KAMS030070562023

**IN THE COURT OF THE X ADDL. CIVIL JUDGE AND JMFC, MYSURU**

**PRESENT**

**Sri. Harish Singh.H.G.**
**B.Com., LL.B.,**

**X Addl. Civil Judge & J.M.F.C., Mysuru.**

**Dated this the 4th day of December, 2023**

**O.S./1399/2023**

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| **Plaintiff** | **:** | | **Sri. Anthony Arokya Jarald,**<br>**S/o. Late Philomina Raj,**<br>**Aged about 48 years,**<br>**R/at No.125, 2nd Main,**<br>**Rajiv Nagar,**<br>**Devanur Badavane,**<br>**N.R. Mohall, Mysuru.** |

**(Plaintiff-Sri.RSA., Adv)**

**V/s**

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| **Defendants** | **:** | **1.** | **Mr. Mohammed Noorulla**<br>**@ M.D. Noorulla,**<br>**S/o. Mohammed Yusuf,**<br>**Aged about 47 years,** |

**2. Mrs. Ayesha Khanam,**
**W/o Mohammed Mohd.**
**Noorulla @ M.D.Noorulla,**
**Aged about 40 years,**

**Both are Residing at**
**D.No.894, 9th Cross,**
**Ayesha Maseedi Road,**
**Mahadevpura Main Road,**
**Shanthi Nagar. Mysuru.**

**3. Bank of Maharashtra**
**Jayalakshmi Puram Branch,**
**Jayalakshmi Puram,**
**Devaraj Mohalla,**
**Mysuru.**
**By its Branch Manager**

**(Def No.1 & 2-Exparte)**
**(Def No.3-Sri.KSN., Advocate)**

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| **i.** | **Provision under which the application is filed.** | **U/O 39 Rule 1 and 2 of CPC** |
| **ii.** | **Relief sought for** | **Temporary injunction** |
| **iii.** | **The date on which the application is filed** | **09.08.2023** |
| **iv.** | **Number of the application** | **I.A.I** |
| **v.** | **Date of filing of objection** | **06.10.2023** |
| **vi.** | **The date on which the orders were passed on the said application.** | **04.12.2023** |

**ORDER ON IA.No.I FILED UNDER ORDER XXXIX RULE 1 AND 2 OF CPC**

1. The Applicant has filed IA.No.I to pass an ad-interim exparte temporary injunction order against the Defendant No.3 restraining it from, his agents, officials, subordinate, servants or anybody acting on their behalf from dispossessing the plaintiff from the schedule property in any manner pending disposal of the suit.

2. In support of this application the plaintiff has filed his affidavit and stated that, the plaintiff filed the suit against the Defendants for the relief of Permanent Injunction. The Plaintiff and his family members are residing in the suit schedule property and the plaintiff has entered into agreement for mortgage pertaining to the suit schedule property dated 10.09.2020 for a period of two years with the Defendant No.1 and 2 being the owners of the suit schedule properly. The Plaintiff has paid the mortgage amount of Rs.6.75,000/- to the Defendant No.1 and 2 on the date of entering into the said agreement for mortgage dated 10/09/2020 and the Defendant No.1 & 2 have acknowledged the receipt of the said amount from the plaintiff. Since from the date of entering into the agreement of mortgage the Plaintiff and his family members are residing in the suit schedule property. The

Plaintiff is regular in the payment of electricity consumption charges for the consumption made by him pertaining to the suit schedule property is concerned. The Plaintiff has also obtained the schedule property for the purpose of residence. The Plaintiff is working as lab attender at Philomena's Degree College and except the meager salary which he gets is the only source of for the Plaintiff and his family members for their livelihood. All of a sudden to the utter shock and surprise of the Plaintiff, the bank officials attached to the 3rd Defendant came near the schedule property and demanded the Plaintiff and his family members to vacate and hand over the vacant possession of the schedule property. The officials of the 3rd Defendant put the Plaintiff and his family members in utter shock and when it was questioned by the Plaintiff regarding their prudent and credibility, at that point of time, they proclaimed that the Defendant No.1 & 2 have availed loan before them on the schedule property and they became defaulters and as such they want to proceed against the schedule property for the recovery of the loan amount. This fact is not at all made known to the Plaintiff at the time of entering into the Agreement to Mortgage dated 10.09.2020. The Plaintiff has invested his hard earned money of Rs.6,75,000/- to the Defendant No. 1 and 2. The said Defendant No.1 and 2 have suppressed all the material and vital aspect with the Plaintiff and in spite of the same they have mortgaged the said property and obtained/received a sum of Rs.6,75,000/- from the Plaintiff. Unless and until the mortgage amount of Rs.6.75,000/- is paid back to the Plaintiff, the Plaintiff is under law entitled to be in peaceful possession and enjoyment over the schedule property. When the said officials of the 3rd Defendant started to interfere with Plaintiff's peaceful possession and enjoyment over the suit schedule property, the Plaintiff was constrained to approach the jurisdictional police. Hence. The plaintiff has come up with this application to restrain the Defendant No.3 from forcefully dispossessing him from the suit schedule property. Further, the plaintiff has also under taken to surrender his possession if his mortgage amount of Rs.6,75,000/- is repaid to him. Hence, this application is filed.

3. On the other hand the Defendant No.3 had filed its objections and denied the allegation of plaintiff being in possession of the suit schedule property and paying the mortgage amount of Rs.6,75,000/- to the Defendant No.1 and 2 and further, completely denied the allegation made in this application. The Defendant particularly submits that, the Defendant No.1 and 2 have sold the schedule

property in favour of Sri. Alfred Richard.S under registered sale deed dated 03.10.2020 by delivering possession on the same day. Then said Alfred Richard .S availed a loan of Rs.39,75,000/- from Defendant No.3 with respect to suit schedule property by executing the registered equitable mortgage by deposit of title deeds on 16.10.2020.

4. As Sri. Alfred Richard has failed to pay the said loan amount the Defendant No.3 has initiated legal action against him according to SARFAESI Act and issued notice under Section 13(2) on 30.11.2023 and initiated further action as per the said act. Defendant No.1 and 2 and plaintiff colluded together and created the alleged mortgage deed to defraud Defendant No.3. The alleged mortgage is unregistered and insufficiently stamped, as such it is not enforceable in law and it does not convey or create any right or interest over the suit schedule property. As such the Defendant No.3 seeks to dismiss the application with cost.

5. Heard arguments on application from both side and perused the materials placed before this court. .

6. The points that arise for my consideration is as follows:

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| **Point No.1** | **:** | **Whether the plaintiffs have made out prima- facie case against the defendants?** |
| **Point No.2** | **:** | **Whether balance of convenience lies in favour of plaintiff?** |
| **Point No.3** | **:** | **Whether the plaintiff will be put to irreparable loss or hardship?** |
| **Point No.4** | **:** | **What Order?** |

7. My findings on the above points are as follows :-

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| **Point No.1** | **:** | **In the Negative** |
| **Point No.2** | **:** | **In the Negative** |
| **Point No.3** | **:** | **In the Negative** |
| **Point No.4** | **:** | **As per final order for the following-** |

## REASONS

8. **Point No.1:** In simple terms it is the case of the plaintiff that, he is the mortgagee under Defendant No.1 and 2 by virtue of a mortgage deed dated 10.09.2020 for the mortgage amount of Rs.6,75,000/-. The mortgage period is for 2 years. When such being the case Defendant No.3 is trying to dispossess the plaintiff by acting as a mortgagee with respect to the loan issued to Alfred Richard S.

9. Firstly, the plaintiff had produced the unregistered lease agreement dated 10.09.2020. Wherein, the

Defendant No.1 and 2 had executed the lease agreement in favour of plaintiff for the period of 2 years by paying Rs.6,75,000/-. The Defendant No.3 had furnished copy of registered sale deed dated 05.10.2020 executed by Defendant No.1 and 2 in favour of Alfred Richard S. The said sale deed is not disputed by plaintiff. Further, the Defendant had produced memorandum of record of deposit of title deeds dated 16.10.2020, demand notice under Section 13(2) of SARFAESI Act dated 31.07.2023 to Alfred Richard S and copy of possession notice under Section 13(4)(a) of SARFAESI Act dated 25.09.2023 to Alfred Richard S. The said documents are not disputed by the plaintiff. These documents show that, Alfred Richard S is the absolute owner of the suit schedule property and he has obtained loan from Defendant No.3 bank and he had failed to repay the loan amount and as a consequence Defendant No.3 bank had taken action against Alfred Richard S with regard to non-payment of loan amount.

10. It is settled principle of law that, the unregistered mortgage deed may lack legal validity or priority, which means it might not be recognized or enforceable by authorities. Registration typically provides a public record of property transactions, ensuring transparency and protecting the interests of all parties involved. Without

proper registration, the mortgage might not take precedence over subsequent claims, potentially causing complications in the event of disputes or property transactions.

11. Defendant No.3 asserts its authority under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. This legislation empowers financial institution to take possession of the secured assets upon default in repayment. Defendant No.3 had relied on decision passed in **AIR 2008 BOMBAY 167.**

12. At this juncture it is necessary for this court to refer Section 13 and Section 34 of SARFAESI Act. For ready reference the said provisions are extracted.

> **<u>Section 13 of SARFAESI Act</u>** :Enforcement of security interest.-
>
> 1. Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882 ), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

2. Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non- performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub- section (4).

3. The notice referred to in sub- section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non- payment of secured debts by the borrower.

4. In case the borrower fails to discharge his liability in full within the period specified in sub- section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

a). take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;

b). take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

c). appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

d). require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

**Section 34 of SARFAESI Act :** Section 34 in The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

> Civil court not to have jurisdiction.—No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).

13. Considering Section 13 of SARFAESI Act it is clear that, where a borrower, who is under a liability to secured creditor under Security agreement, commits default in repayment of debt or any installment there off and his account has been classified as non-performing asset, then the creditor may issue a notice under sub Section(3) giving all details of debt as well as secured assets intended to be enforced and call upon the borrower to make payment within 60 days from the receipt of notice. If the borrowers fails to pay, the secured creditor may take action under Section 13(4).

14. Section 17 provides that, any person, including borrower aggrieved by any of the measures referred to in Sub section (4) of Section 13 taken by secured creditor or his authorized officer, may make an application to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measure had been taken. Under Section 17 the DRT can here the appeal and pass appropriate orders.

15. Section 34 specifically provides that, no civil court shall have jurisdiction to entertain any suit or proceedings in respect of any matter which DRT or appellate tribunal is empowered by or under SARFAESI Act. Further, no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under SARFAESI Act. Thus, the aforesaid provisions are clear about entertaining of the suit by civil court and granting of any injunction order.

16. By applying the aforesaid provisions and the facts of the case it is clear that, the lessee cannot assert a defense or protect possession of the lease property against the mortgagee bank relying solely on an unregistered lease agreement, particularly when the landlord has obtained a loan from the bank. A registration of lease agreement is a

crucial factor in determining their legal validity and enforceability. The mortgage bank having a security interest in the property due to the landlord's loan, is likely to prioritize its rights under the mortgage and may not be bound by an unregistered lease agreement.

17. Generally, when a document is unregistered it may create a gap in awareness for parties involved, potentially leading issues for the agreement holders. A registration often provides legal recognisation and public notice helping prevent lacunae in understanding the status of the property and the terms of agreement. In the present case on hand the plaintiff had relied on unregistered mortgage agreement which is compulsorily registrable. Due to this act the Defendant cannot be blamed because, there are no chances for Defendant No.3 to get know about the mortgage agreement between plaintiff and Defendant No.1 and 2.

18. The plaintiffs defense based on such an agreement lacks legal standing. For the said reasons and authority given by SARFAESI Act empowers financial institutions to take possession of the secured assets upon default in repayment. Thus, the plaintiff has failed to prove his prima-facie case. Hence, this court answers point No.1 in

the **Negative.**

19. **<u>Point No.2 and 3</u>** : In the present case on hand the plaintiff has failed to establish his prima-facie case. Which means the plaintiff had not presented sufficient initial evidence to support his claim. Considering the principle of equity this courts finds that, the balance of convenience tilts in favour of bank in this case. The bank, being a secured creditor has a statutory right to recover its dues through taking possession of the secured assets. Granting temporary injunction against the bank could impede its legitimate rights and remedies under the statute. Further, when the plaintiff has failed to prove his prima-facie case, further discussion on concept of balance of inconvenience which might be caused to plaintiff and irreparable hardship or injury does not arise for this court consideration.

20. In the light of above analysis this court is inclined to reject the plaintiff's request for temporary injunction. The bank having statutory right under the SARFAESI Act is entitled to take possession of the property in accordance with the law. Hence, this court answers Point No.2 and 3 in the **Negative.**

21. **<u>Point No.4</u>**: For the afore-made discussion this court proceeds to pass the following:

**<u>ORDER</u>**

**The Application i.e., I.A.No.1 under Order XXXIX Rule 1 and 2 of CPC filed by the plaintiff is hereby rejected.**

[Dictated to the judgment-writer, corrected and then pronounced by me in the Open court, this the **4th day of December, 2023**]

**Sd/-**
**(SRI. HARISH SINGH.H.G.)**
**X Addl. Civil Judge and JMFC,**
**Mysuru**