IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.11.2016

CORAM

THE Hon'ble Mr.JUSTICE S. MANIKUMAR

AND

THE Hon'ble Mr.Justice N. AUTHINATHAN

W.P.No.31009 of 2016
and WMP Nos.30347 & 26885 of 2016

P. Baskaran (Guarantor) .... Petitioner

vs

1. The Registrar,
   Debt Recovery Tribunal,
   No.770-A, Anna Salai,
   V Floor (DBWA Towers),
   Chennai - 2

2. The Authorised Officer,
   Bank of India,
   33/3, First Main Road,
   Gandhi Nagar, Adyar,
   Chennai - 600 020

3. K. Vijaya
   Proprietrix,
   M/s Saibaba Traders,
   No.68/A, Sambosrria Apartments,
   Flat No.E, 4th Main Road,
   Nolambur, Chennai - 600 037

4. E. Velu

(R.4 is impledaded as per Order dated 14.11.2016 in WMP No. 31505/2016 in WP No.31009/2016) .... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying this Court to issue a Writ of Certiorarified Mandamus to call for the records in SASR No.6744 of 2016, on the file of Debts Recovery Tribunal No.3, Chennai in connection with the impugned order dated 24.08.2016 and quash the same and direct the first respondent to receive the petitioner's appeal i.e., SASR No.6744/2016 on the file of Debts Recovery Tribunal No.3, Chennai and to number the same and dispose of the appeal in accordance with law.

For petitioner	:	Mr.N. Ravikumar
R.1	:	Tribunal, P.Wilson-SR Counsel for
R.2	:	Mr.OR.Santhanakrishnan
R4	:	K.Balaji

ORDER

(Order of the Court was made by N. AUTHINATHAN,J.,)

The third respondent, as the Proprietrix of M/s Saibaba Traders availed of credit facilites to the tune of Rs.50,00,000/- from the Bank of India, (the second respondent). The writ petitioner has given guarantee for the financial facilities availed by the third respondent Ms.K. Vijaya. He mortgaged his properties in favour of the Bank by way of security to the said loan. The third respondent committed default in repayment of the loan. The loan account was classified as "Non Performing Asset". Thereafter, the Bank initiated action to enforce Security Interest.

2. The case of the Bank is that the loan account of the third respondent has become “Non performing Asset” as on 30.09.2015. Consequent to which, Notice under Sec.13(2) of SARFAESI Act dated 18.12.2015 was issued and the receipt of the Notice was acknowledged by the petitioner on 26.12.2015. The borrowers have failed to repay the outstanding dues. Hence, the Bank took possession of the mortgaged properties on 31.03.2016 and notice under Sec.13(4) of the SARFAESI Act was issued to the petitioner and it was also affixed on the premises. Thereafter, sale notice was issued on 13.05.2016 and it was received by the petitioner on 19.05.2016. The sale was scheduled to take place on 29.06.2016. The Sale notice was also published in Newspapers in “ The Indian Express”and “ Dinamani ” on 19.05.2016. After receipt of sale notice, the petitioner assured to repay the entire dues vide his reply dated 27.06.2016. However, he failed to repay the amount. The II schedule property was sold in public auction dated 29.06.2016.

3. After completion of the sale, the petitioner approached the Debts Recovery Tribunal by way of an application, seeking for the following relief:

> "1. ..... to set aside the e-auction sale held on 29.06.2016 under the SARFAESI Act in respect of the properties owned by the applicant, and permit the applicant to redeem the schedule mentioned properties......"

4. The case of the writ petitioner is that he did not receive Demand Notice, Possession Notice and the Sale Notice. The Debts Recovery Tribunal, without considering the grounds, raised by the petitioner and without giving an opportunity to the petitioner to put forth his case, passed the impugned order. According to him, the petitioner's property was sold in violation of mandatory requirements. The Sale is not in conformity with the SARFAESI Act. The petitioner has further submitted that he has got a right to redeem the mortgage.

5. The fourth respondent, auction purchaser has filed his counter. The contention of the fourth respondent is that he participated in the auction and purchased the II schedule property (residential property) for a sum of Rs.40,50,000/-. The petitioner, in order to prevent him from taking possession of the property, lodged a false complaint with Kakkalur Police station and enquiry was conducted by police. The petitioner withdrew his complaint and requested the fourth respondent not to vacate the tenants, who have been in occupation of the property. He permitted the fourth respondent to collect the rents from the tenants and gave a letter to that effect. The fourth respondent has been receiving the rents from the tenants. Patta and electricity connection have been transferred in his name. The petitioner, without exhausting his remedy, available to him before the Debts Recovery Appellate Tribunal, has filed the writ petition and therefore, the writ petition is not maintainable.

6. The Hon'ble Supreme Court in Mathew Varghese vs M. Amritha Kumar and Others (2014) 5 SCC 610), after examination of the procedures required to be followed, held that sale of secured assets in contravention of Rules 8 and 9 of Security Interest (Enforcement) Rules, 2002, would be void.

7. In Authorised Officer, Indian Overseas Bank and another vs Ashok Saw Mill (2009 (8) SCC 366) it has been held that the aggrieved person, including the borrower, aggrieved by any of the measures taken by the secured creditor in terms of Sec.13(4)

of the Act could make an application under Sec.17 of the SARFAESI Act and the Debts Recovery Tribunal is vested with authority to set aside a transaction including sale and to restore possession to the borrower in appropriate cases.

8. In the present case, the sale has taken place in respect of both the schedule of properties. As regards the I schedule property, though sale has taken place, it has not been confirmed for failure of the purchaser to deposit the balance of sale consideration. The sale in respect of II schedule property has been confirmed in favour of the fourth respondent. The sale has taken place on 29.06.2016. Thereafter, the petitioner approached the Debts Recovery Tribunal. The operative portion of the impugned order reads thus:

> "In the above circumstances and factual matrix, the appeal is devoid of any merits and therefore returned by the Tribunal as not maintainable."

9. The Order of the Debts Recovery Tribunal when read closely would leave an impression that the Tribunal refused to consider the case of the petitioner by returning in the threshold itself the application filed by the writ petitioner. Refusal to entertain the case by itself would tantamount to denial of a statutory right available to the petitioner under Sec.17 of the SARFAESI Act. A cursory reading of the order would reveal that the Tribunal was under a misconception inasmuch as what has been challenged is the sale and not sale notice and the period of limitation is to be computed with reference to the sale conducted on 29.06.2016. However, the Tribunal observed that the period of limitation had to be computed from the date of sale notice (i.e, 13.05.2016).

10. The contention of the respondents 2 and 4 is that the petitioner should have approached the Debts Recovery Appellate Tribunal and filed an appeal against the impugned order. The learned counsel for the petitioner submits that writ petition can be maintained in view of the refusal to entertain the application under Sec.17 by the Debs Recovery Tribunal. In this connection, he relied on the judgment in Sheeba Philominal Merlin vs The Repatriates Co-op Finance & development Bank Ltd (2010 (5) CTC 449, wherein, it has been held that the writ petition can be maintained, if authority has acted without jurisdiction, contrary to provision of Act and in violation of Principles of Natural Justice. The learned counsel for the respondents relied on the judgment of this court in Gugan Paper Mills Ltd vs The Presiding Officer, Debts Recovery Tribunal and Others (MANU/TN/2831/2016). In that case, the party without exhausting the remedy under Sec.17 of the Act, invoked the Writ

Jurisdiction, but in the case at hand, the petitioner approached the Tribunal under Sec.17 of the Act. The Tribunal has not considered the application on merits. It is significant to note that the application was not rejected but was only returned. The Debts Recovery Tribunal

refused to entertain the application on the ground that cause of action arose on the date of sale notice (13.05.2016). However, as has already been pointed out, the petitioner has challenged the sale, conducted on 29.06.2016. There is failure on the part of the Debts Recovery Tribunal to address the issues raised by the petitioner touching the sale proceedings. Therefore, we are of the considered view that the Order of the Tribunal could not be sustained. Having regard to the peculiar facts of the present case, we deem it fit to entertain the writ petition.

11. The further contention of the respondents is that the petitioner has lost his right of redemption. In this connection, he relied on a judgment in S. Gnanavadivu and Others vs Abdul Azeez Son and Company and others (MANU/TN/2933/2015), wherein it is held that after the confirmation of sale, in favour of the writ petitioners and issuance of sale certificates, in Law, the "Right of Redemption" in favour of the First Respondent/Borrower is completely erased. The contention of the petitioner is that no notice was served on him before the sale and the sale was not in conformity with the provisions of the SARFAESI Act and Rules. The petitioner would further contend that reserve price for the properties has not been fixed as per Rule 8(5) of the SARFAESI Rules. It is not in dispute that the Bank has not taken actual possession of the II schedule residential property. The auction purchaser has given a letter dated 01.08.2016 to the Bank stating thus " I assure that I will take care of the possession part on myself." The petitioner claims that his tenants are in possession of the property. The disputed questions of fact have to be decided only by the authorities concerned. The Tribunal has not adverted to the challenge that has been raised by the writ petitioner to the sale of the properties and the infirmities in the sale proceedings. These aspects have to be gone into only by the Debts Recovery Tribunal. In these circumstances, this court is of the view that the matter has to go back to the Debts Recovery Tribunal for fresh consideration and we are not expressing any opinion on the merits of the case.

12. For the reasons stated above, the impugned order passed by the Debts Recovery Tribunal is set aside and the Debts Recovery Tribunal is directed to take the case on file and decide the issues raised by the petitioner on merits. It is open

to the parties to raise all legal grounds available to them. With the above directions, the writ petition is disposed of. No costs. Consequently, connected WMPs are closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1. The Registrar,
   Debt Recovery Tribunal,
   No.770-A, Anna Salai,
   V Floor (DBWA Towers),
   Chennai - 2

2. The Authorised Officer,
   Bank of India,
   33/3, First Main Road,
   Gandhi Nagar, Adyar,
   Chennai - 600 020

+1 cc to M/s.S.N.Ravikumar Advocate sr 70274
+1 cc to M/s.O.R.Santhana Krishnan Advocate sr 69894
+1 cc to M/s.K.Balaji Advocate sr 69990

W.P.No.31009 of 2016

aa15/12/2016