

*** THE HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU**
AND
THE HON'BLE SRI JUSTICE DUPPALA VENKATA RAMANA
+ WRIT PETITION No.17929 of 2023

% **30th AUGUST, 2023**

Potluri Lakshmi Rajeswari and another

... Petitioners..

AND

2.

\$Punjab National Bank and 7 others.

... Respondents.

! Counsel for the Petitioners: Mr.P.S.P. Suresh Kumar

^ Counsel for the respondents: Mr. Prudviraju Mudunuri

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> Head Note:

? Cases referred:

1. (2019) 9 SCC 94
2. (2016) 3 SCC 762
3. (2014) 6 SCC 1

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AND
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WRIT PETITION No.17929 of 2023

ORDER: *(per Hon'ble Sri Justice D.V.S.S.Somayajulu)*

This Writ Petition is filed by the tenants in the property seeking declaration that they have been highhandedly dispossessed by the respondent-bank through an Advocate Commissioner appointed under the provisions of Section 14 of the The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act") by the Chief Judicial Magistrate, Machilipatnam.

2) The prayer is for a mandamus declaring the action taken by the Bank as highhanded.

3) This Court has heard Sri P.S.P. Suresh Kumar, learned counsel for the petitioners and Sri Prudviraju Mudunuri, learned standing counsel for the 1st respondent-Bank.

4) With the consent of both the learned counsel the Writ Petition itself is taken up for hearing since an objection was raised as to the very maintainability of the writ petition itself.

5) Sri P.S.P. Suresh Kumar, learned counsel for the petitioners argued that the petitioners are tenants of the property consisting of land and building in R.S.No.5/3, Plot No.10, bearing Door No.4-11-4A Gangadharapuram (V), Bommuluru Gram Panchayat, Krishna District. They state that they have entered into a lease in the year 2013, which was valid for a period of 10 years and that they are in settled peaceful possession of the property. It is stated that the lease is existing prior to the mortgage of the property and that therefore the highhanded action of the respondent-bank intaking over the possession through an order of the Chief Judicial Magistrate, Machilipatnam, is contrary to law. Learned counsel submits that since the petitioners are not the borrowers he cannot take any steps to protect his interest in the Debts Recovery Tribunal and before the impugned action is taken this Court should come to the aid of the petitioners, who are in settled possession for more than a decade, and that the Writ Petition should, therefore, be ordered.

6) Learned counsel for the respondent-Bank on the other hand submits that the writ is not maintainable. On the basis of unregistered rental agreement dated 25.12.2013 the

petitioners are claiming to be in possession and that the documents filed are all of recent origin and do not show the petitioners alleged possession from 2013 onwards. It is submitted that the unregistered lease is created for the purpose of this litigation only. Therefore, learned counsel submits that this is an engineered litigation to prevent the bank from taking over the possession of the property. Learned standing counsel for the Bank points out that in view of the judgments of the Hon'ble Supreme Court of India reported in ***Bajarang Shyamsunder Agarwal v. Central Bank of India***¹ and the earlier judgment in ***Vishal N. Kalsaria v. Bank of India***² a writ is not proper remedy and the Court should not interfere in matters of this nature, particularly under writ jurisdiction.

7) The issues raised are set out in the course of the arguments, which are reproduced earlier. The fact remains that the rental agreement, dated 25.12.2013, which is for a period of 10 years, has not been registered. The petitioners are claiming to be in possession pursuant to this. The

¹ (2019) 9 SCC 94

² (2016) 3 SCC 762

documents filed along with the writ petition do not show the alleged settled possession from 2013.

8) In respect of the question of law this Court is of the opinion that Sections 106 (1) and 107 of the Transfer of Property Act (for short “TP Act”) are to be noted:

Section 106 (1) of the TP Act is to the following effect:

“106. Duration of certain leases in absence of written contract or local usage.—(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months’ notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days’ notice.”

9) Section 107 of the TP Act is to the following effect:

“107. Leases how made.—A lease of immoveable 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.

All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:

Provided that the State Government may from time to time, by notification in the Official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.”

10) A reading of both these sections together makes it clear that Section 106 of the TP Act deals with the duration of certain leases in the absence of the written contract or local usage. Section 107 of the TP Act deals with leases, and the heading itself indicates “Leases How Made”. It is very clear that the lease of immovable property from year to year or a term exceeding one year or reserving a yearly rent can only be made by a registered instrument. All “other” leases can be made either by a registered instrument or by an oral agreement accompanied by delivery of possession. Hence there can only be a registered lease or an oral lease with delivery. Therefore, it is clear that if there is a written lease, it has to be registered. If the lease is not registered under the law, it carries its own implications.

11) In addition, for the purpose of deciding the current dispute, Section 65A of the TP Act, which deals with the

mortgagers power to lease and Section 111 of the TP Act are necessary to be considered. They are reproduced hereunder:

65A. Mortgagor's power to lease.—(1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2) (a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(c) No such lease shall contain a covenant for renewal.

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(e) In the case of a lease of buildings, whether leased it or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section

(2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.

111. Determination of lease.—A lease of immoveable property determines— (a) by efflux of the time limited thereby:

(b) where such time is limited conditionally on the happening of some event—by the happening of such event:

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event:

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right:

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them:

(f) by implied surrender:

(g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter; or

(2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or

(3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease:

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

12) As far as the law on the subject of tenancy / SARFAESI Act is concerned the 1st judgment that considered the interplay between the provisions of the SARFAESI Act, Tenancy Laws etc., is the case reported in ***Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd.***,³. In the opinion of this Court for the current issue the following are important:

28. A reading of sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 would show that 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 authorised 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. When, therefore, a lessee becomes aware of the possession being taken by the secured creditor, in respect of the secured asset in respect of 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 Security Interest (Enforcement) Rules, 2002, 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 authorised

³(2014) 6 SCC 1

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 Transfer of Property Act and that the lease does not stand determined in accordance with Section 111 of the Transfer of Property Act. If the lessee surrenders possession, the lease, even if valid, gets determined in accordance with clause (f) of Section 111 of the Transfer of Property Act, but if he resists the attempt of the secured creditor to take possession, the authorised officer cannot evict the lessee by force but has to file an application before the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the SARFAESI Act and state in the affidavit accompanying the application, the name and address of the person claiming to be the lessee. When such an application is filed, the Chief Metropolitan Magistrate or the District Magistrate will have to give a notice and give an opportunity of hearing to the person claiming to be the lessee as well as to the secured creditor, consistent with the principles of natural justice, and then take a decision. If the Chief Metropolitan Magistrate or the District Magistrate is satisfied that there is a valid lease created before the mortgage or there is a valid lease created after the mortgage in accordance with the requirements of Section 65-A of the Transfer of Property Act and that the lease has not been determined in accordance with the provisions of Section 111 of the Transfer of Property Act, he cannot pass an order for delivering possession of the secured asset to the secured creditor. But in case he comes to the conclusion that there is in fact no valid lease made either before creation of the mortgage or after creation of the mortgage

satisfying the requirements of Section 65-A of the Transfer of Property Act or that even though there was a valid lease, the lease stands determined in accordance with Section 111 of the Transfer of Property Act, he can pass an order for delivering possession of the secured asset to the secured creditor.

29.

In our view, therefore, the decision of the Chief Metropolitan Magistrate or the District Magistrate can be challenged before the High Court under Articles 226 and 227 of the Constitution by any aggrieved party and if such a challenge is made, the High Court can examine the decision of the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, in accordance with the settled principles of law. (*Emphasis supplied*)

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36. 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 a year from the date of the instrument or from the date of delivery of possession in his favour by the landlord. (*Emphasis supplied*)

13) The next important judgment is ***Vishal N. Kalsaria case (2 supra)***. Paragraph 30 of this judgment is relevant for the purpose of this case.

“30. The issue of determination of tenancy is also one which is well settled. While Section 106 of the Transfer of Property Act, 1882 does provide for registration of leases which are created on a year-to-year basis, what needs to be remembered is the effect of non-registration, or the creation of tenancy by way of an oral agreement. According to Section 106 of the Transfer of Property Act, 1882, a monthly tenancy shall be deemed to be a tenancy from month to month and must be registered if it is reduced into writing. The Transfer of Property Act, however, remains silent on the position of law in cases where the agreement is not reduced into writing. If the two parties are executing their rights and liabilities in the nature of a landlord-tenant relationship and if regular rent is being paid and accepted, then the mere factum of non-registration of deed will not make the lease itself

nugatory. 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 the proceedings under Section 14 of the SARFAESI Act before the learned Magistrate. Further, in terms of Section 55(2) of the special law in the instant case, which is the Rent Control Act, the onus to get such a deed registered is on the landlord. In the light of the same, neither can the landlord nor the banks be permitted to exploit the fact of non-registration of the tenancy deed against the tenant.”

14) The later judgment on the subject is ***Bajrang Shyamsunder Agarwal case (1 supra)***. This is a judgment of three Judges of the Hon’ble Supreme Court of India. It also deals with an oral lease / oral agreement creating tenancy. The fact show that Chief Metropolitan Magistrate, on the application of the Bank allowed Section 14 application on 09.03.2012 directing that the possession of the secured asset should be taken over. The tenant also preferred an application before the Chief Metropolitan Magistrate, as can be seen from paragraph 6 of the reported judgment, which is rejected. Thereafter, the matter went to the Hon’ble Supreme Court of India and after considering the law on the subject, including the two judgments mentioned earlier, the following

conclusions are reached by the Hon'ble Supreme Court of India:

“24.1. If a valid tenancy under law is in existence even prior to the creation of the mortgage, the tenant's possession cannot be disturbed by the secured creditor by taking possession of the property. The lease has to be determined in accordance with Section 111 of the TP Act for determination of leases. As the existence of a prior existing lease inevitably affects the risk undertaken by the bank while providing the loan, it is expected of banks/creditors to have conducted a standard due diligence in this regard. Where the bank has proceeded to accept such a property as mortgage, it will be presumed that it has consented to the risk that comes as a consequence of the existing tenancy. In such a situation, the rights of a rightful tenant cannot be compromised under the SARFAESI Act proceedings.

24.2. If a tenancy under law comes into existence after the creation of a mortgage, but prior to the issuance of notice under Section 13(2) of the SARFAESI Act, it has to satisfy the conditions of Section 65-A of the TP Act.

24.3. In any case, if any of the tenants claim that he is entitled to possession of a secured asset for a term of more than a year, it has to be supported by the execution of a registered instrument. In the absence of a registered instrument, if the tenant relies on an unregistered instrument or an oral agreement accompanied by delivery of possession, the tenant is not entitled to possession of the secured asset for more than the period prescribed under Section 107 of the TP Act.”

15) It was also noticed by the Hon'ble Supreme Court of India that the Civil Court (Small Cause Court) entertained a case filed by the tenant and passed an *ex parte* order against the landlord pertaining to the tenancy. Ultimately, in paragraph 35 it was held that the absolute primacy of the Rent Acts, as held in the previous judgments, is not the correct position of the law. It was also held that the tenant-in-sufferance viz., a person occupying the premises after the determination of the lease does not have any legal right and is akin to trespassers.

16) The question that arises, therefore, in the light of this case law is that whether the writ petition can be maintained before this Court and whether the tenant / writ petitioner is entitled to the relief.

17) The law on the subject is sufficiently clear, when there is an effective alternative remedy the writ Court will not have jurisdiction. The Hon'ble Supreme Court of India has in the course of these judgments permitted and in fact allowed the tenants to approach the jurisdictional Magistrate / District Magistrate before whom an application is filed under Section 14 and seek a determination of their status / claim. In the

case on hand, this Court is not, therefore, pronouncing anything on the merits of the matter. It is clearly visible from the case laws cited above, which are judgments of the Hon'ble Supreme Court of India itself that a tenant has been given an opportunity by the Hon'ble Supreme Court to India of vindicating his / her stand before the jurisdictional Magistrate / District Magistrate. The challenge before the High Court can only be after the decision of the Magistrate / District Magistrate. This is clear from the judgments of the Hon'ble Supreme Court of India cited earlier.

18) Since the judgments of the Hon'ble Supreme Court of India are binding and in view of the settled position of law this Court is of the firm opinion that the tenant has approached this Court wrongly. The writ itself is misconceived. Time and again the Hon'ble Supreme Court of India has clearly held that the High Court should not entertain the writ petition under the provisions of the SARFAESI Act as there are effective alternative remedies. For this reason also the writ petition is held to be misconceived and therefore liable to be dismissed.

19) Accordingly, the Writ Petition is dismissed. No order as to costs.

20) Consequently, Miscellaneous Applications pending, if any, shall also stand dismissed.

D.V.S.S.SOMAYAJULU, J

DUPPALA VENKATA RAMANA, J

Date:30.08.2023
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