IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.07.2017

CORAM

THE HONOURABLE MR.JUSTICE NOOTY.RAMAMOHANA RAO

and

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No. 36849 OF 2015 &
M.P.No.1 of 2015

1 S.Manugandhi @ Rajeshwari [PETITIONER]

Vs

1 Authorised Officer cum Branch Manager
State Bank of India
Ayyampettai Branch
Kancheepuram District.

2 S.Rathinavel

3 V.C.Gnanasekaran

4 The District Magistrate/District Collector
District Collectorate
Kancheepuram.

5 The Tahsildar
Kancheepuram.

6 The District Superintendent of Police
Kancheepuram.

[RESPONDENTS]

Writ Petition filed under Article 226 of the Constitution of India for issuance of a writ of mandamus to direct the respondents 1 4 to 6 to restore possession of the property at No.85, Bharathidasan Street, Mamallan Nagar, Kancheepuram to the petitioner.

For Petitioner : Mr.M.Sriram

For Respondents :Mr.S.R.Murthy - R1

No appearance – R2

Mr.P.B.Balaji -R3

Mr.P.Siva Shanmugasundaram -R4 to R6
Special Government Pleader

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ORDER

(Order of the Court was made by NOOTY.RAMAMOHANA RAO, J.)

The present writ petition is instituted, seeking for issuance of a writ of mandamus, directing the respondents, 1,4, 5 & 6, to restore the possession of the property at No.85, Bharathidasan Street, Mamallan Nagar, Kancheepuram, to the petitioner.

2.Heard the learned counsel for the petitioner, learned counsel for the first respondent-Creditor Bank and the learned counsel for the third respondent-Auction purchaser.

3.The case of the writ petitioner is that the property in question originally belonged to her husband by name Late Shri A.M.Shanmugavel, who purchased a plot of land from Mamallan Co-Operative House Building Society Ltd., in pursuance of a Registered Sale Deed dated 24th January, 1969. It is also her case that her husband had developed the property by raising suitable construction thereon. However, the husband of the writ petitioner/original owner died intestate, on 25th January, 2001, leaving behind him, the writ petitioner, two daughters and two sons. One of them Shri.S.Rathinavel, the second respondent herein appears to have availed financial assistance from State Bank of India, Ayyampettai Branch, Kancheepuram District and committed default in recycling the debt. Consequently, proceedings have been initiated under section 13, to begin with, of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (henceforth referred to as 'the SARFAESI Act'). Ultimately, the mortgaged property, which is the subject matter of this Writ Petition has been put to sale and the third respondent herein emerged as the best bidder in the auction which was conducted on 10th July, 2013. It is the case of the writ petitioner that in the family arrangement, the property in question fell to the share of her son Rathinavel. In those circumstances, the writ petitioner has allegedly entered into a leasehold arrangement with her son Shri Rathinavel on 5.3.2010. It is the case of the writ petitioner that she was regularly paying rent to her landlord-son from thereon. It is also her further case that her son without informing the developments, except kept on assuring her that all necessary steps were taken to protect the interest in the property, has not disclosed any fact relating to and leading up to the sale by public auction, held on 10.07.2013. It is also the case of the writ petitioner that she has already approached the Court of the Subordinate Judge at Kancheepuram and instituted O.S.No.10 of 2014 on 10.01.2014, seeking an injunction to restrain the third respondent/ Auction purchaser from interfering with her possession in any manner. It is also her case that an *ad* interim injunction was granted by that Court on 10th January, 2014, which is still subsisting. However, on 19th October, 2015, in her absence, an authorized officer of the Bank, the fifth respondent, Tahsildar with the Police aid provided by the 6th respondent, have forcefully taken possession of the property in question and thus, dispossessed the writ petitioner unauthorisedly. Hence, this Writ Petition is instituted, seeking for the relief, referred to supra.

4.It is the contention of Shri M.Sriram, learned counsel for the writ petitioner that the tenant is not liable to be evicted forcefully under the SARFAESI Act and that the SARFAESI Act has only provided for a special and speedy mechanism for recovery of debts to Banks and other Financial Institutions and the Creditor or for that matter, the purchaser of the asset, cannot secure forceful eviction of the tenant without taking recourse to law, which regulates any such eviction.

5.The learned Senior Counsel for the writ petitioner would place reliance upon the Judgment rendered by the Hon'ble Supreme Court in ***VISHAL N.KALSARIA v. BANK OF INDIA ANDOTHERS [(2016 3 SCC 762***] and would urge that the writ petitioner could not have been evicted from the premises in question without following the due process of law and by merely falling upon the procedure prescribed under section 14 of the SARFAESI Act.

6.Per contra, the learned counsel for the first respondent-Bank and the third respondent-auction purchaser would submit that the writ petitioner is none other than the mother of the defaulting borrower-Shri Rathinavel and he having failed in all his attempts to dodge the repayment of the loan availed by him, has only set up the writ petitioner as a tenant in the premises. Therefore, there are no *bonafides* behind his claim of tenancy and it is only invented for the purpose of preventing the first respondent creditor/bank and the third respondent/auction purchaser from realising the fruits of their efforts of recovery of the loan amount. In support of his contentions, the learned counsel relied on the decision of the Hon'ble Supreme Court in ***MADRAS PETROCHEM LIMITED v. BOARD FOR INDUSTRIAL AND FINANCIAL RECONSTRUCTION AND ORS [(2016) 4 SCC 1].***

7.It is no doubt true that the SARFAESI Act is a special piece of legislation, not only to help the ailing Banking Sector from realising the mounting debts due, but, it is a conscious effort to keep the economy going. SARFAESI Act has provided for a speedy and special procedure for recovery of debts as the normal methods otherwise available have proven to be causing nearly unsurmountable hardship in recovering the overdue debts in time. The recovery of debts is so vitally important in the Financial Sector that their very survival depends upon their own efficiency of recovery of debts and then recycling them for the benefit of the other borrowers. Thus, the necessity for putting in place an efficient and expeditious mechanism for recovering the debts overdue has become very profound. The mounting non-performing assets are impacting the growth of the economy. As a result, the developmental activities which are expected to move with necessary speed are found to be getting increasingly slowed down. That was the reason why a special procedure which is far more distinct and unique from the normal mode of recovery of debts, hitherto available under the prevailing legal regime stands departed from. But, at the same time, the rights of genuine tenants, whose properties which have been the subject matter of mortgage created in favour of the creditors, have not been completely left without any care or concern for them.

8.The Hon'ble Supreme Court in ***TRANSCORE v. UNION OF INDIA [(2008) 1 SCC 125]*** and ***HARSHAD GOVARDHAN SONDAGAR v. INTERNATIONAL ASSETS RECONSTRUCTION CO., LTD., [(2014) 6 SCC 1],*** have examined the entire scheme being the Act and worked out the necessary principles applicable on this subject. Ultimately, in ***VISHAL N.KALSARIA***'s case, it has been now firmly ruled with the provisions of SARFAESI, cannot not be used to override the provisions of the Rent Control Act and other similar Legislations regulating the rights of the tenants in the demised premises. Whereas, in ***MADRAS PETROCHEM LIMITED,*** which Judgment has been rendered subsequent to the Judgment in ***VISHAL N.KALSARIA***'s case, the entire gamut of the Act was once again considered by the Hon'ble Supreme Court and the relevant principles have been crystalized and in paragraph No.4 of the ***MADRAS PETROCHEM LIMITED,*** it was found that notwithstanding the non obstante clauses found under section 22(1) and (4) read with section 37 and 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, (in short 'SICA, 1985'), will have to give way to the measures taken under the SARFAESI Act. More particularly, contained in section 13 and the SARFAESI Act.

9.It is true that as contended by Shri Sriram, learned counsel for the petitioner that ***MADRAS PETROCHEM LIMITED,*** which was delivered in a short time after the Judgment in ***VISHAL N.KALSARIA***'s case was rendered, did not have the benefit of studying or considering the principles evolved in the ***VISHAL N.KALSARIA***'s case. However, after careful scrutiny of the principles evolved in ***HARSHAD GOVARDHAN SONDAGAR & VISHAL N.KALSARIA***'s case, the principle which emerges is that the provisions of section 13 of the SARFAESI Act, override the provisions of section 69 or section 69A of the Transfer of Property Act, but, do not override the provisions of the Transfer of Property Act relating to the rights of the lessee under the lease created before the service of notice under sub-section (2) of section 13 of the SARFAESI Act. Thus, the possession of a lessee of the secured asset under a valid lease deed made by the mortgagor prior to the creation of mortgage or after the creation of mortgage in accordance with Section 69-A of the Transfer of Property Act, are required to be protected.

10.Thus, the emphasis has been correctly laid on a validly subsisting lease and is in contra distinction thereto, if leases have been created with the sole objective of defeating the interest of the creditor, then such convenient creation of encumbrances/new set of relationships by the debtor cannot come to the rescue of the alleged lessee/tenant. The burden is, hence, placed on the person claiming right to possession to establish that a valid lease was subsisting as of the date of mortgage is created by the debtor or the consent of the Creditor was obtained for creating the lease hold rights over the mortgaged property.

11.In the instant case, the principal borrower-cum-defaulting debtor is none other than the son of the writ petitioner. It is the specific case of the writ petitioner that the property in question has fallen to the share of the said son/second respondent herein and after creating the security interest over the property, the writ petitioner has been inducted as a tenant. It, therefore, does not inspire confidence in our mind to come to a conclusion that the rights of the tenancy created in favour of the writ petitioner by her own son/ defaulting borrower, is a *bona fide.* We further feel that it is obviously created to defeat the interests of the Creditor-Bank, first respondent herein, as the consent of the Creditor for creating rights of tenancy has not been obtained.

12.The writ petitioner has knowledge of all the developments, it appears. This can be made out from the following averments made in paragraph No.3 of the affidavit filed in support of the writ petition, which reads as follows:

> "3.It is submitted that the 2nd respondent has availed loan from the 1st respondent by mortgaging his share of property where this petitioner was residing. The petitioner or the other family members were unaware of the said mortgage and none of them has signed any papers as a borrower or a guarantor. The petitioner submits that since the 2nd respondent has defaulted in repayments, the 1st respondent seems to have taken action under the SARFAESI Act, 2002 against the 2nd respondent. The petitioner on coming to know about the said action taken by the 1st respondent, she was informed by the 2nd respondent that he had challenged their proceedings before the DRT Chennai and she need not worry about the matter. The petitioner was under the bonafide belief that she will not be disturbed without notice and her possession will not be disturbed in any manner. The petitioner

thereafter came to know that the 1st respondent seems to have brought the property for Auction Sale under the SARFAESI Act and the 3rd respondent was the successful bidder and purchased the same on 10.07.2013. The 3rd respondent after his purchase visited the property and started threatening the petitioner with rowdy elements to handover vacant possession of property. For the purpose of protecting her lawful possession, the petitioner filed suit in O.S.No.10 of 2014 on the file of the Sub-Judge, Kanchipuram praying for Permanent Injunction not to interfere with her peaceful possession and enjoyment of the said property. The Hon'ble Court after hearing was pleased to grant interim injunction by its order dated 10.01.2014, restraining the 3rd respondent from interfering with the petitioner's peaceful possession. The said order of injunction granted by the Hon'ble Court was being extended and the same is in force till date. The 3rd respondent had also entered appearance in the said suit and contesting the matter."

But, when we look into the alleged Lease Deed, which has been entered into on 5th March, 2010, though it is not registered, even assuming for the sake of argument, that tenancy right has been created in favour of the writ petitioner in the demised premises, the contents of paragraph No.6 of the Plaint, a copy of which has been placed before us at page No.4 of the accompanying paper book, read as under:

"6.The Plaintiff submits that she has entered into a Lease Agreement on 01.07.11 with her eldest son S.Rathinavel. The

Plaintiff submits that Plaint Schedule mentioned premises was let out to the Plaintiff for Residential purpose on a monthly rent of Rs.3,000/- and the same is being payable on or before 5th of every English calendar month. The Plaintiff is in absolute possession and enjoyment of the Suit premises under the Contractual Tenancy."

13.Apart from the discrepancy relating to the date the lease was entered into, which is sought to explained away by saying that it was a typographical error in the Plaint and also in paragraph No.2 of the affidavit filed in support of this Writ Petition, but, nowhere the Plaint discloses the date on which the Notice under sub-section(2) of section 13 of the SARFAESI Act, has been served on the defaulting borrower, the son of the writ petitioner. Interestingly, all other contentions relevant for the purpose of neutralizing the action initiated under SARFAESI Act has been urged and put forward in the suit. Further interestingly, the landlord has not been impleaded to the Suit nor was the Creditor-Bank. The Suit is only against the third respondent-auction purchaser and it is a bare suit for granting permanent injunction. Thus, the right of tenancy has not been sought to be established before the competent Civil Court by seeking for an appropriate declaration in respect of the property in question. It is thus, obvious, that the writ petitioner has merely lent her name to some how bail out her son.

14.We are, therefore, of the view that the present writ petition is not the appropriate remedy available to the writ petitioner and the writ petitioner can only seek to establish her rights by approaching the Court of competent jurisdiction by securing a declaration of her right, title and interest in the property in question first. It is needless to mention that the furniture and other domestic items which were lying in the premises such as Cot, Ceiling Fans, etc. which have been inventoried, may be restored to the possession of the writ petitioner and or her son Shri Rathinavel, second respondent herein, by obtaining proper acknowledgment, from any one of them, by the purchaser, or the first respondent/Creditor Bank.

15.For the aforementioned reasons, we are of the opinion that the action taken under section14 of the SARFAESI Act by the first respondent Bank, as at present advised cannot be taken exception to. Accordingly, the Writ Petition stands dismissed. However, there will be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

(N.R.R.J.,) **(S.M.S.J.,)**

21.07.2017

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To

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NOOTY.RAMAMOHANA RAO , J.,
and
S.M.SUBRAMANIAM, J.,

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<u>W.P.No.24151 OF 2015</u>

27.06.2017..