IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 18.10.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

and

THE HONOURABLE MR.JUSTICE N.AUTHINATHAN

W.P.No.24657 of 2016 &

W.M.P.No.21051 of 2016

R.Anandapadmanaban ... Petitioner

-vs-

1.The Chief Metropolitan Magistrate,
Egmore, Chennai.

2.Indiabulls Housing Finance Ltd.,
Rep.by its Power of Attorney /
Authorised Officer,
Mr.Prathik,
No.20, Apex Chamber, 1st Floor,
Sir Theyagaraya Road,
T.Nagar, Chennai - 600 017.

3.Shine Garments (Through Proprietor),
No.154, North Usman Road,
T.Nagar, Chennai - 600 017.

4.Francis George
5.Lincy George
6.Mary Rini George ... Respondents

Prayer: Writ petition has been filed under Article 226 of the Constitution of India, praying for a Writ of Certiorari, calling for the records of the order passed by the first respondent in Crl.M.P.No.6052 of 2014 dated 21.06.2016 and quash the same.

For Petitioner	:	Mr.A.S.Baalaji
For Respondent No.1	:	Court
For Respondent No.2	:	Mr.C.Uma Shankar
For Respondent No.3	:	No Appearance
For Respondent Nos.4&5	:	Mr.S.Nambi Arooran
For Respondent No.6	:	No Appearance

O R D E R

[Order of the Court was made by N.AUTHINATHAN, J.]

The petitioner has come up with the present writ petition for a Writ of Certiorari, to call for the records of the order passed by the learned Chief Metropolitan Magistrate, 1st respondent herein, in Crl.M.P.No.6052 of 2014, dated 21.06.2016 and to quash the same.

2.Indiabulls Housing Finance Ltd.,/ respondent No.2 is a Financial Institution. Respondents 3 to 5 / borrowers have approached the respondent No.2 for grant of a loan of Rs.3,08,91,574/- against equitable mortgage. A loan agreement dated 30.03.2012 was entered into between the respondents 3 to 5 and the respondent No.2. The loan was secured by the mortgage of the property bearing Old Door No.18, New Door No.2, Baskara Sastri Street, Rangarajapuram, Kodambakkam, Chennai - 600 024. The loan was sanctioned and disbursed. The borrowers committed default in repayment. The loan account was classified as "non-performing asset" [NPA].

3.The respondent No.2 has initiated action for enforcement of the security interest. It has issued notice dated 07.06.2013 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act") to the borrowers calling upon them to repay the dues working out to Rs.3,32,18,047/-. Thereafter, the respondents 3 to 5 i.e. the borrowers, respondent No.2 / secured creditor and a third party, namely, Rakesh M.Jain, who has agreed to purchase the property for Rs.5 crore, have entered into a Tripartite Agreement dated 03.01.2014. The financier and the borrowers arrived at a settlement and the loan to be repaid was fixed at Rs.3,56,00,000/- and this amount was agreed to be paid by the third party from the total sale consideration of Rs.5 crore and the balance amount was agreed to be paid to the respondents 3 to 5. Subsequently, the Tripartite Agreement was terminated on 23.06.2014, as the third party has failed to comply with the terms and conditions of the said Agreement.

4.Thereafter, the respondent No.2 has approached the learned Chief Metropolitan Magistrate, Egmore, Chennai and filed Crl.M.P.No.6052 of 2014, invoking Section 14(2) of the SARFAESI Act. The learned Chief Metropolitan Magistrate by an order dated 08.09.2014 appointed an Advocate Commissioner to take possession of the property.

5.The petitioner herein approached this Court by way of Writ Petition in W.P.No.5872 of 2015 to quash the order of the learned Chief Metropolitan Magistrate dated 08.09.2014 and prayed for an order for restoration of possession of the middle portion of the mortgage property on the ground that he is a tenant in respect of the said portion. This Court by its order dated 12.06.2015 set aside the order dated 08.09.2014 and remitted the matter to the learned Chief Metropolitan Magistrate to consider the matter, after affording an opportunity to all parties concerned including the petitioner herein and pass appropriate orders in accordance with law laid down in Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and others [2014 (6) SCC 1].

6.Pursuant to the above mentioned orders of this Court, the learned Chief Metropolitan Magistrate after giving opportunity to the petitioner passed the impugned order. The learned Chief Metropolitan Magistrate has held that the petitioner has failed to prove that he is a lawful tenant in respect of the property in question and rejected the claim of the petitioner.

7.Aggrieved by the said order dated 21.06.2016, the present Writ Petition has been filed by the petitioner.

8.The learned counsel appearing for the petitioner submitted that a Rental Agreement dated 05.06.2010 has been entered into between the petitioner and the respondent No.4 and the former claims tenancy rights in respect of a room, which constitutes the middle portion in the ground floor of the mortgaged property. According to him, prior to the mortgage in favour of the respondent No.2, the Rental Agreement has been entered into and has been extended periodically. The respondent No.2 has taken possession on 07.01.2015, when he was out of town. The petitioner claims that he is a statutory tenant entitled to the protection of the Tamil Nadu Rent Control Act.

9.In Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and others [2014 (6) SCC 1], it has been held that if a mortgaged property is given on lease then the secured creditor can take possession of the property only after determination of lease under the provisions of

Transfer of Property Act. In the case at hand, it is alleged that the lease in question has been periodically extended till 30.04.2015. The respondent No.2 has issued a demand notice under Section 13(2) of SARFAESI Act on 07.06.2013. Admittedly, no consent of the creditor was obtained for the extension of lease. In Valluvar Guide Technical Training Centre vs. M.Dinakaran & Others [2016-2-L.W.268], it has been held that subsequent renewal of rental agreement was not possible without the consent of the secured creditor.

10.Learned counsel appearing for the petitioner relied on the decision in Vishal N.Kalsaria vs. Bank of India and others [(2016) 3 SCC 762], wherein it has been held that once tenancy is created, the tenant can be evicted only after following the due process of law as prescribed by Rent Control Act. It has also been held that a tenant cannot be arbitrarily evicted by using provisions of SARFAEST Act.

11.The borrowers supported the claim of the petitioner.

12.The respondent No.2 has filed a counter affidavit opposing the claim of the petitioner stating that there is collusion between the borrowers and the petitioner herein and the documents were fabricated for the purpose of the case. According to the respondent No.2, the Writ Petitions have been filed at the behest of the respondent No.4, who has voluntarily handed over the possession to the Advocate Commissioner. In his submission, the Writ Petition is designed only to stall the proceedings initiated by the respondent No.2 to recover the huge amount owed by the borrowers to the creditor.

13.The petitioner claims tenancy rights under a Rental Agreement dated 05.06.2010 and a photo copy of the Rental Agreement has been filed by the petitioner. The genuineness of this Rental Agreement has been disputed by the respondent No.2. A perusal of the photo copy of the Rental Agreement would show that the stamp paper was purchased on 03.12.2009, wherein the stamp vendor's address has been shown as S.Subramanian, Mu.Ve.Mananoorpettai, Tamil Nadu. The Rental Agreement purports to have been executed on 05.06.2010. There is no explanation as to why a stamp paper of the date 03.12.2009 should have been utilised for preparing the Rental Agreement on 03.06.2010. Equally there is no explanation as to why the stamp paper should have been purchased, not in Chennai where the agreement of tenancy has been entered into, but in a remote place named in the stamp paper. This state of affairs would only cast a cloud of doubt on the genuineness of the rental agreement.

14.It is significant to note that the respondents 3 and 4 have executed the loan agreement on 30.03.2012. In the loan agreement, clause 5.3(c) deserves to be extracted.

> "5.3.Representations and Warranties
>
> "(a).....
>
> (b).....
>
> (c)The Borrower/s assures IHFL that he/she/they is/are the undisputed and absolute owner of the Property and have an absolute clear and marketable title to the Property and are in possession of the same. Further, the Property is absolutely unencumbered and is free of all liens, charges, liabilities, third party interests and/or claims etc. The Borrower/s further represents that they shall not create any mortgage, encumbrance, lien etc. in favour of any third party (except that of IHFL) or any third party interest and/or part with the possession of the Property or any part thereof, till the time the entire Loan has been completely repaid to the full satisfaction of IHFL. That the Borrower/s is not aware of any document, Judgment, order or legal process or other charges or of any tenant or patent defect affecting/which may affect the title of the Property or of any material defect in the Property which has remained undisclosed and/or which may affect IHFL prejudicially."

In the said Clause, it has been pointedly stated that the respondents 3 to 5 were in possession at the time of execution of the loan agreement.

15.In the declaration accompanying the loan agreement, Clause 5 would be relevant. It reads thus:

> "5.I/We confirm and assure you that the said property is free from all lien, charges, encumbrances, claims and demands and the same is not subject to any charge, liens, lis pendens, attachment or any other processes issued by any court or authority and I/We have not created any lien, gift or trust in respect of the said property and that no notice for acquisition or requisition is issued in respect of the said property or any part thereof. I/We further declare that the said property is not encumbered in any manner whatsoever and I/We have an absolute, clear and marketable title thereto. That there is no statutory tenant in the said property or any part thereof."

16.A close consideration of Clause 5.3(c) of the loan agreement and the declaration extracted supra would reveal that there is no statutory tenant in the mortgaged property at the time of loan agreement. The declaration is a solemn declaration as well, and deserves to be acted upon. These circumstances would unerringly point to the conclusion that the tenancy has been set up only to extricate the property from action under provisions of SARFAESI Act. As the genuineness of the tenancy agreement having not been established, the case of the petitioner is bound to fail.

17.The impugned order dated 21.06.2016 has been passed on appreciation of the facts and circumstances of the case. The reasons set out in the impugned order and the conclusion reached by the learned Chief Metropolitan Magistrate deserves to be upheld, in our considered view for the reasons stated supra. In this view, the Writ Petition has to fail. Accordingly, the Writ Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

sri
To

The Chief Metropolitan Magistrate,
Egmore, Chennai.

+1cc to Mr.A.S.Baalaji, Advocate, S.R.No.58676
+1cc to Mr.S. Nambi Aroora Shankar, Advocate, S.R.No.58817
+1cc to Mr. C. Umashankar, Advocate Sr.No.59466

ks (CO)
md (10/11/2016)

W.P.No.24657 of 2016