IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.02.2015

CORAM

THE HON'BLE MR.JUSTICE SATISH K. AGNIHOTRI
AND
THE HON'BLE MR.JUSTICE M.VENUGOPAL

W.P.Nos.30199 to 30204 of 2014

V.Viswanathan	..	Petitioner in W.P.No.30199 of 2014
S.Ganesan	..	Petitioner in W.P.No.30200 of 2014
M.Meenakshi	..	Petitioner in W.P.No.30201 of 2014
G.Balamurugan	..	Petitioner in W.P.No.30202 of 2014
B.Manikandan	..	Petitioner in W.P.No.30203 of 2014
B.Ramakrishnan	..	Petitioner in W.P.No.30204 of 2014

Vs.

1.The District Collector cum District Magistrate,
Coimbatore District,
Collectorate Building,
Coimbatore-641 018.
2.The Authorized Officer,
The Karur Vysya Bank Ltd.,
Coimbatore Main Branch,
No.577, Oppanakara Street,
Coimbatore-641 001.
3.R.Anantha Padmanabhan
4.Nithyakala Anantha Padmanabhan
5.The Tahsildar South
Coimbatore District,
Coimbatore-641 018

6.M/s.Sri Lakshmi Krishna Jewellers Private Limited,
having its registered office at
405, Sathya Complex,
Big Bazaar Street,
Coimbatore 641 001
represented by its Managing Director.
7.K.Selvam
8.K.Chandrasekaran
9.K.Udhya Kumar
10.J.Andal .. Respondents in all writ petitions

These writ petitions are filed under Article 226 of the Constitution of India praying for the issue of a writ of certiorarified mandamus to call for the records to quash the order of the first respondent in Ref.No.3326/2014/E3, dated 04.09.2014 issued under Section 14 of the SARFAESI Act, 2002 and further directing the respondents to permanently handover the possession of leased portion of the petitioner morefully described in the schedule of property until the petitioner is evicted by proper procedure laid down by law.

For Petitioner : Mr.M.Velmurugan

For Respondents : Mr.N.Sakthivel, GA for RR1 and 5
Mr.A.V.Radhakrishnan for R-2
Mr.G.Vijayakumar for RR6 to 10
No appearance for RR3 and 4

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COMMON ORDER

(Order of the Court was made by SATISH K. AGNIHOTRI, J.)

The petitioners, claiming to be tenants of 'Sri Lakshmi Krishna Nivas', Coimbatore, have come up with these writ petitions, questioning their eviction from the premises on 08.11.2014 pursuant to the order dated 04.09.2014 passed by the District Magistrate and District Collector in exercise of powers under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (For short 'SARFAESI Act').

2. All the writ petitioners are similarly situated being tenants in the common building. Thus, all writ petitions are being considered and decided by a common order.

3. The case of the petitioners before us is that the building in question, namely, 'Sri Lakshmi Krishna Nivas', appears to have been mortgaged as security by the owners/borrowers with the second respondent Bank. A demand notice under Section 13(2) of the SARFAESI Act was issued on 12.6.2013. Thereafter, symbolic possession notice was issued under Section 13(4) of the SARFAESI Act on 19.8.2013. Subsequently, notice for putting the property in question on auction was published in the newspaper on 20.11.2013 for auction to be held on 23.12.2013. The second respondent Bank preferred an application under Section 14 of the SARFAESI Act before the District Magistrate and District Collector, without impleading the petitioners/tenants as party respondents and also without informing the petitioners about the action taken against the borrowers. It appears that the petitioners have preferred an application for interim relief in the pending S.A.No.48 of 2014 filed by the borrowers, before the Debts Recovery Tribunal, Coimbatore. The interim relief to an extent of returning back the essential items, i.e., books, dress materials, jewels, etc., was passed by the Debts Recovery Tribunal. It transpires that one more S.A.No.228 of 2013 has been filed earlier by the borrowers before the Debts Recovery Tribunal, Coimbatore, seeking declaration that the e-auction notice was unjust and illegal. We do not propose to pass any order on merits leaving open the same to be considered by the Tribunal on merits.

4. The instant writ petitions have been filed, questioning the order of taking possession under Section 14 of the SARFAESI Act, on the ground that the District Magistrate and District Collector, without considering the requirement of provisions of law and without affording an opportunity of hearing to the petitioners/tenants of the building in question, had passed the impugned order.

5. On the other hand, the learned counsel appearing for the second respondent Bank would submit that in order to recover the secured amount, the property in question, which was the secured asset, was put in auction and even possession has been handed over to the auction purchasers. The petitioners/tenants have not taken steps at the relevant time immediately after the notice of e-auction was published in the newspaper on 20.11.2013. Thus, the petitioners cannot be permitted to question the order dated 4.9.2014 passed by the District Magistrate and District Collector under Section 14 of the SARFAESI Act.

6. None appeared for respondents 3 and 4 /auction purchasers despite service of notice.

7. We have heard the learned counsel appearing for the parties, perused the pleadings and documents appended thereto.

8. Section 14 of the SARFAESI Act enables secured creditor to make an application for possession of any secured asset before the Chief Metropolitan Magistrate or the District Magistrate, as the case may be. In the instant case, the competent officer is the District Magistrate. The first proviso to Section 14 prescribes that the application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor declaring as under :

> "(i)the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;
>
> (ii)the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;
>
> (iii)the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;
>
> (iv)the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;
>
> (v)consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;
>
> (vi)affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;
>
> (vii)the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;
>
> (viii)the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;
>
> (ix)that the provisions of this Act and the rules made thereunder had been complied with:
>
> Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents

of the affidavit pass suitable orders for the purpose of taking possession of the secured assets:

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.]"

9. What is the requirement of such affidavit came into consideration in Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited and others[1], wherein the Supreme Court observed as under :

"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 assets 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

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> possession of a lessee under the valid lease made prior to creation of the mortgage by the borrower or made in accordance with Section 65-A 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 of 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."

10. Thus, the secured creditor is obliged to state in the affidavit accompanying the application that the secured asset is not in possession of a lessee or tenant under the valid lease made prior to creation of the mortgage by the borrower or made in accordance with Section 65-A 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.

11. It is next contended by the learned counsel for the second respondent Bank that the borrowers had not informed the Bank that a valid deed has been created in favour of some persons/ petitioners herein and as such, the respondent Bank could not make proper averment/ statement in the affidavit required to be filed along with the application.

12. It is not the case of the second respondent Bank that the affidavit was filed clearly indicating that the writ petitioners' occupation of the secured asset was not legal and valid. It is for the District Magistrate and District Collector to examine the disputed nature of lessees'/ tenants' right while considering the application under Section 14 of the SARFAESI Act.

13. It is the responsibility of the Bank to verify the status of the secured asset before making an application under Section 14

of the SARFAESI Act for taking over possession of the property. Before us, some documents have been produced, indicating the lease deeds executed in favour of the petitioners. The question as to whether the lease deeds were valid or proper cannot be examined by this court in exercise of power under Article 226 of the Constitution of India, at this juncture.

14. The right of the lessee created by the mortgagor under the mortgage deed has been discussed at length by the Supreme Court in Harshad Govardhan Sondagar[1] (supra), as under :

> "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-A of 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 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

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> 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."

15. Having regard to all facets of the case, one fact is established that the impugned order dated 04.09.2014 was passed by the District Magistrate and District Collector in exercise of power under Section 14 of the SARFAESI Act, without affording an opportunity of hearing to the tenants / petitioners. The petitioners were in possession of the premises in question at the relevant time when application under Section 14 of the SARFAESI Act was made by the secured creditor. The question of applicability and validity of the possession can be considered and decided only after proper enquiry and also after issuing proper notice to the affected parties, i.e., lessees/tenants.

16. We are not inclined to express any opinion on the nature of the lease created in favour of the petitioners and also as to whether the petitioners are entitled to any protection under the law laid down by the Supreme Court in Harshad Govardhan Sondagar[1] (supra) and also we do not propose to go into the merits of the case at this stage. However, keeping in view the fact that the petitioners being tenants were not afforded an opportunity of hearing before the impugned order was passed by the District Magistrate and District Collector, we set aside the impugned order and remit back the matter to the first respondent /District

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Magistrate and District Collector to pass orders in accordance with the law laid down in Harshad Govardhan Sondagar[1] and also any other law relevant in the case, after giving an opportunity of hearing to all the parties concerned. The District Magistrate and District Collector is further directed to consider the matter and pass final orders under Section 14 of the SARFAESI Act within a period of three months from the date of filing a certified copy of this order, by either party. We further make it clear that status quo in respect of the possession of the property by the writ petitioners /tenants shall be maintained till the disposal of the application by the District Magistrate and District Collector.

17. In view of the foregoings, all the writ petitions are allowed. No costs.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

vvk

To

1.The District Collector cum District Magistrate,
Coimbatore District,
Collectorate Building, Coimbatore-641 018.

2.The Authorized Officer,
The Karur Vysya Bank Ltd.,
Coimbatore Main Branch,
No.577, Oppanakara Street,
Coimbatore-641 001.

3.The Tahsildar South
Coimbatore District, Coimbatore-641 018

1 cc to Mr.M. Velmurugan, Advocate, sr. 10309
1 cc to Mr.A.V. Radhakrishnan, Advocate, Sr 10395
1 cc to Government Pleader, sr.10812

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