

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.03.2015

CORAM

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

W.P.No.6857 of 2015
and
M.P.No.1 of 2015

Hairoonthai Public School,
represented by its Principal,
No.25, Plot No.11, Venkatachalapathy Nagar,
Alapakkam, Chennai-600 087. ... Petitioner

Vs.

1. The District Collector-cum-Magistrate,
Office of the District Collector,
Tiruvallur District,
Tiruvallur.
2. ASERC (India) Ltd.,
rep by the Authorised Officer,
S.PArthasarathy,
No.3, 3rd Floor,
Wellington Estate,
No.53, Ethiraj Salai,
Egmore, Chennai-600 008.
3. D.Prasad,
Proprietor,
JMJ Cottage Industries,
No.11, Kadambadi Amman Koil Street,
Valasaravakkam, Chennai-87.
4. S.Sampath ... Respondents

This writ petition is filed under Article 226 of the Constitution of India to issue a Writ of mandamus to direct the first respondent to consider the representation dated 9.2.2015 while passing orders under Section 14 of the SARFAESI Act.

For Petitioner : Mr.T.Velumani

For Respondents : Mr.P.S.Sivashanmugasundaram, Spl.G.P
for R-1
Mr.Anand Gomathy Sivakumar for R-2

ORDER

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

The petitioner claiming to be a lawful tenant of the secured asset, the property in dispute, i.e., D.No.11, Kadambadi Amman Koil Street, Valasaravakkam, Chennai-600 087 had come up with the instant petition, seeking a direction to the first respondent, i.e., the District Collector, Tiruvallore to consider its representation dated 09.12.2015 in the pending application filed under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act) by the second respondent-Financial institution.

2. Mr.P.S.Sivashanmugasundaram, learned Special Government Pleader appears for the first respondent. The second respondent is represented through M/s.Anand Gomathy Sivakumar, learned counsel.

3. The learned counsel appearing for the second respondent submits that the alleged tenancy of the petitioner in question is not protected as per the judicial pronouncement made by the Supreme Court in Harshad Govardhan Sondagar¹ It is further contended that the demand notice under Section 13(2) of the SARFAESI Act was issued on 26.3.2011. Thereafter, symbolic possession was taken under the provisions of Section 13(4) of the Act on 7.6.2011. The second respondent-Bank could not take over possession. Thus, they took recourse to filing of the application under Section 14 of the SARFAESI Act for obtaining physical possession of the said secured asset on the file of the first respondent. The application was kept pending. Thus, the second respondent approached this court in W.P.No.1091 of 2015, which was disposed of on 3.2.2015 with a direction to the first respondent to take up the matter and decide the same in accordance with law and on its own merit, as expeditiously as possible, preferably within a period of eight weeks from the date of receipt of a copy of this order.

4. It is further contended that since the tenancy of the petitioner was created after the demand notice under Section 13(2), ibid, the petitioner is not entitled to any protection under the aforesaid decision of the Supreme Court in Harshad Govardhan Sondagar¹.

5. The learned counsel appearing for the petitioner, on the other hand, would submit that the petitioner is not seeking a decision on merit, but only an opportunity of hearing before the first respondent, wherein the application under Section 14 filed by the second respondent is pending consideration.

6. The learned Special Government Pleader submits that the first respondent will not have any objection to afford an opportunity of hearing to the petitioner.

7. The Supreme Court in Harshad Govardhan Sondagar¹ had considered the rights of lessee and tenants at length and observed as under :

"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.

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 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.

8. The facts are disputed. The claim of the petitioner is that the petitioner is in possession as lawful tenant under a valid lease, which is disputed by the second respondent that the lease has been created after Section 13(2) notice and as such, is not a valid lease, as the tenant inducted after the demand notice does not have the right to continue in possession.

9. Be that as it may, without going into the merits of the case, we direct the first respondent to consider the representation of the petitioner in accordance with law and on its own merit and pass orders. We make it clear that the first respondent shall decide the case in accordance with the law laid down in Harshad Govardhan Sondagar and also other relevant laws prevalent, after giving an opportunity of hearing to all parties concerned, including the petitioner. Accordingly, the writ petition is allowed to that extent. No costs. Consequently connected miscellaneous petition is closed.

vvk

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

To

The District Collector-cum-Magistrate,
Office of the District Collector,
Tiruvallur District, Tiruvallur.

- +1 C.C. To MR.Ananda Gomathy, Advocate, Sr.No.14128
- +2 C.C. To MR.T.Velumani, Advocate, Sr.No.13652
- +1 C.C. To. Government Pleader, Sr.No.13852

W.P.No.6857 of 2015

SSI (CO)
sd 20/03/2015

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