

HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

WRIT PETITION No.3571 of 2015

ORDER: (Per the Hon'ble Sri Justice M. Satyanarayana Murthy)

The petitioners claiming to be tenants in the secured asset, possession of which is proposed to be taken by the Advocate Commissioner under Section 14 of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests Act (for short 'the SARFAESI Act'), filed the writ petition to declare that the order of the Debt Recovery Appellate Tribunal (DRAT), Kolkata in Appeal No.15 of 2015 dated 11.02.2015 and the order of the Chief Metropolitan Magistrate (CMM), Ranga Reddy District dated 28.11.2014 in CrI.M.P.No.914 of 2014 as illegal, arbitrary and violative of provisions of SARFAESI Act and the Rules framed thereunder.

2. The petitioners are claiming that they are running small industrial units in the secured asset belonging to the 2nd respondent situated in plot No.2, CIE, Ghandinagar, Balanagar, approximately in an extent of Ac.1.00, having obtained different bits or piece of land on lease, erected structures for running their units. The details of lease period, obtaining registered lease deeds and suits filed by them and dates of decrees are given hereunder:

Sl. No.	Lease period From	To	Registered lease deed dated	Suit No.	Date of decree
1.	10.01.2004	09.01.2019	13.03.2013	234 of 2013	03.12.2013
2.	01.01.2004	31.12.2018	08.03.2013	253 of 2013	31.01.2014
3.	26.02.201028.07.2001	25.02.201525.02.2010	08.03.2013	254 of 2013	18.02.2014
4.	04.04.2007	03.04.2017	08.03.2013	247 of 2013	31.01.2014
5.	01.01.2006	31.12.2017	08.03.2013	249 of 2013	31.01.2014
6.	15.05.2007	14.04.2017	08.03.2013	248 of 2013	31.01.2014
7.	04.04.2007	03.04.2017	13.03.2013	250 of 2013	12.03.2014
8.	23.10.2003	22.10.2018	14.03.2013		

3. According to the petitioners, they were inducted as tenants in the secured asset on various dates mentioned in column No.2 of the table supra, continuing in possession and enjoyment of the same as tenants by paying rent regularly to the 2nd respondent. As the 2nd respondent insisted the petitioners to obtain registered lease

deeds in the year 2013, the petitioners entered into a written agreement of lease as shown in column No.4 of the table. As the 2nd respondent started pressuring the petitioners to vacate the premises due to pressure exerted on him by some banks, the petitioners filed various suits and obtained decrees against the 2nd respondent as shown in column Nos.5 and 6 of the table supra. Thus, the petitioners are in lawful possession and enjoyment of the secured asset as tenants and they cannot be evicted by either of the respondents.

4. While the petitioners are continuing as tenants, an advocate commissioner was appointed by the Chief Metropolitan Magistrate, Ranga Reddy District in CrI.M.P.No.914 of 2014, who visited the premises on 19.12.2014 and issued notice informing about her appointment as advocate commissioner to take vacant possession of the secured asset and demanded the petitioners to handover possession of the property within three days with a threat to take physical possession of the property in the event of their failure to handover vacant possession.

5. The petitioners' main contention is that the order passed by the Chief Metropolitan Magistrate without issuing notice to the petitioners is against the principle laid down by the Apex Court in **HARSHAD GOVARDHAN SONDAGAR v. IARC LIMITED AND OTHERS**, according to the principle laid down in the above judgment, the authorized officer is required to first issue and affix notice under Rule 8(1) of the SARFAESI Rules, before taking possession of the property to enable the lessees either to surrender possession or object taking of possession of the property by the authorized officer. In such a situation, the authorized officer has to approach the Chief Metropolitan Magistrate of the area under Section 14 of the SARFAESI Act and state in the application, the names of the lessees, who are objecting to hand over the vacant possession of the property on the ground that they are lessees of the property, cannot be evicted for the dues of their lessor. But, in the present case, the authorized officer did not follow the procedure under Rule 8(1) of the Rules framed under the Act. Thereby, the petitioners are deprived of their right to defend taking possession of the property by the Advocate Commissioner.

6. As the 1st respondent failed to follow the procedure laid down by the Apex Court in the judgment referred supra, the petitioners had approached the Debt Recovery Tribunal (DRT) by filing Securitization Application No.24 of 2015, complaining the

illegal action of the

1st respondent-authorized officer. The petitioners also filed I.A.No.88 of 2015 to restrain the respondents from taking further steps to dispossess the petitioners. While granting stay of further proceedings, the DRT directed the petitioners to pay Rs.1 crore in two installments i.e.,

1st installment of Rs.50,00,000/- within four weeks from the date of the order and another Rs.50,00,000/- within four weeks thereafter.

7. Aggrieved by the order passed by the DRT in I.A.No.88 of 2015 in S.A.No.24 of 2015, the petitioners carried the matter in appeal before the DRAT in Appeal No.15 of 2015, which was disposed of by order dated 11.02.2015, wherein the Presiding Officer of the Appellate Tribunal directed the DRT to decide the jurisdiction of the Tribunal before taking further steps.

8. While the matter stood thus, the petitioners now challenged the order dated 28.11.2014 in Crl.M.P.No.914 of 2014, contending that the order passed by the Chief Metropolitan Magistrate is totally contrary to the principles laid down by the Apex Court in **Harshad Govardhan's case (Supra 1)**.

9. The DRT and DRAT did not consider the law laid down by the Apex Court in proper perspective and failed to consider the illegality committed by the 1st respondent in taking steps to recover possession of the secured asset invoking Section 14 of SARFAESI Act. Thus, the order of the DRAT suffers from illegality and required to be set aside. In view of the above grounds, the petitioners sought relief of setting aside the order passed by the DRAT in Appeal No.15 of 2015 dated 11.02.2015 and the order passed by the CMM under Section 14 of SARFAESI Act in Crl.M.P.No.914 of 2014 dated 28.11.2014.

10. It is specifically contended that the 1st respondent obtained the order from the CMM without disclosing the subsisting lease between the petitioners and the 2nd respondent and suppressing the facts, the

1st respondent obtained the order illegally and as such, the order passed by the CMM is unsustainable and prayed to allow the writ petition setting aside the order passed by the by the DRAT in Appeal No.15 of 2015 dated 11.02.2015 and the order passed by the CMM under Section 14 of SARFAESI Act in Crl.M.P.No.914 of 2014 dated 28.11.2014.

11. The 1st respondent filed counter at the stage of admission denying the material allegations *inter-alia* contending that there was no oral lease between the petitioners and the 2nd respondent as contended by the petitioners and the registered lease deeds were obtained in the year 2013 after issuing notice under Section 13 (2) of SARFAESI Act dated 30.12.2008. As the borrower committed default in payment of the amount due to the 1st respondent, declared the account as NPA. Therefore, the lease between the petitioners and the 2nd respondent is hit by Section 13(13) of SARFAESI Act and basing on the registered lease deeds, they cannot claim any right to continue or even notice under Rule 8(1) of the Rules framed under the Act.

12. It is further contended that filing of civil suits due to pressure exerted on them by the 2nd respondent, as some of the banks compelling the 2nd respondent to deliver vacant possession of the property, itself indicates that there was a demand from various banks against the

2nd respondent for recovery of amount due to the banks, but without impleading the banks which threatened the 2nd respondent to dispossess from the property, the petitioners conveniently obtained permanent injunction restraining the 2nd respondent from dispossessing them from the property in their possession which form part of secured asset. The

2nd respondent remained *ex parte* in all the suits conveniently and therefore, the permanent injunction obtained by the petitioners in various suits referred in the table is not binding on the 1st respondent.

13. Admittedly, the 1st respondent after following necessary procedure declared the account of the borrower as NPA, issued notice under Section 13(2) of the SARFAESI Act dated 30.12.2008 and in response to the notice, the 3rd respondent-borrower raised certain objections by issuing reply dated 10.02.2009. Thereupon, the 1st respondent clarified by issuing reply dated 20.02.2009. Thereafter, as a preparatory measure, the authorized officer of the bank filed CrI.M.P.No.133 of 2009 on the file of CMM, Ranga Reddy District seeking appointment of an advocate commissioner to take possession of the property. Accordingly, an advocate commissioner was appointed to assist the 1st respondent to take possession of the property and the commissioner issued notice to the

3rd respondent to deliver vacant possession of the property. No tenant was in

occupation of the secured asset when the advocate commissioner issued notice to the 3rd respondent. The 3rd respondent filed S.A.No.161 of 2009 before the DRT, Hyderabad seeking stay of proceedings in pursuance of the notice under Section 13(4) of SARFAESI Act. In the said SA, the 3rd respondent did not disclose anything about occupation of the secured asset in the possession of any tenant and no document was brought on record before the DRT in the first round of litigation. However, after hearing, S.A.No.161 of 2009 was dismissed on 06.02.2013 by the DRT. During pendency of S.A.No.161 of 2009, the 3rd respondent filed W.P.No.18263 of 2010 before this Court, which ended in dismissal and later filed review petition No.7 of 2013 in S.A.No.161 of 2009 before DRT, which also ended in dismissal. While pendency of S.A. and W.P., the 3rd respondent clandestinely disposed of the machinery and equipment hypothecated to the Bank, worth Rs.10 crores without the knowledge of the 1st respondent and the respondent lodged a complaint with SHO, Jeedimetla and the same was registered as crime No.227 of 2011. However, the 2nd and 3rd respondents are reportedly absconding and not responding to phone calls. Hence, the SHO did not file charge sheet against respondent Nos.2 and 3.

14. After dismissal of S.A.No.161 of 2009 by the DRT and W.P.No.18263 of 2010 by this Court, again the 1st respondent invoked the jurisdiction of CMM by filing Crl.M.P.No.914 of 2014 seeking appointment of advocate commissioner on 27.10.2014. Thereupon, the petitioners approached the DRT by filing S.A.No.24 of 2015 and an Appeal before the DRAT in Appeal No.15 of 2015, having failed in their attempt to get an order, approached this Court and this Court cannot exercise its jurisdiction under Article 226 of Constitution of India when respondent Nos.2 and 3 created the registered lease deeds with a scheming brain to avoid payment of debt due to the 1st respondent and prayed to dismiss the writ petition.

15. During the course of arguments, Sri Raghunathan, learned senior counsel appearing for the petitioners would contend that the

1st respondent failed to follow the procedure prescribed under Section 13 (2) of the SARFAESI Act and Rule 8(1) of the Rules framed under the Act before invoking the jurisdiction of the CMM under Section 14 of the SARFAESI Act and on account of

default committed by the borrower, the tenants cannot be dispossessed from the property invoking procedure contemplated under SARFAESI Act and it is the duty of the 1st respondent to issue notice to the tenants or at least affix notice under Rule 8(1) of the Rules framed under the Act or at the conspicuous place, possession of which is proposed to be taken. As the entire proceedings of the 1st respondent is totally against the guidelines issued by the Apex Court in **Harshad Govardhan's case (Supra 1)**, the 1st respondent is not entitled to dispossess the petitioners who are lawful tenants in occupation of the property without following the procedure contemplated under Section 13(4) read with Rule 8(1) of the Rules framed under the Act. In case, the petitioners who are in lawful occupation as tenants under registered lease deeds are evicted from the premises invoking the provisions of SARFAESI Act, they will be deprived of their livelihood and put to irreparable loss. That to, the petitioners have no remedy except to approach this Court in view of the Apex Court judgment referred supra. Therefore, the order dated 11.02.2015 passed by the DRAT in Appeal No.15 of 2015 and the order dated 28.11.2014 passed by the CMM in Crl.M.P.No.914 of 2014 appointing an advocate commissioner is illegal.

16. *Per contra*, the learned counsel for the 1st respondent-Mohammed Habibullah would contend that the petitioners failed to produce any scrap of paper to establish that they are continuing in possession of the secured asset since 2004 as contended by them in Para 2 of the affidavit filed along with writ petition under oral tenancy. In fact, the property was let out by the 2nd respondent to the 3rd respondent and created a security for due payment of the debt due to the bank long prior to the commencement of the registered lease deeds. Therefore, the oral tenancy is not supported by any material and on the other hand, the 1st respondent issued notice under Section 13(2) of SARFAESI Act declaring the account of the plaintiff as NPA, due to the default committed by the 3rd respondent in discharge of loan due to the 1st respondent on 30.12.2008. But, all these lease deeds are subsequent to issuance of notice under Section 13(2) of the SARFAESI Act and even if the registered lease deeds are true, they are not valid, as leave of the 1st respondent as required, was not obtained under Section 13(13) of SARFAESI Act. Therefore, the petitioners are not entitled to claim any protection obtaining permanent injunction by filing various suits shown in the table, when the 2nd

respondent conveniently remained *ex parte* would go to establish that decrees were collusive and not binding on the 1st respondent, since the 1st respondent is not a party to these suits. The documents whatever produced by the petitioners relates to the period posterior to the issue of Section 13(2) notice on 30.12.2008 and those documents created conveniently by the 2nd respondent with the collusion of the petitioners, would not enure any benefit to the petitioners to retain possession of the property. It is finally contended that in the first round of litigation, the 3rd respondent never disclosed about the subsisting tenancy between the petitioners and the 2nd respondent and it is a strong circumstance to disbelieve the case of the petitioners about subsisting tenancy between the petitioners and the 2nd respondent and the 2nd respondent is not entitled to create a lease in favour of the petitioners without terminating the subsisting lease between the 2nd respondent and the 3rd respondent. Therefore, the 2nd and 3rd respondents are behind the litigation, conveniently created several documents and got filed the present writ petition and that there are no bona fides in the claim of the petitioners, prayed to dismiss the writ petition.

17. Considering the contentions of both the counsel on record including voluminous material available on record, the sole point that arises for consideration is:

“Whether the lease in favour of the petitioners is valid, if not, whether the petitioners are entitled to protection from their dispossession?”

POINT:

18. According to the petitioners, the 1st and 2nd petitioners are in possession of the property as tenants under oral lease from 2004, whereas the 3rd petitioner was initially inducted into possession under oral lease dated 28.07.2001 and 26.02.2010. Similarly, petitioner Nos.4, 6 and 7 are in occupation of the premises as tenants under oral lease from 2007, whereas the 5th petitioner is in occupation of the property since 2006 and the 8th petitioner is in possession as tenant under oral lease since 2003 and the period of lease is varying from petitioner to petitioner as shown in the table. However, the petitioners themselves admitted that they entered in various registered lease agreements shown in column No.4 of the table and all the lease deeds were obtained in the month of March 2013 on three different dates i.e., 08.03.2013, 13.03.2013 and 14.03.2013, almost within a span of six weeks, all

the tenants obtained registered lease deeds and immediately within a year all the petitioners/tenants under registered lease deeds, approached the Court filed suits and obtained *ex parte* decrees of permanent injunction restraining the 2nd respondent from dispossessing from the property in their occupation as tenants. The petitioners produced several documents to substantiate oral tenancy commencing from 2001 and 2004 etc. The petitioners produced VAT registration certificate and certificate of registration.

19. The 1st petitioner produced certificate of registration issued by Commercial Tax Department and according to it, the place of business is situated at plot No.53, 1st floor, ALEAP IE, Gajularamaram, Ranga Reddy District. This certificate is of no use to prove the possession of the

1st petitioner as tenant in the premises, conveniently in the registration certificate for the year 2002-2003, the plot No.53, 1st Floor, ALEAP IE, Gajularamaram was mentioned as plot No.2, CIE, Gandhi Nagar and initialed by somebody, affixed the stamp of ACTO, Jeedimetla. Hence, this document is doubtful to establish the tenancy between the petitioners and the 2nd respondent. The 3rd document is VAT registration certificate dated 24.03.2005 and the place of business is shown as plot No.2, CIE Gandhinagar, Balanagar. But this certificate was not signed by the authorities concerned, who issued the certificate, though affixed the stamp of Commercial Tax Officer and it is without signature. Therefore, this document cannot be taken into consideration to believe the occupation of the part of the secured asset under oral lease. The 1st petitioner also filed O.S.No.234 of 2013 and obtained a permanent injunction by judgment dated 03.12.2013 passed by the Principal Junior Civil Judge, Medchal, Ranga Reddy District. In Para 2 of the judgment, there is a reference about commencement of lease dated 10.01.2004 and execution of lease agreement for a period of 11 months and the lease was extended from time to time and agreed to continue as a lessee for a period of 15 years up to 09.01.2019 and later obtained registered lease deeds. The registered lease between the 1st petitioner and the 2nd respondent dated 13.03.2013 is produced before this Court and the in the lease deed there was a reference regarding the earlier lease, similarly, the other petitioners also produced the copies of VAT registration certificate to establish their occupation.

20. The 2nd petitioner produced the registered lease deed dated 08.03.2013 and in

the said lease there is a reference about earlier lease agreement and he also produced VAT registration certificate dated 16.12.2005, which shows the place of business of Samrat Energy Systems as plot No.2, Gandhinagar, Hyderabad, Ranga Reddy District. This certificate at best would show that the 2nd petitioner is in possession of the property and similarly, the VAT registration certificate and judgment and decree in O.S.No.253 of 2013 shows that the 2nd petitioner is in occupation of the property.

21. The 3rd petitioner also filed the Photostat of the registered lease deed dated 08.03.2013 and there is reference about the earlier lease in the said document. Moreover, he did not produced any VAT registration certificate or any other evidence to show that the he is in occupation of the property except filing the decree and judgment dated 18.02.2014 in O.S.No.254 of 2013 passed by the Junior Civil Judge-cum-V Metropolitan Magistrate, Cyberabad at Medchal, Ranga Reddy District. This document at best would go to show that the lease was commenced under the registered lease dated 08.03.2013.

22. The 4th petitioner also produced the Photostat of the registered lease deed dated 08.03.2013, wherein there was a reference about the earlier lease dated 04.04.2007. He further produced VAT registration certificate for the year 2012, which shows the place of business as plot No.2/4, CIE Gandhi Nagar, Bala Nagar, Hyderabad, Ranga Reddy District. This document is subsequent to issue of notice under Section 13(2) of SARFAESI Act and the registered lease deeds were obtained by all the petitioners subsequent to issue of notice under Section 13(2) of SARFAESI Act. Therefore, the VAT registration certificate and Photostat of decree and judgment 31.01.2014 in O.S.No.247 of 2013 passed by the Junior Civil Judge-cum-V Metropolitan Magistrate, Cyberabad at Medchal, Ranga Reddy District, would not create any valid lease.

23. The 5th petitioner also brought on record the registered lease deed dated 08.03.2013, wherein there was reference about the earlier lease dated 01.01.2006 and produced VAT registration certificate for the year 2011, which is subsequent to notice under Section 13(2) of SARFAESI Act, similarly, the Photostat of decree and judgment dated 31.01.2014 in O.S.No.249 of 2013 passed by the Junior Civil Judge,

Medchal, Ranga Reddy District, are of no use to establish the tenancy between the 5th petitioner and the 2nd respondent.

24. The 6th petitioner produced the Photostat of registered lease deed dated 08.03.2013, wherein there was reference about the earlier lease dated 15.04.2007 and also produced the Notification of Advisory/Audit visit to a VAT dealer dated 23.03.2010, which shows the place of business as plot No.2, CIE Shop Nos.9 & 10, IDA Gandhi Nagar, Balanagar, Hyderabad, also produced the Photostat of decree and judgment dated 31.01.2014 in O.S.No.248 of 2013 passed by the Junior Civil Judge-cum-V Metropolitan Magistrate, Cyberabad at Medchal, Ranga Reddy District. But, those documents are subsequent to issue of notice under Section 13(2) of SARFAESI Act.

25. The 7th petitioner brought on record to substantiate his contention that it is in occupation of part of the secured asset and produced the Photostat copy of registered lease deed dated 13.03.2013, wherein there was reference about the earlier lease dated 04.04.2007 and also produced VAT registration certificate for the year 2013 and Photostat of decree and judgment dated 12.03.2014 in O.S.No.250 of 2013 passed by the Principal Junior Civil Judge, Medchal, Ranga Reddy District. But, they are all subsequent to issue of notice under Section 13(2) of SARFAESI Act.

26. To substantiate its contention, the 8th petitioner produced Photostat copy of registered lease deed dated 14.03.2013, wherein there was reference about the earlier lease dated 23.10.2003 and also produced Certificate of Registration issued by CTO for the year 2003-2004, which shows the place of business as plot No.2, CIE Exp., Phase-II, Gandhinagar, Ranga Reddy District, but did not obtained any permanent injunction by filing any suit against the 2nd respondent.

27. All these documents produced by the petitioners would establish that the lease under the registered lease was commenced subsequent to issue of notice under Section 13(2) of SARFAESI Act dated 30.12.2008, but there was a reference about prior lease. If really, the petitioners are in possession and enjoyment of the property as tenants in the secured asset commencing from 2001, 2004 etc., as shown in the table, they would have paid rent to the 2nd respondent and they would have registered their industry with the Department of Industries with the same address.

But, for the reasons best known to them, the petitioners did not produce the certificate of registration or any other document evidencing payment of tax to the authorities under AP Sales Tax Act or VAT Act. Therefore, the reference of earlier lease made by the 2nd respondent in the lease deed is only with an explicit intention to avoid payment of debt. In the absence of any material to show that the petitioners are continuing in possession of the property as tenants prior to the registered lease deeds, it is difficult for this Court to accept the contention of subsisting lease prior to the registered lease deeds referred supra.

28. It is a fact that the 2nd respondent let out the premises to the 3rd respondent and filed an affidavit with the bank at the time of advancing loan. The 1st respondent brought on record the lease deed dated 13.05.1999 between the 2nd respondent and the 3rd respondent and the lease is for a period of 30 years, which would expire on 2029. He also filed an affidavit dated 14.08.2007 before the Bank at the time of advancing amount admitting about the lease executed by the 2nd respondent in favour of the 3rd respondent and created security over the schedule property. When, a lease was subsisting between the 2nd respondent and the 3rd respondent, question of letting out the premises to the petitioners by the 2nd respondent does not arise unless the lease between the 2nd respondent and the 3rd respondent was terminated and the 3rd respondent was duly evicted from the premises. The property leased out by the 2nd respondent to the 3rd respondent is plot No.2, CIE, Expansion-II, Gandhinagar situated in survey No.150, Quthbullapur, Ranga Reddy District admeasuring 3000 square yards with super built-up area of 6000 square feet. The 2nd respondent is the owner of the land to an extent of Ac.1.00 guntas (4840 square yards) in plot No.2, in survey No.150, out of 4840 square yards, he leased out 3000 square yards while retaining 1840 square yards. On close verification of material available on record, we find no iota of evidence to establish the earlier oral lease between the petitioners and the 2nd respondent, at best the lease is only from the date of execution of registered lease deeds. Based on registered lease deeds, the learned counsel for the 1st respondent would contend that the lease is invalid as no leave of the 1st respondent was obtained before creating such lease, drawn our attention to Section 13(13) of SARFAESI Act and the same is extracted hereunder for better

appreciation:

“No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.”

29. A bare reading of the Section 13(13) of the SARFAESI Act would go to show that any lease created subsequent to issue of Section 13(2) notice without the written consent of the secured creditor i.e.,

1st respondent herein is unenforceable. Admittedly, in the present case, the 2nd respondent without obtaining written consent of the

1st respondent-secured creditor as required under Section 13(13) of SARFAESI Act created a registered lease deed in favour of the petitioners. Therefore, those leases are void and unenforceable. Since the registered leases in favour of the petitioners are void, on the strength of such void leases, the petitioners are not entitled to claim any relief restraining the 1st respondent from dispossessing them from the secured asset.

30. The submission of the learned counsel for the 1st respondent is that failure to make any reference about tenancy in favour of the petitioners in the earlier round of litigation by the 3rd respondent is another strong circumstance to disbelieve the contention of the petitioners. No doubt, in the earlier round of litigation produced in S.A.No.161 of 2009 and W.P.No.18263 of 2010 filed before this Court, there was absolutely no reference about subsisting lease. However, the contentions raised in the petitions filed by the 3rd respondent cannot be taken into consideration for the reason that the petitioners are claiming independent right through the 2nd respondent as tenants. Mere failure to mention about subsisting lease in the property by the 3rd respondent by itself is not a ground to suspect the lease.

31. The learned senior counsel for the petitioners would further contend that the 1st respondent did not follow the procedure contemplated under Section 13(4) of SARFAESI Act and Rule 8(1) of the Rules framed under the SARFAESI Act, directly invoked the jurisdiction of CMM under Section 14 of SARFAESI Act. The 1st respondent initially issued Section 13(2) notice and, thereafter, invoked the jurisdiction of CMM by filing CrI.M.P.133 of 2009. But, due to pendency of writ petition before this Court and SA before the DRT, the warrant was not executed.

Again, the 1st respondent invoked the jurisdiction of CMM by filing Crl.M.P.No.914 of 2014 and got appointed advocate commissioner and according to the guidelines of the Apex Court, a notice under Rule 8(1) is required to be issued and affixed at the conspicuous place of secured asset, so as to enable the tenants to surrender the vacant possession or to object the proposed taking possession of the property. If there is any objection by the alleged tenant, then the secured creditor can invoke the jurisdiction of CMM under Section 14 of SARFAESI Act. But no document is produced about compliance of Section 13(4) of SARFAESI Act before invoking the jurisdiction of CMM under Section 14 of SARFAESI Act. However, this would not render the entire proceedings redundant. Hence, failure to follow the guidelines in **Harshad Govardhan's case** (Supra 1) would not confer any right on the petitioners to claim protection from the Court restraining the 1st respondent to dispossess from the property under the provisions of the SARFAESI Act, as the lease under the registered lease deeds is totally in contravention of Section 13(13) of SARFAESI Act.

32. The learned senior counsel appearing for the petitioners further contented that the question of validity of lease shall be determined by the CMM only and the 1st respondent invoked the jurisdiction of CMM under Section 14 of the SARFAESI Act without impleading the petitioners as parties to Crl.M.P.No.133 of 2009. However, the 1st respondent brought on record the earlier writ petition copy where the 3rd respondent raised a specific contention that the notice under Section 13(4) was not issued, thereby, the proceedings under Section 14 of SARFAESI Act are vitiated.

33. The learned counsel for the 1st respondent contended that even according to the principles laid down in **Harshad Govardhan's case**, the tenant/mortgagee can create a lease and such leases are subject to Section 65-A of Transfer of Property Act, 1882. According to Section 65-A of TP Act, a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof and such leases are binding on the mortgagee. According to Clause 2(c), no such lease shall contain covenant for renewal, as per Clause 2(d), every such lease shall take effect from a date not later than six months from the date on which it is made, Clause 2(e), it shall not exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid with a time therein specified. The present registered lease deeds were not entered strictly

complying the conditions prescribed under Section 65-A of T.P. Act. Therefore, the leases in favour of the petitioners executed by the 2nd respondent are not valid in view of Section 65-A of T.P. Act. When the lease is not valid under Section 65-A of the TP Act, the petitioners are not entitled to claim a benefit of the decision in **Harshad Govardhan's case** (Supra 1). Even according to the judgment of the Apex Court, the possession notice will have to be affixed on the outer door or at the conspicuous place of the property and also published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorized officer. At this stage, the lessee of an immovable property will have notice of the secured creditor making efforts to take possession of the secured assets of the borrower. Therefore, a lessee becomes aware of the possession being taken by the secured creditor, in respect of the property which he is the lessee, from the possession notice which is delivered, affixed or published in sub-rule (1) and sub-rule (2) of Rule 8 of the Rules framed under the SARFAESI Act, 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 authorized 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 Section 65-A of the TP Act and that the lease does not stand determined in accordance with Section 111 of the TP Act. Therefore, the issue of notice under Rules 8(1) and (2) is only to enable the lessee to resist, taking possession of the property subject to producing proof of lease or he was inducted into possession legally. At Para 27 of the judgment, the Supreme Court finally concluded as follows:

“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 an year from the date of the instrument or from the date of delivery of possession in his favour by the landlord.”

34. As per the principle laid down in the above judgment of the Apex Court, it is clear that a notice under Rules 8(1) and (2) of the Rules framed under the Act is required to be issued and affixed at the outer door of the premises or at the conspicuous place, so as to enable the lessees to resist such taking possession or to surrender the possession of the property and the secured creditor is required to invoke the jurisdiction of CMM without taking possession, resisted by the lessee and the lessee will have an opportunity to prove the subsisting tenancy prior to commencement to mortgage or in accordance with Section 65-A of TP Act. In the instant case, admittedly, the lease deeds were executed subsequent to issue of Section 13(2) notice and no *prima facie* material is brought on record to establish the oral tenancy between the petitioners and the 2nd respondent. Hence, the lease deeds executed subsequent to issue of Section 13(2) notice without obtaining written consent of the secured creditor are void and on the strength of those lease deeds, while exercising discretionary power under Article 226 of the Constitution of India, no relief can be granted to the petitioners declaring the proceedings of CMM in CrI.M.P.No.914 of 2014 as illegal.

35. The petitioners also claimed a declaration that the order of DRAT in Appeal No.15 of 2015 as void and illegal. The appellate authority remanded the matter to the DRT to decide the jurisdiction and no specific illegality in the order passed by the DRAT is brought to our notice to set aside the same and that apart the proceedings before the DRT are still pending. Since the petitioners did not produce the order passed by the DRT after its remand by the appellate authority, in the absence of any illegality in the order passed by the DRAT, it is difficult for this Court to declare the order passed by the DRAT in Appeal No.15 of 2015 as illegal and void. For all the above reasons, we find that the petitioners miserably failed to prove *prima facie* tenancy between the petitioners and the 2nd respondent prior to execution of registered lease deeds referred supra and miserably failed to establish their lawful tenancy prior to execution of registered lease deeds and before issue of notice under Section 13(2) of SARFAESI Act. After remand by DRAT with specific direction to DRT, the SA is pending and while

prosecuting SA, the present petition is filed challenging the order of DRAT. Therefore, we find that it is difficult to exercise our jurisdiction to grant any relief to the petitioners.

36. The SARFAESI Act is enacted only to enable the Banks and Financial Institutions to recover the debts due to it by invoking the provisions of the Act without resorting to cumbersome procedure in ordinary civil Courts for realization of debts due to the banks. If the practice of creating such leases in favour of third parties over the secured asset so as to disable the secured creditor to recover the debt due to it by the borrowers invoking the provisions of the SARFAESI Act, it is nothing but frustrating the very intention of legislature in enacting the SARFAESI Act. The borrowers did not allow the secured creditor-1st respondent to recover the amount, resorting to different litigation before DRT by filing SA and before this Court by Writ Petitions and later invented theory of lease in anticipation of taking possession invoking Section 14 of SARFAESI Act, created lease in favour of the petitioners from 2004 onwards, same is not proved *prima facie* by producing any material.

37. Hence, it is only an attempt made by the 2nd and 3rd respondents in collusion with the petitioners brought into existence the lease either oral or written prior to execution of registered lease deeds and execution of registered lease deeds only to disable the 1st respondent-secured creditor to recover the legitimate amount due to it. If such practices are encouraged by exercising power under Article 226 of Constitution of India, it is nothing but frustrating the intention of the legislature. Therefore, we are not inclined to grant any relief to the petitioners, as we find no merits.

38. In view of our foregoing discussions, it is not a fit case to grant any relief to the petitioners and the writ petition is accordingly dismissed. There shall be no order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending in the writ petition shall stand closed.

JUSTICE RAMESH RANGANATHAN

JUSTICE M. SATYANARAYANA MURTHY

Date: 08-04-2015

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