

Dr.K. Venkatesh & 4 Others vs Indian Overseas Bank, Hyderabad & 2 ... on 30 July, 2015

Bench: R. Subhash Reddy, A. Shankar Narayana

HONBLE SRI JUSTICE R. SUBHASH REDDY AND HONBLE SRI JUSTICE A. SHANKAR NARAYANA

WRIT PETITION No.16043 OF 2015

30-07-2015

Dr.K. Venkatesh & 4 others .. Petitioners

Indian Overseas Bank, Hyderabad & 2 others .. Respondents

Counsel for the petitioners :Sri Raja Reddy Koneti

Counsel for respondents:Sri Subrahmanyam Kurella

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? CASES REFERRED:

1. (2014) 6 SCC 1

HONBLE SRI JUSTICE R. SUBHASH REDDY

AND

HONBLE SRI JUSTICE A. SHANKAR NARAYANA

WRIT PETITION No.16043 OF 2015

ORDER:

(Per Honble Sri Justice A. Shankar Narayana) The petitioners herein filed this Writ Petition under Article 226 of the Constitution of India seeking a Writ of Mandamus declaring the action of respondent No.1 Indian Overseas Bank, Adarshnagar Branch, Hyderabad, in proceeding to evict them under the orders passed in Criminal M.P. Nos.1072, 1073 and 1074 of 2015 by the learned Chief Metropolitan Magistrate, Nampally, Hyderabad, as illegal and arbitrary, and consequently not

to evict them from their respective portions in Alekhyas Mahesh Land Mark, House No.8-3-302/D/2 situated at Yousufguda, Khairathabad, Hyderabad (hereinafter referred to as subject building).

2. The facts, in brief, are that petitioner No.1 obtained a portion of the subject building on lease on a monthly rent of Rs.22,000/- and running a clinic for the last one year. Petitioner No.2 also took a portion of the building on lease and running a clinic on a monthly rent of Rs.25,000/- for the last two and half years. Petitioner No.3 also took a portion on lease for his real estate office on a monthly rent of Rs.22,000/- about six months prior to filing the instant writ petition. Petitioner No.4 took his portion on lease to run e-commerce business in the name and style of Movierainbow.com on a monthly rent of Rs.32,000/- per month for the last eight months. Petitioner No.5 being a limited company doing infrastructure business, took a portion on lease on a monthly rent of Rs.45,000/-. According to the petitioners, owner of the subject building viz., M. Venkatesh, obtained a loan of Rs.2.09 crores from respondent No.2 i.e., Adarsh Nagar Branch of respondent No.1 bank, by mortgaging the subject building and since he defaulted in discharging the debt, the Bank resorted to the measures under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short the Act) and obtained symbolic possession under Section 13(4) of the Act.

3. Respondent No.1, while resorting to the measures, filed Criminal M.P Nos.1072, 1073 and 1074 of 2015 before the Chief Metropolitan Magistrate, Hyderabad (CMM) under Section 14 of the Act seeking physical possession of the subject building and obtained orders. Pursuant thereto, the learned Magistrate appointed Advocate- Commissioners by the order, dated 08-05-2015, and warrants were issued accordingly permitting them to take assistance of the police and directing the Advocate-Commissioners to issue a notice by giving fifteen (15) days time, in case, any person other than the borrower is found. The Advocate-Commissioners have issued notices to them in terms of the warrants.

4. The common case of the petitioners is that the Bank has no right to evict them as it deliberately suppressed the fact of their possession as tenants. Claiming that they have no other effective alternative remedy, as no right is provided for the action initiated under Section 14 of the Act, they approached this Court for the aforesaid relief under Article 226 of the Constitution of India.

5. The Bank resisted the request of the petitioners stating that the petitioners have no locus standi to question the instant action as they are third parties to the proceedings. According to the Bank, the remedy for the petitioners is to file an appeal under Section 17 of the Act before the Debts Recovery Tribunal (DRT). It is also stated that there is no illegality or infirmity in the order under challenge passed by the learned CMM as the interest of the petitioners was sufficiently protected by ordering fifteen (15) days prior notice. It is also pleaded that the instant writ petition is filed in collusion with the principal borrower viz., M. Venkatesh, Managing Director of M/s. TCI Constructions Limited, which is petitioner No.5 herein, but, got described that it was represented by its Director, Smt. M. Anuradha, wife of M. Venkatesh. According to the Bank, principal borrower borrowed amounts from it towards housing loan and mortgaged the scheduled building. Petitioner No.5 also borrowed working capital and other commercial loans from it and extended mortgage of the scheduled

property for the said loan. Thus, the principal borrower M. Venkatesh, who borrowed amounts towards housing loan and TCI Constructions, which is petitioner No.5, which borrowed amount towards commercial loans, owe a total amount of Rs.12,41,20,269/- to it and the said account has been classified as Non-Performance Account (NPA) and the Bank initiated proceedings under the Act and issued notices under Section 13(2) of the Act. Since petitioner No.5 and the principal borrower, M. Venkatesh, failed to repay the debt, it was constrained to issue notice under Section 13(4) of the Act. It is also stated that the Bank has already initiated proceedings for recovery of amount due by filing O.A. before the DRT, Hyderabad against petitioner No.5 and principal borrower M. Venkatesh. The Bank has stated that no notice is required to be issued to the petitioners by the learned CMM before appointing Advocate- Commissioners in the proceedings under Section 14 of the Act. Thus, stating that right of appeal also lies against the action initiated under Section 14 of the Act, sought to dismiss the writ petition.

6. Heard Sri Raja Reddy Koneti, learned counsel for the petitioners, and Sri Subrahmanyam Kurella, learned counsel for the respondents - Bank, and perused the material on record.

7. Learned counsel for the petitioners would submit that no opportunity of being heard was afforded to the petitioners by issuing notice in the Criminal M.Ps. despite the fact that they are tenants under lease deeds and issue of notice to them is mandatory.

8. Per contra, learned counsel for the Bank would submit that no notice is required to be issued to the petitioners by the learned CMM before appointing the Advocate Commissioners in the proceedings under Section 14(1) of the Act. He would also submit that the instant writ petition is filed in collusion with the principal borrower, who is Managing Director of petitioner No.5, and the very fact that the petitioner No.5 is described as M/s. TCI Constructions Limited, represented by its Director, Smt. M. Anuradha, who is no other than the wife of the principal borrower - M. Venkatesh, would prove that the instant writ petition is an out come of collusion between them. It is his submission that the petitioners have no locus standi as they are third parties to the proceedings. Further, the learned counsel would submit that an effective alternative remedy is available under the provisions of Section 17 of the Act, and, therefore, the instant writ petition is not maintainable. Learned counsel has placed reliance on (an unreported) decision of a Division Bench of this Court in M/s. Aumento Pallinos Private Limited v. Authorized Officer, Union Bank of India, Maharashtra & others, dated 22-07-2014, in support of his stand that the lease deeds filed by the petitioners herein, since unregistered and improperly stamped, the leases cannot be construed as valid and, therefore, the petitioners cannot maintain the writ petition based on such lease deeds.

9. The short point that arises for consideration is whether the impugned order passed in Criminal M.P. Nos.1072, 1073 and 1074 of 2015 are liable to be set aside?

POINT:

10. In the decision relied on by the learned counsel in Aumento Pallinoss Case, this Court while deciding the question whether the petitioner therein was a tenant in respect of a portion of the petition scheduled premises, referring to provisions of Sections 17 and 49 of the Indian Registration

Act, 1908 as to the effect of non- registration of documents, which are required to be compulsorily registerable and Section 35 of the Indian Stamp Act, 1899, dealing with the instruments not duly stamped, this Court rejecting the submission that the unregistered deeds can be used for collateral purpose under the provisions of the Registration Act as the main purpose therein was to show that the petitioner was a tenant and by placing reliance on the decision of the Honble Supreme Court in Harshad Govardhan Sondagar v. International Assets Reconstruction Company Limited and others , rejected the request.

11. The learned counsel has also placed reliance on the decision in Harshads Case (Supra 1) contending that the lease deeds since were unregistered, cannot be construed as valid leases in favour of the petitioners, and, therefore, they have no right to challenge the impugned orders passed by the CMM.

12. We have perused the rental agreements filed by the petitioners. The first rental agreement was said to have executed by the principal borrower on 12-08-2010 in favour of petitioner No.5 for a period of four (4) years. Second rental agreement said to have executed on 15-05-2009 in favour of the principal borrower, M. Venaktesh by M/s. Trendset Infratech (India) Pvt. Limited, by its Managing Director Smt. M. Anuradha, who is no other than the wife of the principal borrower, for a period of eleven (11) months. Third rental agreement said to have executed on 14-03-2014 by M. Venkatesh in favour of M/s. ITCS International Private Limited for a period of two (2) years. Fourth rental agreement said to have executed on 06-02-2013 by the principal borrower in favour of Medexpress (Clinics & Diagnostics), represented by N.Y. Prashanth Chandra, petitioner No.2, with month to month tenancy for a period of eleven (11) months. Last rental agreement said to have executed by the principal borrower on 03-09-2014 in favour of Movie Rainbow Web Services India (Private) Limited, of which the director is said to be the petitioner No.4, for a period of eleven (11) months.

13. All these rental agreements are unregistered deeds. They cannot be construed as valid lease deeds so as to protect the rights of the lessees entitling them for notice under Section 14 of the Act. Though, at one place in the affidavit averments in the instant writ petition, it is stated that the petitioner No.4 has taken the premises of a portion about six (6) months prior to filing of the writ petition, no document is forthcoming. But, the said rental agreement is not filed into Court to prove the said fact. In Harshads Case (Supra 1), the Honble Supreme Court, in the context of lessee resisting the attempt of the secured creditor to take possession of the secured property, observed that the authorized officer cannot evict the lessee perforce, but has to file a petition before the CMM or District Magistrate (DM) under Section 14 of the Act and state in the affidavit accompanying the application, the name and address of the person claiming to be lessee; on which, the CMM or the DM would have to give a notice, opportunity of hearing to the person claiming to be the lessee as well as the secured creditor, consistent with the principles of natural justice and then take a decision. It is also held by the Honble Supreme Court that if the CMM or the DM is satisfied that there is a valid lease created before the mortgage or after the mortgage in accordance with the requirements of Section 65-A of the Transfer of Property Act (for short TP Act) entered into prior to receipt of notice under Section 13(2) of the Act by the borrower and that the lease has not been determined in accordance with the provisions of Section 111 of the TP Act, no order can be passed

for delivering possession of the secured asset to the secured creditor. The Honble Supreme Court further held that in case the CMM or the DM comes to the conclusion that there is, in fact, no valid lease made, either before creation of a mortgage or after creation of the mortgage satisfying the requirements of Section 65-A of the TP Act or that even though there was a valid lease, the lease stands determined in accordance with Section 111 of TP Act, an order can be passed for delivering possession of the secured asset to the secured creditor. It would be profitable to extract the observations of the Honble Supreme Court contained in paragraph Nos.27, 28 and 29, thus:

27. We may now deal with the remedies available to the lessee where he is threatened to be dispossessed by any action taken by the secured creditor under Section 13 of the SARFAESI Act.

Sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 provide for a possession notice where the secured asset is an immovable property. Sub-rules (1), (2) and (3) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 as well as Appendix IV of the said Rules, which is the form of such possession notice, are extracted hereunder:

8. Sale of immovable secured assets.-(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in Sub-rule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspaper one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as an owner of ordinary prudence would, under the similar circumstances, take of such property.

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 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 65A 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 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 65A 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 65A 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.

14. We have adverted to the rental agreements filed by the petitioners and referred to the dates of commencement of leases thereunder. We would like to observe that M/s. ITCS International Private Limited, said to be the lessee under the rental agreement, dated 14-03-2014, Medexpress (Clinics & Diagnostics), said to be the lessee under the rental agreement, dated 06-02-2013, and Movie Rainbow Web Services India (Private) Limited, said to be the lessee under the rental agreement, dated 03-09-2014, are not the petitioners herein. The petitioner Nos.2 and 4 in their individual capacity joined the other petitioners though, they were shown representing Medexpress (Clinics & Diagnostics) and Movie Rainbow Web Services India (Private) Limited in the respective rental agreements. We are of the considered view that since the rental agreements were unregistered, they cannot be construed as valid, and, therefore, no obligation was cast on the authorized officer to move the learned CMM requesting to issue notice to the petitioners herein. Hence, we are of the considered view that the impugned orders passed by the learned CMM do not suffer from any illegality or infirmity warranting interference. Thus, the writ petition is devoid of merit.

15. Accordingly, the Writ Petition is dismissed. There shall be no order as to costs.

16. As a sequel thereto, Miscellaneous Petitions, if any, pending stand disposed of.

R. SUBHASH REDDY, J
A. SHANKAR NARAYANA, J July 30, 2015.