

**THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN**  
**AND**  
**THE HON'BLE DR JUSTICE SHAMEEM AKTHER**

**Writ Petition No.1488 of 2017**

**ORDER:** {Per the Hon'ble the Acting Chief Justice Ramesh Ranganathan}

Heard Sri Muddu Vijay, learned counsel appearing on behalf of Sri K.Ramakanth Reddy, learned counsel for the petitioner, and Sri S.Niranjan Reddy, learned Senior Counsel appearing on behalf of the respondent-bank and, with their consent, the writ petition is disposed of.

The relief sought for in this writ petition is to declare the action of the respondents in taking physical possession of the petitioner's property, pursuant to the order passed by the Chief Judicial Magistrate, East Godavari in CrI.M.P.No.360 of 2016 dated 20.12.2016, as arbitrary and illegal. A consequential direction is sought to the respondents not to disturb the peaceful possession and enjoyment of the petitioner's property, and to set aside the possession notice dated 20.12.2016.

Facts, to the limited extent necessary, are that the petitioner claims to have entered into a lease agreement with the 2<sup>nd</sup> respondent on 01.11.2015 on a monthly rent of Rs.45,000/- for a hotel situated in Rajahmundry City covering an area of 5,000 square yards of land with a built up area of 60,000 square feet. The 2<sup>nd</sup> respondent had mortgaged the subject property in favour of the 1<sup>st</sup> respondent-bank and had obtained a loan which, with accumulated interest, is now said to exceed Rs.130.00 crores.

The only contention urged before us by Sri Muddu Vijay, learned counsel appearing on behalf of the petitioner, is that, even though the lease deed is not registered, the fact that the petitioner is in possession of the subject property has been admitted by the respondents themselves, as they refer to the lease deed dated 01.11.2015 in the list of dates detailed in the counter affidavit; as the possession of the petitioner is admitted, he can be evicted from the subject premises only in accordance

with law; and as appointment of the Advocate-Commissioner, by the Judicial Magistrate under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short “the SARFAESI Act”), was without putting him on notice and without giving him an opportunity of being heard, the impugned proceedings are illegal. Learned counsel would rely on ***Vishal N.Kalsaria vs. Bank of India***<sup>1</sup> in this regard.

Sri S.Niranjan Reddy, learned Senior Counsel appearing on behalf of the 1<sup>st</sup> respondent-bank, would draw our attention to the contents of the lease deed filed by the petitioner to submit that the genuineness of this lease deed is doubtful. Learned Senior Counsel would submit that, while the stamp paper was purchased on 19.05.2014, the lease deed is said to have been entered into nearly one and half years thereafter on 01.11.2015, that too for a measly monthly rent of Rs.45,000/-; while the lease period is stipulated as three years, the lease deed has not been registered; and, as the genuineness of the lease agreement is doubtful, this Court would not examine its validity in proceedings under Article 226 of the Constitution of India, more so as the petitioner has an effective alternative remedy under Section 17(4A) of the SARFAESI Act, as inserted by Act 44 of 2016 with effect from 16.06.2016.

The fact that the subject lease agreement has not been registered, as required in terms of the Registration Act, is not in dispute. In ***Vishal N.Kalsaria***<sup>1</sup>, the questions which arose for consideration before the Supreme Court were whether a protected tenant, under the Maharashtra Rent Control Act, 1999 could be treated as a lessee; whether the provisions of the SARFAESI Act would override the provisions of the Rent Control Act; and the manner in which the right of a protected tenant could be preserved in cases where the debtor landlord secured a loan by offering the very same property as security interest either to the banks or financial institutions.

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<sup>1</sup> (2016) 3 Supreme Court Cases 762

The present case does not fall within the ambit of any Rent Control enactment. From the list of dates, detailed in the counter affidavit, it is evident that the 2<sup>nd</sup> respondent had mortgaged the subject property to the 1<sup>st</sup> respondent-bank in the year 2006, more than 9 years prior to the execution of the lease deed on 01.11.2015. It is not as if the petitioner-tenant was in possession of the subject building even prior to its mortgage, or that the landlord was using the provisions of the SARFAESI Act to have the tenant evicted from the subject premises.

The observation of the Supreme Court, in **Vishal N. Kalsaria**<sup>1</sup> is that, if two parties were executing their rights and liabilities in the nature of landlord-tenant relationship, and if regular rent was being paid and accepted, then the mere factum of non-registration of the lease deed will not make the lease itself nugatory; and if no written lease deed exists, then such tenants are required to prove that they have been in occupation of the premises as tenants by producing such evidence, in proceedings under Section 14 of the SARFAESI Act, before the Magistrate concerned. The aforesaid observations cannot be read out of context or its application extended even to cases not falling under the Rent Control Act.

It is only the law declared by the Supreme Court which is binding on the High Court. Judgments should neither be read as statutes nor as Euclid's theorems divorced from the context in which the observations, in the judgment, were made. In **Vishal N. Kalsaria**<sup>1</sup>, the Supreme Court clarified that, for granting leasehold rights created after the property has been mortgaged to the bank, consent of the creditor needs to be taken (para 36). It is evident, therefore, that, even in terms of the Judgment of the Supreme Court in **Vishal N.Kalsaria**<sup>1</sup>, the subject lease agreement executed on 01.11.2015, without obtaining the consent of the secured creditor (1<sup>st</sup> respondent-bank), cannot be relied upon to defeat the rights of the secured creditor-bank to recover its dues under the SARFAESI Act.

In any event, all these questions can as well be examined by the Debt Recovery Tribunal, on its jurisdiction being invoked by the petitioner, who claims to be the tenant of the subject premises in terms of the lease agreement dated 01.11.2015. Section 17(4A) of the SARFAESI Act, inserted by Act 44 of 2016 with effect from 16.06.2016, reads thus:

“17(4A) Where-

- (i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy -
  - (a) has expired or stood determined; or
  - (b) is contrary to section 65A of the Transfer of Property Act, 1882; 4 of 1882 or
  - (c) is contrary to terms of mortgage; or
  - (d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act;
- and
- (ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.”

In the light of Section 17(4A), the petitioner, as a tenant, has the right to invoke the jurisdiction of the Debt Recovery Tribunal and, in case his claim is held to fall within the ambit of Clauses (a) to (d) of Sub-clause (i) of Section 17(4A), the Debt Recovery Tribunal is empowered to grant them such relief as it deems fit under Clause (ii) of Section 17(4A) of the SARFAESI Act. As the petitioner has an effective alternative statutory remedy under Section 17(4A) of the SARFAESI Act, and in the light of the law declared by the Supreme Court in **Union Bank of India vs. Satyawati Tondon**<sup>2</sup> that where there exists an effective remedy to an aggrieved person under the SARFAESI Act, the High Court should ordinarily not entertain the writ petition under Article 226 of the Constitution of India, we see no reason to adjudicate the petitioner's claim on its merits.

Leaving it open to the petitioner, if he so chooses, to avail his remedy under Section 17(4A) of the Act, the Writ Petition fails and is,

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<sup>2</sup> (2010) 8 Supreme Court Cases 110

accordingly, dismissed. Miscellaneous Petitions pending, if any, shall also stand dismissed. There shall be no order as to costs.

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**(RAMESH RANGANATHAN, ACJ)**

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**(DR. SHAMEEM AKTHER, J)**

27<sup>th</sup> March, 2017

**Note: Issue C.C tomorrow.**

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AND  
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**Date: 27.03.2017**

**JSU**