IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.07.2015

DATE OF DECISION : 10.07.2015

CORAM:

THE HONOURABLE MR. JUSTICE SATISH K. AGNIHOTRI
AND
THE HONOURABLE MR. JUSTICE M. VENUGOPAL

W.P.No.9507 of 2015
and
M.P.No.1 of 2015

M/s.Kongunadu Hospitals (P) Ltd.,
rep by its Managing Director Dr.Raju
116/117, 11th Street,
Tatabad,
Coimbatore-640 012. ...Petitioner

Vs

1. The Recovery Officer,
   Debt Recovery Tribunal-II,
   6th Floor, 770 A, Anna Salai,
   Chennai-600 002.

2. Dr.Shantha Ramakrishna

3. S.Paremellam
   Proprietor,
   M/s.Verismolmpex,
   Plot No.55, 1st Floor, Parry Colony,
   Keelkatalai, Chennai-117.
   (R3 impleaded vide order dated 23.6.2015
   in M.P.No.2/2015) ...Respondents

The Writ Petition is preferred under Article 226 of the Constitution of India praying for a writ of mandamus directing the first respondent to receive the demand draft for Rs.1,15,00,000/- (Rupees One Crore and fiffteen Lakhs only) from the petitioner in the light of the condition No.VI passed in the common order dated 25.2.2009 in W.P.No.6131, 6152, 6662 of 2006, 23002 and 49641 of 2006 and

C.R.P.No.1807 and 1808 of 2006 by the division bench of this court and issue the possession certificate in favour of the petitioner within the time stipulated by the court.

For petitioner : Mr.AR.L.Sundaresan, SC for Mr.A.Thiyagarajan

For respondents : Mr.T.T.Ravichandran for Mr.N.K.Sekar for R-2
Mr.Srinath Sridevan for R-3

ORDER

SATISH K. AGNIHOTRI, J.

The instant writ petition is filed by the auction purchaser, seeking a direction to the first respondent-Recovery Officer to receive a sum of Rs.1,15,00,000/- deposited by way of demand draft from the petitioner in the light of the condition No.VI of paragraph 29 in the common order dated 25.02.2009 passed in W.P.No.6131, 6149, 6662 of 2005, 23002 and 49641 of 2006 and C.R.P.(NPD)Nos.1807 and 1808 of 2006 and to issue possession certificate in favour of the petitioner.

2 The brief facts relevant for adjudication of the disputes, as projected by the petitioner, are that the secured financial institution, Indian Overseas Bank (for short "IOB"), to recover outstanding dues of Rs.25 lakhs from the third respondent, obtained an ex parte final order dated 31.5.2004 of the Debts Recovery Tribunal-II, Chennai in O.A.No.304 of 2003 filed by it. Being aggrieved, several writ petitions were filed by the Bank, guarantor and borrower before this Court. In the meantime, the said property was put on public auction held on 2.3.2006, which was confirmed by issuance of sale certificate in favour of the petitioner /auction purchaser on 3.3.2006. The division bench of this court, considering all facts of the matter, disposed of all petitions by a common order with the following directions :

> "29.For the aforesaid reasons, the following directions are issued :
>
> (i)The amount deposited with the Recovery Officer shall be returned to the auction purchaser within a period of one week from the date of receipt of a copy of this order.
>
> (ii)The borrowers/guarantor are required to pay interest by way of compensation to the auction

purchaser at the rate of 10% per annum from the respective dates of deposit of such amount by the auction purchaser i.e., deposit of initial amount at the time of auction and deposit of balance amount at the time of confirmation, till the date of payment by the borrowers / guarantor.

(iii)A sum of Rs.8,05,000/-, which is paid by the auction purchaser towards bondage fee and registration fee, shall be paid by the guarantor.

(iv)The amounts as per condition Nos.(ii) and (iii) shall be paid directly to the auction purchaser or deposited with the Recovery Officer within a period of 90 days. If such amount is deposited with the Recovery Officer, he in his turn shall pay such amount to the auction purchaser within a period of one wek from the date of such deposit.

(v)The guarantor is required to deposit a further sum of Rs.15,00,000/- (Rupees fifteen lakhs) with the Recovery Officer as a condition precedent for the guarantor to contest the proceedings as well as condition precedent for setting aside the auction and the order of confirmation. Such amount shall be kept in a separate fixed deposit account in the creditor bank, so that the benefit of the accrued interest would be ultimately enjoyed by the successful party.

(vi)The directions contained in Condition Nos. (ii), (iii) and (v) shall be complied with by the guarantor within a period of 90 days as a condition precedent for setting aside the ex-parte final order so far as the guarantor is concerned. It is made clear that, if such conditions are not complied with within a period of 90 days from the date of receipt of a copy of this order, the ex-parte final order against the guarantor and the auction of the property shall be deemed to have been confirmed as against such guarantor."

3 Being aggrieved, the guarantor/ second respondent preferred a Special Leave to Appeal (Civil) No.9487 of 2009, wherein the Supreme Court by order dated 1st May, 2009, while issuing notice, stayed the operation of the said order of the High Court, which continued till the final dismissal of the Special Leave Petition on 21st January, 2015. Challenging the order dated 25.02.2009 passed by this Court, the petitioner herein has also preferred Special Leave Petitions, being SLP(C) Nos.27031-27035 of 2009 and the third respondent, being the borrower had also preferred Special Leave

Petitions, being SLP(C)No.17174 of 2009. All the petitions were heard together and dismissed by order dated 21.01.2015.

4 Mr.AR.L.Sundaresan, the learned Senior Counsel with Mr.A.Thiagarajan, learned counsel for the petitioner, would submit that the Recovery Officer has no competence to extend the period of 90 days granted by this court for the deposit of the money on 25.2.2009, by accepting the demand drafts for the said sum by the second respondent on 27.03.2015. It is further contended that after exclusion of the period of stay granted by the Supreme Court, there was delay of 31 days in complying with the order dated 25.2.2009. Compliance of directions contained in condition Nos.(ii), (iii) and (v) within a period of 90 days from the date of receipt of a copy of the High Court's order was a condition precedent for setting aside the sale in favour of the petitioner. The learned Senior Counsel would further contend that under the provisions of Section 29 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "RDDBFI Act") read with Rule 60 of the II Schedule of the Income Tax Act, the sale cannot be set aside if the amount is not deposited within the prescribed time. The limitation period is sacrosanct and in default, the mortgagor of the property forfeits his right to redeem the mortgage.

5 Further relying on the decision of the Constitution Bench of the Supreme Court in Padmasundara Rao (Dead) & Others Vs. State of Tamil Nadu and others[1], it is submitted that the second respondent is entitled to exclusion of the period only which was covered under the order of stay granted by the Supreme Court.

6 Further, it is contended that even under the provisions of Order 21 Rule 89 of the Code of Civil Procedure, the deposit made after the expiry of the limitation period cannot confer any right on the mortgagor to redeem the mortgaged property by setting aside the sale. The learned Senior Counsel relies on decisions of the Supreme Court in Annapurna Vs. Mallikarjun and another[2] and Nava Bharat Ferro Alloys Limited Vs. Transmission Corporation of Andhra Pradesh Limited and another[3] in support of the aforestated contentions.

7 Per contra, Mr.T.T.Ravichandran, learned counsel appearing with Mr.N.K.Sekar, learned Advocate for the second respondent / guarantor would contend that the sale made in favour of the writ petitioner was set aside by this court and the money deposited by him was refunded back to him and as such, the petitioner has not acquired any right. The period of 90 days as granted by this court would

1 2002 (2) CTC 55
2 (2014) 6 SCC 397
3 (2011) 1 SCC 216.

commence from the date of dismissal of the Special Leave Petitions preferred by all the parties, including the auction purchaser / the petitioner herein. The second respondent /guarantor had immediately taken steps to deposit the money on 09.03.2015. However, since drafts were drawn in favour of the petitioner / auction purchaser in addition to the draft drawn in favour of the IOB for a sum of Rs.15 lakhs, the Recovery Officer returned back the said demand drafts, granting 10 days time to make proper drafts drawn in favour of the Recovery Officer, Debts Recovery Officer-II. Accordingly, the entire amount, i.e., a sum of Rs.45,74,795/- for payment to the petitioner and Rs.15,00,000/- for payment to the IOB, were deposited by way of demand drafts on 27.03.2015 and the same was duly accepted.

8 It is further urged that even if there is some delay, the guarantor being the mortgagor and the owner of the property in question, has first right to redeem the mortgage, particularly when the sale was not confirmed in favour of the petitioner and also the money deposited by the petitioner was returned back to him. He relies on the decisions of the Supreme Court and other High Courts in Anandilal and another Vs. Ram Narain and others[4], Union of India and others Vs. West Coast Paper Mills Ltd and another[5], and Narayana Pillai Krishna Pillai Vs. Damodaran Pillai Velayudhan Pillai[6] rendered by the Kerala High Court, Kandaswami Pillai Vs. Kannappa Chetty[7] of the Madras High Court.

9 The third respondent / borrower, who has been impleaded as party respondent at his instance, as originally he was not made as party respondent, representing through Mr.Srinath Sridevan, learned counsel, in addition to what has been contended by the second respondent/ guarantor, would submit that against the dismissal of the Special Leave Petitions filed by the second and third respondents, a review petition has been filed, which is still pending consideration. In the meantime, the entire amount has been paid and as such, the petitioner is not entitled to any benefit.

10 The learned counsel would further contend that the second and third respondents are put back in the same position as they stood immediately at the time of grant of 90 days time by the High Court, on dismissal of the Special Leave Petitions, particularly when the operation of the High Court's order was stayed and continued till the dismissal of the Special Leave Petitions. He relies on the decision of the Supreme Court in Delhi Development Authority Vs. Skipper

4 AIR 1984 SC 1383
5 (2004) 2 SCC 747
6 AIR 1967 Kerala 159 (V 54 C 66)
7 AIR (39) 1952 Madras 186 (C.N.94.)(1)

Construction Co. (P) Ltd. and another[8] and Century Flour Mills Ltd. Vs. S.Suppiah and others[9] of the Madras High Court.

11 It is further contended by the learned counsel appearing for second and third respondents that the provisions of CPC and also the Income Tax Act would not be applicable in the case on hand as the High Court, while exercising its jurisdiction under Article 226 of the Constitution of India, has granted 90 days time. Thus, this court is competent to extend further time in the interest of justice.

12 Heard the learned counsel appearing for parties, perused the pleadings and documents appended thereto.

13 Indisputably, the second respondent mortgaged the property in question to arrange the loan amount for the borrower/third respondent from the secured creditor, i.e., IOB. The IOB filed an original application, being O.A.No.304 of 2003 for recovery of money, which was allowed on 31.5.2004 ex parte. Thereagainst, the writ petition was filed, being W.P.No.6662 of 2005. In the meantime, the property in question was put on sale. This Court ordered to proceed with the auction sale, but with a condition not to confirm the sale. Defying the said order passed by this court, the sale was confirmed and the petitioner made an initial payment of Rs.28,75,000/- and also the balance amount was paid, knowing fully well that there was stay operating against the confirmation of the sale. In the meantime, the Debts Recovery Tribunal set aside the ex parte order in a petition filed by the borrower / third respondent on condition of payment of Rs.15 lakhs, which was also challenged by the bank in this court in W.P.No.49641 of 2006 and it was heard together along with other petitions and disposed of by a common order dated 25.02.2009. The division bench, while disposing of all petitions by the said common order, observed as under :

> "13.We have already noticed that the High Court had issued a specific order in W.P.No.6662 of 2005 filed by the guarantor to the effect that the auction sale should not be confirmed. Such an order had also been passed in W.P.No.6131 of 2005. It is no doubt true that in W.P.No.6149 of 2005 filed by the principal debtor the order of interim stay of confirmation of sale was modified by giving a direction relating to deposit of certain amount but, the principal debtor instead of complying with such direction, had chosen to file an appeal, which was ultimately withdrawn with liberty to pursue the remedy before the Debt Recovery

8 (1996) 4 SCC 622 : 1996 (II) CTC 557

9 AIR 1975 Madras 270

Tribunal. Therefore, even though the stay of confirmation of sale became non-operational so far as W.P.No.6149 of 2005 was concerned, orders dated 28.2.2005 and 1.3.2005 in W.P.Nos.6662 of 2005 and 6131 of 2005 directing that auction should not be confirmed, continued to be operative. Since an order of confirmation was passed by the Recovery Officer notwithstanding orders of stay to the contrary, there cannot be any doubt that such an order of confirmation of sale by the Recovery Officer must be taken to be inoperative. It is no doubt true that in the Contempt Proceedings initiated in connection with W.P.No.6662 of 2005 against such Recovery Officer, the High Court has chosen to accept the apology offered by such Recovery Officer. The effect of such order is that the dereliction of duty on the part of the officer has been condoned by the High Court, but it does not mean that invalidity of the order has been validated. In the present juncture, it has to be seen whether such order of confirmation of sale can at all be given effect to merely because the contempt proceedings has been closed by accepting the apology. We do not think it would be appropriate to allow such an order of confirmation, which was in contravention of an order of stay passed by the High Court, to remain effective merely because the contempt proceedings had been closed as adopting such a course may result in encouragement of similar transgression by other persons. In this context it has to be remembered that the Recovery Officer is not a mere layman, who can feign ignorance in such matters. Therefore, in our considered opinion, irrespective of the result of different writ petitions, the order of confirmation of sale issued by the Recovery Officer in violation of the specific order passed by the High Court, has to be held to be invalid."

14 By the said order, the order of confirmation of sale issued by the Recovery Officer was held as invalid. The division bench issued several directions, as aforestated. The first direction was to return the amount deposited by the auction purchaser / writ petitioner herein, with the Recovery Officer, which was done. The second and third respondents were required to pay interest by way of compensation to the auction purchaser at the rate of 10% per annum from the dates of deposit of such amount till the date of payment by the borrower / guarantor. The said amount had also been deposited.

The second respondent also was directed to pay a sum of Rs.8,05,000/- paid by the petitioner / auction purchaser towards bondage fee and registration fee and that has also been paid. The entire amount was payable within a period of 90 days from the date of receipt of a copy of the order dated 25.02.2009. The second respondent was also required to deposit a sum of Rs.15 lakhs with the Recovery Officer as a condition precedent for the guarantor to contest the proceedings as well as condition precedent for setting aside the auction and the order of confirmation.

15 According to the second respondent, the copy of the said order was received on 6.3.2009. Thereafter, the special leave petition, as aforestated, was filed by the second respondent. The Supreme Court while issuing notice, stayed the operation of the said order dated 25.2.2009, on 01.05.2009. In the meantime, as stated herein-above, the third respondent / borrower and the petitioner / auction purchaser had also preferred Special Leave Petitions, being S.L.P.(C)No.17174 of 2009 and S.L.P.(C)Nos.27031-27035 of 2009 respectively. All Special Leave Petitions were heard together and by a common order dated 21.1.2015, all the Special Leave Petitions were dismissed.

16 Now the question arises is as to whether the period of 90 days shall commence from the date of dismissal of the special leave petitions or from the date of receipt of the order dated 25.2.2009 passed by this Court, after excluding the period of stay granted by the Supreme Court.

17 It is pertinent to state here that it is not a case, where, by the grant of stay in a petition filed by the second respondent / guarantor, the petitioner / auction purchaser has been prejudiced. The petitioner / auction purchaser had also filed special leave petitions, questioning the legality of the said order dated 25.02.2009. In that view of the matter, the stay order passed by the Supreme Court suspends the operation of the order of this court from the date it became effective. The suspension of the order continues till all special leave petitions were dismissed on 21.1.2015. As a sequitur, since the operation of the order dated 25.02.2009 of this Court was stayed, it stood suspended with effect from the date of passing of the order, and as such, the period of 90 days shall commence from the date of dismissal of the special leave petitions by the Supreme Court.

18 The provision of Section 29 of the RDDBFI Act prescribes for applicability of certain provisions of the Income Tax Act, i.e., Second and Third Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962.

19 The relevant provision under Schedule-II, as pointed out by the learned Senior Counsel appearing for the petitioner / auction purchaser, is Rule 60. It contemplates application to set aside the sale of immovable property on deposit. On a bare perusal of the said provision, it is manifest that in case of complete sale of immovable property, including the issuance of certificate of sale on deposit of money, an application may be made by the interested person affected by sale at any time within 30 days from the date of sale. In the instant case, the said provision shall not be applicable to the facts of the case. Firstly, there was no complete sale of the property in question as the sale was held as invalid by this court. Secondly, this court had granted 90 days time to deposit the money with the bank in exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India. This is not a case of statutory prescription of limitation and as such, this provision shall not lend any support to the petitioner.

20 Let us examine the applicability of the Order 21 Rule 89 of the Code of Civil Procedure. As pleaded by the petitioner, Rule 89 of Order 21 also deals with the application to set aside the sale on deposit. Where immovable property has been sold in execution of a decree, any person claiming interest in the property sold at the time of the sale or at the time of making the application, may apply to have the sale set aside on his depositing in court for payment to the purchaser, a sum equal to 5% of the purchase money with other conditions. As aforestated, since the sale was not complete, as the money deposited by the petitioner / auction purchaser, was directed to be returned back and the sale was held invalid, the statutory period of limitation will not be applicable.

21 In Padmasundara Rao (supra), the issue involved was limitation for issuance of declaration under Section 6 of the Land Acquisition Act, wherein, the statutory prescription is two years. The Supreme held that "the fact that legislature specifically provided for periods covered by orders of stay or injunction clearly shows that no other period was intended to be excluded and that there is no scope for providing any other period of limitation."

22 In Nava Bharat Ferro Alloys Ltd. (supra), it was observed by the Supreme Court that a party who fails in the main proceedings cannot claim benefit from the interim order issued during the pendency of such proceedings. The said observation was made in view of the fact that the consumer has obtained the interim relief in the pending proceedings. In the case on hand, the order of stay was granted, wherein, all the parties have approached the Supreme Court

against the order dated 25.02.2009. Thus, no party was prejudiced by the order of stay granted by the Supreme Court in the pending Special Leave Petitions. As such, the decision in Nava Bharat Ferro Alloys Ltd. (supra) is not relevant to the facts of the case.

23 As we have held hereinabove that this is not a case of application of statutory prescription of limitation, the ratio laid down by the Supreme Court in Annapurna (supra), wherein, the provisions of Order 21 Rule 89 of the Civil Procedure Code was under consideration, is not applicable to the instant case.

24 In Anandilal, the issue involved was, whether a partial stay of execution shall entitle the decree-holder to claim exclusion of the period during which there was a stay of sale, but, the property was to continue under attachment for the purpose of computation of the period of limitation provided by Section 48 of the Civil Procedure Code. The Supreme Court held as under:

> "11 x x x x x x x x Stay of any process of execution is therefore stay of execution within the meaning of the section. Where an injunction or order has prevented the decree-holder from executing the decree, then irrespective of the particular stage of execution or the particular property against which, or the particular judgment debtor against whom execution was stayed, the effect of such injunction or order is to prolong the life of the decree itself by the period during which the injunction or order remained in force. The majority view to the contrary taken by some of the High Courts overlooks the well settled principle that when the law prescribes more than one modes of execution, it is for the decree-holder to choose which of them he will pursue."

25 It is not necessary to deal with other decisions cited by the learned counsel for the parties as the facts involved therein are different and as such, the same are not applicable to the facts of the case on hand. In the case on hand, as has been specifically observed hereinabove, the Special Leave Petition challenging the order dated 25.02.2009 passed by the High Court, was not filed only by the guarantor/second respondent, but, by the petitioner/auction purchaser as well as the borrower also. Thus, the limitation granted by this Court prolonged the life of the direction of this Court. The parties were put back to the same position as they stood at the time of passing of the order dated 25.02.2009 of this Court. Hence, the second respondent was entitled to comply with the directions contained in condition Nos.(ii), (iii) and (v) of paragraph no.29 of the said order within a period of 90 days from the date of the order

of dismissal passed by the Supreme Court, and it was done.

26 As a sequel, the writ petition, being sans merit, must fail and is accordingly dismissed. Costs made easy. Connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

vvk/cad

To

The Recovery Officer,
Debt Recovery Tribunal-II,
6th Floor, 770 A, Anna Salai,
Chennai-600 002.

1 CC to Mr.Srinath Sridevan, Advocate SR.No. 35273

1 CC to Mr.N.K.Sekar, Advocate SR.No. 35227

1 CC to Mr.A.Thiyagarajan, Advocate SR.No. 34791

W.P.No.9507 of 2015

KK (CO)
PSI (22.07.2015)