

**HIGH COURT OF JAMMU AND KASHMIR AND LADAKH
AT JAMMU**

OWP No. 510/2014(O&M)

Reserved on 25.04.2024

Pronounced on 17.05.2024

1. Kulbhushan Khullar, Aged 63 years S/o. L. Nand Gopal Khullar, R/o. Rehari, JammuAppellant(s)/Petitioner(s)
2. Vidya Bhushan Khullar, Aged 61 years, S/o. L. Nand Gopal Khullar, R/o. 189-P Khoo Wali Gali, Sector-I-A Extension Trikuta Nagar, Jammu
3. Vijay Khullar, Aged 53 years, S/o. Late Nand Gopal Khullar, R/o. 241-B Vikram Nagar, Rehari Colony, Jammu

Through: Mr. Navyug Sethi, Adv.

Vs

1. J&K State Financial Corporation, State Financial Corporation, Bahu Palaza, Jammu through its Managing Director Respondent(s)
2. Managing Director, J&K State Financial Corporation, State Financial Corporation, Bahu Plaza, Jammu
3. Dy. General Manager, J&K State Financial Corporation, State Financial Corporation, Bahu Plaza, Jammu
4. M/s Kushal Confectionary and Pharma Ltd. 6-B Rizvi Park-D, Raj Lane, Atamount Road, Mumbai

Through: Mr. Sumeet Bhatia, GA for Nos. 1 to 3

CPOWP No. 76/2014(O&M)

1. Kulbhushan Khullar, Aged 63 years S/o. L. Nand Gopal Khullar, R/o. Rehari, JammuAppellant(s)/Petitioner(s)
2. Vidya Bhushan Khullar, Aged 61 years, S/o. L. Nand Gopal Khullar, R/o. 189-P Khoo

Wali Gali, Sector-I-A
Extension Trikuta Nagar,
Jammu

3. Vijay Khullar, Aged 53 years,
S/o. Late Nand Gopal Khullar,
R/o. 241-B Vikram Nagar,
Rehari Colony, Jammu

Through: Mr. Nayjug Sethi, Adv.

Vs

1. Sh. Mohd. Farooq Thokar,
Managing Director, J&K State
Financial Corporation, State
Financial Corporation, Bahu Plaza,
Jammu
2. Sh. Nissar Hussain Naik, Dy,
General Managing J&K State
Financial Corporation, State
Financial Corporation, Bahu Plaza,
Jammu

..... Respondent(s)

Through: Mr. Sumeet Bhatia, GA

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGMENT

1. The petitioners being the owners of land measuring 2 kanals and 19 marlas comprising survey No. 177 and 12 marlas comprising survey No. 624 situated at Digiana and Narwal Pain, Jammu, had constructed the double storied building, hall, godown, office block and terrace on the same.
2. In the year 1983, a Lease Deed dated 14.10.1983 was executed by the petitioners in respect of the above mentioned property in favour of respondent No. 4 for a period of 25 years with effect from 01.11.1983. In terms of Clause 10 of the Lease Deed, the respondent No. 4 was allowed by the petitioners to mortgage the lease hold rights of the demised property in favour of any banking/financial institutions/corporation for

raising the funds and the said institution was further entitled to transfer the lease hold rights in favour of a third party, in the event of foreclosure of the mortgage. A Supplementary Lease Deed dated 26.02.1985 was executed in respect of the same property thereby delineating the survey numbers of the land, which along with the building was leased out to the respondent No. 4 vide Lease Dated 14.10.1983, wherein the Survey numbers were not mentioned. The respondent No. 4 in terms of the Clause 10 of the Lease Deed dated 14.10.1983 mortgaged the lease hold rights in favour of respondent No. 1, through the medium of Mortgage Deed dated 08.04.1985. It is stated by the petitioners that respondent No. 4, due to unknown reasons, did not continue to operate its industrial unit established upon the property owned by the petitioners but leased out to respondent No.4 and after closing down the same, handed over the possession of the property to them way back in the year, 1996 though the term of the lease was to expire in the year, 2008. The rentals for the aforesaid period were also not paid to the petitioners by the respondent No. 4. The petitioners also claim to have kept the articles/machinery of the respondent No. 4 in separate rooms and further that they were enjoying the possession of the aforesaid property being the lawful and absolute owners of the same. As there was substantial amount of loan outstanding against the respondent No.4, the respondent Nos. 1 to 3 continued to issue notices to the respondent No. 4 on the property owned and possessed by the petitioners. The petitioners continued to apprise the respondent Nos. 1 to 3 about the fleeing away of the respondent No. 4

leaving the plant and machinery and requested them to remove the same and put to auction and pay the rent of the building to the petitioner. In the year, 2004, the petitioners through their counsel, served a legal notice dated 05.10.2004 upon the respondent No. 2 requesting him to remove the machinery and plants hypothecated with respondent No. 1-Corporation in lieu of the loan advanced to the respondent No.4 within the period of 30 days and if the same was not removed, they would sell the same and recover the dues/arrears of rent out of the sale proceeds. In the year, 2005, the petitioner No. 1(now deceased) requested the respondent Nos. 1 and 2 vide representation dated 09.05.2005 to lift the plant and machinery lying in the premises of the petitioners but in vain.

3. The respondent No. 3 in exercise of the powers vested under section 29 of the State Financial Corporations Act took over the possession of the property of the petitioners on 31.12.2013 and in consequence of which, the respondent No. 3 issued the possession notice dated 03.01.2014 which was published in the local daily newspaper Daily Excelsior's edition dated 08.01.2014.
4. The petitioners being aggrieved of the possession notice dated 03.01.2014 issued by the respondent No. 3, has impugned the same on the grounds that the property has been illegally and unlawfully taken over by respondent Nos. 1 to 3 for realization of loan outstanding against the respondent No. 4, particularly when respondent No. 4 had handed over the vacant possession of the property to the petitioners in the year, 1996 and after expiry of the period of lease as stipulated in the lease deed, the

property in question was duly vested with the petitioners as lawful owners and the said property cannot be subjected to auction for recovery of the loan outstanding against the respondent No. 4. It is urged that the mortgage remained valid till the currency of the lease period and immediately after expiry of the lease period, the said property cannot continue to be remained as mortgaged property with the respondent Nos. 1 to 3. It is also stated that respondent No. 4 has not only cheated the respondent Nos. 1 to 3 but has also deprived the petitioners of their legitimate rentals.

5. By placing and pleading these facts before this Court, the petitioners have not only impugned the possession notice dated 03.01.2014 but have also sought directions upon the respondents to release the abovementioned property in favour of the petitioners, which have been taken over by the respondents for recovery of arrears of loan outstanding against the respondent No. 4.
6. Respondent Nos. 1 to 3 have filed the response stating therein that the respondent No. 4 was sanctioned a loan of Rs. 27.06 lacs on 27.09.1984 and the Corporation has been able to recover only an amount of Rs. 40,12,440.64/- and for recovery of balance dues, the Corporation issued notice under section 29 of the SFCs Act 1951 on different dates in the years-1996, 1997 and 1998 besides regular follow up and default notices for recovery of dues. The Corporation got the auction notice published on different dates in Daily Excelsior dated 15.12.1998, Daily Excelsior dated 18.12.1999, Kashmir Times dated 17.05.1999 and Daily Excelsior dated

21.05.1999. The Corporation tried to auction the unit in the year, 2000 but only a single bid was received in the matter and the Sub-Committee of the Corporation constituted in the matter in its meeting held on 04.08.2001 decided to reject the bid/offer due to bid being single and not reasonable. The Committee desired that the Corporation should re-auction the unit. It is also stated that the respondent No. 4-company is not only the defaulter of the Corporation, but also of the Central Excise Department as it owed Central Excise Duty, as is evident from the communication dated 06.11.2001 issued by the office of D. C. Central Excise Division Jammu. The unit was put to auction again in the year, 2004 vide publication in Daily Excelsior dated 01.05.2004 and dated 25.11.2004 and default notice was published in Daily Excelsior dated 05.11.2004, but there was no response to the notice. Even a letter dated 18.05.2006 was written to the promoter/directors of the company in the year, 2006 for extension of lease period, as the period of lease was expiring on 01.11.2008. A further offer was made to the defaulter-company for settlement of loan under OTS 2007 but to no effect. The Corporation further published the default notice in Daily Excelsior dated 16.01.2009 and Kashmir Times dated 15.01.2009 and Auction Notices in Daily Excelsior dated 02.03.2009, Kashmir Times dated 02.03.2009, Kashmir Times dated 20.05.2009 and State Times dated 21.05.2009 but again there was no response. Yet another offer under OTS-10 was made to the company-respondent No. 4 but it again evoked no response. Finally, a notice under section 29 of the SFCs Act dated 14.09.2009 was issued to the respondent No. 4, which too yielded no

response in the matter and as per laid down procedure, the Corporation took over the assets of the unit on 31.12.2013 at 12.30 PM and handed over to M/s B. D. Security Ltd for the purpose of “watch and ward”. The Possession Notice dated 03.01.2014 was got published in Daily Excelsior dated 08.01.2014 and Arising State dated 05.01.2014 informing the general public about taking over the possession of the mortgaged property and cautioning against the dealing with said property without information to the respondent-corporation.

7. After the possession of the mortgaged property was taken over, the petitioners/lessors approached the Corporation for release of the premises in their favour and legal notice was also received for release of mortgaged property in favour of the petitioners/lessors. The respondent Nos. 1 to 3, have admitted the execution of the lease deed between the petitioners-lessors and the respondent No. 4 for a period of 25 years with effect from 01.11.1983. It is further stated the property mortgaged by respondent No. 4 in favour of respondent Nos. 1 to 3 continued to be in the actual and physical possession of the respondent No. 4 till the possession of the same was taken over from the respondent No. 4 by the State Financial Corporation by virtue of powers vested in it in terms of section 29 of the SFC Act, 1951 and in pursuance to the taking over the possession of the mortgaged property, a Possession Notice dated 04.01.2014 has been published in the newspaper. The property i.e. the land as well as the building is in peaceful possession of the State Finance Corporation and the Corporation intends to auction the same in the near future following

due procedure under the SFC Act. In fact the present petition is the ploy of the respondent No. 4 and the petitioners to defraud the answering respondents and there is nothing on record to suggest that the petitioners took any action against the respondent No. 4 at any point of time seeking recovery of rentals or securing the vacant possession of the property. The circumstances clearly suggest that the petitioners have agreed with the respondent No. 4 to continue with the lease may be orally or in writing after the expiry of the lease period. The respondent Nos. 1 to 3 have further stated that the plant and machinery of the unit were in their possession at the time when they took over the possession and there was nothing to suggest that the whole of the premises was being used for any other purpose as the whole premises was in disuse due to the plant being not functional.

8. The respondent Nos. 1 to 3, have filed the counter affidavit also wherein a similar stand has been taken by the respondents. It is further stated that the site plan of the existing structure/building of M/s Kaushal Confectionery and Pharma Pvt. Ltd. Digiana would show that huge structure has been raised on the land in question from the funds of the Corporation and once the company has defaulted in the repayment of loan, the Corporation is well within its right to hold and possess the property till the amount is realized out of these assets.
9. The respondent Nos. 1 to 3 have also filed the supplementary affidavit and it is reiterated that the petitioners had authorized the lessee to raise the structure in addition to the existing structure according to the

requirements at their own cost and have further authorized the lessee to make any alternation, modification and extension in the instant building at their own cost. After obtaining the possession of the leased out land and securing the loan from respondent Nos. 1 to 3, the respondent No. 4 raised huge structure over the land besides making certain alterations to the existing structure as shown in the lease deed and also installed plant and machinery, out of the loan so disbursed. The communication dated 10.10.1986 substantiates that huge structure has been raised and plant and machinery installed by utilizing the loan so disbursed to the respondent No. 4. It is further averred that while executing mortgage deed of lease hold rights, the respondent No. 4 has conveyed in categorical terms that the lease hold rights in the land measuring 3 kanals 11 marlas comprising Survey Nos. 624 and 177 situated at Village Digiana and Narwal Pain, Tehsil Jammu hereditaments together with all the buildings and the structure thereon or may be erected thereon or any part thereof shall be the mortgaged property.

10. Mr. Navyug Sethi, learned counsel for the petitioners has vehemently argued that the respondent No. 4 was having the lease hold rights only for a period of 25 years and the same were mortgaged by the respondent No. 4 with respondent Nos. 1 for the purpose of obtaining loan and once the period of 25 years stood expired, the respondent Nos. 1 to 3 cannot enforce any claim in respect of the property owned and possessed by the petitioners after the expiry of the lease period. He has further submitted that communication dated 18.05.2006 placed on record by the respondent

Nos. 1 to 3 themselves, demolishes the claim of the respondents Nos. 1 to 3.

11. On the contrary, Mr. Sumeet Bhatia, learned GA appearing for respondent Nos. 1 to 3 has submitted that after obtaining the loan from respondent Nos. 1 to 3, the respondent No. 4 had constructed the huge structure on the property and respondent Nos. 1 to 3 can very well exercise their right under the SFC Act, not only in respect of the structure constructed by the respondent No. 4 after availing the loan but also in respect of the property leased out by the petitioners to respondent No. 4 in view of the stipulation contained in the lease deed itself.

12. Heard and perused the record.

13. The following facts are admitted:

- (i) That the lease deed dated 14.10.1983 in respect of the building comprising of godown, office block and pacca terrace floor existing on the land measuring 2 kanals 19 marlas comprising survey No. 177 and land measuring 12 marlas comprising survey No. 624 situated at Digiana and Narwal Pain Jammu was executed by the lessors-petitioners in favour of the respondent No.4 for a period of 25 years with effect from 01.11.1983. The lease deed was followed by a Supplementary Lease Deed dated 26.02.1985 executed between the lessors-petitioners and Director of respondent No. 4-company.
- (ii) In terms of Clause 10 of the lease deed, the respondent No. 4 was further allowed to mortgage lease hold rights in favour of any

banking/financial institutions/corporation for raising the funds and the said institution was further entitled to transfer the lease hold rights in favour of a third party in the event of foreclosure of the mortgage.

- (iii) The Mortgage Deed dated 08.04.1985 was executed by the respondent No. 4 in favour of respondent Nos. 1 to 3 in respect of lease hold rights of the property in question mentioned above.
- (iv) That as per Mortgage Deed dated 08.04.1985, the loan for an amount of Rs. 27.06 lacs was obtained by the respondent No. 4 and the same was to be liquidated in 16 installments and the 16th installment of Rs. 1.56 lacs was to be paid on 8th day of October, 1994. The interest on the loan amount was to be paid in accordance with the terms as laid down in the mortgage deed.
- (v) That respondent No. 4 raised more construction on the mortgaged property and also made alterations in the existing structure.
- (vi) The respondent No. 4 became defaulter in the year 1995 and notice was issued to the respondent No. 4 under section 29 of the State Financial Corporations Act on 13.06.1996 for making payment of Rs. 22,54,493.25/- which includes principle of Rs. 17,87,454.25/- and interest up to 15.09.1995 for an amount of Rs. 4, 67,039/-

14. From the admitted facts, it is evident that the respondent No. 4 was having the lease hold rights in respect of mortgaged property for a period of 25 years only with effect from 01.11.1983 and the lease period stood expired on 31.10.2008. The respondent Nos. 1 to 3 have placed on record the

number of notices issued to the respondent No. 4, whereby respondent No. 4 was called upon to liquidate the amount due to them and the respondent Nos. 1 to 3 have also placed on record the various auction notices published by them in the Daily newspapers but the said notices evoked no response.

15. Now the following issues arise for consideration and adjudication:

A. Whether the respondent No. 1 in terms of mortgage deed dated 14.10.1985, where by the lease hold rights were mortgaged by the respondent No.4 with the respondent No. 1, can claim the possession of the demised premises leased out by the petitioners to respondent No. 4 for a period of 25 years after the expiry of the lease period ?

B. If the answer to the above issue is in negative, whether the respondent No. 1 can claim any right over the construction raised or alterations made by the respondent No.4 on the mortgaged property, by utilizing the loan amount obtained from the respondent No. 1 ?

Issue No. A:

16. Whether the respondent No. 1 in terms of mortgage deed dated 14.10.1985, where by the lease hold rights were mortgaged by the respondent No.4 with the respondent No. 1, can claim the possession of the demised premises leased out by the petitioners to respondent No. 4 for a period of 25 years after the expiry of the lease period?

17. There is no denying of the fact that respondent No. 4 was having a lease hold rights for a period of 25 years only with effect from 01.11.1983 with regard to the building comprising of godown, office block and open space

in the form of pacca terrace existing on the land measuring 3 kanals and 11 marlas comprising Survey Nos. 177 and 624 situated at Industrial Estate Digiana. Once the respondent No. 4 was having the limited interest in a property for a limited period of 25 years, it could have mortgaged such limited interest in the form of lease hold rights in respect of the demised property pursuant to the permission granted by the petitioners in favour of respondent No. 1 only for a period of 25 years and as such by virtue of mortgage deed, only the lease hold rights qua the property leased out to respondent No. 4 were mortgaged in favour of the Corporation for a period of 25 years of lease. In the mortgage deed reference has been made to the Lease Deed dated 14.10.1983 and the Supplementary Lease Deed executed in the year, 1985. The respondent Nos. 1 to 3 have also tacitly acknowledged that the petitioners were having the limited interest (lease hold rights) in the property for a limited period of 25 years only i.e. during the subsistence of the lease deed executed between the petitioners and respondent No. 4 and because of this reason only, a communication dated 18.05.2006 was addressed by the Chief Manager of the respondent No. 1 to the Director of respondent No. 4 for seeking extension of the period of lease. The communication is extracted as under:

“Reg: Extension of lease period in respect of Lease Deed executed between Sh. Nand Gopal Khullar and M/s Kaushal Confectionary and Pharma (P) Ltd, Opp. Industrial Estate, Digiana, Jammu.

Madam,

You are aware that the Corporation has advanced a loan of Rs. 27.06 lakhs in favour of the captioned company for setting up of a unit on leased land at Digiana Opposite Industrial Area, Digiana Jammu. **The lease period in terms of lease deed executed by you on 14.10.1983 and**

supplementary Lease Deed dated 06.02.1985, is expiring on 01.11.2008, you are therefore, advised to get the lease period extended with the lessor for further suitable period till the liquidation of the loan outstanding of the Corporation.

Your are also advised to take necessary steps within a period of one month for extending the lease period from date of receipt of the letter and furnish the amended lease deed duly registered in Court of Law, positively. In case we do not hear anything from you within stipulated time, the Corporation shall be constrained to take legal action under Section 29 of the SFCs Act without further notice to you.

Treat the matter urgent.

Yours faithfully

Sd/-

Chief Manager”

18. The respondent-corporation was having the knowledge that the respondent No.4 was having a limited interest in the mortgaged property that too for a limited period but still it took the risk to advance the loan to the respondent No.4 against the mortgage of limited interest for a limited period. The respondent-corporation never took the possession of the mortgaged property during the subsistence of lease for reasons unknown and allowed the lease period to expire and six years after the expiry of the lease, took the possession of the mortgaged property which is not permissible under law because the limited interest of the respondent-corporation in the mortgaged property ceased to exist after the expiry of the lease. In view of above, this court is of the considered view that the respondent No. 1 cannot claim the possession of the demised premises leased out by the petitioners to respondent No. 4 for a period of 25 years after the expiry of the lease period. The issue No. A is answered accordingly.

Issue No. B:

- 19.** If the answer to the above issue is in negative, whether the respondent No. 1 can claim any right over the construction raised by the respondent No.4 on the mortgaged property, by utilizing the loan amount obtained from the respondent No. 1?
- 20.** Clause-3 of the lease deed dated 14.10.1983 provided that the lessee (respondent No.4) shall raise the structure in addition to the existing one according to the requirement at their own cost. The respondent No.1-3 are right in submitting that the respondent No. 4 has added to the constructions existing on the land leased out to respondent No. 4 after availing the loan from respondent No. 1. Thus, the respondent No.4 was the owner of the new construction raised on the demised premises. In view of the mortgage deed, the respondent Nos. 1 to 3 has every right over the constructions raised by the respondent No. 4 after availing the loan facility from them. Respondent No. 1 could have proceeded against the respondent No. 4 right when in the year, 1996 the respondent No.4 became a defaulter but except for issuing notices and publishing auction notices, the respondent-corporation did not resort to the power vested in them by virtue of section 29 of the SFC Act. Even if it is assumed that the respondent No.1-3 have the rights qua the constructions raised by the respondent No.4 after availing the loan facility, the respondent No.4 cannot claim a right better than that of the respondent No.4. In this context it would be proper to take note of section 108(h) of the Transfer of Property Act which is extracted as under:

(h) the lessee may [even after the determination of the lease] remove, at any time [whilst he is in possession of the property]

leased but not afterward] all things which he has attached to the earth : provided he leaves the property in the state in which he received it ;

21. Thus, the lessee during the currency of the lease and being in possession of the property leased can at any time remove the superstructure which the lessee has put on the land and leave the property in the state in which the lessee received it. In '**K.A. Dhairyawan (Dr) v. J.R. Thakur**', 1958 AIR(SC) 789, the Hon'ble Apex Court has held as under:

7. Normally, under S. 108 of the Transfer of Property Act, before the expiry of the lease, a lessee can remove all structures and buildings erected by him on the demised land. All that was necessary for him to do was to give back the land to the lessor, on the termination of the lease, in the same condition as he found it. The ownership therefore, of the building in this case was not with the lessors but was with the lessees. Under S. 108 of the Transfer of Property Act there was nothing to prevent the lessees contracting to hand over any building or structure erected on the land by them to the lessors without receiving any compensation. In other words, although under S. 108 the lessees had the right to remove the building, by the contract they had agreed to hand over the same to the lessors without the right to receive compensation at the end of the lease, the matter being entirely one of contract between the parties. Such a contract, however did not transfer the ownership in the building to the lessors while the lease subsisted.

(emphasis added)

22. Thus, the only right the lessee i.e. respondent No.4 or the respondent No.1 could have exercised at the time of expiry of the lease or prior there to, was to remove the superstructure constructed by the respondent No.4 by utilizing the loan amount.
23. For all what has been said and discussed above, this writ petition is disposed of with the following directions:
- (i) The respondent Nos. 1 to 3 shall remove the plant and machinery of the respondent No.4 from the demised property and deliver the possession of the property in question leased out by the petitioners

to respondent No. 4 in terms of Lease Deed dated 01.11.1983 and Supplementary Lease dated 26.02.1985, to the petitioners within a period of 90 days from today.

- (ii) The respondent Nos. 1 to 3 shall be at liberty to remove the superstructure constructed by the respondent No.4 out of the proceeds of the loan advanced by the respondent No.1.

24. Disposed of.

(RAJNESH OSWAL)
JUDGE

JAMMU
17.05.2024
Rakesh PS

