

Ladda

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 2041 OF 2015.

ALONG WITH

WRIT PETITION No. 2043 OF 2015.

Mr Girish D. KachaliaPetitioner.

Vs

J.M. Financial Assets Reconstruction
Co. Pvt. Ltd.Respondents.

Ms Y. Y. Naik i/by Pranita Kshirsagar Abhay for the
Petitioner.

Mr Ashish Kamat a/with Mr Nikhil Rayani i/by V.
Deshpande & Co. for the Respondents.

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

DATE : 3rd March, 2015.

P.C.

1) Heard learned Counsel appearing for the petitioner and the respondents in both the petitions. A common question is involved in the above petitions and, therefore, they are being disposed of by this common order.

2) The petitioner is aggrieved by the order dated 19th

November, 2014 passed by the learned Chief Metropolitan Magistrate, Esplanade, Mumbai (hereinafter referred to as “the learned Magistrate”) who is pleased to reject the applications filed for the intervention being Misc. Application No. 740/MA/2014 in 09/SA/2011 and Misc. Application No. 740/MA/2014 in 10/SA/2011. It is submitted that the petitioner is a tenant of the mortgaged premises and he is in possession of the said property prior to the execution of the mortgage. It is submitted that since the petitioner is a tenant, in view of the judgment of the Apex Court in **Harshad Govardhan Sondagar Vs. International Assets Reconstruction Co. Ltd & Ors in Criminal Appeal No. 736 of 2014**, arising out of **S.L.P (Cri) No. 1666 of 2012** a tenant/lessee is entitled to get protection and no order can be passed by the learned Chief Metropolitan Magistrate directing the bank to take possession of the said premises which is occupied by the tenant / petitioner. It is submitted that though in the present case, the petitioner does not have a registered instrument of lease in his favour in view of the provisions of Section 33 of the Maharashtra

Rent Control Act, even if he has other documents to prove his possession and tenancy, these documents ought to have been taken into consideration by the learned Magistrate.

3) In support of the said submission, the learned Counsel appearing for the petitioner has relied on a number of judgments which are annexed to the compilation having been tendered viz., judgment in the cases of (i) **Tulsi Vs Paro (dead) (Smt)** reported in (1997) 2 Supreme Court Cases 706; (ii) **Government of Tamil Nadu & Ors Vs. S. Vel Raj** reported in (1997) 2 Supreme Court Cases 708 and (iii) **Gunamani Swain & Ors Vs. Orissa State Financial Corporation & Ors** reported in III (2011) BC 378 (DB).

4) The learned Counsel also invited our attention to various judgments of the Apex Court and other High Courts which have been referred by the Orissa High Court in the case of **Gunamani Swain** (supra).

5) On the other hand, the learned Counsel appearing on behalf of the bank has submitted that the Apex Court in **Harshad**

Govardhan Sondagar (supra) has observed that only tenant/lessee having a registered instrument in his favour alone is entitled to get protection. In our view, there is much substance in the submission made by the learned counsel appearing for the respondent-bank. The Apex Court in the case of Harshad Govardhan Sondagar (supra) in paragraph 27 of the judgment made the following observations:-

27. “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 immoveable 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 immoveable 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 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 an year from the date of the instrument or from the date of delivery of possession in his favour by the landlord.”

(Emphasis supplied).

6) We are, therefore, bound by the decision given by the Supreme Court and, therefore, it will not be possible to take into consideration the oral agreement and other documents on which reliance is placed by the learned Counsel appearing for the petitioner. We are not inclined to entertain this petition. The writ petition is dismissed.

7) The learned Counsel appearing for the petitioner

submits that the petitioner would like to move the Apex Court seeking clarification of the observations made by the Apex Court in the said paragraph and seeks four weeks time. On the other hand, the learned Counsel appearing on behalf of the respondents submits that the impugned orders was passed by the learned Magistrate on 19th November, 2014 and 3rd January, 2015 and only when notice for taking possession was issued to the petitioner, he has moved this Court. Be that as it may, in our view, since the petitioner wishes to seek clarification of the order passed by the Apex Court, we grant four weeks time to the petitioner from the date on which the order passed by this Court is uploaded on the High Court Website. Both the writ Petitions are accordingly disposed of in aforesaid terms. For a period of four weeks from the date this order is uploaded possession shall not be taken. If no stay order is obtained within a period of four weeks as directed by this Court, the Registrar may take steps to take possession of the property in question.

(A.R. JOSHI, J)

(V.M.KANADE,J)