IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.03.2015

CORAM

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

W.P. No.7341 of 2015 and M.P. Nos.1 and 2 of 2015

S. Salavudeen ... Petitioner

Vs.

1 Indian Bank
represented by Assistant General Manager
Alwarpet Branch
Eldams Road
Alwarpet
Chennai 600 018

2 T. Rajendra Kumar
S/o E.Z. Pichaiya
Proprietor of
Unity Enterprises
No.19/6, Bajanai Koil III Street
Villivakkam
Chennai 600 049

3 The State
represented by the Inspector of Police
K-7 Police Station, ICF
Perambur
Chennai 600 011 ... Respondents

Writ Petition filed under Article 226 of the Constitution of India seeking a writ of certiorari, calling for the records relating to the order dated 22.09.2014 passed in Crl.M.P. No.5245 of 2014 on the file of the Chief Metropolitan Magistrate's Court, Egmore and quash the same.

For petitioner Mr. Adithya Reddy
for M/s. Mohana Vadivelan

For R1 Mr. Jayesh B. Dolia

For R3 Mr. N. Sakthivel
Government Advocate

ORDER

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

The instant writ petition has been filed challenging the order dated 22.09.2014 passed by the Chief Metropolitan Magistrate, Egmore in Crl.M.P. No.5245 of 2014.

2 With the consent of the learned counsel for the petitioner, the learned counsel appearing for the first respondent-bank and the learned Government Advocate appearing for the third respondent, this writ petition is taken up for final disposal, at the admission stage itself.

3 The petitioner is stated to be a lessee, who came into possession of the property in question under the lease executed by the second respondent in his favour on 21.07.2010 for a period of 11 months commencing from 15.07.2010 to 15.06.2011, which has been extended from time to time.

4 Thereafter, the property in question was mortgaged by the second respondent, in his capacity as a guarantor, with the first respondent-bank against loans of Rs.40 lakhs and Rs.4.25 lakhs availed by the third respondent from the first respondent bank. Thus, the petitioner was in possession and occupation of the property in question, which was mortgaged with the first respondent-bank, 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-bank 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.

5 It is contended by the petitioner that he was not a party to the proceedings before the CMM. The CMM held that the first respondent-bank 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.

6 Relying on the ratio laid down by the Supreme Court in Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and Others[1], the learned counsel for the petitioner

1

submitted that the impugned order passed by the CMM be set aside and the matter be remitted back to the CMM for fresh hearing, after affording an opportunity of hearing to the petitioner.

7 Countering the submission made by the learned counsel for the petitioner, Mr. Jayesh Dolia, learned counsel for the first respondent-bank would submit that in Harshad Govardhan Sondagar[1] the Supreme Court observed as under:

> "36 x 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."

It is further contended that the assignment of the petitioner is not yet established as the instrument has to be properly registered.

8 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.

9 The Supreme Court, in Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Ltd. And Others[1], 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
>
> 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

1 (2014) 6 SCC 1

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.

10 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.

11 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[1] 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, after affording an opportunity of hearing to the petitioner as well as the second respondent/guarantor and other concerned parties, within a period of two months from the date of filing a certified copy of this order, by either party. Status quo, as obtained today, in respect of the property in question shall be maintained till then.

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

s/d-
Assistant Registrar(CS-III)
Dt:23/3/2015

True Copy

Sub-Assistant Registrar

To
1 The Chief Metropolitan Magistrate Court
Egmore Chennai

2 The Assistant General Manager
Indian Bank
Alwarpet Branch
Eldams Road Alwarpet
Chennai 600 018

3 The Inspector of Police
K-7 Police Station, ICF
Perambur, Chennai 600 011

+ 1 cc to Mr.S.Mohanavadivelu, Advocate SR 14797

+ 1 cc to Govt.Pleader SR 14476

+ 1 cc to M/s.Aiyar & Dolia, Advocate SR 14569

ku(co)
prk25/3