(2016) 01 KL CK 0066

In the High Court Of Kerala

Case No : W.P.(C) No. 30016 of 2015

P.M. Kelukutty and Others APPELLANT

Vs

Young Men''s Christian Association and Others RESPONDENT

Date of Decision : 19-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Limitation Act, 1963 — Section 29
Registration Act, 1908 — Section 17, Section 49
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 200

Citation : (2016) ACD 1079 : (2016) AIR(Kerala) 135 : (2016) 4 BC 302 : (2016) 1 KerLJ 536 : (2016) 1 KHC 493 : (2017) 1 NIJ 643

Hon'ble Judges : A.K. Jayasankaran Nambiar, J.

Bench : Single Bench

Advocate : A. Sudhi Vasudevan, Sr. Adv., P.V. Baby, Jose Jones Joseph and M. Praveesh, for the Appellant; E. Narayanan, M. Mohamed Navaz, T.P. Sajan, S. Easwaran, P. Muraleedharan, M.A. Augustine and P. Sreekumar, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Jayasankaran Nambiar, J.—1. As the issue involved in all these writ petitions is the same, they are taken up together for consideration and disposed by this common judgment. For the sake of convenience, the reference to facts and exhibits is from W.P.(C). No. 30016/2015. The petitioners in these writ petitions are tenants in buildings owned by the 1st respondent. The 1st respondent constructed the said building, which is a four storeyed building, after demolishing a two storeyed building that originally stood on the site. For the purposes of constructing the said building, the 1st respondent had availed a term loan of Rs. 400 Lakhs from the 2nd respondent bank. The security offered by the 1st respondent, for the loan amounts advanced to it by the 2nd respondent, was in the form of a mortgage by deposit of title deeds. Ext. P2 dated 31.12.2004 is the memorandum of deposit of title deeds. The 1st respondent also entered into Ext.

P3 loan agreement dated 27.12.2004, whereby it agreed to repay the 2nd respondent the said loan amount in installments in the manner specified in the schedule to the said agreement. Annexure 3 of the schedule to the said agreement states that towards the term loan of Rs. 4 Crores, a sum of Rs. 150 Lakhs has to be paid on receipt of advance from prospective shop tenants within the time stipulated therein, and the balance amount has to be paid in 120 equal monthly installments starting from 6 months from the date of disbursement.

2. The 1st respondent began to lease out various premises within the building in question to third parties even while the building was under construction. As a result, mere were registered lease deeds executed by the 1st respondent in favour of various persons, both prior to and subsequent to, the creation of the mortgage by deposit of title deeds. There were also certain unregistered lease deeds that were executed by the 1st respondent, subsequent to the creation of the mortgage. The 1st respondent, thereafter, occasioned a default in effecting repayment of the loan amounts to the 2nd respondent and, as a consequence, the 2nd respondent initiated steps under the SARFAESI Act, against the secured asset viz. the four storeyed building, for recovery of the defaulted loan amounts. The said proceedings culminated in a private sale of the building in question to one Ahammed Koya.

3. It is relevant to note that the petitioners had, in the meanwhile, and on coming to know of the proposed sale to Ahammed Koya, got themselves impleaded in a writ petition that had been filed by the 1st respondent seeking to interdict the proceedings initiated by the 2nd respondent bank under the SARFAESI Act. The petitioners basically wanted an opportunity to redeem the mortgage executed by the 1st respondent by paying the amounts payable to the 2nd respondent bank. The writ petition was subsequently dismissed as infructuous when the private sale took place. The petitioners, therefore, filed S.A. No. 18/2010 before the Debts Recovery Tribunal challenging the private sale. This S.A. was dismissed by Ext. P18 order on the ground that the Tribunal did not have the jurisdiction to decide the claim for redemption of mortgage and subrogation put forward by the petitioners.

4. The 2nd respondent thereafter, issued a sale certificate of sale of the property in question and registered the same as Document No. 630/1/2013 of the Sub Registrar, Kozhikode on 10.09.2013. Immediately thereafter, it took steps in terms of Section 14 of the SARFAESI Act, to obtain vacant possession of the building in question. The petitioners, therefore, submitted objections before the Chief Judicial Magistrate, inter alia, pointing out that their tenancy rights in the building could not be determined without recourse to the provisions of Section 111 of the Transfer of Property Act. The litigation that ensued resulted in Exts. P20A and P21 judgments, of a single bench and Division bench respectively, of this court whereby this court directed the Chief Judicial Magistrate to consider the objections raised by the tenants in the building to the application preferred by the 2nd respondent bank under Section 14 of the SARFAESI Act. The Chief

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Judicial Magistrate, thereafter, considered the matter and by Ext. P26 common order dated 18.08.2015 found that only those tenants who had obtained tenancy rights before the date of creation of mortgage would be entitled to a protection from dispossession and that, the tenants who had obtained tenancy rights through lease deeds executed subsequent to the creation of the mortgage, would not be entitled to such protection. In arriving at the said finding, the learned Magistrate found that Ext. P3 agreement constituted a mortgage deed, the terms of which expressly prevented the 1st respondent from executing lease agreements with respect to the building in question and, further, that the lease agreements executed subsequent to the creation of the mortgage did not conform to the nature of leases permitted under Section 65A(2) of the Transfer of Property Act. Ext. P26 common order of the Chief Judicial Magistrate is impugned in these writ petitions.

5. I have heard learned Senior Counsel Sri. Sudhi Vasudevan for the petitioners in all these writ petitions and Sri. E. Narayanan, Sri. Mohammed Navaz as also Sri. S. Easwaran, the learned counsel appearing for respondents 1, 2 and 3.

6. The contentions put forth on behalf of the petitioners in these writ petitions, briefly stated, are as follows:

Ext. P3 agreement is not valid since the 1st respondent did not have the necessary permission from the International YMCA to execute such an agreement. The agreement is therefore null and void.

Alternatively, the 1st respondent had the power to execute lease agreements, and this power was one that was generally available with any mortgagor and independent of the powers granted under Section 65A of the Transfer of Property Act. The lease agreements entered into between the petitioners and the 1st respondent were therefore valid and the petitioners were consequently entitled to protection from dispossession under Section 14 of the SARFAESI Act.

The contrary intention referred to in Section 65A(3) is in respect of an intended prohibition, if any, to create a lease so long as it is expressed in a mortgage deed. It follows, therefore, that if there is no express prohibition on the mortgagor to create a lease, then the provisions of Section 65A will not be attracted. Reliance is placed on paragraph 17 of the decision of the Supreme Court in Harshad Govardhan Sondagar v. International Assets Reconstruction Company Limited and Others -, (2014) 6 SCC 1.

It is contended, in the alternative, that there is no requirement of the contrary intention mentioned in Section 65A(3) being expressed in a mortgage deed. A contrary intention can be gathered from an express consent granted in an agreement entered into between the parties. The general power of a mortgagor to create a lease was recognised in law even before the introduction of Section 65A of the TP Act. The Section does not take away the right of the mortgagee to give consent to the creation of a lease. Reference is made to the decision in Kamakshaya Narayan Singh v. Chohan Ram and another - , AIR 1952 SC 401.

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As regards the requirement of registration of a mortgage deed, it is submitted that a mortgage deed need not be in writing. An oral arrangement can also be deemed to be a mortgage deed by adopting a purposive interpretation by reading the provisions of Section 58 along with Section 96 of the Act. Alternatively, for the purposes of Section 65A, an agreement to create a mortgage can also be seen as a mortgage deed and in such a case, the requirement of registration will not apply. It is further contended that the provisions of Section 49 of the Registration Act clearly indicate that a non-registration of the mortgage deed itself would render the mortgage invalid. As Ext. P3 is not registered, it cannot be seen a valid mortgage deed in the eyes of law and consequently, a mortgage itself never came into existence. The document itself can, however, be relied upon for a collateral purpose of establishing the consent of the mortgagee under the document. Reliance is placed on the decisions in Babu Parasu Kaikadi (Dead) by L.Rs. v. Babu (Dead) by L.Rs. - , AIR 2004 SC 754 and State of Haryana and Others v. Navir Singh and Another - , 2013 KHC 2518. The decision in Dipak Kumar Singh and Another v. Park Street Properties (P) Limited - , 2014 KHC 3373 (Cal) is relied upon for the proposition that once a document has been accepted in evidence before the lower court, the same cannot be challenged as inadmissible before the Higher Court.

It is submitted that in the private sale entered into between the mortgagee and the purchaser of the property, there was an express agreement that the sale was on "as is where is" basis. This meant that the mortgagee intended that the tenancies created in the property would continue notwithstanding the sale. The mortgagee cannot, therefore, now turn around and contend that the tenants should be dispossessed. Any such contention would be hit by the principles of estoppel. Reliance is placed on the decision in Mahendra Mahato v. Central Bank of India - , 2015 (1) KLT SN 81 (C. No. 100) (Cal).

It is argued that since the petitioners'' induction as a lessee is accepted by the respondents, the termination of the lease can only be in the manner contemplated under the Rent Control Laws. The decision in V. Dhanapal Chettiar v. Yesodai Ammal - , AIR 1979 SC 1745 is relied upon for contending that the Rent Control Laws will prevail over the provisions of the TP Act.

Lastly, by referring to Article 137 of the Limitation Act, it is contended that the time for making an application under Section 14 of the SARFAESI Act is three years from the date of arising of the cause of action. It is contended that for reckoning the starting point of limitation, the date on which the necessity arose to seek the assistance of court is relevant. The resistance by the petitioners to the attempt at dispossession was evident in 2009, when the writ petition that led to Ext. P31 judgment was filed and, further, in 2010, when the petitioners approached the DRT through an S.A. The application under Section 14 was preferred only on 11.09.2013, and was therefore, barred by limitation. It is pointed out that this issue, although raised in the objection filed before the

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Magistrate, was not considered by him in Ext. P26 common order.

7. The above contentions of the learned Senior Counsel for the petitioners are vehemently resisted by counsel for the respondents who would contend as follows:-

The issue regarding validity of the mortgage, raised by the petitioners, is hit by the principles of constructive res judicata. Reliance is placed on the provisions of Section 11 of the CPC and, in particular, Explanation IV thereto. It is also pointed out that the petitioners had accepted the creation of mortgage in the earlier writ petition filed before this court.

As regards the submissions made on the applicability of Section 65A(3) of the Transfer of Property Act, it is submitted that paragraph 17 of the decision of the Supreme Court in Harshad Govardhan Sondagar v. International Assets Reconstruction Company Limited and Others - , (2014) 6 SCC 1 is a complete answer to the submissions on behalf of the petitioners.

On the issue of whether Ext. P3 can be treated as a mortgage deed, it is contended that the said document is only a loan agreement that was marked as such by the Magistrate. For the said document to be a mortgage deed, it should be an instrument that effects a transfer of the property. In Ext. P3 agreement, there is no stipulation with regard to a transfer of property. It only speaks of the creation of a charge on fixed assets but does not effect a transfer of property. Reliance is placed on the decision in Bank of India v. Abhay D. Narottam and Others - (2005) 11 SCC 520 to contend that a mere undertaking to create a mortgage is not sufficient to create any interest in immovable property. It is also argued that the said document is not registered and since the collateral purpose, for which the document is sought to be used by the petitioners, is for styling it as a mortgage deed, the proviso to Section 49 would not come to the aid of the petitioners and the unregistered document cannot be relied upon for any purpose. Reliance is placed on the decisions in State of Haryana and Others v. Narvir Singh and Another - , (2014) 1 SCC 105 and Indus Towers Ltd. v. Sub Inspector of Police - , 2013 (3) KLT 828. It is reiterated that merely by giving consent, the mortgagee cannot be seen as contracting out of the provisions of Section 65A(1) & (2) and that the contrary intention must be expressed in the mortgage deed. Reliance is placed on the decision in Public Trustee v. Lawrence- [(1911-1913) All. E.R. Rep. 670]. Countering the submissions on the issue of limitation, it is submitted that Section 36 of the SARFAESI Act makes the Limitation Act applicable only for the purposes of Section 13(4) of the SARFAESI Act. The said provision, read with Section 29 of the Limitation Act, would indicate that it is the period of limitation in the special statute that would prevail. Reliance is placed on the decision in Commissioner of Customs and Central Excise v. Hongo India Private Limited and Another - (2009) 5 SCC 791. It is contended that in such cases, the period of limitation is 12 years from the date of creation of mortgage as provided under Article 62 of the Limitation Act. Section 14 proceedings being post Section 13(4) actions, the provisions of Section 36 will

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ensure that, so long as Section 13(2) proceedings are initiated within 12 years from the date of creation of the mortgage, Section 14 proceedings will be treated as within time. Reliance is placed on the decisions in Kottakkal Co-op. Urban Bank Ltd. v. Balakrishnan - , 2008 (2) KLT 456 and Sreedharan v. Indian Bank - , 2011 (2) KLT 627. Alternatively, it is contended that, even if the limitation period is taken as 3 years under Article 137, which governs applications made to court, then in the instant case the notice under Section 13(2) was issued on 16.11.2007, which was well within the period of three years from the date of arising of the cause of action.

8. On a consideration of the facts and circumstances of the case and the submissions made across the bar, I find that the sustainability of Ext. P26 common order dated 18.08.2015 of the Chief Judicial Magistrate is the issue that arises for consideration in these cases. The learned Magistrate found that only those tenants who had obtained tenancy rights before the date of creation of mortgage would be entitled to a protection from dispossession and that, the tenants who had obtained tenancy rights through lease deeds executed subsequent to the creation of the mortgage, would not be entitled to such protection. The petitioners in these writ petitions are all persons who had entered into lease agreements with the 1st respondent, subsequent to Ext. P3 agreement entered into between the 1st and 2nd respondents, as also subsequent to 31.12.2004, the date on which a mortgage by deposit of title deeds was created by the 1st respondent in favour of the 2nd respondent. The judgment of the Supreme Court in Harshad Govardhan Sondagar v. International Assets Reconstruction Company Limited and Others - , (2014) 6 SCC 1 recognises the rights of tenants under post mortgage leases to resist an action for dispossession subject to certain conditions. The following extracts from the said decision may now be noted;

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 65-Aof the Transfer of Property Act. Section 65-A of the Transfer of Property Act is extracted hereinbelow:

"65-A. 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

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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 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 65-A 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 65-A of the Transfer of Property Act and such lease is binding on the mortgagee. Sub-section (3) of Section 65-A further provides that such a power is available with the mortgagor to make a lease of the mortgaged 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 65-A, 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.

18. We may now consider whether the provisions of the SARFAESI Act have the effect of terminating these valid leases made by the borrower or the mortgagor made in accordance with the provisions of the Transfer of Property Act. Section 35 of the SARFAESI Act, on which the High Court has placed reliance in Trade Well as well as in the impugned judgment is reproduced herein below:

"35. The provisions of this Act to override other laws.--The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law"

Section 35 of the SARFAESI Act, therefore, provides that the provisions of the SARFAESI Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Thus, if there is any provision in the SARFAESI Act and if there is any provision in any other law which is inconsistent therewith, the provision of the SARFAESI Act will have effect and not the provision of any other law.

19. The only section in the SARFAESI Act which confers a statutory right on the secured creditor to take possession of the secured asset and enforce the secured asset for the realisation of the secured debt is Section 13. We will, therefore, have to find out whether there is any provision in Section 13 of the SARFAESI Act

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which is inconsistent with the right of a borrower or a mortgagor to make a lease in accordance with the provisions of the Transfer of Property Act and the corresponding right of a lessee to remain in possession of the property leased out to him during the period of a lease.

20. xxxxx

21. When we read the different provisions of Section 13 of the SARFAESI Act extracted above, we find that sub-section (4) of Section 13 provides that in case the borrower fails to discharge his liability in full within sixty days from the date of notice, as provided in sub-section (2) of Section 13 of the SARFAESI Act, the secured creditor may take recourse to one or more of the measures mentioned therein to recover his secured debt One of the measures mentioned in clause (a) in sub-section (4) of Section 13 of the SARFAESI Act is to take possession of the secured assets of the borrower including the right to transfer by way of lease. Where, however, the lawful possession of the secured asset is not with the borrower, but with the lessee under a valid lease, the secured creditor cannot take over possession of the secured asset until the lawful possession of the lessee gets determined. There is, however, no mention in sub-section (4) of Section 13 of the SARFAESI Act that a lease made by the borrower in favour of a lessee will stand determined on the secured creditor deciding to take any of the measures mentioned in Section 13 of the said Act. Sub-section (13) of Section 13 of the SARFAESI Act, however, provides that after receipt of notice referred to in sub-section (2) of Section 13 of the SARFAESI Act, no borrower shall lease any of his secured assets referred to in the notice, without the prior written consent of the secured creditor. This provision in sub-section (13) of Section 13 of the SARFAESI Act and the provisions of the Transfer of Property Act enabling the borrower or the mortgagor to make a lease are inconsistent with each other. Hence, sub-section (13) of Section 13 of the SARFAESI Act will override the provisions of Section 65-A of the Transfer of Property Act by virtue of Section 35 of the SARFAESI Act, and a lease of a secured asset made by the borrower after he receives the notice under sub-section (2) of Section 13 from the secured creditor intending to enforce that secured asset will not be a valid lease.

36. We may now consider the contention of the respondents that some of the appellants have not produced any document to prove that they are bona fide lessees of the secured assets. We find that in the cases before us, the appellants have relied on the written instruments or rent receipts issued by the landlord to the tenant. Section 107 of the Transfer of Property Act provides that a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made "only by a registered instrument" and all other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Hence, if any of the appellants claim that they are entitled to possession of a secured asset for any term exceeding one year from the date of the lease made in his favour, he has to produce proof of execution of a registered instrument in his

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favour by the lessor. Where he does not produce proof of execution of a registered instrument in his favour and instead relies on an unregistered instrument or oral agreement accompanied by delivery of possession, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, will have to come to the conclusion that he is not entitled to the possession of the secured asset for more than a year from the date of the instrument or from the date of delivery of possession in his favour by the landlord."

9. The issue that arises for consideration, therefore, is whether the petitioners can be treated as tenants under post mortgage leases who are entitled to a protection from dispossession. The power of a mortgagor, who retains possession of the mortgaged property, to create leases, is recognised by Section 65A of the Transfer of Property Act. The said provision reads as under;

[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-en try on the rent not being paid with 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.]

10. It will be seen from a reading of the above provision that it is one that is designed to protect the interests of the mortgagee, inter alia in a mortgage created by deposit of title deeds, by permitting the mortgagor, who retains possession of the immovable property, to create only such leases as do not prejudice the right of the mortgagee to proceed against the property in the event of the mortgagor not paying the amounts due to him. The power to create leases

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is therefore made subject to the provisions of sub-section 2, which stipulates the conditions that must necessarily be incorporated in the leases that are so created. The provisions of sub-section (3), however, recognise a power in the mortgagee to permit a mortgagor to create leases that are not hedged in by the conditions specified in sub-section (2), with the rider that such a contrary intention must be found expressed in a mortgage deed and, when so expressed, will operate to extend or vary the terms of the mortgage entered into between the parties.

11. In the instant cases, de hors Ext. P3 agreement, the lease agreements under which the petitioners herein obtained their tenancy rights, are post mortgage leases that do not satisfy the requirement of Section 65A of the Transfer of Property Act, as rightly found by the Chief Judicial Magistrate in Ext. P26 common order. Consequently, the petitioners would not ordinarily be entitled to the protection from dispossession. This is because the judgment of the Supreme Court in Harshad Govardhan''s case (Supra) has interpreted the provisions of the SARFAESI Act as recognizing only such post mortgage leases as conform to the requirements of Section 65A, and have been created prior to the initiation of proceedings under Section 13(2) of the SARFAESI Act, as entitled to a protection from dispossession under Section 14 of the SARFAESI Act.

12. The question then arises as to whether Ext. P3 agreement could be construed as a mortgage deed and, if so, whether the terms of the said deed contain an express permission by the mortgagee to the mortgagor to create leases that were not hedged in by the conditions stipulated in sub-section (2) of Section 65A of the Transfer of Property Act. Such an enquiry is necessitated since the petitioners contend that the lease agreements that conferred tenancy rights on them were entered into before a notice under Section 13(2) was served on the 1st respondent mortgagor and Ext. P3 agreement contains a contrary intention with regard to the nature of leases that could be created by the 1st respondent mortgagor. It is contended, therefore, that the lease agreements in their case were valid and not hit by the provisions of Section 65A(2).

13. I find from a reading of the clauses in Ext. P3 agreement, especially clause 3 of the agreement, read with Appendix III thereto, that the agreement between the 1st and 2nd respondent did envisage the creation of tenancy rights in the building in question, as the specific terms of repayment clearly stipulate that repayments should be effected utilizing the advance amounts received from prospective tenants. The said clause, when read with clause 3 of the agreement, must be seen as permitting the entering into of lease agreements by the mortgagor. Consequently, Ext. P3 agreement can be said to have contained the expression of a contrary intention for the purposes of Section 65A(3) of the Transfer of Property Act, though not in a valid mortgage deed. The finding to the contrary in Ext. P26 common order of the Chief Judicial Magistrate is therefore factually and legally incorrect.

14. The learned Magistrate, however, finds that Ext. P3 is a mortgage deed.

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While there is no discussion in the order to support such a finding, it is relevant to note that Ext. P3 does not effect a transfer of the interest in respect of the property from the 1st respondent in favour of the 2nd respondent. As already noted, the said agreement was entered into on 27.12.2004 and it was only on 31.12.2004 that a mortgage was created by deposit of title deeds. No doubt, it could be argued that, the inter se rights of the mortgagor and mortgagee were spelt out in Ext. P3 agreement and, on account of its proximity in time with the creation of a mortgage by deposit of title deeds, it ought to be seen as a mortgage deed. Such an argument would find support in the decision of the Supreme Court in Rachpal Mahraj v. Bhagwandas Daruka - , AIR 1950 SC 272, wherein, at para 4 it is observed as follows:

"4. A mortgage by deposit of title deeds is a form of mortgage recognised by Section 58(f) of the TP Act, which provides that it may be effected in certain towns (including Calcutta) by a person delivering to his creditor or his agent documents of title to immovable property with intent to create a security thereon''. That is to say, when the debtor deposits with the creditor the title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required under Section 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under Section 17 of the Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. The time factor is not decisive. The document may be handed over to the creditor along with the title deeds and yet may not be registrable."

15. The said argument would, however, be of no assistance to the petitioners herein because a mortgage deed, to be valid, has to be registered in terms of Section 17 of the Registration Act and, it is not in dispute in the instant case that Ext. P3 agreement is not a registered document. The effect of non-registration of a document that is compulsorily registrable is clearly spelt out in Section 49 of the Registration Act, which reads as follows:

"49. Effect of non-registration of documents required to be registered.- No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882) to be registered shall-

a) affect any immovable property comprised therein, or

b) confer any power to adopt, or

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c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), or as evidence of any collateral transaction not required to be effected by registered instrument."

16. Further, in the decision of the Supreme Court in United Bank of India Ltd. v. Lekharam Sonoram & Co. - , AIR 1965 SC 1591, the possibility of relying on such a document as evidence was negated in the following words;

"7. ... It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration under Section 17 of the Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in the evidence at all and the transaction itself cannot be proved by oral evidence either."

17. The inescapable conclusion, therefore, is that while it may be possible to contend that Ext. P3 agreement contains within it an express consent by the 2nd respondent, to the creation of leases by the 1st respondent, Ext. P3 agreement cannot be treated as a mortgage deed for the purposes of Section 65A(3) of the Transfer of Property Act. Consequently, the petitioner cannot be heard to contend that the mortgagee had expressly consented to the creation of leases contrary to the provisions of sub-section (2) of Section 65A. This is more so because I am of the view that the contrary intention, if any, must be expressed in a mortgage deed and cannot be inferred from other circumstances or conduct of the mortgagee. The arguments to the contrary advanced by the learned Senior counsel for the petitioners, are therefore; rejected. I also do not find any substance in the contentions of the petitioner on the validity of Ext. P3 agreement because the petitioners had accepted the said transaction in earlier proceedings and such a contention would not be available to them at this stage on the principles of constructive res judicata. I hold, therefore, that the petitioners are not entitled to any protection from dispossession, in proceedings under the SARFAESI Act initiated at the instance of the 2nd respondent bank.

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18. I must now turn to the contentions of the learned Senior Counsel for the petitioners on the issue of limitation. As already noted, it is the stand of the petitioners that the application under Section 14 of the SARFAESI Act was filed before the Chief Judicial Magistrate only on 11.09.2013 and therefore, beyond a period of 3 years from the date on which the 2nd respondent was aware of the resistance offered by the petitioners to an attempted dispossession. The petitioners point to their submissions in the writ petition filed by the 1st respondent as also the S.A. filed by them before the Debts Recovery Tribunal to contend that the 2nd respondent was aware, as early as in 2009, of their objections in the matter. It is argued, therefore, that by virtue of Article 137 of the Limitation Act, the Section 14 application ought to have been filed within three years from 2009 and, since it was not, the said application of the 2nd respondent could not have been entertained by the learned Magistrate. Persuasive though the argument may seem at first blush, I''m afraid it cannot be accepted. Section 36 of the SARFAESI Act that deals with limitation reads as follows:

"36. Limitation.- No secured creditor shall be entitled to take all or any of the measures under sub-section (4) of section 13, unless his claim in respect of the financial asset is made within the period of limitation prescribed under the Limitation Act, 1963 (36 of 1963).

It will be apparent from a reading of the above provision that once a claim in respect of a financial asset is made within the period of limitation prescribed under the Limitation Act, 1963, then the measure adopted by the secured creditor under Section 13(4) is also deemed to be within limitation. This view has been endorsed by a Division Bench of this Court in the judgment dated 22.08.2012 in W.A. No. 899 of 2011 [E.P. Sreedharan v. Manager, Indian Bank and Ors.] A Special Leave Petition preferred against the said judgment was dismissed by the Supreme Court on 17.02.2014 [S.L.P. Nos. 10904-10905/2013]. Further, the decision of this Court in Sami v. Bank of India - , 2011 (3) KLT 554 is authority for the proposition that the action of a financial institution in approaching the Magistrate under Section 14 of the SARFAESI Act would itself constitute a measure under Section 13(4) of the Act. On the facts of the instant cases, therefore, since it is not in dispute that the notice under Section 13(2) was issued within the period of limitation under the Limitation Act, 1963, the subsequent measures taken by the 2nd respondent, including approaching the Magistrate under Section 14 of the SARFAESI Act, have to be seen as within the period of limitation prescribed under the SARFAESI Act. Thus, although it might be a fact that the issue of limitation, though raised by the petitioners before the Magistrate, was not considered by him in Ext. P26 common order, for the reasons stated above, I do not see any merit in the said contention and therefore do not deem it necessary to remit the matter to the learned Magistrate for an examination of the said issue.

The writ petitions are thus dismissed by holding as follows:

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1. The post mortgage lease agreements that conferred tenancy rights on the petitioners in the instant cases, though created before the initiation of proceedings under Section 13(2) of the SARFAESI Act, cannot be seen as valid leases on account of the fact that they do not conform to the conditions stipulated in Section 65A(2) of the Transfer of Property Act.

2. Ext. P3 agreement cannot be seen as a valid registered mortgage deed, the terms of which would operate to express a contrary intention for the purposes of sub-section (3) of Section 65A of the Transfer of Property Act.

3. The proceedings initiated by the 2nd respondent under Section 14 of the SARFAESI Act, for dispossession of the petitioners from the building in question, are not barred by limitation.

4. The petitioners are consequently, not entitled to any protection against dispossession as envisaged in the judgment of the Supreme Court in the Harshad Govardhan''s case (Supra).

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