IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.04.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.18261 of 2016
and
WMP No.15985 of 2016

B.Satyanarayanan ... Petitioner

vs.

1. Chief Metropolitan Magistrate,
Allikulam Complex, Chennai - 3.

2. Federal Bank Ltd.,
Rept. by its Zonal Manager,
Bhattad Tower, 1st Floor,
No.30, West Cott Road,
Royapettah, Chennai - 600 014.

3. Mr.C.P.Shibukumar (defacto Respondent)

4. M.Pandian

5. Inspector of Police,
V-5, Thirumangalam Police Station,
School Road,
Anna Nagar Western Extension,
Chennai - 600 101.

6. Shreenivasa Paper & Boards,
No.196, Mariamman Koil Street,
Rajapalayam, Virudhunagar District.

7. V.Rajarajan

8. P.Karpagavadivu ... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorarified mandamus, to call for the records relating to the order dated 27.04.2016 made in Crl.MP.No.6801/2015 on the file of the Chief Metropolitan Magistrate, Chennai-3, quash the same and directing the Respondents 2 and 3 to refrain from evicting the petitioner and his family from the Flat No.D2, 4th Floor, Plot No.Z-2993, 13th Main Road, Shanthi Colony, Anna Nagar West, Chennai - 600 040 on the basis of the said impugned order without following procedure laid down for eviction of tenant under the Tamil Nadu Buildings Lease & Rent Control Act, 1960.

For Petitioner : Mr.M.B.Raghavan

For Respondents: Mr.S.Sathyanarayanan (for R2)
R1- Court
R3 - Not Ready Notice
R6, R7 & R8 - No appearance

ORDER

(Order of the Court was made by S.MANIKUMAR, J)

Aggrieved by an order made in Crl.MP No.6801 of 2015 dated 27.04.2016, on the file of Chief Metropolitan Magistrate, Allikulam, Chennai, tenant of the property, mortgaged with Federal Bank Limited, has filed the instant Writ petition, for a certiorarified mandamus, to call for the records relating to the order dated 27.04.2016 made in Crl.MP.No.6801/2015 on the file of the Chief Metropolitan Magistrate, Chennai-3, to quash the same and to direct the Respondents 2 and 3, to refrain from evicting the petitioner and his family from the Flat No.D2, 4th Floor, Plot No.Z-2993, 13th Main Road, Shanthi Colony, Anna Nagar West, Chennai - 600 040 on the basis of the said impugned order without following procedure laid down for eviction of tenant under the Tamil Nadu Buildings Lease & Rent Control Act, 1960, based on the decisions of the Hon'ble Supreme Court in Harshad Govardhan Sondagar Vs. International Assets Reconstruction, reported in 2014(5) CTC 546 and Vishal N Kalsaria Vs. Bank of India & Others, reported in 2016(3) SCC 762,

2. After considering the provisions of SARFAESI Act, 2002, the Hon'ble Supreme Court in Harshad Govardhan Sondagar Vs. International Assets Reconstruction, reported in 2014(5) CTC 546, at paragraph No.21, held as follows:

> "21. When, therefore, a lessee becomes aware of the possession being taken by the secured creditor, in respect of the secured asset in respect of which he is the lessee, from the possession notice which is delivered, affixed or published in sub- rule (1) and sub-rule (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, he may either surrender possession or resist the attempt of the secured creditor to take the possession of the secured asset by producing before the authorised officer proof that he was inducted as a lessee prior to the creation of the mortgage or that he was a

lessee under the mortgagor in accordance with the provisions of Section 65A of the Transfer of Property Act and that the lease does not stand determined in accordance with Section 111 of the Transfer of Property Act. If the lessee surrenders possession, the lease even if valid gets determined in accordance with clause (f) of Section 111 of the Transfer of Property Act, but if he resists the attempt of the secured creditor to take possession, the authorized officer cannot evict the lessee by force but has to file an application before the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the SARFAESI Act and state in the affidavit accompanying the application, the name and address of the person claiming to be the lessee.

When such an application is filed, the Chief Metropolitan Magistrate or the District Magistrate will have to give a notice and give an opportunity of hearing to the person claiming to be the lessee as well as to the secured creditor, consistent with the principles of natural justice, and then take a decision. If the Chief Metropolitan Magistrate or District Magistrate is satisfied that there is a valid lease created before the mortgage or there is a valid lease created after the mortgage in accordance with the requirements of Section 65A of the Transfer of Property Act and that the lease has not been determined in accordance with the provisions of Section 111 of the Transfer of Property Act, he cannot pass an order for delivering possession of the secured asset to the secured creditor. But in case he comes to the conclusion that there is in fact no valid lease made either before creation of the mortgage or after creation of the mortgage satisfying the requirements of Section 65A of the Transfer of Property Act or that even though there was a valid lease, the lease stands determined in accordance with Section 111 of the Transfer of Property Act, he can pass an order for delivering possession of the secured asset to the secured creditor."

3. By drawing the attention of this Court to paragraph Nos.29 and 30 of the judgment of the Hon'ble Supreme Court in Vishal N.Kalsaria Vs. Bank of India and Others, reported in (2016) 3 SCC 762, learned counsel for the petitioner submitted that statutory tenants are entitled to protection under the Rent Control Act and in such circumstances, 2nd respondent Bank or anyone acting on their instructions cannot forcibly evict the petitioner by resorting to any unlawful means. Paragraph Nos. 29 and 30 are extracted.

"29. When we understand the factual matrix in the backdrop of the objectives of the above two legislations, the controversy in the instant case assumes immense significance. There is an interest of the bank in recovering the Non Performing Asset on the one hand, and protecting the right of the blameless tenant on the other. The Rent Control Act being a social welfare legislation, must be construed as such. A landlord cannot be permitted to do indirectly what he has been barred from doing under the Rent Control Act, more so when the two legislations, that is the SARFAESI Act and the Rent Control Act operate in completely different fields. While SARFAESI Act is concerned with Non Performing Assets of the Banks, the Rent Control Act governs the relationship between a tenant and the landlord and specifies the rights and liabilities of each as well as the rules of ejectment with respect to such tenants. The provisions of the SARFAESI Act cannot be used to override the provisions of the Rent Control Act. If the contentions of the learned counsel for the respondent Banks are to be accepted, it would render the entire scheme of all Rent Control Acts operating in the country as useless and nugatory. Tenants would be left wholly to the mercy of their landlords and in the fear that the landlord may use the tenanted premises as a security interest while taking a loan from a bank and subsequently default on it. Conversely, a landlord would simply have to give up the tenanted premises as a security interest to the creditor banks while he is still getting rent for the same. In case of default of the loan, the maximum brunt will be borne by the unsuspecting tenant, who would be evicted from the possession of the tenanted property by the Bank under the provisions of the SARFAESI Act. Under no circumstances can this be permitted, more so in view of the statutory protections to the tenants under the Rent Control Act and also in respect of contractual tenants along with the possession of their properties which shall be obtained with due process of law.

30. The issue of determination of tenancy is also one which is well settled. While Section 106 of the Transfer of Property Act, 1882 does provide for registration of leases which are created on a year to year basis, what needs to be remembered is the effect of non-registration, or the creation of tenancy by way of an oral agreement. According to Section 106 of the Transfer of Property Act, 1882, a monthly tenancy shall be deemed to be a tenancy from month to month and must be registered if it is reduced into writing. The Transfer of Property Act, however, remains silent on the position of law in cases where the agreement is not reduced into writing. If the two parties are executing their rights and liabilities in the nature of a landlord-tenant relationship and if regular rent is

being paid and accepted, then the mere factum of nonregistration of deed will not make the lease itself nugatory. If no written lease deed exists, then such tenants are required to prove that they have been in occupation of the premises as tenants by producing such evidence in the proceedings under Section 14 of the SARFAESI Act before the learned Magistrate. Further, in terms of Section 55(2) of the special law in the instant case, which is the Rent Control Act, the onus to get such a deed registered is on the landlord. In light of the same, neither the landlord nor the banks can be permitted to exploit the fact of non registration of the tenancy deed against the tenant."

4. The above principles of law is settled by the Hon'ble Supreme Court in Vishal N. Kalsaria's case on 20.01.2016. Harshad Govardhan Sondangar's case was rendered, when there was no provision in SARFAESI Act, 2002, protecting the interest of the tenant and enabling the tenant to challenge any action taken by the bank under Section 13(4) of the SARFAESI Act, 2002. Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has been amended on 12/6/2006, by insertion of Section 4 -A of 2016, with effect from 1/9/2016. Now, that Section 4-A has been inserted to Section 17 of the SARFAESI Act, 2002, petitioner who claims to be a tenant has an alternate and effective remedy before the tribunal to challenge any action taken by the bank under Section 13(4) of the SARFAESI Act, 2002 which includes an order passed under Section 14 of the SARFAESI Act, 2002, as the case may be.

5. As per Section 17(4-A) of SARFAESI Act, 2002 any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purpose of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy, -

(a) has expired or stood determined; or

(b) is contrary to Section 65 A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of Section 13 of the Act; and

(ii). the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act."

6. In view of the amendment, by way of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 (44 of 2016), an effective and alternative remedy is provided to a person, who claims to be a tenant or has lease hold rights, on the secured asset and that if any application is filed, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties, in relation to such claim shall, for the purpose of enforcement of security interest, has jurisdiction to examine whether the lease or tenancy and other parameters, mentioned in Section 4 A of the Amended Act and to pass such orders, as deems fit, in accordance with the provisions of Securitisation and Reconstructions of Financial Assets and Enforcement of Security Interest Act, 2002, taking note of the amendment.

7. Repeatedly, the Hon'ble Supreme Court has held that when there is an efficacious and alternate remedy under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act or Securitisation And Reconstructions of Financial Assets Act, 2002, as the case may be, a writ petition is not maintainable. We deem it fit to consider the following decisions.

(i) In Precision Fastenings v. State Bank of Mysore, reported in 2010(2) LW 86, this Court held as follows:

> "This Court has repeatedly held in a number of decisions right from the decision in Division Electronics Ltd. v. Indian Bank (DB) Markandey Katju, C.J., (2005 (3) C.T.C., 513), that the remedy of the aggrieved party as against the notice issued under Section 13(4) of SARFAESI Act is to approach the appropriate Tribunal and the writ petition is not maintainable. The same position has been succinctly stated by the Hon'ble the Supreme Court in Transcore v. Union Of India (2006 (5) C.T.C. 753) in paragraph No. 26 wherein the Supreme Court has held as under: —
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> > "The Tribunal under the DRT Act is also the Tribunal under the NPA Act. Under Section 19 of the DRT Act read with Rule 7 of the Debts Recovery Tribunal (Procedure) Rules, 1993 (1993 Rules), the applicant bank or FI has to pay fees for filing such application to DRT under the DRT Act and, similarly, a borrower, aggrieved by an action under Section 13(4) of NPA Act was entitled to prefer an Application to the DRT

under Section 17 of NPA." (Emphasis added) "

(ii) In Union Bank of India v. Satyawati Tondon, reported in 2010 (5) LW 193 (SC), the Hon'ble Apex Court has held as follows:

> "16. The facts of the present case show that even after receipt of notices under Section 13(2) and (4) and order passed under Section 14 of the SARFAESI Act, respondent Nos. 1 and 2 did not bother to pay the outstanding dues. Only a paltry amount of Rs. 50,000/- was paid by respondent No. 1 on 29.10.2007. She did give an undertaking to pay the balance amount in installments but did not honour her commitment. Therefore, the action taken by the appellant for recovery of its dues by issuing notices under Section 13(2) and 13(4) and by filing an application under Section 14 cannot be faulted on any legally permissible ground and, in our view, the Division Bench of the High Court committed serious error by entertaining the writ petition of respondent No. 1.
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> 17. There is another reason why the impugned order should be set aside. If respondent No. 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression 'any person' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations

enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

18. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for re-dressal of his grievance. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of

course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad AIR 1969 SC 556, Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1=1999-2-L.W. 200 and Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order.

27. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

28. Insofar as this case is concerned, we are convinced that the High Court was not at all justified in injuncting the appellant from taking action in furtherance of notice issued under Section 13(4) of the Act.

29. In the result, the appeal is allowed and the impugned order is set aside. Since the respondent has not appeared to contest the appeal, the costs are made easy."

(iii) In Saraspathy Sundararaj v. Authorised Officer and Assistant General Manager, State Bank of India, reported in (2010) 5 LW 560, the Court held as follows:

"The petitioner has filed this writ petition praying for a Writ of Certiorarified Mandamus calling for the records relating to the possession notice dated 16.09.2004 issued by the respondent under the SARFAESI Act and consequently direct the respondent to effect the settlement in accordance with the SBI OTS-SME 2010 Scheme as contained in its letter dated 18.03.2010 and unconditionally restore physical possession of the six rooms taken physical possession by it at No. 29, Sarojini Street, T. Nagar, Chennai - 17 with such damages.

... When a specific forum has been created which enables the borrower to challenge the action of the financial institution by filing necessary petition under Section 17, the petitioner is not entitled to invoke the writ jurisdiction of this

Court. What could not be achieved by the petitioner by filing a petition before the appropriate Forum, which is at present barred by period of limitation, could not be permitted to be achieved by extending the jurisdiction conferred to this Court under Article 226 of The Constitution of India. Above all, since the petitioner has violated the terms and conditions of the loan by transferring the property in favour of her son, this Court is not inclined to entertain the petition.
.... "

8. Though, Mr.M.B.Gopalan, learned counsel for the petitioner submitted that bank without disclosing the tenancy, bank has obtained an order under Section 14(1) of the SARFAESI Act, 2002, and that the same is illegal, and whereas, Mr.S.Sathyanarayanan, learned counsel for the bank submitted that the tenancy has been entered into between the parties subsequent to the mortgage, we are not inclined to advert to the abovesaid rival contentions, for the reason that when the instant writ petition is disposed of, giving liberty to the writ petitioner / tenant to assail the correctness of the order dated 27.04.2016 made in Crl.M.P.No.6801 of 2015, on the file of the learned Chief Metropolitan Magistrate, Allikulam, Chennai, before the tribunal under Section 17 (4-A) of the SARFAESI Act, 2002, no observation or decision, can be made with regard to the above contentions.

9. Material on record discloses that the petitioner has been protected by an interim order of a Hon'ble Division Bench of this Court dated 19.05.2016 and that the tenant continues to be in occupation. Thus, by disposing of the present writ petition, liberty is granted to the petitioner, to prefer an application under Section 17(4-A) of the SARFAESI Act, 2002 within a period of two months from the date of receipt of a copy of this order and it is open to the petitioner to seek for interim orders. Petitioner/tenant had the benefit of interim order for nearly two years. Tribunal, while adverting to the plea of the petitioner/tenant, is directed to pass appropriate interim orders.

Sd/-
Asst.Registrar (CS IX)

/true copy/

Sub Asst. Registrar

ars

To

1. Chief Metropolitan Magistrate,
Allikulam Complex, Chennai - 3.

2. Zonal Manager,
Federal Bank Ltd.,
Bhattad Tower, 1st Floor,
No.30, West Cott Road,
Royapettah, Chennai - 600 014.

+ 1 cc to M/s.V.Manisekaran, Advocate,SR.24205

+ 1 cc to Mr.S.Sathyanarayanan Advocate,SR.24274

+ 1 cc to M/sGopalan Associates, Advocate,SR.24377

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