Karnataka High Court Hutchison Essar South Ltd. A ... vs Union Bank Of India Represented By ... on 11 September, 2007 Equivalent citations: AIR 2008 Kant 14, ILR 2007 KAR 4362, 2008 (3) KarLJ 106 Author: A B Hinchigeri Bench: A B Hinchigeri ORDER Ashok B. Hinchigeri, J. Page 1860 1. Although the matter was listed for hearing on IA.I of 2007 for vacating the interim order of stay, I have taken up the main matter itself for disposal with the consent of the learned advocates appearing for the parties. 2. This writ petition is filed seeking, interalia, a declaration that the petitioner's leasehold rights over the premises bearing No. 209, 1st Main Road, Seshadripuram, Bangalore, are not regulated and/or covered by Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ['Securitisation Act' for short] and consequently the writ of certiorari for quashing the first respondent's communication, dated 8th December, 2005 (Annexure-D), which calls upon the petitioner to vacate the said premises before 15th December, 2005. 3. The brief facts of the case are that the aforesaid premises was leased by the second respondent to the petitioner on a monthly rent of Rs. 40,710/- (Rupees forty thousand seven hundred ten only) vide lease agreement, dated 9th February, 2004. The petitioner claims to have paid a security deposit of Rs. 6,10,650/- (Rupees six lakh ten thousand six hundred and fifty only). It also claims to have spent Rs. 25,00,000/- (Rupees twenty five lakh only) on interior decoration, computers, electrical fittings, fax machines, etc. after taking the possession of the aforesaid premises in February, 2004. The photographs of the aforesaid properties and the infrastructure created therein are produced as Annexures B1 to B6. 4. When thus stood the things, the petitioner received a letter, dated 8th December, 2005 (Annexure-D) from the first respondent informing that on the failure of the second respondent to clear the dues of the first respondent, the first respondent has initiated enforcement measures under the Securitisation Act. Further it is stated in the said letter that the first respondent has come to know that the petitioner is in occupation of the aforesaid premises, which is secured in favour of the first respondent. The first respondent called upon the petitioner to make alternative arrangements and to vacate the said premises before 15th December, 2005. The petitioner was further informed that the first respondent would approach the Chief Judicial Magistrate/DC or any other appropriate forum for getting the possession of the aforesaid premises, under the provisions of the Securitisation Act, if the petitioner does not vacate on its own. 5. The petitioner had sent a reply, dated 14th December, 2005 (Annexure-K). It is the case of the petitioner that on receipt of its said reply, some officers of the first respondent threatened that the petitioner would be thrown out of the aforesaid premises by resorting to the proceedings under Page 1861 Securitisation Act. Apprehending the imminent threat of dispossession under the provisions of the Securitisation Act, this petition is presented. 6. Sri Gururaj, the learned Counsel for the petitioner urged the following contentions: a. The aforesaid premises was given as non-possessory security. There has been no legal impediment for second respondent to lease the aforesaid premises to the petitioner. The petitioner is lawfully inducted into the aforesaid premises as a tenant. Therefore if the petitioner is to be dispossessed, it is only in accordance

with the provisions of the Transfer of Property Act, 1882. Even where the sale of assets takes place under Section 29 of the State Financial Corporation Act, 1951 the tenant cannot be evicted without the due process of law. In this regard he cited the judgment of the Patna High Court in the case of Abhay Kumar Pandey Etc. v. State of Bihar . b. Sri Gururaj has also relied upon the judgment of Punjab & Haryana High Court in the case of Prem Gupta v. Bank of Maharashtra reported in AIR 2007 (DOC) 174 (P&H) 45 wherein it is held that a secured creditor is entitled to take only symbolic possession under the Securitisation Act. The gist of the judgment, as reported in the said Digest of Cases, reads as follows: Borrower or any other person in possession of the immovable property cannot be physically dispossessed at the time of issuing notice Under Section 13(4) of the Act so as to defeat the adjudication of his representation or objection by the Debts Recovery Tribunal. The physical possession can be taken by the bank or the financial institution by following the procedure laid down in Section 14 of the Act or after the sale is confirmed. After notice Under Section 13(2) of the Act is served upon a borrower, right is given to the borrower to make any representation or objection. The secured creditor has to communicate the reason for non acceptance of representation or objection to the borrower. On the failure of the borrower to discharge his liability, the secured creditor is permitted to take possession. Thus actual physical possession cannot be taken Under Section 13(4) of the Act so as to make remedy Under Section 17 of the Act as a purposeful remedy. Therefore, the possession notice given in Appendix IV is like an attachment notice but that does not entitle the bank to dispossess a person in possession of the mortgaged property. c. Sri Gururaj submitted that Section 13 of the Securitisation Act contains a non-obstinate clause only in so far as Section 69 and 69A of the Transfer of Property Act are concerned. Therefore Section 13(1) of the Securitisation Act does not take away the second respondent-Mortgager's Page 1862 power to lease, guaranteed by Section 65A of the Transfer of Property Act. d. Sri Gururaj further submitted that the petitioner is a third party unconnected with the transactions between the first respondent and the second respondent; therefore the petitioner is not amenable to the provisions of the Securitisation Act. 7. Sri Prakash, the learned Counsel appearing for second respondent submitted that the second respondent has filed O.A.No. 142 of 2005 before the Debt Recovery Tribunal and has obtained an interim direction to defer all further proceedings in pursuance of the impugned notice dated 22nd November, 2005 (Annexure-D). In this regard, he has filed the Tribunal's order, dated 22nd December, 2005. The perusal of the said order reveals that it was a conditional order requiring the second respondent to deposit Rs. 5,00,000/- in addition to Rs. 20,00,000/-, which the second respondent had paid under one-time settlement. Sri Prakash also produced the second respondent's letter, dated 10th July, 2007 evidencing the three payments including the payment made in compliance with the Tribunal's conditional interim order. He supports the petitioner and submits that if the petitioner is summarily dispossessed under the Securitisation Act, the petitioner may sue the second respondent for damages for no fault on the part of the second respondent. 8. Per contra, Sri Ramasubramanyam, the learned Counsel appearing for Sri

Narayanappa for first respondent, gave the reply as follows: a) The impugned letter is only an informal advice to the petitioner. It gives no cause of action to the petitioner to file this writ petition. b) If, as and when the first respondent purports to take action in terms of Section 13(4) of the Securitisation Act, it is open to the petitioner to avail of the appeal remedy under Section 17 of the Securitisation Act. c) The petitioner is virtually a trespasser in the eyes of law. As admittedly the lease in respect of the aforesaid premises is for a period exceeding one year (20th February, 2004 to 19th February, 2013), it is a compulsarily registerable document. As the lease agreement is not registered, the petitioner is not entitled to any protection under the provisions of the Transfer of Property Act. In support of this argument, he relied upon the judgment of the Hon'ble Supreme Court in the case of Samir Mukherjee v. Davinder K. Bajaj . The relevant portion of the said judgment is extracted hereinbelow: 6. Section 107 prescribes the procedure for execution of a lease between the parties. Under the first para of this section a lease of immovable property from year to year or for any term exceeding Page 1863 one year or reserving a yearly rent can be made only by a registered instrument and remaining classes of leases are governed by the second para, that is to say all other leases of immovable property can be made either by a registered instrument or by an oral agreement accompanied by delivery of possession. d) Sri Ramasubramanyam has relied upon a judgment of the Apex Court in the case of Transcore v. Union of India and Anr. in appeal No. 3228 of 2006. The relevant portion of the said judgment is extracted hereinbelow: ...the NPA Act provides for recovery of possession by non-adjudicatory process, therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8, undoubtedly, refers to sale of immovable secured asset. However, Rule 8(4) indicates that where possession is taken by the authorised officer before issuance of sale certificate under Rule 9, the authorised officer shall take steps for preservation and protection of secured assets till they are sold or otherwise disposed of. Under Section 13(8), if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred. The costs, charges and expenses referred to in Section 13(8) will include costs, charges and expenses which the authorised officer incurs for preserving and protecting the secured assets till they are sold or disposed of in terms of Rule 8(4). Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a court receiver under Order XL Rule 1 CPC. The court receiver can take symbolic possession and in appropriate cases where the court receiver finds that a third party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorised officer under Rule 8 has greater powers than even a court receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorised officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that third patty interests

are created overnight and in very many cases those third parties take up the defence of being a bona fide purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules e) Sri Ramasubramanyam also relied upon a Division Bench judgment of Delhi High Court in the case of Sri Sanjeev Bansal v. Oman Page 1864 International Bank Soag and Anr. passed in Writ Petition (C) No. 12463 of 2000. The relevant portion of the said judgment is extracted hereinbelow: 6. Manifestly the said unregistered lease was created for the alleged unlimited period through unregistered lease deed in complete contravention of Section 65-A of the Transfer of Property Act. As per the said provision of Section 65-A, the lessee can enjoy the protection if the lease is created by the mortgagor in conformity with the mandate of requirements laid down in Section 65-A of TP Act and not otherwise. Neither the mortgagor nor the lessee can defeat the right of mortgagee and no lessee can claim any protection unless his tenancy is as per the requirements of Section 65-A of Transfer of Property Act. The present petition is devoid of any merits. We would not like to interfere in the orders passed by the DRAT. e. Sri Ramasubramanyam submitted that Section 35 of the Securitisation Act gives primacy to the provisions of this Act over the other laws. 9. Sri Gururaj, in his rejoinder, submitted that the non-registration of the lease deed is not fatal to the creation of the lease as such. He sought to draw support from a judgment of the Hon'ble Supreme Court in the case of Anthony v. K.C. Ittoop and Sons and Ors. reported in AIR 2000 SC 3523. 10. Sri Gururaj further brought to my notice the Hon'ble Supreme Court's judgment in the case of A.G. Varadarajulu and Anr. v. State of Tamilnadu and Ors. . In the said case the Hon'ble Supreme Court has held that while dealing with a non-obstante clause, under which the legislature wants to give a over-riding effect to a Section, the Court must try to find out the extent to which the legislature had intended to give one provision overriding effect over another provision. Based on the said judgment, Sri Gururaj requested that the scope of Sections 13 and 14 of the Securitisation Act be determined strictly. He prays for the harmonious construction of the provisions contained in the Transfer of Property Act and the Securitisation Act. 11. On hearing the aforesaid arguments, the following points arise for my consideration: (1) Is the petitioner a lessee or a trespasser in the aforesaid premises? (2) Whether a third party occupant can be dispossessed from the secured asset under Sections 13 and 14 of the Securitisation Act? 12. The perusal of the lease agreement, dated 9th February, 2004 clearly shows that the respondent No. 2 inducted the petitioner into the aforesaid premises as a tenant. From the pleadings in the writ petition, the lease Page 1865 agreement, dated 9th February, 2004, and the stand of the respondent No. 2, there is no possibility for holding that the nature of possession of the petitioner in respect of the aforesaid premises is anything other than as a lessee. No doubt, the said lease agreement is a compulsorily registerable document. Its non-registration may have other consequences for the parties. But its non-registration does not come in the way of existence of the jural relationship of a lessor and a lessee. 13.

In the case of Samir Mukherjee (supra) the Hon'ble Supreme Court has taken the considered view that the existence of the valid lease is a prerequisite for the purpose of invoking rule of constructions and deeming provisions embodied in Section 106 of the Transfer of Property Act. In the absence of a registered instrument no valid lease from year to year or for a term exceeding one year or reserving a yearly rent can be created. If the lease is not a valid lease within the meaning of the opening words of Section 106 of the Transfer of Property Act and in the wake of non-registration of the lease agreement, it can only be said that the lease is terminable without issuing the advance notice to the petitioner by the respondent No. 2 or by the respondent No. 1, when it steps into the shoes of the respondent No. 2. I answer the first point by holding that the petitioner is a lessee in the aforesaid premises. The first respondent-Rank's contention that the petitioner is a trespasser is absolutely repellable. Even assuming that there are some irregularities in inducting the petitioner into the aforesaid premises, they do not make it an unauthorised occupant, much less a trespasser. 14. Now I proceed to answer the second point. It may also be profitable to refer to somewhat similar provisions in Section 269UE in Chapter XX-C of the Income Tax Act, 1961 ('the IT Act' for short) by virtue of which the property, purchased under the order under passed in exercise of the power conferred by Section 269UD of the IT Act vests in the Central Government. The said provisions, as originally enacted, providing for vesting of property in the Central Government, were as follows: Section 269UE: Vesting of property in Central Government: (1) Where an order under Sub-section (1) of Section 269-UD is made by the appropriate authority in respect of an immovable property referred to in Sub-clause (i) of Clause (d) of Section 269-UA, such property shall, on the date of such order, vest in Central Government free from all encumbrances. 15. The perusal of the afore-extracted provision reveals that when an order for compulsory purchase is made under Section 269UD(1) of the IT Act, the property, in respect of which the order is made, shall vest in the Central Government free from all encumbrances. It might happen that the property, which is intended to be sold under an agreement, may be subject to Page 1866 encumbrances and leasehold rights. In the case of C.B. Gautam v. Union of India and Ors. reported in ITR Vol. 199 (1993) 530, the Constitution Bench of the Hon'ble Supreme Court dealing with the validity of the provisions of Section 269UE(1) of the IT Act, has held that the said provisions are to be read down without the expression "free from all encumbrances"; the resultant position is that the property of pre-emptive purchase would vest in the Central Government subject to such encumbrances and leasehold interest as are subsisting thereon except for such of them as are agreed to be discharged by the vendor before the sale is completed. The Hon'ble Supreme Court has said that in order to save a statute or a part thereof from being struck down, it can be suitably read down. The relevant portion of the said judgment is extracted herein below: It was submitted by the learned Attorney-General that the provisions of Sub-section (1) of Section 269UD be read down so as to mean that the property compulsorily purchased under an order made under Section 269UD(1) would vest in the Central Government subject to bona fide encumbrances or leasehold interests

subsisting thereon other than monthly tenancies. It was urged by him that, in a pre-emptive purchase, normally, what would be purchased is only that which was put up for sale or sold and, if the same principle was applied to the compulsory purchase by the Central Government under Section 269UD, the rights of the encumbrance holders or the holders of leasehold interests subject to which the property was agreed to be sold could be protected. We agree that in order to save a statute or a part thereof from being struck down it can be suitably lead down. But such reading down is not permissible where it is negatived by the express language of the statute. Reading down is not permissible in such a manner as would fly in the face of the express terms of the statutory provisions. In view of the express provisions in Section 269UE that the property purchased would vest in the Central Government "free from all encumbrances" (emphasis supplied), it is not possible to read down the section as submitted by the learned Attorney-General. In the result the expression "free from all encumbrances" in Sub-section (1) of Section 269UE is struck down and Sub-section (1) of Section 269UE must be read without the expression "free from all encumbrances" with the result that the property in question would vest in the Central Government subject to such encumbrances and leasehold interests as are subsisting thereon except for such of them as are agreed to be discharged by the vendor before the sale is completed. If under the relevant agreement to sell the property is agreed to be sold free of all encumbrances or certain encumbrances, it would vest in the Central Government free of such encumbrances, it would vest in the Central Government free of such encumbrances. Similarly, Sub-section (2) Page 1867 of Section 269UE will be read down so that if the holder of an encumbrance or a lessee is in possession of the property and under the agreement to sell the property, it is not provided that the sale would be free of such encumbrances or leasehold interests, the encumbrance holder or the lessee who is in possession will not be obliged to deliver possession of the property to the appropriate authority or any person authorised by it and the provisions of Sub-section (3) also would not apply to such persons. If the provisions of Section 269UE are read down in the manner indicated above, then, in our opinion, the provisions of Sub-section (6) of that section do not present any difficulty because the vesting in the Central Government would be subject to such encumbrances and leasehold rights as stated earlier. 16. The Division Bench of this Court, in the case of Ghatge Patil Transports Ltd. v. Appropriate Authority and Ors. reported in ITR Vol. 202 (1993) 887, following the afore-extracted judgment of the Hon'ble Supreme Court has held that the leasehold rights of a lessee are not affected by an order of preemptive purchase passed under Section 269UD of the IT Act. The relevant portions of the said judgment are extracted herein below: That being so, by reason of the order passed under Section 269UD, it is not possible to hold that there is an infarction of the right of the lessee. The right that accrues to the auction purchaser is subject to the leasehold rights of the lessee in possession of the property. The auction purchaser will have to follow the law applicable to a leasehold property if he wants to secure the possession of the property from the lessee. 17. In the wake of the afore-extracted judgment of the Hon'ble Supreme Court, the provisions of Section 269UE of the IT Act were

retrospectively amended so as to replace the words 'free from all encumbrances' by the words 'in terms of the agreement for transfer referred to in Sub-section (1) of Section 269UC'. 18. In the case of Tata Consulting Engineers and Anr. v. Union of India and Ors. , this Court has taken the considered view that a tenant cannot be summarily evicted under Section 269UE of the IT Act because of a wrong statement filed by the owner. In such a case the summary eviction will lead to injustice to the tenant, which is not the intendment of the IT Act. Thus it is held that the tenant is entitled to continue in occupation of the property, in respect of which an order of pre-emptive purchase has been made, as tenant under the Central Government. The Central Government is entitled to evict the tenant in accordance with law either under the provisions of the Public Premises Act or in accordance with any other law relating to eviction, which may be applicable. Page 1868 19. More or less on the same lines is the judgment of the Division Bench of Madras High Court in the case of Adair Dutt and Co. (India) P. Ltd. v. Appropriate Authority, Income-Tax Department . In the said case it is held that the said provisions of the IT Act do not have the effect of depriving a tenant of his tenancy rights. 20. Thus what cannot be lost sight of, while deciding the second point, is the subtle distinction between the proprietary right and possessory right. 21. In the case of TRANSCORE (supra) the Hon'ble Supreme Court, has said that the Court Receiver can take symbolic possession and in appropriate cases where the Court Receiver finds a third party interest is likely to be created overnight, he can take actual possession even prior to the decree. 22. The answer to the question of whether the actual possession can be taken under Sections 13 and 14 of the Securitisation Act cannot be a complete 'yes' or a complete 'no'. It is partly in the affirmative and partly in the negative. If the secured asset is in the possession of the borrower, its possession can be taken in accordance with the provisions contained in Sections 13 and 14 of the Securitisation Act. If the borrower has inducted somebody overnight only to defeat the rights of the bankers, then also the provisions of Sections 13 and 14 of the Securitisation Act can be pressed into service for taking the possession. 23. However if the secured asset is in the possession of a bonafide lessee or tenant, he cannot be thrown out by invoking Sections 13 and 14 of the Securitisation Act. In taking this view, I am fortified by the decision of Punjab and Haryana High Court in the case of Prem Gupta (supra). The decisions in the cases of C.B. Gautam, Ghatge Patil Transport Company, Tata Consulting Engineers and of Adair Dutt (supra) rendered while examining the provisions of IT Act are of grant guidance in resolving the present controversy. What is contemplated under Sections 13 and 14 of the Securitisation Act is only symbolic possession and not actual possession, if a bonafide third party is in occupation of the secured asset. It is also open to the mortgagee-Bank to sell the assets with the tenancy intact. Possession notice under Section 13(4) of the Securitisation Act is like an attachment notice, but it does not entitle the Bank to dispossess a person in possession of the mortgaged property. However, if the banker or purchaser of the secured asset has to take the actual possession, the same has to be in accordance with the due process of law only. This is the considered view taken by Patna High Court in the case of Abhay Kumar Pandey (supra) while

dealing with the issue of possession of the property auctioned under Section 29 of the State Financial Corporation Act, 1951. Page 1869 24. In the result this petition is allowed by holding that the respondent No. 1 can take only symbolic possession of the aforesaid premises from the petitioner, invoking Sections 13 and 14 of the Securitisation Act. 25. The respondent No. 1 or the purchaser claiming under it has to take recourse to the appropriate legal proceedings for taking the actual possession of the aforesaid premises from the petitioner. 26. No order as to costs.