

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.01.2015

CORAM

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

THE HON'BLE MR.JUSTICE M. VENUGOPAL

W.P. No.35147 of 2014 and M.P. No.1 of 2014

M. Alphonse Packiaraj

Petitioner

Vs.

- 1 L & T Housing Finance Ltd.  
(Inter alia Branch)  
VI Floor  
KGN Towers  
No.62, Ethiraj Salai  
(Commercial-in-Chief Road)  
Egmore  
Chennai 600 085  
represented by its Authorised Officer  
Mr. P. Srinivasan
- 2 The Chief Metropolitan Magistrate Court  
Egmore  
Chennai
- 3 R. Zainudeen
- 4 Mrs. Shoba Chetty
- 5 K.N. Loganathan

Respondents

Writ Petition filed under Article 226 of the Constitution of India seeking a writ of certiorarified mandamus calling for the records pertaining to the impugned order of the second respondent passed in Crl.M.P. No.6448 of 2014 dated 11.12.2014 and quash the same and consequently, forbear the first respondent their men, agents from interfering with the physical possession of the petitioner and from in any manner evicting the petitioner from the property situated at Old Door No.28, New Door No.24, (First Floor), Vellala Street, Villivakkam, Chennai 600 049, comprised in Survey No.348/1, T.S. No.172, Block No.57 of 71, Konnur Village, Purasawakkam - Perambur Taluk, within the limits of Corporation of Chennai, except following the due process of law.

For petitioner Mr. R. Sagadevan  
For R1 Mr. M.L. Ganesh  
R2 Court  
For RR 3-5 No appearance

ORDER

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

The instant writ petition has been filed challenging the order dated 11.12.2014 passed by the second respondent in Crl.M.P. No.6448 of 2014 and also for a direction forbearing the first respondent their men, agents from interfering with the physical possession of the petitioner and from in any manner evicting the petitioner from the property situated at Old Door No.28, New Door No.24, (First Floor), Vellala Street, Villivakkam, Chennai 600 049, comprised in Survey No.348/1, T.S. No.172, Block No.57 of 71, Konnur Village, Purasawakkam - Perambur Taluk, within the limits of Corporation of Chennai, except following the due process of law.

2 The petitioner is stated to be a lessee, who came into possession of the aforestated land and building under the lease executed by the fifth respondent in his favour on 27.10.2012.

3 Thereafter, the property in question was mortgaged by the respondents 3 and 4 with the first respondent-financial institution on 25.07.2013 against a housing loan for an amount of Rs.1.74 crores. Thus, the petitioner was in possession and occupation of the property in question, which was mortgaged with the first respondent-financial institution subsequently. After initiating requisite steps under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act"), the first respondent-financial institution filed a petition before the Chief Metropolitan Magistrate, Egmore, Chennai - 8 (for short "the CMM") under Section 14 of the SARFAESI Act to secure assistance for taking over possession of the property in question, i.e., the secured asset.

4 It is contended by the petitioner that he was not a party to the said proceedings. The CMM held that the first respondent was entitled to take possession of the said property and also, assistance to secure possession of the secured asset was granted. Being aggrieved, the petitioner has come up with the instant writ petition, seeking quashment of the said order on the ground that he was in possession of the property in question and thus, no order to the effect of taking over possession could be passed, even if the property in question was under mortgage, without affording an opportunity of hearing to him.

5 Relying on the ratio laid down by the Supreme Court in Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and Others<sup>1</sup>, the learned counsel for the petitioner further submitted that the impugned order passed by the CMM be set aside and the matter be remitted back to the second respondent for fresh hearing, after affording an opportunity of hearing to the petitioner.

6 Countering the submission made by the learned counsel for the petitioner, Mr.M.L. Ganesh, learned counsel for the first respondent-financial institution would submit that in Harshad Govardhan Sondagar<sup>1</sup> the Supreme Court observed as under:

"36 x x x x x x x 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."

In this case, according to the petitioner, the lease period had come to an end on 26.10.2014 and also, the instrument was unregistered. Thus, the petitioner was not entitled to the benefit under the said case.

7 We have carefully examined the statutory provisions, pleadings and documents appended thereto. We have also considered the rival submissions advanced by the learned counsel on either side.

8 The Supreme Court, while examining the provision of Sections 13 and 14 of the SARFAESI Act, vis-a-vis, the right of a lessee created under the provisions of Section 65-A of the Transfer of Property Act, held as under:

"17. x x x x x x x x x

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

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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."

It was further observed in the said judgment that the secured creditor cannot take over possession of the secured asset until the lawful possession of the lessee gets determined.

9 The issues as to whether the lease was created under a registered document or otherwise, whether the lease got terminated in the meantime and further, whether the possession and occupation of the petitioner is valid or not, are to be decided by the CMM while considering the application under Section 14 of the SARFAESI Act.

10 In that view of the matter, we are not inclined to go into the merits of the case. However, since the impugned order was passed without considering the position of the petitioner in the proceedings, we set aside the impugned order and remit back the matter to the CMM to pass orders in accordance with the law laid down in Harshad Govardhan Sondagar<sup>1</sup> and also any other law relevant in the case, after giving an opportunity of hearing to all the parties concerned. The CMM is further directed to consider the matter and pass final orders under Section 14 of the SARFAESI Act within a period of two months from the date of filing a certified copy of this order, by either party.

11 The writ petition stands allowed to the above extent. No costs. Connected Miscellaneous Petition is closed.

Sd/-  
Assistant Registrar

//True Copy//

सतगमनेन जयते  
Sub Assistant Registrar

cad  
To  
The Chief Metropolitan Magistrate  
Egmore  
Chennai

1 cc to Government Pleader, Sr.No5228  
1 cc to Mr. R. Sagadevan, Advocate, SR.No.5455

W.P. No.35147 of 2014

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