BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.10.2024

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THE HONOURABLE MR.JUSTICE B.PUGALENDHI

S.A.(MD)No.229 of 2024 and
CMP(MD) Nos.4534 & 10787 of 2024

Samraj ... Appellant

Vs

1.Er.S.D.Ibid Vino
2.State Bank of India,
Kuzhithurai Branch,
Rep by the Authorized Officer,
Kuzhithurai,
Vilavancode Village,
Vilavancode Taluk,
Kanyakumari District. ... Respondents

PRAYER :- Second Appeal filed under Section 100 of Code of Civil Procedure, as against the judgment and decree, dated 11.12.2023 made in A.S.No.25 of 2023, on the file of the learned Principal Subordinate Court, Nagercoil, confirming the judgment and decree, dated 20.07.2023, made in unnumbered O.S.SR No.177 of 2023, on the file of the learned Principal District Munsif Court, Nagercoil.

For Appellant	: Mr.L.George Paul Anto
For R1	: No appearance
For R2	: Mr.P.Pethu Rajesh

JUDGMENT

This Second appeal is filed by the plaintiff in O.S.SR No.177 of 2023 as against the judgment and decree rendered by the learned Principal District Munsif, Nagercoil in O.S.SR No.177 of 2023 and confirmed by the learned Principal Subordinate Judge, Nagercoil in A.S.No.25 of 2023, dated 11.12.2023.

2.The plaintiff' has filed the above suit, seeking permanent injunction against the second defendant from interfering or disturbing with the plaintiff's peaceful possession and enjoyment over the plaint schedule property, in any manner whatsoever, until he is evicted by the first defendant under due process of law. The suit filed by the plaintiff was not entertained by the trial Court that the subject plaint schedule property is the property, which was already attached by the State Bank of India, Kuzhithurai Branch/the second respondent herein, under Section 34 of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act. More over, the plaintiff has filed the above suit based on an unregistered lease deed, dated 01.03.2022. Therefore, the trial Court has rejected the plaint that the alleged lease deed executed by the first defendant in favour of the plaintiff' is an unregistered one and subsequent to the mortgage of the plaint schedule property in favour of the second defendant. The trial Court, while rejecting the plaint has also taken into consideration the sale notice, dated 07.07.2023 issued by the second defendant/State Bank of India, Kuzhithurai Branch, under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act. As against the judgment and decree passed by the trial Court, the plaintiff has preferred an appeal in AS No.25 of 2023, before the Principal Subordinate Court, Nagercoil and the same was dismissed on 11.12.2023. Aggrieved over the same, the plaintiff is before this Court with this Second appeal.

3.This Court, while entertaining this second appeal, has ordered notice to the respondents and also granted an order of interim stay, by order, dated 28.03.2024. The second respondent/ second defendant has filed an application to vacate the interim order granted by this Court on 28.03.2024.

4.Today(19.10.2024), while entertaining the application filed by the respondents to vacate the interim injunction granted by this Court, this Court has taken up the main second appeal for final disposal.

5.The learned counsel appearing for the appellant/plaintiff submits that the trial Court is erred in not entertaining the suit without considering the fact that the appellant /plaintiff is a tenant under the first respondent. He further submits that the appellant/plaintiff is no way connected with the alleged loan transaction between the first defendant and the second defendant and he is a bonafide tenant under the first respondent and paying rent regularly without any default. Therefore, the judgments rendered by the Courts below are liable to be set aside.

6.The learned counsel appearing for the second respondent Bank submits that the first respondent has availed home loan by mortgaging the plaint schedule property, through a registered Mortgage deed, dated 31.01.2017; since the loan availed by the first respondent has become Non-Performing Asset on 30.08.2022, a demand notice under Section 13(2) of the SARFAESI Act was issued on 01.09.2023, demanding a sum of Rs.49,16,275/-; however, no reply has been received from the first respondent, therefore, possession notice was issued on 29.11.2022 and paper publication was also effected on 04.12.2022; in order to take physical possession of the mortgaged property, the Bank authorities have filed an application in Crl.MP.No.989 of 2023, under Section 14 of the SARFAESI Act and the same was allowed on 25.02.2023; an Advocate commissioner was appointed and after inspection, the

Advocate Commissioner has took physical possession and handed over the same to the second respondent Bank on 08.06.2023; thereafter, sale notice, dated 07.07.2023, fixing the date of e-auction sale on 17.08.2023 was issued; One Wilfred Blessing Nesian was declared as successful bidder and the property has been sold to him for a sale consideration of Rs.42,00,000/-; sale certificate has also been issued to him on 20.09.2023 and since then the said Wilfred Blessing Neisan is the owner of the property.

7.There is no representation for the first respondent.

8.This Court considered the rival submissions made and also perused the materials placed on record.

9.Admittedly, the suit was filed by the plaintiff in the capacity of a tenant under the first defendant/first respondent, based on the unregistered lease deed, dated 01.03.2022 and it has been rightly rejected by the trial Court as well as by the first Appellate

Court. More over, the plaint scheduled property has been mortgaged by the first respondent with the second respondent Bank as a security for availing housing loan and for the default of loan by the first respondent, the second respondent has initiated proceedings under the SARFAESI Act, by issuing a sale notice, dated 07.07.2023. Considering proceedings under the SARFAESI Act and the bar under Section 34 of the SARFAESI Act, the trial Court has rejected the plaint in the SR stage itself and the first Appellate Court has also confirmed the same. The learned counsel for the second respondent has relied on the judgment of the Honourable Supreme Court, in ***Hemraj Ratnakar Salian vas. HDFC Bank Ltd and others***, reported in ***(2021) 6 MLJ 278 (SC)*** and submits that suit is not maintainable as per Section 34 of SARFAESI Act. The relevant portion is extracted as under:-

> *10. Procedural mechanism for taking possession of the Secured Asset is provided under Section 14 of the SARFAESI Act. Section 17 of the SARFAESI Act provides for the right of appeal to any person including the borrower to approach Debt Recovery Tribunal (DRT).*

Section 17 has been amended by Act No.44 of 2016 providing for challenging the measures to recover secured debts (for short, "the Amendment"). Under the Amendment, possession can be restored to the borrower or such other aggrieved person. This Amendment has come into force w.e.f. 1st September, 2016. This Court in Harshad Govardhan Sondagar v. International Asset Reconstruction Co. Ltd. & Ors (2014) 6 SCC 1 has held that right of appeal is available to the tenant claiming under the borrower. In Kanaiyalal Lalchand Sachdev vs. State of Maharashtra LNIND 2011 SC 2685; (2011) 2 SCC 782, this Court has held that DRT can not only set aside the action of the secured creditor but even restore the status quo ante. Therefore, an alternative remedy was available to the appellant to challenge the impugned order under Section 17 of the SARFAESI Act even before the amendment to Section 17 of the SARFAESI Act. However, given that the instant appeal has been pending consideration before this Court from the year 2016, we propose to examine the case on merits without directing the appellant to avail the alternative remedy.

11.In Harshad Govardhan Sondagar Vs.International Asset Reconstruction Co. Ltd and others (supra) this Court has categorically held that if the tenancy claim is *for any term exceeding one year, the tenancy can be made only by a registered instrument. It was held thus :*

"36. We may now consider the contention of the respondents that some of the appellants have not produced any document to prove that they are bona fide lessees of the secured assets. We find that in the cases before us, the appellants have relied on the written instruments or rent receipts issued by the landlord to the tenant. Section 107 of the Transfer of Property Act provides that a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made "only by a registered instrument" and all other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Hence, if any of the appellants claim that they are entitled to possession of a secured asset for any term exceeding one year from the date of the lease made in his favour, he has to produce proof of execution of a registered instrument in his favour by the lessor. 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."

12. A Three Judge Bench of this Court in Bajarang

Shyamsunder Agarwal vs. Central Bank of India & another (2019) 9 SCC 94, after considering almost all decisions of this Court, in relation to the right of a tenant in possession of the secured asset, has held that if a valid tenancy under law is in existence even prior to the creation of the mortgage, such tenant's possession cannot be disturbed by the secured creditor by taking possession of the property. If a tenancy under law comes into existence after the creation of a mortgage but prior to issuance of a notice under Section 13(2) of the SARFAESI Act, it has to satisfy the conditions of Section 65A of the Transfer of Property Act, 1882. If a tenant claims that he is entitled to possession of a Secured Asset for a term of more than a year, it has to be supported by the execution of a registered instrument. In the said decision of this Court, it was clarified that in the absence of a registered instrument, if the tenant only relies upon an unregistered instrument or an oral agreement accompanied by delivery of possession, the tenant is not entitled to possession of the secured asset for more than the period prescribed under the provisions of the Transfer of Property Act. It was held thus:

"24.1. If a valid tenancy under law is in existence even prior to the creation of the mortgage, the tenant's possession cannot be disturbed by the secured creditor by taking possession of the property. The lease has to be determined in accordance with

Section 111 of the TP Act for determination of leases. As the existence of a prior existing lease inevitably affects the risk undertaken by the bank while providing the loan, it is expected of banks/creditors to have conducted a standard due diligence in this regard. Where the bank has proceeded to accept such a property as mortgage, it will be presumed that it has consented to the risk that comes as a consequence of the existing tenancy. In such a situation, the rights of a rightful tenant cannot be compromised under the SARFAESI Act proceedings. 24.2. If a tenancy under law comes into existence after the creation of a mortgage, but prior to the issuance of notice under Section 13(2) of the SARFAESI Act, it has to satisfy the conditions of Section 65-A of the TP Act.

24.3. In any case, if any of the tenants claim that he is entitled to possession of a secured asset for a term of more than a year, it has to be supported by the execution of a registered instrument. In the absence of a registered instrument, if the tenant relies on an unregistered instrument or an oral agreement accompanied by delivery of possession, the tenant is not entitled to possession of the secured asset for more than the period prescribed under Section 107 of the TP Act."

13. It was further held that the Rent Act would not come to the aid of a "tenant-in- sufferance" vis à vis SARFAESI Act, due to the operation of Section 13(2) read with Section 13(13) of the SARFAESI Act. It was held as follows:

"35. The operation of the Rent Act cannot be extended to a "tenant-in-sufferance" vis-à-vis the SARFAESI Act, due to the

operation of Section 13(2) read with Section 13(13) of the SARFAESI Act. A contrary interpretation would violate the intention of the legislature to provide for Section 13(13), which has a valuable role in making the SARFAESI Act a self executory instrument for debts recovery. Moreover, such an interpretation would also violate the mandate of Section 35, SARFAESI Act which is couched in broad terms."

14. In the present case, first of all there is a serious doubt as to the bona fide of the tenant, as there is no good or sufficient evidence to establish the tenancy of the appellant. According to the appellant, he is a tenant of the Secured Asset from 12.06.2012. However, the documents produced in support of his claim are xerox copies of the rent receipts and the first xerox copy of the rent receipt is of 12.05.2013 which is after the date of creation of the mortgage. It is pertinent to note here that the Borrowers have not claimed that any tenant is staying at the Secured Asset. At the time of grant of facility, third party valuers had also confirmed that the Borrowers were staying at the Secured Asset. Be that as it may. The appellant has pleaded tenancy from 12.06.2012 to 17.12.2018. This is not supported by any registered instrument. Further, even according to the appellant, he is a "tenant in-sufferance", therefore, he is not entitled to any protection of the Rent Act. Secondly, *even if the tenancy has been claimed to be renewed in terms of Section 13(13) of the SARFAESI Act, the Borrower would be required to seek consent of the secured creditor for transfer of the Secured Asset by way of sale, lease or otherwise, after issuance of the notice under Section 13(2) of the SARFAESI Act and, admittedly, no such consent has been sought by the Borrower in the present case.*

10.In the above judgment, it has been clarified that if the appellant claims that he is entitled to possession of a Secured Asset for a term of more than a year, it has to be supported by the execution of a registered instrument and in the absence of any such registered instrument, if the tenant only relies upon an unregistered instrument or an oral agreement accompanied by delivery of possession, the tenant is not entitled to possession of the secured asset for more than the period prescribed under the provisions of the Transfer of Property Act. Here, in this case, the appellant has relied upon the unregistered lease deed, dated 01.03.2022, that too, after the deed of Mortgage, dated 31.01.2017.

11.In view of the foregoing reasons and discussions and following the decision of the Honourable Supreme Court as stated supra, this Court is not inclined to interfere with the judgment and decree passed by the Courts below. Accordingly, this Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

19.10.2024

NCC : Yest/No
Index : Yes/No
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To

1.The Principal Subordinate Court, Nagercoil

2.The Principal District Munsif Court, Nagercoil.

3.The Section Officer,
Madurai Bench of Madras High Court,
Madurai.

B.PUGALENDHI, J.

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Judgment made in
S.A.(MD)No.229 of 2024 and
CMP(MD) Nos.4534 & 10787 of 2024

19.10.2024