09.2011, as illegal and arbitrary.

9. To substantiate the petitioner's stand, learned counsel for the petitioner takes support of the decision of the Hon'ble Supreme Court in **Harshad Govardhan**

Sondagar's Case (Supra 1), and, in the said context, learned counsel placed reliance on the narrations at paragraph No.17, thus:

> "17. After the mortgage of an immovable property is created by the borrower in favour of a secured creditor, the right of the borrower to lease a mortgaged property is regulated by Section 65-A of the Transfer of Property Act. Section 65-A of the Transfer of Property Act is extracted hereinbelow:
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> > "65-A. **Mortgagor's power to lease.--** (1) Subject to the provisions of Sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.
> >
> > (2)*(a)* Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.
> >
> > *(b)* Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.
> >
> > *(c)* No such lease shall contain a covenant for renewal.
> >
> > *(d)* Every such lease shall take effect from a date not later than six months from the date on which it is made.
> >
> > *(e)* In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the

> rent and condition of re-entry on the rent not being paid within a time therein specified.
>
> (3) The provisions of Sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of Sub-section (2) may be varied or extended by the mortgage deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that subsection."

> Thus, Sub-section (1) of Section 65-A of the Transfer of Property Act states that the mortgagor has the power to make lease of a mortgaged property while he is in lawful possession of the same subject to the provisions of Sub-section (2) of Section 65-A of the Transfer of Property Act and such lease is binding on the mortgagee. Sub-section (3) of Section 65-A further provides that such a power is available with the mortgagor to make a lease of the mortgaged property only if and as far as a contrary intention is not expressed in the mortgage deed. Thus, so long as the mortgage-deed does not prohibit a mortgagor from making a lease of the mortgaged property and so long as the lease satisfies the requirements of sub-section (2) of Section 65-A, a lease made by a borrower as a mortgagor will not only be valid but is also binding on the secured creditor as a mortgagee."

Thus, it is the submission of the learned counsel for the petitioner that respondent No.1 is not entitled to dispossess the petitioner.

10. On the other hand, learned counsel for respondent No.1 submits that subsection (13) of Section 13 of the SARFAESI Act will override the provisions of Section 65-A of the Transfer of Property Act by virtue of Section 35 of the SARFAESI Act and, since the lease deed executed by respondent Nos.2 and 3 in favour of the petitioner was subsequent to issuance of notice under Section 13(2) of the SARFAESI Act, the same is not a valid lease. In support of the said submission, he placed reliance on the very same decision referred supra and observations of the Hon'ble Supreme Court at paragraph No.21, thus:

> "21. When we read the different provisions of Section 13 of the SARFAESI Act extracted above, we find that Sub-section (4) of Section 13 provides that in case the borrower fails to discharge his liability in full within sixty days from the date of notice, as provided in subsection (2) of Section 13 of the SARFAESI Act, the secured creditor may take recourse to one or more of the measures mentioned therein to recover his secured debt. One of the measures mentioned in clause *(a)* in Sub-section (4) of Section 13 of the SARFAESI Act is to take possession of the secured assets of the borrower including the right to transfer by way of lease. Where, however, the lawful possession of the secured asset is not with the borrower, but with the lessee under a valid lease, the secured creditor cannot take over possession of the secured asset until the lawful possession of the lessee gets

> determined. There is, however, no mention in Sub-section (4) of Section 13 of the SARFAESI Act that a lease made by the borrower in favour of a lessee will stand determined on the secured creditor deciding to take any of the measures mentioned in Section 13 of the said Act. Subsection (13) of Section 13 of the SARFAESI Act, however, provides that after receipt of notice referred to in Sub-section (2) of Section 13 of the SARFAESI Act, no borrower shall lease any of his secured assets referred to in the notice, without the prior written consent of the secured creditor. This provision in Sub-section (13) of Section 13 of the SARFAESI Act and the provisions of the Transfer of Property Act enabling the borrower or the mortgagor to make a lease are inconsistent with each other. Hence,
> sub-section (13) of Section 13 of the SARFAESI Act will override the provisions of Section 65-A of the Transfer of Property Act by virtue of Section 35 of the SARFAESI Act, and a lease of a secured asset made by the borrower after he receives the notice under Sub-section (2) of Section 13 from the secured creditor intending to enforce that secured asset will not be a valid lease."

11. For the aforesaid reasons, we are of the considered view that there is no need to probe further in the matter in view of the following features:

1. Respondent Nos.2 and 3 contracted the loan on 28.03.2007 and mortgaged the secured asset on the very same day.

2. Respondent No.1 issued demand notice under Section 13(2) of the SARFAESI Act to respondent Nos.2 and 3 on 15.07.2009.

3. No reply got issued by respondent Nos.2 and 3 under Section 13(3) of the SARFAESI Act to the demand notice issued by respondent No.1.

4. Auction of the secured asset was held on 29.09.2011 with a reserve price of Rs.2,76,06,000/- and the highest bidder has deposited Rs.77.00 lakhs out of the bid amount of Rs.3.11 crores on the date of auction itself towards initial deposit.

5. The lease deed of the petitioner was dated 17.03.2011.

12. Thus, the lease deed based on by the petitioner was subsequent to the measures initiated by respondent No.1 by issuance of notice under Section 13(2) of the SARFAESI Act on 15-07-2009, and, therefore, the decision, referred to supra, would not render any assistance to him and on the other hand it aids respondent No.1's case in treating the lease as an invalid one. Thus, we find no merit in the writ petition.

13. Therefore, the Writ Petition fails and is dismissed.

There shall be no order as to costs.

14. As a sequel thereto, Miscellaneous Applications, if any, pending in the writ petition stand closed.

R. SUBHASH REDDY, J

A. SHANKAR NARAYANA, J

November 2, 2015.

PV

[1] (2014) 6 SCC 1