

(2016) 02 KL CK 0060

In the High Court Of Kerala

Case No : W.A. Nos. 135, 156 and 158 of 2016

Kelukutty P.M. and Others

APPELLANT

Vs

Young Men's Christian Association and Others

RESPONDENT

Date of Decision : 11-02-2016

Acts Referred:

Constitution of India, 1950 — Article 300A
Maharashtra Rent Control Act, 1999 — Section 33
Registration Act, 1908 — Section 17, Section 32(1B), Section 49, Section 58(f)
Securitisation and Reconstruction of Financial Assets and

Citation : (2016) 4 BC 23 : (2016) 3 DCR 385 : (2016) 1 DRTC 819 : (2016) 2 ILRKerala 5 : (2016) 1 KerLJ 652 : (2016) 1 KHC 853 : (2016) 2 KLT 14

Hon'ble Judges : Ashok Bhushan, C.J. and A.M. Shaffique, J.

Bench : Division Bench

Advocate : A. Sudhi Vasudevan, Senior Advocate and Jose Jones Joseph, Advocate, for the Appellant; P. Sreekumar, E. Narayanan, M. Mohamed Navaz, M.A. Augustine and P. Muraleedharan, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Ashok Bhushan, C.J.

1. These three Writ Appeals arise out of a common judgment dated 19/01/2016 delivered in WP(C) Nos. 30016 of 2015, 33407 of 2015 and 33798 of 2015. Writ Petitions were filed challenging the order dated 18/08/2015 passed by the learned Chief Judicial Magistrate, Kozhikode by which order the learned Chief Judicial Magistrate allowed the applications filed by the United Bank of India under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the 2002 Act") for getting possession of the properties covered by Exts. P3 to P13, whereas the applications for taking possession of properties covered by Exts. P1 and P2 were rejected. Writ Petitions were filed by the petitioners who claim to be tenants of the properties, Exts. P3 to P13, challenging the orders passed by the learned Chief Judicial Magistrate which Writ Petitions have been dismissed by the

learned Single Judge. Aggrieved by the judgment of the learned Single Judge, these three Writ Appeals have been filed. It shall be sufficient to refer to the facts in WP(C) No. 30016 of 2015 giving rise to WA No. 135 of 2016 for deciding all the Writ Appeals. Parties shall be referred to as described in the said Writ Petition. 2. First respondent, Young Men's Christian Association, Kozhikode, was established by a registered trust deed dated 22/05/1913. The 1st respondent held 93.44 cents of land in the Kozhikode City in which a two storied building was constructed. The 1st respondent applied for a loan of Rs. 4 crores from the United Bank of India, 2nd respondent, for construction of the building. Loan of Rs. 4 Crores was sanctioned by the 2nd respondent on 27/12/2004. An agreement dated 27/12/2004 was entered into between the parties, Ext. P3. Equitable mortgage of YMCA Commercial Complex existing on a plot of land in construction was created by deposit of title deeds vide letter dated 31/12/2004, Ext. P2. Under Annexure ill of Ext. P3, agreement, repayment schedule of term loans, it was mentioned that "Rs. 150 lacs on receipt of advance from prospective shop tenants within 6 months as and when received. Rest to be repaid by 120 equal monthly instalments of Rs. 3,65,000/- each, starting from six months from the date of disbursement. Interest to be serviced during the holiday period." An additional loan of Rs. 50 lakhs was further sanctioned on 05/08/2005. The 1st respondent executed a registered lease deed dated 27/01/2005 in favour of the 1st petitioner for a period of 99 years with option to the lessee to renew the lease. The lease deed further reserved monthly rent. The lessee further deposited Rs. 3 lakhs by cheque as refundable interest free security deposit. Shop room at the northern side of the first floor of the building, namely YMCA International Cultural Complex building having an area of 448.46 sq. ft. was leased out which was described in the site plan attached to the lease deed. Similar lease deeds were executed in favour of petitioners 2 to 9 between 25/01/2005 to 2006 for a period from 51 to 99 years on similar terms and conditions as narrated therein. All the lease deeds contained a condition for payment of lumpsum money as security deposit and monthly rent. Petitioners after obtaining lease deeds had put up walls, doors and windows and also carried out the flooring, interior plastering, etc. The premises were also allotted with door numbers by the local authority. First petitioner was allotted with Door No. 6/875G. Some of the premises were allotted to different sub-tenants. The above lease hold premises were put in possession of the petitioners pursuant to the lease deeds and petitioners continued to be in possession of the leased premises. Due to the default committed by the 1st respondent in repaying the loan advanced by the 2nd respondent, proceedings were initiated under Section 13 of the 2002 Act. Notice dated 16/11/2007 under Section 13(2) of the 2002 Act was issued to the 1st respondent demanding a sum of Rs. 3,90,47,157/- and the 1st respondent having not made the payment, the 2nd respondent invoking power under Section 13(4) of the 2002 Act, a sale notice dated 02/07/2009 was issued on "as is where is basis". Possession of those portions of YMCA International Cultural Complex which was in the possession of the 1st respondent were taken by the 2nd respondent. The 1st respondent conducted a private sale in favour of

one Ahamed Koya, Managing Partner of the third respondent for an amount of 9 crores on 02/12/2009. Petitioners filed SA No. 18 of 2010 before the Debt Recovery Tribunal challenging the private sale dated 02/12/2009. There were certain litigations with regard to the sale in favour of the 3rd respondent, issue of sale certificate in favour of the 3rd respondent, which being not relevant for the purpose of present case are not being mentioned in detail. The 2nd respondent issued a certificate of sale of the property which was registered on 10/09/2013. On 11/09/2013, the 2nd respondent filed an application under Section 14 of the 2002 Act before the Chief Judicial Magistrate for enabling the 2nd respondent to take possession of the property, the subject-matter of the leases granted to petitioners and respondent Nos. 4 to 6. The petitioners were not made parties to the said proceedings. The learned Chief Judicial Magistrate passed an order dated 04/10/2013 appointing an Advocate Commissioner to take possession of the property on or before 22/10/2013. After coming to know about the said order from the Advocate Commissioner, the petitioners filed an application before the learned Chief Judicial Magistrate praying for recall of the order and to give opportunity to the petitioners to file objections to the application of the 2nd respondent filed under Section 14 of the 2002 Act. The said application was dismissed on 02/06/2015 against which petitioners filed WP(C) No. 19221 of 2015. A learned Single Judge of this Court by judgment dated 29/06/2015 set aside the order dated 02/06/2015. The learned Single Judge held that matters relating to tenancy rights, creation of mortgage and the question as to whether the leases satisfy the requirements of Section 65A(2) of the Transfer of Property Act, 1882 (for short, "the 1882 Act") are matters to be decided by the Chief Judicial Magistrate. The 3rd respondent filed WA No. 1466 of 2015 challenging the order of the learned Single Judge. A Division Bench of this Court by judgment dated 20/07/2015 dismissed the Writ Appeal. In view of the above order of this Court, petitioners and respondents 4 to 6 were impleaded in the application filed by the 2nd respondent. The 3rd respondent was also impleaded. Petitioners and respondents 4 to 6 filed their objections before the learned Chief Judicial Magistrate. Application for impleadment of National Council of YMCA was also filed. The learned Chief Judicial Magistrate passed a common order dated 18/08/2015 (Ext. P26), by which the learned Chief Judicial Magistrate issued the following directions:

"(1) The request for aid for dispossession of properties covered by Ext. P3 to P13 post-mortgaged lease deeds is allowed.

(2) The request for dispossession aid in respect of properties covered by Ext. P1 and P2 lease deeds is disallowed. The tenants thereunder can continue their possession of the premises until a valid determination of their leases.

(3) It is clarified that any properties covered by the sale in favour of the purchaser other than those under Ext. P1 and P2 and not covered by Ext. P3 to P13 lease deeds are also liable to be evicted.

(4) Advocate Smt. Reena Sukumaran is appointed as Commissioner for effecting

the actions under Section 14(1)(a)(b) of the SARFAESI Act subject to the above. The Bank shall pay batta Rs. 10,000/- to the Commissioner.

(5) CMP 1460/15 for impleading the International YMCA is dismissed for reasons stated."

The learned Chief Judicial Magistrate appointed an Advocate Commissioner directing her to take possession of the property. Challenging the order dated 18/08/2015, petitioners filed WP(C) No. 30016 of 2016 praying for the following reliefs:

"1. To call for the entire records leading to Ext. P26.

2. To issue a writ of certiorari or other writ setting aside Ext. P26 and Ext. P27.

3. To issue a writ of prohibition or other writ interdicting the 2nd respondent any one claiming under them from interfering with the tenancy rights of the petitioners and enjoyment of the properties leased out to the petitioners."

2. WP(C) No. 33407 of 2015 was filed by one V. Kunhabdulla who claimed to be a lessee by registered lease deed dated 30/06/2005 executed by the 1st respondent in favour of the petitioner and one E.P. Aboobacker Haji for a period of 51 years in respect of premises having an area of 3145 sq. ft. Similarly in WP(C) No. 33798 of 2015, Rashid V.K., petitioner claims on the basis of a lease deed dated 30/05/2006 executed in favour of the petitioner, E.P. Aboobacker Haji, Abdulla N.P., Ammed Haji P. and V. Kunhabdulla for a period of 99 years.

3. Rest of the facts giving rise to the above two Writ Petitions are similar as noted while noticing the facts in WP(C) No. 30016 of 2015, hence need no repetition.

4. All the three Writ Petitions were heard together by the learned Single Judge. The learned Single Judge after hearing the learned counsel for the petitioners, learned counsel for the Bank and the learned counsel for the 3rd respondent, auction purchaser, dismissed the Writ Petitions. These Writ Appeals have been filed against the common judgment of the learned Single Judge.

5. We have heard Shri A. Sudhi Vasudevan, learned Senior Counsel for the appellants, Shri E. Narayanan, for the 1st respondent, Shri M. Mohammed Navaz for the 2nd respondent and Shri S. Easwaran for the 3rd respondent. Learned Senior Counsel for the appellants raised the following submissions.

6. The lease deeds executed by the 1st respondent in favour of the Writ Petitioners were with consent of the 2nd respondent and the 1st respondent was entitled to grant lease even after the mortgage. Lessees being in possession of the premises consequent to the lease deeds they cannot be summarily evicted in a proceeding under Section 14 of the 2002 Act by the Chief Judicial Magistrate. The possession of petitioners was entitled to be protected under law. Mortgage of the property and execution of the agreement without the consent of the International YMCA is null and void. The consent of the 2nd respondent to

execute the lease deeds by the 1st respondent is apparent from the agreement, Ext. P3 dated 27/12/2004. There being no express prohibition for a mortgagor to create lease, provisions of Section 65A of the 1882 Act are not attracted. Learned Senior Advocate further contended that Ext. P3, even unregistered can be relied for collateral purposes for establishing consent of the mortgagee for execution of the lease. The sale deed executed in favour of the 3rd respondent was on "as is where is basis". Thus the 3rd respondent has to take the property along with the tenancy created in the property and the tenants of the premises cannot be thrown out or dispossessed in exercise of the power under Sections 13(4) and 14 of the 2002 Act. Petitioners could have been evicted only in accordance with the rent control laws. Learned counsel for the appellants has placed reliance on the judgment of the Apex Court dated 25/01/2016 in Criminal Appeal No. 52 of 2016 - Vishal N. Kalsaria v. Bank of India and Others , 2016 (1) KHC 330 : AIR 2016 SC 530 for the proposition that the tenants who are in possession in pursuance of the tenancy agreement cannot be evicted under the provisions of the 2002 Act and for eviction of such tenants the process as prescribed in the Rent Control Laws have to be resorted to. It is further submitted that the application filed by the 2nd respondent under Section 14 of the 2002 Act was barred by limitation. Further in view of the sequence of the events and facts of the present case, respondents are estopped from evicting the petitioners who are valid tenants in possession of the premises. Huge amount having been collected from the appellants as advance for the purpose of repayment of loan to the second respondent, the principle of estoppel is fully applicable in the facts of the present case.

7. Shri S. Easwaran, learned counsel for the 3rd respondent refuted the submissions of the learned Senior Counsel for the appellants. It is submitted that the lease deeds on which the appellants claim their right to continue in possession of the property were all the leased deeds which were executed subsequent to the mortgage of the property. Any lease executed by the mortgagor has to comply with the conditions as enumerated in Section 65A(2) of the 1882 Act and the leases in question on which reliance is placed by the appellants being contrary to Section 65A(2) cannot be held to be valid leases which are entitled for protection in the proceedings under the 2002 Act. It is submitted that as per Section 65A(2) no mortgagor can execute a lease for a period exceeding three years and further there cannot be any condition for renewal of the lease whereas the leases in question executed for 51 to 99 years and that too with renewal clause are clearly in violation of the Section 65A(2) of the 1882 Act. It is submitted that the Apex Court in Harshad Govardhan Sondagar v. International Assets Reconstruction Co. , 2014 KHC 4229 : (2014) 6 SCC 1 : 2014 (2) KHC SN 21 : 2014 (3) KLT 357 : 2014 (3) KLJ 495 has already laid down that leases which have been executed by the mortgagor after execution of the mortgage can be protected only when the leases are in accordance with the provisions of Section 65A(2) of the 1882 Act. It is submitted that the learned Chief Judicial Magistrate has come to the conclusion that the

appellants are not entitled to protection from dispossession in accordance with the law laid down by the Apex Court in Harshad Govardhan Sondagar's case (supra). Learned counsel for the 3rd respondent submitted that judgment of the Apex Court in Vishal N. Kalsaria's case (supra) can at best be read as laying down the proposition that tenancies created by any unregistered documents are also entitled for protection in proceedings under Section 14 of the 2002 Act. It is submitted that even if it is assumed that there was implied consent on behalf of the 2nd respondent for execution of the lease subsequent to the mortgage, the consent can at best be read only for execution of lease in accordance with Section 65A(2) of the 1882 Act. The 2nd respondent cannot be presumed to have given consent for execution of the lease agreement which is invalid and not in accordance with law. It is submitted that none of the appellants are entitled for protection from dispossession in the facts of the case and the order passed by the learned Chief Judicial Magistrate directing eviction is fully in accordance with law. The learned Chief Judicial Magistrate has already protected those leases which were executed prior to the mortgage. Agreement Ext. P3, being an unregistered one cannot be treated to be a mortgage deed. It is submitted that even in agreement Ext. P3 there is condition that the mortgagor shall not hand over possession of the assets to any one without the consent of the mortgagee. It is submitted that the auction purchaser having paid an amount of 9 crores in 2009 is unable to get the possession over the last six years which is causing irreparable loss and hardship. Learned counsel for respondents 1 and 2 have also adopted the submissions made by Shri S. Easwaran.

8. Learned counsel for the parties have referred to and relied on the judgments of the Apex Court and High Courts which shall be referred to while considering the submissions in detail.

9. We have considered the submissions made by the learned counsel for the parties and perused the records. From the submissions of the parties and the pleadings on record, the following are the issues which arise for consideration in these appeals.

I. Whether the agreement dated 27/12/2004, Ext. P3, which is an unregistered document can be treated to be a mortgage deed or an integral part of the mortgage coupled with memorandum dated 31/12/2004 by which mortgage was created by deposit of title deeds and the agreement dated 27/12/2004 being unregistered can be relied for any purpose?

II. Whether the leases executed in favour of the petitioners by the 1st respondent which are leases subsequent to the execution of the mortgage can be held to be lease agreements with permission of the mortgagee, i.e., the 2nd respondent?

III. Whether the lease granted by the mortgagor after execution of the mortgage has to be in accordance with the provisions of Section 65A(2) of the Transfer of Property Act unless any contrary intention is not expressed in the mortgage

deed?

IV. Whether consent of the mortgagee for execution of the lease after mortgage, if presumed, can the consent be treated to be a consent for execution of lease in disregard to the conditions as enumerated in Section 65A(2)?

V. Whether in the facts of the case, petitioners could not have been dispossessed in a proceeding under Section 14 of the 2002 Act or for the dispossession of the petitioners, it was incumbent upon respondents 1 and 2 to institute proceedings for eviction under the Kerala Rent Laws?

VI. Whether the application filed by the 2nd respondent under Section 14 of the 2002 Act was barred by limitation?

VII. Whether on principle of estoppel, the respondents were estopped from dispossessing the petitioners from the premises they having taken advance from the petitioners for repayment of the loan?

VIII. To what relief, if any, the appellants are entitled?

10. Issue Nos. I to V being interconnected are taken together.

11. Before we proceed to examine the issues, it is necessary to refer to the statutory provisions relevant in the present case. Sections 13 and 14 of the 2002 Act are relevant for the present case. Section 13(1), (2), (3) and (4) are as follows:

"13. 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 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 instalment 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.

(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the

reasons for non-acceptance of the representation or objection to the borrower:

PROVIDED that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under section 17A.

(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 realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(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 14 provides that the Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured assets. Section 14 is quoted as below:

"14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.--(1) Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him

- (a) take possession of such asset and documents relating thereto; and
- (b) forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any Court or before any authority."

In the present case the 1st respondent applied for grant of land to the 2nd respondent the security of which loan was the YMCA Commercial Complex with the existing building under construction which were mortgaged. The 1882 Act defines mortgage, different kinds of mortgages, rights and liabilities of mortgagor and provisions relating to mortgagor's power to lease. Section 58 defines mortgage. In the present case we are concerned with the mortgage by deposit of title deeds defined in Section 58(f). Thus Section 58(a) and 58(f) which are relevant are as follows:

"58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.--(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

xxxx xxxx xxxx

(f) Mortgage by deposit of title-deeds.--Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay and in any town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds."

12. Section 65A which deals with mortgagor's power to lease and relevant for the present case is as follows:

"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 promises 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 of which it is made,

(e) In the case of a lease of buildings, whether leased with 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 with a time therein specified.

(3) The provision of sub-section (1) apply only if and as far as the 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."

Provisions of Section 17 of the Registration Act, 1908 which is also relevant for the present case is as follows:

"17. Documents of which registration is compulsory.--(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866 (XX of 1866) or the Registration Act, 1871 (VIII of 1871) or the Indian Registration Act, 1877 (III of 1877) or this Act came or comes into force, namely:

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate, create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of

one hundred rupees and upwards, to or in immovable property:

Provided that the State Government may, by order published in the Official Gazette, exempt from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rent reserved by which do not exceed fifty rupees.

(f) agreement relating to the Deposit of title deeds, where such deposit has been made by way of security for the repayment of a loan or an existing or future debts;

(g) sale certificate issued by any competent officer or authority under any recovery Act;

(h) irrevocable Power of Attorney relating to transfer of immovable property in any way, executed on or after the commencement of the Registration (Maharashtra Amendment) Act, 2010."

13. Ext. P3 is an unregistered agreement dated 27/12/2004 between respondents 1 and 2. In the Schedule A security has been mentioned. Schedule A of the agreement which is relevant is quoted as below:

SCHEDULE A SCHEDULE OF SECURITIES

First Charge on all the Fixed Assets of YMCA backed up equitable mortgage of YMCA commercial complex existing and under construction.

ANNEXURE II RATES OF INTEREST ON TERM LOANS

ANNEXURE III REPAYMENT SCHEDULE OF TERM LOANS

The agreement has been signed by the 1st respondent as well as the 2nd respondent. But it is not a registered document. Memorandum dated 31/12/2004 has been brought on record as Ext. P2 by which memorandum, title deeds of documents pertaining to properties described in Schedule A was deposited.

14. It is clear that by Ext. P3 which purported to create security interest in the property in A schedule that Ext. P3 cannot be treated as a document transferring any right in the land Schedule A nor it can be treated to be a mortgage. Section 17 of the Registration Act as quoted above clearly indicate that any deed transferring or creating any right in the immovable property requires registration. The Apex Court in Babu Parasu Kaikadi (Dead) by Lrs. v. Babu (Dead) by LRs. , 2004 KHC 406 : AIR 2004 SC 754 : (2004) 1 SCC 681 had held that without execution of registered document no interest can be transferred in the land nor document can be treated as mortgage. The following was observed by the Apex Court in paragraphs 20 and 21:

"20. The contention of the respondent was that he has executed an agreement for sale in the year 1967 with one Bajrang Maruti Kanse and, therefore, the landlord is not in possession. It is no doubt true that the Tribunal recorded a finding that the purchaser was in possession. Surprisingly, however, on perusal of

the relevant documents, we find that the case set up by the respondent that he has executed an agreement for sale was not correct. In fact it was a mortgage with the right of re-conveyance and as such it was not an agreement for sale. Thus, the mortgagee was in possession of the land on behalf of the landlord because no title or interest was passed on in favour of the mortgagee, insofar as no registered document was executed transferring the interest in the land by the landlord in favour of the mortgagee.

21. In absence of any registered document having regard to the provisions contained in Sections 17 and 49 of the Registration Act, no lawful title could pass on to the mortgagee. Lawful title as well as the legal possession of the land in question, therefore, remained with the landlord. The so-called mortgagee in the aforementioned circumstances must be held to have merely in permissive possession of the land. Such a possession, on the part of the so-called mortgagee, being not in his own right, the land could have been restored in favour of the appellant. The Appellate Authority correctly analysed the legal position. It is true that the Tribunal while reversing the judgment and order of the Appellate Authority came to a finding that a third party was in possession but such purported finding of fact has been arrived at on applying wrong legal tests and without taking into consideration the effect of the provisions of the Transfer of Property Act and also the Indian Registration Act. In that view of the matter, the finding of the Tribunal was not sustainable. It is only in that premise the High Court arrived at a finding that the appellant has satisfied all conditions laid down under Section 32(1B) of the Act."

On a perusal of Ext. P2 it is clear that security interest was created in the Schedule A property by virtue of mortgage by deposit of title deeds as contemplated under Section 58(f) of the 1882 Act.

15. Another issue which arises to be considered at this juncture is as to whether Ext. P3 dated 27/12/2004 which is not a registered document can be relied for any other purpose. Learned counsel for the appellant has vehemently submitted that even if a document is not registered one, it can be relied for collateral purposes. It is submitted that in the present case the agreement evidences the consent of the mortgagee to receive advance from the prospective shop tenants (within six months) which clearly means that even after the execution of the mortgage, the 2nd respondent consented for creating tenancy in favour of prospective tenants to raise advance for payment of Rs. 150 lakhs to the 2nd respondent.

16. The Apex Court had occasion to consider in *Bondar Singh and Others v. Nihal Singh and Others*, 2003 KHC 952 : (2003) 4 SCC 161 : AIR 2003 SC 1905 a case where the land was subject-matter of transaction dated 09/05/1931 which was an unstamped and unregistered sale deed in favour of the purchaser in interest of the plaintiff. Plaintiff had claimed title to the land based on adverse possession. Question arose as to whether the said unregistered deed can be looked into for any other purpose. In the above case the Apex Court held that a

document though not admissible in evidence can be looked into for collateral purpose. The said document was looked into for purposes of finding out the nature of the possession of the plaintiff. The following was observed in paragraph 5:

"5. The main question as we have already noted in the question of continuous possession of the plaintiffs over the suit lands. The sale deed dated 09/05/1931 by Fakir Chand, father of the defendants in favour of Tola Singh, the predecessor interest of the plaintiff, is an admitted document in the sense its execution is not in dispute. The only defence set up against said document is that it is unstamped and unregistered and therefore it cannot convey title to the land in favour of plaintiffs. Under the law a sale deed is required to be properly stamped and registered before it can convey title to the vendee. However, legal position is clear law that a document like the sale deed in the present case, even though not admissible in evidence, can be looked into for collateral purposes. In the present case the collateral purpose to be seen is the nature of possession of the plaintiffs over the suit land. The sale deed in question at least shows that initial possession of the plaintiffs over the suit land was not illegal or unauthorised...."

Another judgment relied on by the learned counsel for the appellants *Indus Towers Ltd. v. Sub Inspector of Police*, 2013 (3) KHC 653 : 2013 (3) KLT 828 : ILR 2013 (3) Ker. 755 also supports the submission of the learned counsel for the appellant where a Division Bench of this Court held that a document which is unregistered and was required to be registered under Section 17 of the Registration Act can be looked into for any collateral transaction not required to be a registered document. In paragraph 13, the following was stated:

"13. The principle that can be culled out on a reading of the proviso to Section 49 of the Registration Act in the light of the above referred decision is that an unregistered document which is required to be registered under Section 17 of the Registration Act is not an absolutely invalid document; but the same can be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Performance Act or as evidence of any collateral transaction not required to be effected by registered instrument. A collateral transaction must be independent of or divisible from, the transaction to effect, which the law required registration and must be a transaction not itself required to be effected by a registered document."

We have already noted the provisions of Section 13(13) of the 2002 Act which clearly contemplated that no borrower shall after the notice under Section 13(2) shall transfer by way of lease or otherwise without prior written consent of the secured creditor. Section 65A is an enabling provision which empowers the mortgagors to mortgage the property subject to conditions as mentioned therein. The Apex Court in *Kamakshaya v. Ghohan Ram*, 1952 KHC 349 : AIR 1952 SC 401 : 1953 SCR 108 : 1953 (1) MLJ 12 had held that even before insertion of Section 65A in the 1882 Act, the mortgagor in possession had authority to deal with the property in usual course of management and the lease granted by him

can be deemed operative against the mortgagee. Thus from the above it is clear that mortgagor's right to lease the mortgaged property continued even after the mortgage. However, after receipt of the notice under Section 13(2), the said right of the mortgagor is restricted by further condition to obtain written permission of the mortgagee. Notice dated 16/11/2007 was issued by the 2nd respondent which was received by the 1st respondent on 19/11/2007 calling upon the first respondent to pay Rs. 3,19,47,157/-. Thus written consent was required thereafter for grant of any lease. In the present case the leases have been granted by the 1st respondent in favour of the appellants during the years 2005-08. All the leases in the present case are the leases executed subsequent to the execution of the mortgage. The learned Chief Judicial Magistrate by the impugned order had already protected possession of those leases which were executed prior to the execution of the mortgage. We thus in these appeals are only concerned with the leases executed subsequent to the mortgage and the right of the mortgagor to execute the leases and the terms and conditions applicable thereon.

17. Learned counsel for the appellants has emphasised that in Ext. P3 which is an agreement executed by the Bank there was clear stipulation that Rs. 150 lakhs be received as advance from the prospective shop owners within six months for the purpose of repayment of the term loan of Rs. 4 Crores. Schedule A clearly indicate the aforesaid facts. Annexure III which is an unregistered agreement between the parties can thus very well be looked into for finding out the consent of the 2nd respondent regarding execution of the lease after the mortgage. Stipulation as contained in Annexure III clearly provides that prospective tenants shall be found out from whom advance shall be taken for raising the amount of Rs. 150 lakhs. Thus there is clear consent of the 2nd respondent for executing the lease even after the mortgage. Leases in favour of the appellants were executed thereafter. The main dispute between the parties is as to whether the leases executed in favour of the appellants after mortgage are valid leases entitling the appellants to protect their possession in proceedings under Section 14 of the 2002 Act. Submissions of the learned counsel is that there being consent for execution of the mortgage even after the mortgage and under the said consent it was open for the 1st respondent to execute leases, all leases are valid and entitled for protection under Section 14 of the 2002 Act. Learned counsel for the 3rd respondent however refuted the submissions and contended that for leases executed after execution of the mortgage, conditions as enumerated in Section 65A(2) are to be mandatorily followed and any lease executed in violation of Section 65A(2) of the 1882 Act has to be treated as invalid. It is the further submission that even if it is assumed that there was consent of the 2nd respondent for execution of the lease after mortgage, the said consent has to be read as consent for execution of lease in accordance with law. It is further submitted by the learned counsel for the 3rd respondent that in the event any contrary intention regarding lease to be executed after the mortgage is to be found out, the said intention has to be gathered from the mortgage deed

itself. In the present case Ext. P3 being not a mortgage deed, there is no question of reaching any contrary intention in the mortgage deed. It is submitted that for modification of any of the conditions as mentioned in Section 65A(2) contrary intention or varied conditions have to be found out from the mortgage deed. In the present case no variance of any condition under Section 65A(2) can be read and hence the leases which obviously are contrary to the provisions of Section 65A(2) of the 1882 Act are invalid. The learned counsel for the 2nd respondent submitted that the leases violates the following mandatory preconditions in Section 65A(2): (i) Leases granted in favour of the appellants contained a renewal condition which is contrary to Section 65A(2)(c). (ii) Leases executed in favour of the appellants have been executed for a period of 51 to 99 years which is clearly contrary to Clause (e) of sub-section (2) which provides that duration of the lease shall not in any case exceed three years. (iii) In the leases amount running to lakhs have been taken were contemplated to be paid in the name of security deposit which is nothing but payment of premium which is prohibited by Clause (d) of sub-section (2).

18. As observed above, agreement dated 27/12/2004 cannot be treated as a mortgage deed hence the said agreement is not relevant for finding out any varied conditions or contrary intention as contained in Section 65A(2) of the 1882 Act. However, for finding out consent of the mortgagee as contemplated under Section 13(3) as well as consent of the mortgagee to permit execution of lease deed, agreement dated 27/12/2004 is relevant and can be used for the aforesaid purpose. We agree with the submission of the learned counsel for the appellants that consent for execution of the lease can be read from the unregistered document dated 27/12/2004 which evidences consent of the 2nd respondent to execute the lease in favour of the prospective tenants for raising advance of 150 lakhs.

19. From the above it is clear that the leases executed in favour of the appellants after execution of the mortgage are not in accordance with Section 65A(2). Learned counsel heavily relied upon the judgment of the Apex Court in Harshad Govardhan Sondagar's case (supra) where the Apex Court held that protection under Section 14 from dispossession can be claimed by a lessee/tenant who claims such right on the basis of valid lease executed in accordance with Section 65A(2) of the 1882 Act. Judgment of the Apex Court in Harshad Govardhan Sondagar's case (supra) is relevant for deciding the controversy raised in the present appeals, hence the judgment is to be noted in some detail. In the aforesaid case, appellants were tenants of different premises in Mumbai. Premises were mortgaged to different banks as securities for the loan advanced by the Bank. The former defaulted in repayment of the secured loans and proceedings under the 2002 Act was initiated. The Bank after issuing notice under Section 13(2) invoked power under Section 13(4). Secured creditors made application to the Chief Metropolitan Magistrate, Mumbai to take possession. Tenants approached the High Court. The High Court following its earlier judgment in Trade Well v. Indian Bank , 2007 KHC 6431 : 2007 Cri. L.J. 2544 held that

remedy of the tenant is to file application under Section 17 of the 2002 Act before the Debt Recovery Tribunal. High Court refused relief to the appellants and hence the matter was taken up to the Apex Court. Before the Apex Court it was contended that tenants being lessee of the mortgagor proceedings under Section 14 cannot be utilised for dispossessing them from the premises under the tenancy. The Apex Court in the said case held that so long as the mortgage deed does not prohibit the mortgagor from making a lease of the mortgaged property and so long as lease satisfies the requirement of Section 65A(2) of the 1882 Act, the lease deed made by the borrower as a mortgage will not only be valid but also binding on the secured creditor as mortgagee. After referring to Section 65A(2), the Apex Court laid down the following in paragraph 17:

"17. After the mortgage of an immovable property is created by the borrower in favour of a secured creditor, the right of the borrower to lease a mortgaged property is regulated by Section 65A of the Transfer of Property Act. Section 65A of the Transfer of Property Act is extracted hereinbelow:

"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 with 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. Thus, sub-section (1) of Section 65A of the Transfer of Property Act states that the mortgagor has the power to make lease of a mortgaged property while he is in lawful possession of the same subject to the provisions of sub-section (2) of Section 65A of the Transfer of Property Act and such lease is binding on the mortgagee. Sub-section (3) of Section 65A

further provides that such a power is available with the mortgagor to make a lease of the mortgage property only if and as far as a contrary intention is not expressed in the mortgage-deed. Thus, so long as the mortgage-deed does not prohibit a mortgagor from making a lease of the mortgaged property and so long as the lease satisfies the requirements of sub-section (2) of Section 65A, a lease made by a borrower as a mortgagor will not only be valid but is also binding on the secured creditor as a mortgagee."

The Apex Court further proceeded to consider the nature of the lessee and the provisions of Sections 105 to 111 of the 1882 Act. The Apex Court further held that so long as lease of an immovable property does not get determined, the lessee has a right to enjoy the property and this right cannot be taken away. The following was laid down in paragraphs 22 and 25:

"22. We may now consider the nature of the right of the lessee and as to when the lease under the Transfer of Property Act gets determined. Section 105 and Section 111 of the Transfer of Property Act, which are relevant in this regard, are quoted hereinbelow:

"105. Lease defined.--A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.--The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

111. Determination of lease.--A lease of immovable 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.

Section 105 thus provides that a lessee of an immovable property has a right to enjoy such property, for a certain time or in perpetuity when a lessor leases an immovable property transferring his right to enjoy such property for a certain time or in perpetuity. Section 111 of the Transfer of Property Act, 1882 provides the different modes by which a lease gets determined. Thus, so long as a lease of an immovable property does not get determined, the lessee has a right to enjoy the property and this right is a right to property and this right cannot be taken away without the authority of law as provided in Article 300A of the Constitution. As we have noticed, there is no provision in Section 13 of the SARFAESI Act that a lease in respect of a secured asset shall stand determined when the secured creditor decides to take the measures mentioned in Section 13 of the said Act. Without the determination of a valid lease, the possession of the lessee is lawful and such lawful possession of a lessee has to be protected by all Courts and Tribunals.

25. The opening words of sub-section (1) of Section 14 of the SARFAESI Act make it clear that where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor "under the provisions of the Act", the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof. Thus, only if possession of the secured asset is required to be taken under the provisions of the SARFAESI Act, the secured creditor can move the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset. We have already held that Section 13 of the SARFAESI Act does not provide that the lease in respect of a secured asset will get determined when the secured creditor decides to take the measures in the said Section. Hence, possession of the secured asset from a lessee in lawful possession under a valid lease is not required to be taken under the provisions of the SARFAESI Act and the Chief Metropolitan Magistrate or the District Magistrate, therefore, does not have any power under Section 14 of the SARFAESI Act to take possession of the secured asset from such a lessee and hand over the same to the secured creditor. When, therefore, a secured creditor moves the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset, he must state in the affidavit

accompanying the application that the secured asset is not in possession of a lessee under the valid lease made prior to creation of the mortgage by the borrower or made in accordance with Section 65A of the Transfer of Property Act prior to receipt of a notice under sub-section (2) of Section 13 of the SARFAESI Act by the borrower. We would like to clarify that even in such cases where the secured creditor is unable to take possession of the secured asset after expiry of the period 60 days of the notice to the borrower of the intention of the secured creditor to enforce the secured asset to realise the secured debt, the secured creditor will have the right to receive any money due or which may become due, including rent, from the lessee to the borrower. This will be clear from Clause (d) of sub-section (4) of Section 13, which provides that in case the borrower fails to discharge his liability in full within the notice period, the secured creditor may require, at any time by notice in writing, any person who has acquired any of the 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."

The Apex Court further held that if the Chief Metropolitan 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 1882 Act and the lease has not been determined in accordance with the provisions of Section 111 of the 1882 Act, he cannot pass an order for delivering possession of the secured asset to the secured creditor. The following was laid down in paragraph 28:

"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 news papers, 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."

Insofar as the question as to whether tenant have remedies under the tenancy law is concerned, the Apex Court held that by virtue of Section 34 of the 2002 Act, jurisdiction of the Civil Court has been ousted and no injunction can be granted by any Court or authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the 2002 Act. The following was laid down in paragraph 35:

"35. A further question of law raised in these appeals is whether the tenants have remedies under the concerned tenancy law. In the State of Maharashtra, the Maharashtra Rent Control Act, 1999 is in force and this Act applies to premises let for the purposes of residence, education, business, trade or storage specified in Schedule I and Schedule II of the Act as well as houses let out in areas to which the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 applied before the commencement of the Act. Section 33 of the Maharashtra Rent Control Act is titled "Jurisdiction of Courts" and it provides that the Courts named therein "shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises and to decide any application made under the Act and the applications which are to be decided by the State Government or an officer authorised by it or the Competent Authority. The question of law that we have to consider is whether the appellants as tenants of premises in the State of Maharashtra including Mumbai will have any remedy to move these Courts having jurisdiction under Section 33 of the Maharashtra Rent Control Act and obtain the relief of injunction against the secured creditor taking possession of the secured asset from the appellants. The answer to this question is in Section

34 of the SARFAESI Act, which is extracted hereinbelow:

"34. 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)."

A reading of the second limb of Section 34 of the SARFAESI Act would show that 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 the Act. Thus, when action is sought to be taken by the secured creditor under Section 13 of the SARFAESI Act or by the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the SARFAESI Act, the Court or the authority mentioned in Section 33 of the Maharashtra Rent Control Act cannot grant the injunction to prevent such action by the secured creditor or by the Chief Metropolitan Magistrate or the District Magistrate. Even otherwise, Section 33 of the Maharashtra Rent Control Act vests jurisdiction in the Courts named therein to decide disputes between the landlord and the tenant and not disputes between the secured creditor and the tenant under landlord who is a borrower of the secured assets."

It was further held in paragraph 36 that if the lease has been executed by registered lease only then it can be treated as executed for a term of more than one year and unregistered or oral agreement only entitled the lessee for a period of one year from the date of delivery of the possession. Learned counsel for the respondents submitted that present case is fully covered by the judgment of the Apex Court in Harshad Govardhan Sondagar's case (supra) and the lease in favour of the appellants being contrary to Section 65A, the Chief Judicial Magistrate was not required to protect possession of petitioners from dispossession under Section 14 of the 2002 Act and there is no error in the judgment of the learned Single Judge upholding the said action. Learned counsel for the appellants submitted that in a recent decision delivered by the Apex Court on 20/01/2016 in Criminal Appeal No. 52 of 2026 (Vishal N. Kalsaria's case (supra) considering the earlier case pertaining to action under Section 14 of the 2002 Act, held that tenants holding tenancy under a valid lease cannot be dispossessed under Section 14 of the 2002 Act. The said judgment is also to be noted in detail. Appellants before the Apex Court were protected tenants within the meaning of the Maharashtra Rent Control Act, 1999. Respondents 4 and 5 who were landlords approached the Bank of India for a financial loan which was granted against equitable mortgage of several properties belonging to several parties including the property in which the appellant is also a tenant. On default being committed, the bank proceeded under the 2002 Act and after failure of repayment within 60 days, filed application before the Chief Judicial Magistrate

for taking possession of the mortgaged assets. The learned Chief Judicial Magistrate allowed the application and directed to take possession. Notice was served on the appellants to vacate the premises within 12 days. A suit, RAD 913/11 was filed before the Small Causes Court, Bombay where an interim order of injunction was passed. In view of the interim order, the appellant filed application as an intervenor before the learned Chief Judicial Magistrate which application was dismissed by the Chief Judicial Magistrate relying on the judgment in Harshad Govardhan Sondagar's case (supra). The Apex Court noticed the object and purpose of the enactment of the Maharashtra Rent Control Act, 1999 and the 2002 Act. The Apex Court also noticed the earlier decision in Harshad Govardhan Sondagar's case (supra) specifically referring to paragraphs 25, 32 and 34 of the judgment. The following was observed in paragraph 24:

"24. A landlord cannot be permitted to do indirectly what he has been barred from doing under the Rent Control Act, more so when the two legislations, that is the SARFAESI Act and the Rent Control Act operate in completely different fields. While SARFAESI Act is concerned with Non-Performing Assets of the Banks, the Rent Control Act governs the relationship between a tenant and the landlord and specifies the rights and liabilities of each as well as the rules of ejectment with respect to such tenants. The provisions of the SARFAESI Act cannot be used to override the provisions of the Rent Control Act. If the contentions of the learned counsel for the respondent Banks are to be accepted, it would render the entire scheme of all Rent Control Acts operating in the country as useless and nugatory. Tenants would be left wholly to the mercy of their landlords and in the fear that the landlord may use the tenanted premises as a security interest while taking a loan from a bank and subsequently default on it. Conversely, a landlord would simply have to give up the tenanted premises as a security interest to the creditor banks while he is still getting rent for the same. In case of default of the loan, the maximum brunt will be borne by the unsuspecting tenant, who would be evicted from the possession of the tenanted property by the Bank under the provisions of the SARFAESI Act. Under no circumstances can this be permitted, more so in view of the statutory protections to the tenants under the Rent Control Act and also in respect of contractual tenants along with the possession of their properties which shall be obtained with due process of law."

The Apex Court further observed that the mere factum of non-registration of lease deed will not make the lease itself nugatory. It was held that the tenancy can be created both by registered deed and neither the landlord nor bank can be permitted to exploit the fact of non-registration of the tenancy deed. In paragraph 25, the following was held:

"25. 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 light of the same, neither the landlord nor the banks can be permitted to exploit the fact of non-registration of the tenancy deed against the tenant. Further, the learned counsel for the appellants rightly placed reliance on a three Judge Bench decision of this Court in Anthony (supra). At the cost of repetition, in that case it was held as under:

"But the above finding does not exhaust the scope of the issue whether the appellant was a lessee of the building. A lease of immovable property is defined in Section 105 of the TP Act. A transfer of a right to enjoy a property in consideration of a price paid or promised to be rendered periodically or on specified occasions is the basic fabric for a valid lease. The provision says that such a transfer can be made expressly or by implication. Once there is such a transfer of right to enjoy the property a lease stands created. What is mentioned in the three paragraphs of the first part of Section 107 of the TP Act are only the different modes of how leases are created. The first paragraph has been extracted above and it deals with the mode of creating the particular kinds of leases mentioned therein. The third paragraph can be read along with the above as it contains a condition to be complied with if the parties choose to create a lease as per a registered instrument mentioned therein."

All other leases, if created, necessarily fall within the ambit of the second paragraph. Thus, de hors the instrument parties can create a lease as envisaged in the second paragraph of Section 107 which reads thus: All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession."

The Apex Court further observed that the judgment in Harshad Govardhan Sondagar's case (supra) has been misinterpreted by the taking up a word or sentence from the judgment. It was held that the judgment in Harshad Govardhan Sondagar's case (supra) cannot be understood to have held that provisions of the 2002 Act overrides the provisions of the Rent Control Act and Banks are at liberty to evict the tenants from the tenanted premises which have been offered as collateral security for the loan. It was further held that no such ratio has been laid down in Harshad Govardhan Sondagar's case (supra) after

mortgage of the property tenancy can be created only by a registered document. It was held that it is settled position of law that once tenancy is created, the tenant can be evicted only after due process of law. The following was stated in paragraphs 29 and 30:

"29. As far as granting leasehold rights being created after the property has been mortgaged to the bank, the consent of the creditor needs to be taken. We have already taken this view in the case of Harshad Govardhan Sondagar (supra). We have not stated anything to the effect that the tenancy created after mortgaging the property must necessarily be registered under the provisions of the Registration Act and the Stamp Act.

30. It is a settled position of law that once tenancy is created, a tenant can be evicted only after following the due process of law, as prescribed under the provisions of the Rent Control Act. A tenant cannot be arbitrarily evicted by using the provisions of the SARFAESI Act as that would amount to stultifying the statutory rights of protection given to the tenant. A non obstante clause (Section 35 of the SARFAESI Act) cannot be used to bulldoze the statutory rights vested on the tenants under the Rent Control Act. The expression "any other law for the time being in force" as appearing in Section 35 of the SARFAESI Act cannot mean to extend to each and every law enacted by the Central and State Legislatures. It can only extend to the laws operating in the same field. Interpreting the non obstante clause of the SARFAESI Act, a three Judge Bench of this Court in the case of Central Bank of India v. State of Kerala and Others, , (2009) 4 SCC 94 has held as under:

"18. The DRT Act and Securitisation Act were enacted by Parliament in the backdrop of recommendations made by the Expert Committees appointed by the Central Government for examining the causes for enormous delay in the recovery of dues of banks and financial institutions which were adversely affecting fiscal reforms. The committees headed by Shri T. Tiwari and Shri M. Narasimham suggested that the existing legal regime should be changed and special adjudicatory machinery be created for ensuring speedy recovery of the dues of banks and financial institutions. Narasimham and Andhyarujina Committees also suggested enactment of new legislation for securitisation and empowering the banks etc. to take possession of the securities and sell them without intervention of the Court.

xxxx xxxx xxxx

110. The DRT Act facilitated establishment of two-tier system of Tribunals. The Tribunals established at the first level have been vested with the jurisdiction, powers and authority to summarily adjudicate the claims of banks and financial institutions in the matter of recovery of their dues without being bogged down by the technicalities of the Code of civil Procedure. The Securitisation Act drastically changed the scenario inasmuch as it enabled banks, financial institutions and other secured creditors to recover their dues without intervention of the Courts

or Tribunals. The Securitisation Act also made provision for registration and regulation of securitisation/reconstruction companies, securitisation of financial assets of banks and financial institutions and other related provisions.

111. However, what is most significant to be noted is that there is no provision in either of these enactments by which first charge has been created in favour of banks, financial institutions or secured creditors qua the property of the borrower.

112. Under Section 13(1) of the Securitisation Act, limited primacy has been given to the right of a secured creditor to enforce security interest vis-a-vis. Section 69 or Section 69A of the Transfer of Property Act. In terms of that sub-Section, a secured creditor can enforce security interest without intervention of the Court or Tribunal and if the borrower has created any mortgage of the secured asset, the mortgagee or any person acting on his behalf cannot sell the mortgaged property or appoint a receiver of the income of the mortgaged property or any part thereof in a manner which may defeat the right of the secured creditor to enforce security interest. This provision was enacted in the backdrop of Chapter VIII of Narasimham Committee's 2nd Report in which specific reference was made to the provisions relating to mortgages under the Transfer of Property Act.

113. In an apparent bid to overcome the likely difficulty faced by the secured creditor which may include a bank or a financial institution, Parliament incorporated the non obstante clause in Section 13 and gave primacy to the right of secured creditor vis-a-vis. other mortgagees who could exercise rights under Sections 69 or 69A of the Transfer of Property Act. However, this primacy has not been extended to other provisions like Section 38C of the Bombay Act and Section 26B of the Kerala Act by which first charge has been created in favour of the State over the property of the dealer or any person liable to pay the dues of sales tax, etc.

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116. The non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act give overriding effect to the provisions of those Acts only if there is anything inconsistent contained in any other law or instrument having effect by virtue of any other law. In other words, if there is no provision in the other enactments which are inconsistent with the DRT Act or Securitisation Act, the provisions contained in those Acts cannot override other legislations."

(emphasis laid by this Court)

In view of the aforesaid discussion, the Apex Court in Viashal N. Kalsaria's case (supra) has held that once tenancy is created the tenant can be evicted only after due process of law as described under the Rent Control Act. For the purpose of the present case, it is not necessary to go into the issue as to whether the appellants could have been evicted only under the provisions of the Kerala Rent

Control Laws. The proposition as laid down in Vishal Kalsaria's case (supra) has to read as proposition laying down that valid tenancy cannot be terminated by resorting to Section 14 of the 2002 Act. We are not to take any other view in the present case in view of the pronouncement of the Apex Court as noted above. The question to be considered in the present case is as to whether the lease on the basis of tenancy as being claimed by the appellants are valid leases in the event the leases are to be held in accordance with Section 65A(2) of the 1882 Act obviously, appellants cannot be dispossessed in exercise of the power under Section 14 of 2002 Act. As noticed above, in the present case the terms and conditions of the lease deed which is claimed by the appellants and brought on record as Exts. P4 to P16 indicate that leases were executed (1) for a period ranging from 51 to 99 years (ii) for a period containing renewal Clause (iii) on payment of advance amount of several lakhs refundable interest security. Certain terms and conditions in the lease deed dated 27/12/2004 are relevant to be noticed hereinbelow:

1. The Lease/let out shall be for a period of 99 (Ninety Nine) years commencing from 27/01/2005 together with an option to the Lessee to renew the lease for such period on terms stipulated hereunder.
2. Monthly rent will be Rs. 300/- (Rupees three hundred only) the monthly rental payment will be made by the Lessee on the 1st day of every English Calender month commencing from 27/01/2005. And it will remain the same throughout the period of Lease.
3. The Lessee has deposited with the Lessor by a crossed account payee cheque No. 0006669 dated 27/01/2005 for Rs. 3,00,000/- (Rupees Three lakhs only) drawn on the Dhanalakshmi Bank Ltd., Chevarambalam Branch, Chevayoor, Kozhikode - 673 017 as Refundable interest free security deposit, refundable at the time of determination of lease and the receipt of which is also hereby acknowledged by the lessor. The amount of advance will not be available for adjustment against any claims/dues.
4. The lessee agrees to pay the rent regularly and punctually without least delay or single default."

Leased deed dated 27/01/2015 containing the aforesaid clause is in violation of the conditions as enumerated in Section 65A of the 1882 Act. As noted above, provisions of 65A can be modified or varied only by mortgage deed and in the present case there being no registered mortgage deed, no variation of the conditions mentioned in Section 65A is to be accepted. Thus the lease granted to the appellants after execution of the mortgage is not a valid lease and contrary to Section 65A(2). It is further relevant to note that in the 2002 Act the words and expression used in the 1882 Act have to be read virtue of Section 2(2) which to the following effect:

"2(2) Words and expressions used and not defined in this Act but defined in the Indian Contract Act, 1872 (9 of 1872) or the Transfer of Property Act, 1882 (4 of

1882) or the Companies Act, 1956 (1 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) shall have the same meanings respectively assigned to them in those Acts."

Thus definition of mortgage as given in the 1882 Act and other provisions of the 1882 Act including Section 65A has to be complied with while execution of the lease deed after a mortgage. Provisions of Section 65A is in no manner are modified or taken away by any provisions of the 2002 Act.

20. In view of the pronouncements made by the Apex Court in Harshad Govardhan Sondagar's case (supra) that protection from dispossession under Section 14 of the 2002 Act is available only to a lessee who claims to have executed a lease deed after creation of the mortgage in accordance with the provisions under Section 65A. Leases which are claimed by the appellants are not in accordance with Section 65A(2), we are afraid that appellants are not entitled to have protection from dispossession under the 2002 Act. Issue Nos. I to V are answered in the following manner:

(1) Agreement dated 27/12/2004, Ext. P3 is neither a mortgage deed nor an integral part of mortgage created by memorandum dated 31/12/2004 depositing title deeds. Ext. P3 however, can be relied for finding out consent by mortgagee for execution of lease deed after creation of the mortgage.

(2) Leases executed in favour of the appellants are leases who have been executed with the permission of the mortgagee which is evident by Annexure III to the Schedule A of agreement dated 27/12/2004, Ext. P3.

(3) Leases granted after execution of the mortgage has to conform the provisions of Section 65A(2) of the 1882 Act. No contrary intention modifying any of the conditions in Section 65A(2) are present in the facts of the present case.

(4) Consent of the mortgagee for execution of the lease deed cannot be treated as consent for execution of a lease contrary to the conditions as enumerated in Section 65A(2) of the 1882 Act.

(5) Lease in favour of the appellants not being in accordance with Section 65A(2) of the 1882 Act, appellants are not entitled to for protection from dispossession under Section 14 of the 2002 Act.

ISSUE NO. VI

21. Learned counsel for the appellants contends that application filed by the 3rd respondent under Section 14 of the 2002 Act was barred by limitation and liable to be dismissed on this ground alone. Submission of the appellant is that application under Section 14 is not filed within the period stipulated under Article 137 of the Limitation Act, hence the application is barred by limitation. Article 137 of the Limitation Act provides as follows:

In the present case notice under Section 13(2) was issued on 16/11/2007

whereas application under Section 14 was filed by the 2nd respondent before the Chief Judicial Magistrate on 11/09/2013. The limitation for filing the application even if the submission of the learned counsel for the appellant is accepted, it is to start running from the date of service of notice under Section 13(2) of the 2002 Act. Application under Section 14 of the 2002 Act is in continuation of a measure as contemplated under Section 13(4) of the 2002 Act. There is no obligation on the creditor to start taking measures for taking possession immediately after expiry of 60 days from service of notice under Section 13(2). In the present case application was filed after private sale in favour of the 3rd respondent was finalised and sale certificate was issued on 10/09/2013. Sale notice dated 02/07/2009 was issued under Section 13(4) of the 2002 Act. There has been series of litigations after issuance of sale notice by the petitioners with respondents and ultimately the private sale in favour of the 3rd respondent could take place only on 10/09/2013. Submission of learned counsel for the appellants that period of limitation shall start running after 60 days from 19/11/2011 and the application is barred by time is wholly incorrect and cannot be accepted. There is no limitation prescribed for sale of the mortgaged assets or for taking possession of the mortgaged assets. Section 14 is only a provision which empowered the creditor to take assistance of the Chief Judicial Magistrate or District Magistrate for obtaining possession of the mortgaged assets. Provision of the 2002 Act cannot be read to mean that the limitation prescribed under Article 137 shall be applicable with reference to an application under Section 14 of the 2002 Act. Learned Single Judge did not commit any error in rejecting the submission of the learned counsel for the appellants on limitation. Application filed by the 2nd respondent under Section 14 could not have been rejected on the ground that it is barred by limitation.

ISSUE NOS. VII & VIII

22. Both the issues being interconnected are taken together. Submission of the learned counsel for the appellants that when respondents 1 and 2 under agreement dated 27/12/2004 which stipulate raising of advance of 150 lakhs, from the prospective tenants took huge amount as advance from the appellants they are estopped from the asking the appellants to vacate the premises. It is further submitted that property was purchased "as is where is" basis. Hence the 2nd respondent was to take the premises along with the tenancies and it cannot file an application under Section 14 of the 2002 Act for eviction of the tenants. From the facts brought on record, there is no dispute that agreement dated 27/12/2004 between respondents 1 and 2, which agreement is not denied by both, contemplate raising of 150 lakhs from the prospective tenants of the shops within six months. The said Annexure III of Schedule A has already been held by us that it contains a consent of the 2nd respondent for lease of the premises subsequent to the mortgage. However, as we have held above, lease to be executed subsequent to the mortgage were to be executed in accordance with Section 65A(2) and consent cannot be read to execute lease contrary to the provisions contained in Section 65A. Proceedings under Section 14 have been

initiated for taking possession and in view of the law laid down by the Apex Court in Harshad Govardhan Sondagar's case (supra) if the lease executed after the mortgage is not in accordance with Section 65A of the 1882 Act, the lessee can be dispossessed. Principle of estoppel cannot be allowed to operate against the specific statutory provisions. Had the leases executed in favour of the appellants were in accordance with Section 65A, appellants might be right in their submission that they could resist the dispossession under Section 14. But we having found that the leases were not executed in accordance with Section 65A, the principle of estoppel cannot be pressed in the facts and circumstances of the case.

23. One more aspect of the matter is to be noted. We have already noticed that in all the leases executed in favour of the appellants after the mortgage deed advance amount of several lakhs were paid by the lessees. One of the conditions, i.e., (23) (Ext. P4) which is relevant to advance amount provided as follows:

"If the lessee is discontinued after expiry of the period at the discretion of the Lessee or upon determination of the Lease, the advance amount of Rs. 3,00,000/- (Rupees Three lakhs only) shall be refunded by the Lessor to the Lessee without any objection whatsoever and in the event of failure, the Lessee reserves the right to claim and recover the same with 24% interest per annum."

As noted above, amount of Rs. 3,00,000/- as advance was referred as refundable interest free security deposit, refundable at the time of termination of the lease. In view of our finding that the leases were not in accordance with Section 65A, the appellants are not entitled to protection from dispossession under Section 14 of the 2002 Act.

Learned counsel for the parties are at variance with regard to the advance amount which was actually paid to the Bank towards repayment of loan as was mentioned in the agreement dated 27/12/2004. We are of the view that liberty be granted to the appellants to seek appropriate steps for refund of the security deposit in accordance with law.

In view of the foregoing discussion, we dismiss all the appeals reserving the right of appellants to seek refund of interest free security paid to the mortgagor at the time of execution of the lease.

Parties shall bear their on costs.