

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1188 OF 2015**

Mr. Sumit Sunil Sadh

..... Petitioner.

V/s

Bank of India

..... Respondent.

Mrs. Y.K. Naik for the Petitioner.

Mr. Rony P. Joseph for the Respondent.

**CORAM: V. M. KANADE &
A.R. JOSHI, JJ.**

DATE: 16th February, 2015

P.C.:-

1. Petitioner is aggrieved by the order dated 20/11/2014 passed by the learned Chief Metropolitan Magistrate dismissing the application of the Petitioner and permitting Respondent-Bank to take possession of the Flat Nos.B-4A and B-4B situated at Ground Floor, Shri Kunthunath Co-operative Housing Society Limited, Popular House, Besant Street Santacruz (West), Mumbai - 400054.

2. Brief facts are that Respondent-Bank filed an application before the Chief Metropolitan Magistrate for taking possession of the said Flats by filing an application under section 14 of the SARFAESI Act. The said application was

allowed. Petitioner, thereafter, filed an application for intervention for setting aside the said order on the ground that he is a tenant of the said premises since 2007 and is paying rent to the borrower and, therefore, he is protected by virtue of provisions of the Maharashtra Rent Control Act, 1999. The learned Magistrate, however, dismissed the application filed by the Petitioner for intervention on the ground that the Petitioner had not produced a registered instrument of lease in his favour and, therefore, he was not entitled to remain in possession of the secured assets.

3. The learned Counsel appearing on behalf of the Petitioner submitted that the Petitioner is a tenant at will and there was an oral agreement between the landlord and the Petitioner and the possession of the property was handed over to him. The learned Counsel has relied on rent receipts which were executed by the landlord in favour of the Petitioner from 2007 onwards. The learned Counsel submitted that in view of section 107 of the Transfer of Property Act, tenancy could be created by a registered instrument or by oral agreement accompanied by receipt of delivery of possession. She submitted that the Petitioner has produced documentary evidence in the form of rent receipts to show that the Petitioner was a tenant of the premises. She submitted that by virtue of provisions of section 55(2) of the Maharashtra Rent Control Act, 1999 the obligation of

getting the instrument registered was cast on the landlord. She submitted that therefore, taking into consideration the provisions of the Maharashtra Rent Control Act, 1999, the Petitioner was a protected tenant. She submitted that this aspect was not taken into consideration by the learned Magistrate.

4. The learned Counsel appearing on behalf of the Petitioner then invited our attention to para 28 the Judgment of the Apex Court in *Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and Others*¹. She submitted that even in paras 37.2 and 37.3 of the said judgment, the Apex Court has directed the learned Magistrate to consider the case of the Petitioner who claims to be in possession. She also relied on the observations made by the Apex Court in para 37.1 of the said judgment. The said observations in para 37.1 read as under:-

“37.1.....These orders passed by the Chief Metropolitan Magistrate, Mumbai are set aside and the matters are remitted to the Chief Metropolitan Magistrate to pass fresh orders in accordance with this judgment and any other law that may be relevant after giving an opportunity of hearing to the appellants and the secured creditors.”

She submitted that therefore, it was incumbent upon the

¹ (2014) 6 SCC 1

Chief Metropolitan Magistrate to have taken into consideration the provisions of the Maharashtra Rent Control Act, 1999. She also relied upon the judgment of the Apex Court in *Tulsi vs. Paro (Dead) (SMT)*¹. She submitted that the Apex Court in the said judgment has held that even a tenant at will has to be evicted in accordance with law. She submitted that the Apex Court therefore has recognized the tenant at will. She submitted that the Petitioner is in possession of the said premises and, at the best, Respondent-Bank could take symbolic possession and thereafter file a suit for eviction and take possession in accordance with law. She has also relied upon the judgment of the Orissa High Court in *Gunamani Swain & Ors. vs. Orissa State Financial Corpn & Ors*².

5. On the other hand, the learned Counsel appearing on behalf of the Respondent-Bank has submitted that the borrower had mortgaged four properties. So far as the property at Akola is concerned, he submitted that the borrower had illegally disposed of the said property and in respect of other three properties including the flats in question, he had tried to show that the possession was handed over to the Petitioner herein and two other tenants in other two properties. He submitted that the borrower had acted fraudulently. He then submitted that in view of the

1 (1997) 2 SCC 706

2 III (2011) BC 378 (DB)

ratio which is found in para 36 of the said judgment in *Harshad Govardhan Sondagar*¹ (supra), Petitioner is required to produce proof of execution of a registered instrument in his favour by the lessor. He submitted that the Petitioner herein has not produced any such proof of a registered instrument of lease in his favour and, therefore, is not entitled to retain possession of the said flats.

6. After having heard both the learned Counsels at length, we are of the view that the Apex Court in *Harshad Govardhan Sondagar*² (supra) has held that only if the tenant produces a registered instrument of lease his possession can be protected by the learned Magistrate. Para 36 of the said judgment reads as under:-

“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

1 (2014) 6 SCC 1

2 (2014) 6 SCC 1

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 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."

7 In our view, ratio of the said judgment in *Harshad Govardhan Sondagar (supra)* is squarely applicable to the facts of the present case. The learned Magistrate, after relying on the said ratio and applying it to the facts of the present case, has rightly held that since the registered document is not produced, tenant is not entitled to claim protection. We are therefore unable to accept the submissions made by the learned Counsel appearing on behalf of the Petitioner. So far as the observations made by the Apex Court in paras 37.1 and 37.2 of the said judgment are concerned, the said observations have been made

because the Magistrate had not considered the applications filed by the persons who claimed to be the tenants. The Apex Court, however, in para 36 of the said judgment has laid down the circumstances under which the Magistrate could grant protection to tenants and thereafter made the observations in paras 37.1 and 37.2 of the said judgment, remanding the matters back to the Magistrate where the Magistrate had dismissed the applications of persons who claimed to be the tenants and who were not heard by the Magistrate by relying on the judgment of the Bombay High Court in *Trade Well V. Indian Bank*¹. The said observations therefore have to be read in the context of the ratio laid down in para 36 of the said judgment and cannot be read out of context. Therefore, the judgments on which reliance has been placed by the learned Counsel appearing on behalf of the Petitioner are not relevant for the purpose of deciding this issue. Hence, the Writ Petition is dismissed.

8. At this stage, the learned Counsel appearing on behalf of the Petitioner seeks continuation of stay for a period of four weeks in order to enable the Petitioner to approach the Apex Court. The earlier order of stay granted by this Court is continued for a period of four weeks.

(A. R. JOSHI, J.)

(V.M. KANADE, J.)

¹ 2007 Cri LJ 2544 (Bom)