

Nelson Rajesekaran vs) Union Bank Of India on 31 January, 2018

Author: K.Ravichandrabaabu

Bench: K.Ravichandrabaabu

1

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON 30.07.2019
DELIVERED ON 07.08.2019

CORAM:

THE HON'BLE MR.JUSTICE K.RAVICHANDRABAABU
and

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY
W.P.(MD)No.3186 of 2018
and

W.M.P.(MD) Nos.11246 & 3346 of 2018

Nelson Rajesekaran
S/o Late S.J. Wilson,
Ward No.5, T.S.No.839E,
Attu Mandai Street,
East Gate,
Thanjavur- 613 001

... Petitioner

Vs.

- 1) Union Bank of India,
ARMB, Chennai.
- 2) S.Abdul Wahab
- 3) The Recovery Officer,
Debts Recovery Tribunal II,
Chennai
- 4) The Inspector of Police,
East Police Station,
East Gate,
Thanjavur.

... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution

India for issuance of Writ of Certiorari calling for the records of t

respondent in connection with the order dated 31.01.2018 in D.R.C.No. 113 of 2009 in O.A.No.139 of 2007 issued to the 4th respondent and quash the same insofar as the petitioner is concerned as being illegal and beyond his powers.

For Petitioner	:	Mr.P.Thirumahilmaran
For R1	:	Mr.V.S.Karthi, For M/s V.S.Karthi Association
For R2	:	M/s J.Maria Roseline
For R4	:	Mr.N.Shanmugaselvam, Additional Government Pleader

ORDER

(Order of the Court was made by SENTHILKUMAR RAMAMOORTHY, J.)

1. This Writ Petition is filed by a person claiming to be a tenant in the premises at Ward No.5, TS No.839E, Attu Mandai Street, East Gate, Thanjavur – 613001. The Petitioner challenges the order dated 31.1.2018 in D.R.C.No.113 of 2009 in O.A. No.139 of 2007, whereby the Recovery Officer passed orders under Rules 39 and 40 of the Income Tax (Certificate Proceedings) Rules, 1962 (the ITCP Rules) and directed four persons, including the Writ Petitioner herein, to hand over vacant possession of the property to the auction purchaser, Mr.S.Abdul Wahab, i.e. the second Respondent herein, by handing over the keys of the respective premises on or before 16.2.2018.

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2. The facts that are relevant for the purpose of deciding this Writ Petition are set out briefly herein. As stated at the outset, the Petitioner claims that he is a tenant in the premises described in the preceding paragraph and that the said tenancy originated from a Rental Agreement dated 28.08.1991 (the Rental Agreement), which is said to be executed by the landlord, the late Mr.Maqqbool Hussain. According to the Petitioner, the tenancy was for purposes of running a medical shop in the said premises and the Petitioner paid rent regularly to the landlord. It is further submitted that the aforesaid Rental Agreement was renewed by Renewal Rental Agreement dated 17.12.2002 (the Renewal Rental Agreement) and that the monthly rent was increased periodically and was eventually fixed at Rs.2000/- per month. The Petitioner states that although the renewal was for a period of five years, further extensions were granted orally and the Petitioner continues to

be in uninterrupted possession till date. In effect, it is the case of the Petitioner that he continues to be a tenant by holding over.

3. Moreover, it appears from the documents that the late Mr. Maqbool Hussain was one of the defendants in Original Application No.139 of 2007, which was filed by the Union Bank of India, i.e. the first Respondent herein, before the Debts Recovery Tribunal-II, Chennai, for recovery of debts and that an order dated 27.7.2009 was issued directing the defendants therein to pay an aggregate sum of <http://www.judis.nic.in> Rs.76,38,807.82 to the Union Bank of India. Pursuant thereto, a recovery certificate, namely, DRC No.113 of 2009, was issued for recovery of the above-mentioned sum.

4. Thereafter, the Petitioner filed a suit against the first Respondent herein, the auction purchaser, the Recovery Officer and the landlord/borrower for a permanent injunction to restrain the defendants therein from interfering with the plaintiff's possession of the property. Even prior to admission, the plaint was returned by order dated 24.01.2012 in C.F.R.No.647 of 2012, which was affirmed in A.S. No. 6 of 2012 by order dated 13.09.2012. Eventually, by order dated 03.03.2017 in S.A.(MD) No.440 of 2014, the Second Appeal was allowed on the basis that the plaint should not have been rejected at the threshold and that "it is desirable to give an opportunity to the plaintiff in the suit to establish his case on merits at the time of trial." On that basis, the suit was numbered as O.S.No.195 of 2017 and is pending.

5. Later, on the basis of the aforesaid D.R.C. No.113 of 2009, proceedings were initiated before the Recovery Officer and the said proceedings culminated in the impugned order, which was issued under Section 29 of the Recovery of Debts and Bankruptcy Act, 1993 (the Recovery of Debts Act) read with Rules 39 and 40 of the ITCP Rules <http://www.judis.nic.in> whereby the Petitioner was directed to hand over vacant possession of the premises in his occupation by handing over the keys of the said premises to the auction purchaser.

6. At the hearing, the learned counsel for the Petitioner submitted that the order of the Recovery Officer is liable to be quashed primarily on the ground that the Petitioner is a tenant in the premises in question and that, therefore, the Recovery Officer is not empowered, under Section 29 of the Recovery of Debts Act read with Rule 40 of the ITCP Rules, to direct that physical possession of the property should be handed over to the auction purchaser. In specific, it is the contention of the learned counsel for the Petitioner that whenever a property is in the possession of a tenant, only symbolic possession and not physical possession should be ordered under the aforesaid provisions. With regard to the delivery of physical possession, it is contended that physical possession can only be granted on the basis of orders passed by a competent civil court or rent control authority. In this regard, the learned counsel for the Petitioner referred to and relied upon the judgment of a Division Bench of this Court in A. Stephen Samuel, Proprietor, Industrial Security Agency versus Union of India 2003 (3) CTC 95 wherein, it was held, in paragraph 9, that the possession and delivery contemplated in Rule 40 of the ITCP Rules is symbolic possession and delivery and not actual possession by evicting <http://www.judis.nic.in> tenants. He also relied upon the judgment of the Supreme Court in Shaha Ratansi Khimji vs. Proposed Kumbhar Sons Hotel P. Ltd. 2015 (3) CTC 339, wherein the Supreme Court held that if a tenancy is created both in respect of land and

building, such tenancy would continue even if the building or superstructure is destroyed. In the said judgment, it was further held, in paragraph 33, that the interest of the lessee was not purchased by the person purchasing the property and, therefore, such interest continues to subsist. By relying upon the aforesaid judgment, the learned counsel for the Petitioner contended that the Recovery Officer exceeded his jurisdiction by ordering that physical possession should be handed over to the auction purchaser. Further, it was contended that the auction purchaser did not purchase the interest of the Petitioner/tenant and that, consequently, such interest continues to subsist as on date.

7. He further relied upon the judgment of this Court in the above mentioned S.A.(MD)No.440 of 2014, wherein, at paragraph 7, this court held that "the fact that the appellant is in possession is also not in dispute". Further, this Court extracted Rule 40 of the ITCP Rules and held that the auction purchaser can only get symbolic possession on that basis by relying upon the decision of the Division Bench, which is cited supra. On this basis, it was submitted that there is a categorical finding that the Petitioner is in possession of the premises in question <http://www.judis.nic.in> and that, therefore, the Recovery Officer exceeded his jurisdiction by ordering that vacant possession should be given to the auction purchaser.

8. To the contrary, the learned counsel for the first Respondent Bank contended that the Writ Petitioner is not a lessee or tenant in the premises because the purported Rental Agreement and Renewal Rental Agreement are unregistered documents in respect of a purported lease for a period of more than one year. Accordingly, the learned counsel submitted that no interest is created in the immovable property on the basis of such unregistered documents. In this regard, the learned counsel for the Bank referred to and relied upon the judgment of the Hon'ble Supreme Court in Harshad Govardhan Sondagar versus International Assets Reconstruction Company Limited (2014) 6 SCC 1 (the Harshad Govardhan case) wherein, at paragraph 36, the Court held that the District Magistrate or Chief Metropolitan Magistrate can come to the conclusion that the person who claims rights under an unregistered agreement is not entitled to the possession of the secured asset for more than one year from the date of the instrument in question. On this basis, the learned counsel for the Bank submitted that the Petitioner is not entitled to protection as a lessee of the premises and that the order of the Recovery Officer is sustainable. <http://www.judis.nic.in>

9. By way of rejoinder, the learned counsel for the Petitioner submitted that the law laid down in the Harshad Govardhan case (cited supra) was clarified in the subsequent judgment in Vishal N. Kalsaria vs. Bank of India (2016) 3 SCC 762 (the Vishal Kalsaria case) wherein, it was held, in paragraph 30, inter alia, as follows:

"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 fact of non-registration 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...."

On the above basis, the learned counsel for the Petitioner reiterated that the Recovery Officer passed an invalid order that is liable to be quashed by this Court.

10. We considered the affidavits, documents and oral submissions carefully. The primary question that arises for consideration in this case is whether the order of the Recovery Officer directing the Petitioner to hand over physical possession of the property in his occupation is valid. An ancillary question would be whether the Petitioner has an effective alternative remedy and, if so, whether this is an appropriate case for the exercise of discretionary jurisdiction under Article 226 of the <http://www.judis.nic.in> Constitution. Upon hearing the rival contentions, it is clear that there is a dispute as to whether the Petitioner is a tenant in the premises in question. The contention of the learned counsel for the Petitioner, in this regard, is that the Petitioner was put in possession of the premises under the Rental Agreement as renewed by the Renewal Rental Agreement and that in spite of expiry of the tenancy period, the tenancy continues by holding over. The learned counsel for the Petitioner further relies upon the observations of this court in S.A.(MD)No.440 of 2014 and contends that it was held by this Court therein that the Petitioner is in possession of the premises in question. Per contra, the contention of the learned counsel for the first Respondent Bank is that the purported tenancy is on the basis of unregistered documents and that the purported tenancy period admittedly expired by efflux of time and, consequently, the Petitioner is not entitled to protection as per the provisions of the Transfer of Property Act, 1882. As regards the judgment of this court in S.A. (MD)No.440 of 2014, the learned counsel for the Respondent Bank submitted that the Court was not required to and did not enter definitive findings that the Petitioner is a tenant because the Second Appeal was filed in the factual context of the plaint being returned by the District Munsif, Thanjavur, on the ground that the suit is not maintainable. In that context, this Court reversed the said decision and held that the trial court had jurisdiction to examine as to whether the <http://www.judis.nic.in> Petitioner is a tenant or not. In other words, the submission of the counsel for the first Respondent is that the Court did not examine the relevant evidence and conclude that the Petitioner herein is a tenant in the premises in question. We are inclined to accept the contention of the learned counsel for the Bank that, in the said Second Appeal, this Court did not enter definitive findings with regard to the alleged tenancy of the Petitioner. This is clear from the operative portion of the judgment at paragraph 11 wherein the Court held that "it is desirable to give an opportunity to the plaintiff in the suit to establish his case on merits at the time of trial." Further, it would be necessary to consider relevant evidence with regard to the alleged holding over by the Petitioner after the expiry of the Renewal Rental Agreement before drawing any conclusions in this regard.

11. Moreover, in the Vishal Kalsaria case, which arose out a proceeding under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the SARFAESI Act), the Supreme Court held that "... 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 fact of non-registration of deed will not make the lease itself nugatory....". Thus, it is evident that the court or tribunal concerned is <http://www.judis.nic.in> required to examine questions of fact such as whether tenancy by holding over is established by considering relevant evidence, such as the payment of and acceptance of rent, before entering definitive conclusions with regard to the tenancy.

12. The impugned order of the Recovery Officer should be examined keeping in mind the aforesaid factual and legal context. On perusal, the said order discloses that the learned counsel for the auction purchaser therein sent private notice to the occupants of various portions of the property, including the Petitioner herein, and in spite of receipt thereof, there was no appearance for the such persons, including the Petitioner, at the hearing on 17.1.2018. As regards the Petitioner herein, in specific, the said order further states that the Petitioner sent a letter in response to such private notice, raising a doubt as to whether the private notice was sent as per the orders of the Recovery Officer and citing the pendency of O.S.No.195 of 2017 before the District Munsif Court. After narrating the above facts with regard to service of notice on the occupants of various portions of the premises, including the Petitioner herein, the Recovery Officer proceeded to direct the said individuals to hand over vacant possession of the property to the auction purchaser by handing over the keys of the respective premises on or before 16.02.2018. Therefore, it is clear that the Recovery Officer did not consider as to whether the Petitioner is a tenant or not and <http://www.judis.nic.in> record findings in that regard. Consequently, the factual questions remain unanswered. In this regard, we find that the Recovery of Debts Act provides for the modes of recovery of debt under Section 25 thereof. Section 25 of the Recovery of Debts Act, prior to amendment by Act 44 of 2016, empowered the Recovery Officer to recover the debt by attachment and sale of the movable or immovable property of the defendant, by arrest and detention in prison of the defendant and by appointing a receiver for the management of the movable or immovable properties of the defendant. The said provision was amended by Act 44 of 2016, with effect from 01.09.2016, by inserting the following sub- clause therein:

"(aa) taking possession of property over which security interest is created or any other property of the defendant and appointing a receiver for such property and to sell the same".

Thus, the Recovery Officer is now expressly authorised to take possession of the property as a mode of recovery of debt. By an earlier amendment, Section 30 was amended whereby a statutory appeal is provided to the Debts Recovery Tribunal (the DRT) against orders passed by the Recovery Officer under Sections 25 to 28 thereof. Consequently, a statutory remedy is available to the Petitioner and the DRT has been expressly empowered to confirm, modify or set aside the order of the Recovery Officer.

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13. In this connection, it is also relevant to state that by the same Act 44 of 2016, the SARFAESI Act was amended by introducing sub- section 4A in Section 17 thereof, which reads as follows:

"(4-A) Where-

(i) 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 purposes of enforcement of security interest, have the jurisdiction to

examine whether the lease or tenancy:

(a) has expired or stood determined; or

(b) is contrary to section 65-A of the Transfer of Property Act, 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 sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary 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 the Act."

Although a provision analogous to section 17(4A) of the SARFAESI Act is not contained in the Recovery of Debts Act, we are of the view that Section 30 thereof confers power on the DRT to consider appeals <http://www.judis.nic.in> against all orders of the Recovery Officer under Sections 25 to 28 thereof, including orders under Section 25(aa) read with Section 29 and Rules 39 and 40 of the ITCP Rules. Therefore, while considering such appeals, the DRT has the implied power to decide as to whether there is a valid lease or tenancy. Needless to say, if it is concluded that there is a valid lease, whether contractual or statutory, eviction or ejection can only be ordered by a competent court or rent control tribunal or authority.

14. As stated earlier, in this case, we find that there is a dispute as to whether the Petitioner is a tenant and the said dispute can only be resolved by leading evidence with regard to proof of tenancy by way of production of lease agreements and rental receipts, proof of occupation such as electricity bill payment receipts, et cetera. We further find that the Petitioner did not appear before the Recovery Officer in spite of receipt of private notice and provide the relevant documents and make submissions to establish tenancy. Consequently, there is no discussion or finding, in this regard, by the Recovery Officer. While exercising the discretionary jurisdiction under Article 226 of the Constitution of India, this Court need not take on the role of a fact finding authority to decide as to whether the petitioner is a tenant or not. Therefore, the question arises as to whether the first Respondent Bank should await the outcome of O.S.No.195 of 2017 before initiating action to take physical <http://www.judis.nic.in> possession as a mode of recovery under Section 25 of the Recovery of Debts Act. On analysis of the judgments of the Supreme Court and the Division Bench judgment of this Court, which were adverted to supra, we are of the view that the Petitioner would be required to establish that he is a tenant in the proceedings initiated by the first Respondent Bank for enforcement of the DRC. Ordinarily, in this situation, we would have set aside the impugned order and remitted the matter for fresh consideration by the Recovery Officer. However, in this case, it is necessary to not only consider and determine the factual dispute as to whether the Petitioner is a tenant by examining the relevant evidence but, more importantly, it is necessary to consider the

principles laid down in the judgments of the Supreme Court and this Court and the implications, if any, of the amendment to Section 25 of the Recovery of Debts Act. Therefore, we are of the considered view that it would be appropriate to dispose of this Writ Petition by granting leave to the Petitioner to file an appeal before the appropriate DRT under Section 30 of the Recovery of Debts Act by impleading all necessary parties, including the legal representatives of the deceased landlord. In this regard, it is pertinent to refer to a couple of judgments. In *Sadashiv Prasad Singh vs. Harendar Singh* (2015) 5 SCC 574, the Supreme Court held that the High Court should have declined to exercise jurisdiction under Article 226 in view of the availability of a statutory appeal under Section 30 of the Recovery of Debts Act. In <http://www.judis.nic.in> *International Asset Reconstruction Company vs. Official Liquidator of Aldrich Pharmaceuticals Ltd.* (2017) 16 SCC 137, the Supreme Court held that the DRT does not have the power to condone delay in filing an appeal under Section 30 of the Recovery of Debts Act and this judgment would need to be taken into account in this case. With regard to limitation, we find that the impugned order is dated 31.01.2018 and the Writ Petition was filed on or about 14.02.2018. In view of the fact that we are disposing of this Writ Petition by granting leave to the Petitioner to file an appeal before the DRT, the entire duration of pendency of this Writ Petition is liable to be and is hereby excluded for the purposes of computing the limitation period for filing an appeal under Section 30 of the Recovery of Debts Act. On that basis, the Petitioner would have a further period of about 15 days from the date of receipt of a copy of this order to file the appeal.

15. In the result, without expressing an opinion as to whether the Petitioner is a tenant or not, this Writ Petition is disposed of by granting leave to the Petitioner to file an appeal against the order of the Recovery Officer before the DRT concerned within 15 days from the date of receipt of a copy of this order by impleading all necessary parties, including the legal representatives of the deceased landlord, and in the event of such appeal being filed, the DRT concerned is <http://www.judis.nic.in> directed to consider and dispose of the same on merits, in accordance with law and the observations made herein within a period of three months from the date of filing of such appeal. The order of interim injunction granted by this Court in W.M.P.(MD) No.3346 of 2018 shall continue in operation for a period of 30 days from the date of receipt of a copy of this order provided an appeal is filed within 15 days as directed. No costs. Consequently, the connected miscellaneous petitions are disposed of as indicated above.

(K.R.C.B. J.) & (S.K.R. J.)
07.08.2019

Index : Yes
Internet : Yes

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To

1) The Recovery Officer,
Debts Recovery Tribunal II,
Chennai

2) Union Bank of India,
ARMB, Chennai.

3) The Inspector of Police,
East Police Station,
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K.RAVICHANDRABAABU, J.
and
SENTHILKUMAR RAMAMOORTHY, J.

sts

Order made in

Dated:
07.08.2019

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