

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO.1092 OF 2016

- | | | |
|--|---|------------------|
| 1. M/s. Otoklin Global Business, |] | |
| A Partnership Firm, |] | |
| having its address at Ground Floor, |] | |
| Plot No.1, Shah Industrial Estate, |] | |
| Veera Desai Road, Andheri (W), |] | |
| Mumbai – 400 053. |] | |
| |] | |
| 2. Mr. Dhaval Dilip Jhaveri, |] | |
| Partner of M/s. Otoklin Global Business, |] | |
| having its office at Ground Floor, |] | |
| Plot No.1, Shah Industrial Estate, |] | |
| Veera Desai Road, Andheri (W), |] | |
| Mumbai – 400 053. |] | Petitioners |

Versus

- | | | |
|---|---|--|
| 1. The State of Maharashtra |] | |
| Through Additional Government Pleader, |] | |
| High Court, Bombay. |] | |
| |] | |
| 2. The Authorised Officer, |] | |
| International Assets Reconstruction |] | |
| Company Private Limited (Assignee of |] | |
| Bank of Baroda), having its office at |] | |
| A-508, 5 th Floor, 215, Atrium Kanakia Spacis, |] | |
| Andheri-Kurla Road, Andheri (East), |] | |
| Mumbai – 400 069. |] | |
| |] | |
| 3. M/s. Otoklin Plants & Equipments Ltd., |] | |
| (In Liquidation), through the Official Liquidator |] | |
| of High Court, Bombay, having his office at |] | |
| 5 th Floor, Bank of India Building, |] | |
| M.G. Road, Fort, Mumbai – 400 001. |] | |
| |] | |
| 4. Mr. Dilip K. Jhaveri (Ex-Director and |] | |
| Guarantor), Indian Inhabitant, |] | |
| Residing at 13, Concord Apartments, |] | |

Bullock Road, Bandra (West),	]	
Mumbai – 400 050.	]	
	]	
5. Mr. Rajendra K. Jhaveri,	]	
(Ex-Director and Guarantor),	]	
Indian Inhabitant, having address at	]	
5, Philomena Apartment, Opp. Hotel-In-Phom,	]	
Juhu Tara Road, Santacruz (West),	]	
Mumbai – 400 049.	]	
	]	
6. (i) Ms. Saloni S. Jhaveri (Daughter),	]	
(ii) Ms. Roshnee S. Jhaveri (Daughter),	]	
(iii) Mr. Rushit S. Jhaveri (Son),	]	
	]	
All 6(i) to (iii) are heirs of Late Shirish Jhaveri	]	
having their common address at 242-B,	]	
Grand Paradi Apartment, 24 th Floor, A.K. Marg,	]	
Dadi Seth, Hill Road, Mumbai-400 036.	]	 Respondents

Mr. Simil Purohit, a/w. Mr. Manoj Agre and Mr. Girish Kedia, i/by Ms. Divya Sanghvi, for the Petitioners.

Mr. Vishal B. Thadani, A.G.P., for Respondent No.1.

Mr. Nitin Thakkar, Sr. Counsel, a/w. Mr. Rohit Gupta, Mr. Amit Jajoo, Ms. Sushmita Gandhi, Ms. Anisha Zachariah and Ms. Anamika, i/by M/s. PKA Advocates, for Respondent No.2.

**CORAM : S.C. DHARMADHIKARI &
DR. SHALINI PHANSALKAR-JOSHI, J.J.**

RESERVED ON : 30TH JUNE 2016.

PRONOUNCED ON : 28TH JULY 2016.

JUDGMENT : [Per S.C. Dharmadhikari, J.]

1. Rule. Respondents waive service.

2. By this Writ Petition, under Article 226 of the Constitution of India, the Petitioners have sought a Writ of Certiorari or any other appropriate writ, order or direction in the nature thereof, calling for the records and proceedings of Case No.67/SA/2012 from the file of the learned Chief Metropolitan Magistrate, Bombay and after examining the legality, validity and correctness of the three orders passed therein dated 6th November 2015, 19th December 2015 and 29th December 2015, the same be quashed and set aside. This relief is sought in the following facts and circumstances.

3. The first Petitioner before us is claiming to be a Partnership Firm, registered under the Indian Partnership Act, 1932. It is engaged in the business of manufacturing various kinds of filters and filtration system used for industrial purposes. It is stated that the Firm operates from the business premises admeasuring 3740 sq.ft., lying and situated at Ground Floor, Plot No.1, Shah Industrial Estate, Veera Desai Road, Andheri (West), Mumbai-400053.

4. It is stated that these premises are in the possession of the Petitioners prior to 1998. The third Respondent to this Writ Petition is a Company incorporated under the provisions of the Indian Companies Act,

1956 and in the business as above, so also of pipe coating from a factory at MIDC, Taloja, District Thane and in the State of Gujarat.

5. The second Petitioner is an individual and a Partner of the first Petitioner. The claim of the Petitioners further is that from the premises on the Ground Floor in Shah Industrial Estate, about 627 sq.ft. were being used as a registered office by this third Respondent, but the Petitioners and the third Respondent were separate Entities.

6. Later on, the third Respondent was ordered to be wound-up by this Court by an order passed in the Company Petition No.970 of 1997. The Official Liquidator attached to this Court took charge of the assets and affairs of the third Respondent on 31st May 2002.

7. The Petitioners claim that Respondent Nos.4 and 5 have inducted them as tenants in the premises, described in para 2 of the Petition, from 1998 or prior thereto. One Shirish Jhaveri was brother of Respondent Nos.4 and 5. The said Shirish Jhaveri expired in 1994. Respondent No.6(i) to (iii) are his legal heirs and representatives. The second Respondent is an Asset Reconstruction Company and has taken over the debt of Bank of Baroda. The Petitioners state that Respondent Nos.4 and

5 along with deceased Shirish Jhaveri were the Directors of Respondent No.3.

8. The Petitioners have set out as to how after formation of Petitioner No.1-Firm in 1997, the registration under the Indian Partnership Act, 1932 was obtained. They have also explained as to how the registration under various other laws, which is necessary for carrying on business, came to be obtained. The Petitioners' claim is that Respondent Nos.4 and 5 had let out the premises to Petitioner No.1-Firm as a monthly tenant. The rent of Rs.1,000/- per month was agreed upon, together with the obligation to pay the property tax, in respect of the ground and first floor of the building. It is the case of the Petitioners that they were diligent and regular in payment of the monthly rent. There was no default. The Petitioners cannot, therefore, be evicted, except in accordance with the law, namely, the Maharashtra Rent Control Act, 1999. The Petitioners were constrained to file a Suit, being R.A.D. Suit No.692/2011 of 2014 in the Court of Small Causes at Mumbai for a declaration that they are the tenants in respect of the tenancy premises and in which Suit, a Decree was passed on 31st July 2014, declaring the Petitioners to be the lawful tenants. Thus, the status of the Petitioners as lawful tenants has been confirmed by the competent Court.

9. From the record it is then revealed that the third Respondent availed of certain financial facilities from the Bank of Baroda for the purpose of its business. The Bank of Baroda filed an Original Application No.1025 of 2001 on 15th October 2001 before the Debt Recovery Tribunal-II, Mumbai against Respondent Nos.3, 4, 5, 6(i) and 6(ii) for recovery of the so called outstanding amount. The claim of the Bank referred to certain security interest created and styled as a mortgage of immovable property. The mortgage by deposit of Title Deeds in relation to certain immovable properties at Mumbai included the tenancy premises. It is stated that in the Original Application, the third Respondent pointed out that majority of the properties were in possession of the tenants and they should not be evicted only on the strength of a Recovery Certificate. This legal position was not disputed by anybody and, therefore, though the Recovery Certificate was issued, the Debt Recovery Tribunal did not empower the Recovery Officer attached to it to dispossess anybody, save and except in accordance with the law. The Petitioners place reliance upon the order dated 5th September 2005 of the Debt Recovery Tribunal-II, Mumbai in Original Application No.1025 of 2001. The Petitioners also rely upon Annexure-I to the Writ Petition, being a copy of the minutes of the meeting before the Official Liquidator dated 31st May 2002, which would confirm that the possession of 627 sq.ft. area on the ground floor of

the building came to be handed over and that is how the record of the Official Liquidator would indicate and confirm the events, which occurred during obtaining the said possession.

10. Then it is stated that the Bank of Baroda assigned its debt by a Deed of Assignment dated 21st January 2008 in favour of the second Respondent to this Petition. Thus, the Recovery Certificate dated 5th September 2005 could have been enforced by the second Respondent, who stepped into the shoes of Bank of Baroda. The second Respondent, therefore, did not claim any rights higher than that of Bank of Baroda. It also appears that the Recovery Officer, Debt Recovery Tribunal, Mumbai sought intervention of the Official Liquidator for taking possession of the premises, but noticed that the Official Liquidator had already taken possession of less than 200 sq.ft. of the area. The Tribunal Receiver, acting in execution of the Recovery Certificate, did not take possession of the balance portion. Then it is stated that the proceedings, namely, Executing Proceedings, were allowed to be amended to correct the area in possession of the Recovery Officer, Debt Recovery Tribunal-II, Mumbai. After the corrections / amendments were carried out, a public notice for sale of the tenancy premises was put up. That described the Petitioner No.1 only as an occupant and not a lawful tenant. Further, the area of the

premises was erroneously mentioned as 4187 sq.ft. In pursuance of this bid / notice, nobody came forward to place his or her bid for the property. The Petitioners, being apprehensive about loosing their valuable tenancy rights, made certain application before the Recovery Officer. The Recovery Officer passed an order and the details of the same are referred to in para 14 of the Petition. It is stated that the Recovery Officer was aware of the order and directions of the Tribunal dated 16th March 2011. The Petitioners also referred to the application filed by the second Respondent to this Writ Petition before the Recovery Officer claiming a relief of handing over possession of the entire ground floor of Plot No.1, Shah Industrial Estate, to the Tribunal Receiver. It is stated that after hearing the necessary parties, the Recovery Officer was pleased to reject the application on 10th May 2012. However, the second Respondent still prevailed upon the authorized officer to issue notice styled as Possession Notice dated 22nd August 2011 and referable to Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (*for short* “SARFAESI Act”). This was to take possession of entire ground and first floor of the building. The Petitioners, in paras 18 and 19 of the Petition, have referred to the public notice and the reply thereto by the second Respondent by an Advocate’s notice. There is a reference made to a rejoinder and eventually it is stated that

against the pasting and issuance of notice under Section 13(4) of the SARFAESI Act, the Petitioners preferred Securitisation Application No.322 of 2011. The Petitioners' reference to the contents of this Securitisation Application and its prayers is in para 19 of the Petition.

11. The Petitioners then refer to the application under Section 14 of the SARFAESI Act made by the Respondent-Company. The Petitioners were apprehensive of losing their tenancy and that is why applied before the Chief Metropolitan Magistrate for intervention. That application was rejected on 23rd January 2013. Thereafter the Chief Metropolitan Magistrate was pleased to allow the Securitisation Application (No.67/SA/2012) by his order dated 5th February 2013.

12. The Petitioners state that during the pendency of their Securitisation Application No.322 of 2011 and after it was substantially heard by the Debt Recovery Tribunal-II, Mumbai, the Supreme Court delivered its verdict in the case of *Harshad Govardhan Sondagar Vs. International Assets Reconstruction Co. Ltd. & Ors. In Criminal Appeal No.736 of 2014, along with connected matters*. The Petitioners submit that this Judgment recognized and protected the tenants and it was held that the Chief Metropolitan Magistrate / District Magistrate cannot, in the garb of resorting to Section 14 of the SARFAESI Act, interfere with the physical

possession of the parties like the present Petitioners. Thus, the Petitioners' submission would also take care of the issue as to whether the parties like them can have recourse to Section 17 of the SARFAESI Act. The Petitioners, therefore, had questioned the proceedings in Securitisation Application No.322 of 2011. The preliminary objection raised to the maintainability of the above Securitisation Application was purported to be dealt with by the Tribunal by its order dated 9th June 2014. Though the Securitisation Application No.322 of 2011 was held to be not maintainable and dismissed, yet, the interim protection therein was extended by four weeks, namely, till 8th July, 2014. The Petitioners, therefore, were of the view that it had correctly moved this Securitisation Application by invoking Section 17 of the SARFAESI Act. The second Respondent questioned its maintainability and at its instance, this order dated 9th June 2014 was passed. Now, the Petitioners have not been able to substantiate the claim of tenancy either in this Securitisation Application or in the proceedings before the learned Chief Metropolitan Magistrate. This once again puts the Petitioners' claim in serious jeopardy. The Petitioners, therefore, filed a Criminal Writ Petition No.2418 of 2014 in this Court. The Petitioners were aggrieved by the two orders of the learned Chief Metropolitan Magistrate dated 23rd January 2013 and 5th February 2013. This Court was pleased to set aside both the orders. This Court also

permitted the Petitioners to file an Intervention Application before the learned Chief Metropolitan Magistrate and the said Chief Metropolitan Magistrate was directed to dispose of the same within four months. This order of this Court was challenged by the aggrieved Respondents to the Writ Petition in the Hon'ble Supreme Court of India. However, there was no stay to the said order from the Supreme Court. The result would be that a senior citizen is dispossessed from the premises, though the Judgment of the Supreme Court in *Sondagar's case (Supra)* supports the Petitioners' version. The Petitioners then received the order rejecting the Intervention Application filed by them. The Chief Metropolitan Magistrate made the Securitisation Application No.67/SA/2012 absolute. The assistance under Section 14 of the SARFAESI Act by the Chief Metropolitan Magistrate was granted so as to take forcible possession of the tenancy premises from the Petitioners. The three orders to the above effect are Annexures "R", "S" and "T". They are dated 6th November 2015, 19th December 2015 and 29th December 2015.

13. It is these orders which are challenged in the present Petition by the Petitioners. Mr. Purohit, learned counsel appearing on behalf of the Petitioners, submits that the impugned orders are contrary to law. The said orders are passed at the instance of the Assignee of the Debt of the Bank. If the Bank/Original Decree-holder has accepted the Petitioners'

tenancy, then, this Assignee was bound by that stand of the Bank of Baroda. The petitioners could not have been evicted by the Assignee of the Debt of the Bank. Mr. Purohit would submit that this is not a case where there is a doubt about the tenancy. The apprehension is absolutely clear. Mr. Purohit submits that all the details of the tenancy have been disclosed. The Petitioners have not suppressed anything from this Court. Mr. Purohit submits that the Assignee of the Debt of the Bank was aware of the proceedings before the Debt Recovery Tribunal-II, Mumbai and the order passed on 5th September 2005. This was the order allowing the Original Application No.1025 of 2001 and pursuant to the said order, the Bank of Baroda and Respondent No.2 had initiated Execution Application No.322 of 2005, in which an application for forcible dispossession of the Petitioners from the tenancy premises was made, but that application was rejected on 10th May 2012 (Annexure-"K"). It is in such circumstances that the Assignee of the Debt of the Bank could not have taken recourse to Section 14 of the SARFAESI Act. Thus, there is an abuse of the process of law. Mr. Purohit has relied upon the grounds in the Memo of the present Petition to submit that a lawful tenancy cannot come to an end in the above manner. It is in this circumstances that Mr. Purohit would submit that this Writ Petition should be allowed.

14. Mr. Purohit has relied upon the Judgment of the Hon'ble Supreme

Court of India in the case of *Harshad Govardhan Sondagar Vs. International Assets Reconstruction Co. Ltd. & Ors. In Criminal Appeal No.736 of 2014, along with connected matters* and *Vishal N. Kalsaria Vs. Bank of India & Ors., AIR 2016 SC 530.*

15. On the other hand, Mr. N.G. Thakkar, learned Senior Counsel appearing on behalf of Respondent No.2 (contesting Respondent) submits that the entire Petition is bogus, frivolous and vexatious. He would submit that the Petitioners have not set out any particulars of the tenancy. Mr. Thakkar would submit that the Writ Petition involves disputed questions of fact. The Petitioners' claim of tenancy cannot be accepted, as the Petitioners have not been able to prove that the tenancy existed prior to creation of the mortgage. If there is a written agreement of tenancy, then, that should have been produced and if that written agreement is in force, then, it should have been registered.

16. In the present case, the mortgage was created in favour of the predecessor-in-title of the second Respondent in 1992. That mortgage was declared as to be valid and binding by the Debt Recovery Tribunal-II, Mumbai on 5th September 2005 in its order passed in the Original Application No.1025 of 2001. There is no written document of tenancy. There is absolutely no registered instrument on record either. In these

circumstances, a very vague submission as made by Mr. Purohit that there was a tenancy much prior to 1998, cannot be accepted. The relevant documents evidencing creation of such tenancy, which is, admittedly, after the mortgage in favour of the predecessor-in-title of Respondent No.2, therefore, should not be protected by this Court. Further, Mr. Thakkar submits that Petitioner No.2-Dhaval Dilip Jhaveri is a Director and Promoter of Respondent No.3. That the Petitioner No.2 is the son of Dilip Jhaveri. Dilip Jhaveri is the part-owner of the property and nephew of other two co-owners. The Petitioners have sought to establish the tenancy by filing a collusive Suit. That Suit was filed so as to defeat the measures in relation to the mortgaged property in favour of the Bank. Therefore, this Court should not accept the claim of the Petitioners. The tenancy is bogus and fake. Mr. Thakkar relies upon the Judgment of the Hon'ble Supreme Court in *Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited & Ors.*, (2014) 6 SCC 1. The Petitioner No.2 is the son of the owner of the premises, who created the mortgage. Thus, none of the Petitioners are strangers to the rights of the Bank. Further, the documents that are produced are not sufficient to prove a valid lease / right created in favour of any party. The Petitioners are suppressing the true and correct facts from this Court. Mr. Thakkar submits that the Bank of Baroda has extended several credit

facilities to one M/s. Otoklin Plants and Equipments Limited (In Liquidation). This is Respondent No.3. It was the mortgagor of the immovable property. The property was admeasuring 4367 sq.ft. approximately. The factum of creation of mortgage is evidenced by the Memorandum of Entry dated 3rd August 1992, as extended by the Memorandum of Entry dated 23rd December 1994. Annexure "A" of the affidavit-in-reply is relied upon by Mr. Thakkar in that regard. Mr. Thakkar then relied upon the Recovery Certificate issued by the Debt Recovery Tribunal in favour of the Bank of Baroda in Original Application No.1025 of 2001, the recovery proceedings / Petition No.376 of 2005 and a Deed of Assignment of the Debt dated 28th January 2008 in favour of the Assignee. He would then submit that Respondent No.2-Assignee issued the Demand Notice on 9th June 2009 to Respondent Nos.3 to 6 under Section 13(2) of the SARFAESI Act and submitted that, after meeting of the statutory period of 60 days, the second Respondent took symbolic possession of the property, in respect of which the possession notice dated 27th August 2006 was published in the local newspaper. Mr. Thakkar submits that the property is one-storied building, out of which total ground floor area admeasuring approximately 4367 sq.ft. Only an area of 180 sq.ft. was in possession of Tribunal Receiver and was given to the authorized officer of the second Respondent by the Receiver of the Debt

Recovery Tribunal-II, Mumbai, who himself was put in possession of the smaller property by the Official Liquidator. The remaining area on the ground floor admeasuring 4187 sq.ft. continues to be in illegal possession of Petitioner No.1. It is that property / part over which the claim of tenancy is laid. Mr. Thakkar submits that the Petitioners went on delaying the proceedings, namely, the Securitisation Application No.67/SA/2011 before the Chief Metropolitan Magistrate, Mumbai. There were several frivolous applications made in that proceedings. Mr. Thakkar then invites our attention to the proceedings before the Chief Metropolitan Magistrate. Mr. Thakkar submits that the Special Leave Petition to challenge the order of this Court dated 9th July 2014 in Criminal Writ Petition No.2418 of 2014 is pending. Still the second Respondent participated in the proceedings before the learned Chief Metropolitan Magistrate, Mumbai, without prejudice. The Chief Metropolitan Magistrate has given the Petitioners extensive opportunities. Mr. Thakkar, therefore, supports the impugned orders and submits that the Writ Petition be dismissed.

17. A list of dates and events was handed over by Mr. Thakkar. He also handed over a copy of the plaint, in which the alleged collusive Decree was passed. Thus, relying upon the Judgment of the Supreme Court in the case of *Vishal N. Kalsaria Vs. Bank of India*, (2016) 3 SCC 762, Mr. Thakkar submits that this is not a genuine and bonafide claim of tenancy.

Mr. Thakkar submits that there is no evidence produced to demonstrate and prove the registration of Petitioner No.1-Firm in the year 1997. Additionally, there is no written instrument of tenancy. Apart therefrom and even if such written instrument is unnecessary, still the Petitioners will have to produce evidence of payment of rent. If the rent was paid and also the property taxes, then, the Petitioners could have definitely produced the requisite receipts. If the rent and permitted increases were payable, then, the quantum ought to have been mentioned. The quantum may have remained static, but proof of payment of that quantum is not forthcoming. The relationship between the parties being already demonstrated, Mr. Thakkar submits that this is a got-up case and this Court should not accept it, but proceed to discard and dismiss it. Mr. Thakkar, the learned Senior Counsel, relied upon pages 69 to 71 of the paper-book, which is a copy of the minutes recorded at the time of taking surprise check of the Registered Office of Respondent No.3. This document is dated 31st May 2002 and it records that the other portion of the premises has been occupied by M/s. Otoklin Global, M/s. Otoklin Exports, Otoklin Filters of India and some financial companies of the family / group. Thus, on 31st May 2002, it is not stated that the Petitioners or Petitioner No.1-Firm was in possession of the premises. It is in these circumstances and relying upon Sections 48 and 65A of the Transfer of

Properties Act, 1882, that Mr. Thakkar submits that the Petition be dismissed.

18. On this Petition, we had passed an initial protective order on 18th April 2016. In that order, we had recorded the readiness and willingness of Mr. Purohit to produce the relevant documents, which would evidence and prove the claim of tenancy. After that order was passed on 18th April 2016, the Petitioners have filed additional affidavit, which we had taken on record. That additional affidavit is of Petitioner No.2-Dhaval Dilip Jhaveri. In that additional affidavit, the Petitioners, more or less, repeated their version, as set out in the Writ Petition. Paras 2, 3, 4, 5 and 6 of the additional affidavit are, therefore, nothing but a reiteration of the Petition averments. It is pertinent to note that this Court had recorded the statement of Mr. Purohit that he would produce relevant and material documents to prove the existence of tenancy. However, Exhibits “1” and “3” to this additional affidavit cannot be said to be any documents proving the same. On the other hand, the Petitioners rely upon Exhibit-2 to the additional affidavit, which are nothing but the copies of covering letters addressed to the Municipal Corporation of Greater Bombay. The photocopies of some cheques have been produced to show that they would evidence payment of property taxes. However, the additional affidavit fails to annex the record reflecting payments made from 1st

October 2000 till 31st November 2014 of property tax of the entire building, including the tenancy premises, paid by the Petitioners since 1998. That is not forthcoming. Exhibit No.3 to this additional affidavit is to support the version of the payment made to M/s. Ghanshyam Co-operative Industrial Estate Limited, which is the building in which the tenanted premises are allegedly located, of Rs.1,00,000/-. That is to be appropriated to the rent payable to the landlords for granting tenancy. It was an obligation on the landlords, as per the instructions of Respondent Nos.4, 5 and 6, which the Petitioners have discharged. However, Exhibit No.3 is a letter dated 1st February 2010 addressed by the authorized signatory of Petitioner No.1. It is referring to some verbal understanding on the subject of payment for digging local pit under the Common Electric Junction Box.

19. Mr. Thakkar, learned Senior Counsel, therefore, relied upon the additional affidavit-in-reply of the second Respondent to submit that none of the statements made by the Petitioners in the additional affidavit inspire confidence. The property tax receipts relied upon by the Petitioners cannot prove tenancy. That is how Mr. Thakkar would submit that the Writ Petition be dismissed.

20. It is on the above material, that we have considered the contentions of both sides. We have also perused the relevant annexures to the

Petition and the affidavit / additional affidavit. We have also perused the relevant statutory provisions and the decisions brought to our notice.

21. We had called upon Mr. Purohit to produce a copy of the plaint in the Suit instituted by the present Petitioner No.1 in the Court of Small Causes at Mumbai.

22. Mr. Purohit has fairly produced a copy of the plaint in R.A.D. Suit No.692 of 2011. That Suit was filed against Dilip Kundalal Jhaveri and four others. It is claimed that some time prior to 1998, Petitioner No.1, the Plaintiff in that Suit, was a tenant of the premises, more particularly described in para 1 of the plaint. The Plaintiffs have claimed their use, occupation and possession of the premises since the date of inception of tenancy prior to 1998. The certificate issued by the Sales Tax Officer, Sales Tax Notice, Profession Tax Certificate, the Certificate of Registration issued under the Bombay Shops and Establishment Act, the Certificate of Importer–Exporter Code from Ministry of Commerce and some correspondence with the Municipal Corporation of Greater Bombay are relied upon, but these, to our mind, would demonstrate, at best, the physical possession of Petitioner No.1 in respect of the said premises. The cause of action for filing the Suit is stated to be that one Otoklin

Plants & Equipments Limited obtained Banking facilities from Bank of Baroda. Defendant Nos.1 and 2 to the Suit as well as the father of Defendant Nos.3, 4 and 5 were guarantors and the property was offered as a security to repay the amount of the credit facility with interest thereon. The default committed by M/s. Otoklin Plants & Equipments Ltd., the appointment of Official Liquidator, are all the facts relied upon and we find that identical averments are incorporated in the memo of the present Petition. There is a reference made to the International Assets Reconstruction Company Private Limited, which is the Asset Reconstruction Company before us. The Petitioners / Plaintiffs therein have not joined either the Bank or the International Assets Reconstruction Company Private Limited as a party-Defendant. They have also not impleaded the Official Liquidator. Be that as it may, the Suit claims a declaration that the Plaintiffs are duly protected as tenants under the provisions of the Maharashtra Rent Control Act, 1999.

23. It is in these circumstances, that we are of the view that Mr. Thakkar is right in contending that such a Suit, which has been brought before the Court of Small Causes, Mumbai on 4th October 2011 and the Consent Decree or terms therein would not prove the claim of tenancy. Para 7 of the Petition reads as under:-

"The Petitioners state that the Petitioners, therefore, constrained to file a suit being RAD Suit No.692/2011 of 2014 before the Ld. Small Causes Court, Mumbai, declaring himself as a tenant in respect of the said tenancy premises. In the said Suit, a decree came to be passed by the Ld. Small Causes Court, Mumbai on 31.7.2014 thereby declaring the Petitioners as lawful Tenants in respect of the said Tenancy premises and as such the status of the Petitioners being a Tenant is confirmed by the Competent Court of jurisdiction."

24. The Consent Terms, copy of which is at Exhibit "G" to the Petition, read thus:

- "1. The Defendants are landlords and owners of the premises on the ground floor of building standing on Plot No.1, Shah Industrial Area, Veera Desai Road, Andheri (West), Mumbai - 400 053 admeasuring in total 4367 sq. feet. The Defendants admit that prior to 1998 the Defendants Nos.1 & 2 had put the Plaintiffs in lawful and exclusive use, occupation and possession of the area admeasuring 3740 sq. feet out of the total area of 4367 sq. feet of the premises on the ground floor of building standing on Plot No.1, Shah Industrial Area, Veera Desai Road, Andheri (West), Mumbai -400 053 (hereinafter referred to as the "Suit Premises") for a monthly tenancy rent of Rs.1000/-.*
- 2. The Plaintiffs and Defendants agree that the Plaintiffs shall pay all proportionate outgoings of the tenancy premises i.e. BMC Tax, Water Tax, property tax and electricity charges consumed by them.*
- 3. The Defendants further admit that the Plaintiffs are their tenants prior to 1998 in respect of area admeasuring 3740 sq. feet out of the total area of 4367 sq. feet of the premises on the ground floor of building standing on Plot No.1, Shah Industrial Area, Veera Desai Road, Andheri (West), Mumbai - 400 053 being the Suit Premises herein. The Defendants admit that the Plaintiffs are carrying on their business in the suit premises prior to 1998.*

4. *The Plaintiffs irrevocably agrees and undertakes to regularly pay rent, permitted increases and the proportionate amount of increases in respect of the suit premises from time to time and within 15 days upon the Plaintiff calling upon the Defendants to pay the same. In addition to the above, the Plaintiffs agreed to pay all outgoings in respect of the said tenancy premises i.e. BMC Tax, Water Tax, property tax and electricity charges consumed by them.*
5. *The parties hereto agree and undertake to this Hon'ble Court to execute such further and other documents, assurances and writings as may be required by the Plaintiffs and/or their nominees and/or assigns for the purpose of implementing and/or carrying out the intents of these Consent Terms.*
6. *The suit is decreed in terms of prayer clause (a) above i.e. Defendants accept the Plaintiffs are monthly tenant in respect of the premises i.e. area admeasuring 3740 sq. ft. on the ground floor of building standing on Plot No.1, Shah Industrial Area, Veera Desai Road, Andheri (West), Mumbai - 400 053 (hereinafter referred to as the "Suit Premises") for a monthly tenancy rent of Rs.1000/-.*
7. *Decree in terms of the consent terms.*
8. *No order as to cost.*
9. *Refund of court fees as per the rules."*

25. The order decreeing the Suit in terms of the Consent Decree reads as under:-

- "1. *The authorized signatory of the plaintiff, defendant No.1 for self and on behalf of the defendant Nos.2 to 5 and their Advocates are present before me.*

2. *The Consent Terms is signed by the plaintiff and defendants. The respective Ld. Advocates of the plaintiff and defendant have identified their signatures on Consent Terms. The contents of Consent Terms are read over and explained to the parties before me. They have admitted the same. The compromise appears to be voluntary one and for betterment of the parties. The Consent Terms are legal and valid. So the consent terms given by the plaintiff and defendants is accepted. Therefore, Consent Terms is read and recorded and order is passed below Exhibit 1."*

"In view of Consent Terms vide Exhibit 17, the matter is compromised / settled between the parties. Hence, the suit is decreed in terms of Exhibit 17.

No order as to costs.

Court fee be refunded to the plaintiff as per rules.

Decree be drawn up accordingly."

26. It is pertinent to note that the terms have been prepared, signed and filed by the Petitioner No.2 and his father Dilip Kundanlal Jhaveri. The said Dilip obtained a Special Power of Attorney in favour from the other Defendants to the Suit on 30/07/2015 and filed the terms promptly and they were accepted on 31st July, 2015. Besides all this, a perusal of the terms resulting in the Decree would reveal that it is a product of collusion and fraud. The Additional Affidavit filed in this Petition in para 14 at page 179 states that as far as the property tax for the entire building including the tenancy premises is paid by the Petitioners since 1998. The Petitioners possess the records reflecting the payments from 1.10.2006 to

30.11.2014. This assertion is in complete contradiction to clauses 2 and 4 of the Consent Decree reproduced above. The words that the plaintiffs (petitioners herein) "shall pay" and "irrevocably agrees and undertakes to regularly pay" in these clauses would expose the parties' version before this Court. It is a clear case of a patently false claim of tenancy projected by misleading this Court. To protect parties placing such version before the Highest Court in the State would make complete mockery of the rule of law. This is a clear abuse of the process of this Court. None including the Hon'ble Supreme Court expects upholding of false, bogus and misleading claims of tenancy. We reject the claim outright.

27. To our mind, the Petitioners' claim of the above nature would not, in any manner, affect the mortgage created in respect of the premises and in favour of the Bank of Baroda. In other words, the mortgage created in favour of Bank of Baroda and the steps taken by the Bank of Baroda can never be and have never been questioned. There is no reference to the tenancy in any of the documents, including the Recovery Certificate issued by the Debt Recovery Tribunal-II, Mumbai. Mr. Thakkar, therefore, is right in contending that, until all the steps were taken by Respondent No.2 to this Writ Petition, by invoking the provisions of SARFAESI Act, the claim of tenancy was not asserted. In fact, the Securitization Application (S.A. No.322 of 2011) was filed before the Debt Recovery Tribunal-II,

Mumbai. In all this time and after the institution of this Securitisation Application, symbolic possession of the premises was obtained on 22nd August 2011. The Petitioners were not found anywhere on the scene. There is absolutely no document evidencing payment of rent. There has been no record produced, which would evidence payment of statutory dues and permitted increases. It is not a co-incidence that Petitioner No.2, Partner of Petitioner No.1, is also a Director of the Company in liquidation. It is in these circumstances that Mr. Thakkar has rightly claimed the tenancy to be doubtful.

28. Mr. Purohit has also not been able to place before this Court any material justifying the order of the Court of Small Causes, Mumbai. He has also not been able to place before this Court any order, which would conclusively prove and establish the Petitioners' claim of monthly tenancy, being genuinely protected by the Court of competent jurisdiction. In such circumstances, we do not think that the Chief Metropolitan Magistrate was in error in allowing the application made by the second Respondent. He has rightly directed the concerned Police Station and the officials therein to render assistance to Respondent No.2 and its officials / staff to obtain physical possession of the premises from the Petitioners. The Decree, which is a result of connivance and collusion between parties, is rightly brushed aside.

29. Mr. Thakkar has brought to our notice the Judgment of the Hon'ble Supreme Court in the case of *Vishal Kalsaria (supra)*.

30. This is a Judgment on which heavy reliance is placed by Mr. Purohit as well. We had an occasion to consider some-what identical controversy recently in the case of *Atul Daulatrai Desai Vs. State of Maharashtra & Ors., in Writ Petition No.7745 of 2016, decided on 7th July 2016*. During the course of considering the claim of tenancy, that too monthly, based on prolonged possession, we had held that in *Vishal Kalsaria (supra)*, the Supreme Court of India, did not doubt the tenancy, nor the claim in that behalf. If such doubts are raised and the claims can be termed as 'bogus and dubious', then, different considerations would apply.

31. We had held in that case that *Vishal Kalsaria (supra)* would apply when the claim was free from doubt and genuine. From paras 4 and 5 of the Judgment in *Vishal Kalsaria (supra)*, it was clear that Appellant Vishal Kalsaria therein had filed two Suits in the Court of Small Causes, Mumbai. An application for interim injunction was made therein. That was on the footing that Vishal Kalsaria was in physical possession of the premises, in relation to which the claim of tenancy was laid and that the obstruction to that possession needs to be prevented. The Court of Small Causes,

Mumbai passed a detailed order at an interlocutory stage and granted interim injunction in above terms. Thus, these are cases where the parties in physical possession, fearing eviction and dispossession and promptly approach the Court of competent jurisdiction, file a suit and make an interim application therein seeking protection against their dispossession. In such cases, the Chief Metropolitan Magistrate was bound to take note of the claims and the pending proceedings. It is in these circumstances and when there was no requirement of producing any registered instrument, that the Hon'ble Supreme Court stepped in and protected the parties like Vishal Kalsaria. In para 10 of our Judgment, we had held as under :-

"We do not think that any claim of tenancy vaguely set up and without any proof or contemporaneous record of its creation and continuance is protected and with greatest respect by the judgment of the Hon'ble Supreme Court. A judgment cannot be read like statutes. Eventually if the Rent Control Legislation and the benefit thereof can be availed off by tenants and occupants, the initial burden is on them to establish and prove the existence of a tenancy and that will be in jeopardy by the act of either the principal borrower or the bank. In the present case, we do not think any such proof is forthcoming, more so, when the challenge to the order passed under Section 14(1) is a clear afterthought. It is also apparent that parties like the petitioner would have to establish that the mortgagor and mortgagee were aware of the creation of the tenancy in the sense it is subsequent to the mortgage or otherwise. If it is subsequent, then, the creditor's consent has been taken. If it is prior, then, the tenant on becoming aware of the bank's action has filed legal proceedings claiming a declaration that the tenancy is valid, subsisting and binding

and that his physical possession be protected by a prohibitory and injunctive order.

32. Such is not the case before us and, on facts, the distinction in Vishal Kalsaria and the present Petitioners is obvious. Therefore, no assistance can be derived by the Petitioners from the Judgment in *Vishal Kalsaria (supra)*.

33. If the above factual materials do not indicate that a monthly tenancy is created and the claim raised is an afterthought, then, all the more, we are not inclined to accept the contentions of Mr. Purohit.

34. As a result of the above discussion, the Writ Petition fails and the same is dismissed.

35. At this stage, it is requested that the ad-interim protection granted by this Court in this Writ Petition be continued for a period of eight weeks, so as to enable the Petitioners to take appropriate steps, including challenging this order in higher court.

36. The request is opposed by the contesting Respondents.

37. We have heard the counsel on this point. Once we have held that there is no genuine and bonafide tenancy and the plea raised is an afterthought, then, this ad-interim protection cannot be continued. It cannot be continued, all the more, because we had granted an opportunity, by this protection, to the Petitioners to produce proof of tenancy. That being not produced, the request is refused.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [S.C. DHARMADHIKARI, J.]