IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.12.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.P.No.37638 of 2016
W.M.P.No.32263 of 2016

1. C.Sakthivel
2. S.Saranya .. Petitioners

versus

1. The Authorised Officer,
State Bank of India,
Thennampalayam Branch,
Tiruppur.

2. R.Annathurai

3. The Sub Registrar,
Thottipalayam,
Tiruppur District. .. Respondent

Writ Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorari, calling for the records pertaining to the Sale Certificate issued by the 1st respondent in favour of the 2nd respondent and registered vide, document No.2835/2016 dated 1.7.2016 on the file of Sub Registrar office, Thottipalayam, Tiruppur, in respect of the house property comprised in Survey Nos.339/2 and 339/1 Site No.8, S.V.Avenue, Tiruppur and quash the same.

For Petitioners : Mr.K.Balaji

For 1st Respondent : Mr.S.Sethuraman

For 2nd Respondent : Mr.S.V.Karthikeyan

For 3rd Respondent : No appearance

ORDER

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

Challenge in this writ petition, is to the Sale Certificate issued by the Authorised Officer, State Bank of India, Thennampalayam Branch, Tiruppur, first respondent herein, in favour of the 2nd respondent and registered vide, document No.2835/2016, dated 1.7.2016, on the file of Sub Registrar's Office, Thottipalayam, Tiruppur, the 3rd respondent herein, in respect of the house property comprised in Survey Nos.339/2 and 339/1, Site No.8, S.V.Avenue, Tiruppur.

2. Supporting the prayer sought for, the petitioners, husband and wife, have contended that they have availed credit facilities from the 1st respondent-Bank, by way of mortgage and by deposit of title deeds of their house property. According to them, they were regularly paying the installments. The respondent-bank has issued the notice, dated 05.10.2012, under section 13(2) of the SARFAESI Act, 2002, demanding payment of Rs.24,13,840/-, within sixty days from the date of said notice. The said notice has been issued, without taking into account the actual payments made. There was also a demand of exorbitant rate of interest.

3. The petitioners have further contended that on receipt of notice, under Section 13(2), they requested the Bank to furnish the details of the payments and entries made in their loan account. Inspite of such request, the respondent bank did not co operate and not furnished the same. When the matter stood thus, the Bank issued another notice, dated 13.12.2012, under Section 13(4) of the SARFAESI Act, 2002, claiming a sum of Rs.24,93,456/-. Hereagain, on receipt of such possession notice, the petitioners approached the respondent-bank, as regards non-furnishing of statement of accounts.

4. Subsequently, on 05.09.2016, the second respondent came to petitioners' house and informed them that he had purchased the property on 01.07.2016, mortgaged with the first respondent bank. Immediately, they approached the office of the Sub Registrar, Thottipalayam, Tiruppur, 3rd respondent herein and found that an encumbrance has been created by the respondent bank, in the name of the 2nd respondent. They applied for a copy of such encumbrance and the same was furnished, vide document No.2835/2016, i.e., sale certificate issued by the respondent-Bank, in favour of the 2nd respondent.

5. The petitioners have further submitted contended that the respondent-Bank has not issued any notice or communication, before the issuance of sale certificate. It is also their

contention that no publication was effected, regarding sale cum tender auction, in respect of sale of their properties in daily newspapers. According to them, they came to know about the sale, only in September' 2016.

6. The petitioners have further contended that the respondent-Bank is bound to issue necessary paper publication in leading newspapers and no notice was also served on them. In such circumstances, the petitioners could not approach the Tribunal, to challenge the said sale certificate, in time. The petitioners have further contended that there was undervaluation of the property. Contending that there is a violation of the principles of natural justice and procedural irregularities, the petitioners have filed this writ petition, for the relief, stated supra.

7. The Chief Manager, Thennampalayam Branch, Tirupur, 1st respondent herein, in his counter affidavit, has contended that having failed to avail the alternate remedy, viz., filing of an application under Section 17 of the SARFAESI Act, 2002, within 45 days from the date of Sale certificate, the petitioners have chosen to file this writ petition, in order to overcome the period of limitation. Bank has further submitted that this writ petition is nothing, but an abuse of process of law and the same is liable to be rejected, in liminie.

8. Without prejudice to the above, the 1st respondent-Bank has further submitted that the petitioners availed a term loan of Rs.20,56,000/- on 31.08.2010. To secure the said loan, the petitioners have mortgaged the properties, by depositing the title deeds, pertaining to the property. The term loan has to be repaid in equated monthly installments, which the petitioners failed to adhere and therefore the loan account was classified as Non performing Asset and the petitioners were called upon to repay a sum of Rs.24,13,840/-, by notice, dated 05.10.2012, under Section 13(2) of the SARFAESI Act, 2002, within a period of 60 days. As the petitioners have failed to pay the same, a notice under Section 13(4) of the SARFAESI Act, 2002, was issued on 13.12.2012. Even though the petitioners have received the said notice, they did not settle the amount.

9. The 1st respondent-Bank has denied the contention of the petitioners that they approached the Bank and sought for details. On the contrary, the Bank has contended that at no point of time, the petitioners have approached the bank for settlement and they were only buying time under the pretext of settling the matter. According to the Bank, though the petitioners were given sufficient opportunity to repay the loan amount, it has not been done and therefore, the bank was constrained to issue a Sale Notice, for sale of the mortgaged

property. The 2nd respondent was the successful bidder in the auction sale conducted by the Bank and the property has been sold to him, for a sum of Rs.16,26,000/- and the petitioners are liable to pay the balance amount. Undervaluation has also been denied.

10. On behalf of the Bank, the Chief Manager of the Bank has further contended that due procedure has been followed under the SARFAESI Act, 2002 and the Rules framed thereunder. Sale notice was served and affixed. After issuance of the said notice, paper publication has also been effected. The Bank has denied the contention that the petitioners came to know of the sale, only in September' 2016. For the abovesaid reasons, the Bank has prayed to dismiss the writ petition.

11. Though 3rd respondent has been served, he has not entered appearance.

12. Heard the learned counsel for the parties and perused the materials available on record.

13. Record of proceedings shows that when the matter came up for consideration on 26.10.2016, we passed the following orders,

> "Material on record discloses that for the loan declared as Non-Performing Asset, State Bank of India, Thennampalayam Branch, Tiruppur/first respondent, has issued a notice, under Section 13 (2) of the SARFAESI Act, and thereafter, caused a notice, under Section 13 (4) of the SARFAESI Act, 2002.
>
> 2. Subject property mortgaged with the State Bank of India, Thennampalayam Branch, Tiruppur, has been sold, to the second respondent and a sale certificate, dated 16/9/2016, has also been issued.
>
> 3. Contending interalia that, there was no Notification, in the leading newspapers and that the petitioners are unaware of the notices, issued under Section 13 (2) and 13 (4) of the SARFAESI Act, 2002 and further contending that market value of the subject property, has been under valued, sale certificate, issued by the State Bank of India, in favour of the second respondent and registered, vide document No.2835 of 2016, dated 1/7/2016, on the file of the Sub-Registrar, Thottipalayam, Tirupur, is sought to be quashed, by issuance of a writ of certiorari.

4. Sale certificate issued is consequent to the proceedings, initiated by the first respondent, under the provisions of the SARFAESI Act, 2002. Possession notice under Section 13 (4) of the said Act is appealable, under Section 17 of the SARFAESI Act, 2002, and so also the sale certificate. But the petitioners have not chosen to do so. Instead have filed the present writ petition for a writ of certiorari.

5. During the course of arguments, when Mr.K.Balaji, learned counsel for the petitioners was posed with a question that as against the sale certificate, petitioners could have very well filed an appeal, under the provisions of the SARFAESI Act, 2002, he submitted that in as much as the entire proceedings, initiated by the first respondent Bank was behind the back of the petitioners and that the issuance of the sale certificate was known to them only recently and before the petitioners could take adequate steps, to challenge the same before the forum, the time for filing an appeal has already expired and hence the petitioners are constrained, to file the instant writ petition, invoking Article 226 of the Constitution of India. It is also the submission of the learned counsel for the petitioners that since the subject property mortgaged with the Bank is a house property, where the petitioners are residing, indulgence be extended.

6. Notice to the respondents through Court and privately returnable by 2/11/2016."

14. Credit facilities, by way of financial assistance, has been availed by the petitioners, by way of mortgage and depositing the title deeds, creating security interest, in favour of the Bank. The 1st respondent-Bank has issued a notice, dated 15.10.2012, under Section 13(2) of the SARFAESI Act, 2002, stating that as on 03.10.2012, a sum of Rs.24,13,840/- was due and therefore, by the said notice, demanded payment, failing which, action would be taken under Sub-Section (4) of Section 13 of the SARFAESI Act, 2002. Schedule 'C' to the notice, dated 05.10.2012, under Section 13(2) of the SARFAESI Act, contains the description of immovable properties, offered as secured asset, for the loan availed.

15. Though the petitioners have contended that the Bank had not properly taken into account, the payments made, by way of installments and also charged exorbitant interest and therefore,

they approached the Bank for details, no document has been filed by the petitioners, to substantiate the said averments. Material on record discloses that for non-payment of the said sum with further interest and incidental expenses, within 60 days, from the date of receipt of the notice, dated 15.10.2012, under Section 13(2) of the SARFAESI Act, Bank has issued possession notice, dated 13.12.2012, under Section 13(4) of the said Act, demanding a sum of Rs.24,93,456/-, as on 12.12.2012.

16. Here again, the contention of the petitioners that they approached the Bank and questioned the illegal act of non-furnishing of statement of accounts, is not substantiated. On the contrary, it is the submission of the respondent-Bank that the petitioners have sought for time, on the pretext of settling the matter.

17. According to the respondent-Bank, though sufficient opportunity was given to the petitioners to repay the loan amount, the same was not done and therefore, the Bank was constrained to issue sale notice for sale of the property mortgaged. The 1st respondent-bank has further contended that the sale notice was served, affixed and paper publication was also effected and therefore, they have complied with the statutory requirements. Contention has also been made that the writ petitioners, who have not challenged the possession notice, dated 13.12.2012, under Section 13(4) of the SARFAESI Act, cannot challenge the sale certificate.

18. From the averments made in the supporting affidavit, it could be deduced that the petitioners were aware of the notice, issued under Section 13(4) of SARFAESI Act, 2002. Admittedly, they have not challenged the same. Security Interest (Enforcement) Rules, 2002, have been framed in exercise of the powers conferred by sub-section (1) and clause (b) of sub-section (2) of Section 38 read with subsections (4), (10) and (12) of section 13 of the Act.

19. Rule 4 of the abovesaid Rules, deals with the procedure, after issuance of the notice, under Section 13(2) of the Act and it states that if the amount mentioned in the demand notice is not paid within the time specified therein, the authorised officer shall proceed to realise the amount by adopting any one or more of the measures specified in sub-section (4) of section 13 of the Act, for taking possession of movable property, namely:-

> (1) Where the possession of the secured assets to be taken by the secured creditor are movable property in possession of the borrower, the authorised officer shall take possession of such movable property in the

presence of two witnesses after Panchnama drawn and signed by the witnesses as nearly as possible in Appendix I to these rules.

(2) After taking possession under sub-rule (1) above, the authorised officer shall make or cause to be made an inventory of the property as nearly as possible in the form given in Appendix II to these rules and deliver or cause to be delivered, a copy of such inventory to the borrower or to any person entitled to receive on behalf of borrower.

(3) The authorised officer shall keep the property taken possession under sub-rule (1) either in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as owner of ordinary prudence would, under the similar circumstances, take of such property:

Provided that if such property is subject to speedy or natural decay, or the expense of keeping such property in custody is likely to exceed its value, the authorised officer may sell it at once.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of. (5) In case any secured asset is:-

(a) a debt not secured by negotiable instrument; or

(b) a share, in a body corporate;

(c) other movable property not in the possession of the borrower except the property deposited in or in the custody of any Court or any like authority, the authorised officer shall obtain possession or recover the debt by service of notice as under:-

(i) in the case of a debt, prohibiting the borrower from recovering the debt or any interest thereon and the debtor from making payment thereof and directing the debtor to make such payment to the authorised officer, or

(ii) in the case of the shares in a body corporate, directing the borrower to transfer the same to the secured creditor and also the body corporate from not transferring such shares in favour of any person other than the secured creditor. A copy of the notice so sent may be endorsed to the concerned body corporate's Registrar to the issue or share transfer agents, if any;

(iii) in the case of other movable property (except as aforesaid), calling upon the borrowers and the person in possession to hand over the same to the authorised officer and the authorised officer shall take custody of such movable property in the same manner as provided in sub-rules (1) to (3) above;

(iv) movable secured assets other than those covered in this rule shall be taken possession of by the authorised officer by taking possession of the documents evidencing title to such secured assets."

20. Rule 8(1) of the abovesaid Rules deals with the sale of immovable secured assets and the same is extracted hereunder:

"8. Sale of immovable secured assets.- (1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property."

21. Possession notice, as set out in Appendix 4 of the Rules, is enclosed in the typed set of papers. The other requirements to be complied with, under Rule 8 of the abovesaid Rules, 2002, are as hereunder:

"(2) The possession notice as referred to in sub-rule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspaper one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed off.

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:-

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction; or

(d) by private treaty.

(6) the authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include, -

(a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price, below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) depositing earnest money as may stipulated by the secured creditor;

(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

(7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the website of the secured creditor on the Internet.

(8) Sale by any methods other than public auction or public tender, shall be on such terms as may be settled between the parties in writing."

22. Requirement before effecting sale of the immovable property, under sub-Rule (6) of Rule 8 of the Security Interest (Enforcement) rules, 2002, is that the authorised officer shall serve to the borrower, a clear notice of 30 days, for sale of immovable secured asset, under sub-Rule (5).

23. Though the respondent-Bank has contended that the sale notice, referred to in Sub-Rule (6) of Rule 8 of the said Rules, has been served and publication has also been effected before the sale of the property, mortgaged with the Bank, no materials have been placed before this Court to substantiate the said contention. However, the first respondent-Bank has enclosed a copy of the notice for sale, in the typed set of papers. Upon perusal of the same, we do not find any acknowledgement of the notice, by the petitioners.

24. As per proviso to Sub-Rule (6) of Rule 8 of the abovesaid Rules, if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include, -

(a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price, below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) depositing earnest money as may stipulated by the secured creditor;

(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

25. As per Sub-Rule (7) of Rule 8 of the abovesaid Rules, every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the website of the secured creditor on the Internet. Though the respondent-Bank has contended that paper publication was also issued by the Bank, no materials have been placed before this Court, to substantiate the same.

26. According to the writ petitioners, procedure set out in Rule 8 of the abovesaid Rules, has not been followed, viz., service of notice of 30 days to the borrower for sale of immovable secured asset, under sub-Rule (5), as stated supra and by the time, they came to know about the sale and issuance of sale certificate, time for filing an appeal was over and thus, left with no other remedy, this writ petition was filed.

27. Perusal of the sale notice, shows that the notice, under Section (4) of Section 13 of the SARFAESI Act, dated 13.12.2012, has been issued, calling upon the petitioners to pay a sum of Rs.24,93,456/-, but the amount mentioned in the sale notice, dated 02.03.2016, enclosed in the typed set of papers, filed by the first respondent-Bank, shows that the amount, as on 16.12.2015, was Rs.22,08,828/-, which is lesser than the amount demanded under sub-Section (4) of Section 13 of the SARFAESI Act. As stated supra, the respondent-Bank has not produced any documentary evidence to substantiate the averments, regarding service of notice of sale and paper publication.

28. According to the writ petitioners, they came to know about the issuance of sale certificate only in September' 2016, when the 2nd respondent came to their house on 17.06.2016 and informed them that he had purchased the property, mortgaged with the first respondent bank. No doubt, the petitioners have not challenged the notice, issued under Section 13(4) of the SARFAESI Act, 2002, but it cannot be contended that the petitioners have no right to challenge the sale notice, on the grounds of non-compliance of Rule 8(6) of the Security Interest (Enforcement) Rules, 2016. As rightly contended by the petitioners, had there been sufficient notice, probably, a challenge could have been made, within the period provided therefor, under Section 17(1) of the SARFAESI Act, 2002.

29. As observed earlier, when the factum of service of sale notice and the paper publication, in the manner provided therefor, have not been substantiated before this Court, the writ petitioners, should not be deprived of their legitimate right, under the SARFAESI Act, 2002, to ventilate the grievances.

30. Though the 1st respondent-Bank has contended that in order to overcome the limitation, instant writ petition has been filed, we are not inclined to accept the said contention, in the light of the discussion, on the aspect of service of notice and paper publication. Though ordinarily, taking note of the decision of the Hon'ble Supreme Court in Union Bank of India v. Satyawati Tondon, reported in 2010 (5) LW 193 (SC) and other decisions of this Court in Precision Fastenings v. State Bank of Mysore, reported in 2010(2) LW 86 and Saraspathy Sundararaj v. Authorised Officer and Assistant General Manager, State Bank of India, reported in (2010) 5 LW 560, this Court would not entertain a writ petition, challenging any of the measures, taken under sub-Section (4) of Section 13 of the SARFAESI Act, including a sale certificate, on the facts and circumstances of the case, when service of sale notice and paper publication, stated supra, are disputed and having regard to the additional fact that the immovable property sold is a house property,

belonging to the petitioners and in the absence of the 3rd respondent herein, auction purchaser, not responding to the Rule NISI of this Court, dismissal of this writ petition, on the ground of alternative remedy, would cause serious prejudice to the writ petitioners.

31. In Ponnusamy v. The Debts Recovery Tribunal reported in 2009 (1) LW 954 : 2009 (2) CTC 302 : 2009 (3) MLJ 1271, a learned single Judge of this Court held that Section 5 of the Limitation Act, would apply to applications filed under Section 17 of the SARFAESI Act. At Paragraph 39, this Court held as follows:

> "39. Viewed in the context of the ratio laid down by the Supreme Court extracted above, it could be seen that the right conferred upon the secured creditor under Section 13(4) of the SARFAESI Act, is a right of recovery. The right conferred upon the debtor or the surety under Section 17 is a right to save one's own property. To hold that the fate of a debtor or surety will be sealed in a period of 45 days from the date of initiation of the measures under Section 13(4) and that he would be left remediless after the said period on account of non-availability of Section 5 of the Limitation Act, would defeat the right to property. Therefore the Court has to choose an interpretation which would lean in favour of the right to property. If so done, the conclusion is irresistible that Section 5 of the Limitation Act, would apply to applications filed under Section 17 of the SARFAESI Act."

Both the learned counsel appearing for the parties, are not in a position, to say, as to whether, the judgment in Ponnusamy's case (cited supra), was taken on appeal to the Hon'ble Apex Court and orders, if any passed.

32. In Authorised Officer, Indian Overseas Bank and another v. Ashok Saw Mill reported in 2009 (8) SCC 366, the Hon'ble Supreme Court held that an aggrieved person, including the borrower, aggrieved by any of the measures taken by the secured creditor in terms of Section 13(4) of the Act could make an application, under Section 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.

33. In Mathew Varghese v. M. Amritha Kumar and Others reported in (2014) 5 SCC 610), after examining the procedure required to be followed, the Hon'ble Supreme Court held that sale of secured assets in contravention of Rules 8 and 9 of Security Interest (Enforcement) Rules, 2002, would be void.

34. Dehors the issue, as to whether, the Tribunal has got powers to condone the delay, in exercise of the powers, under Section 5 of the Limitation Act, when an application under Section 17 of the SARFAESI Act, is filed, in exercise of the extraordinary jurisdiction, under Article 226 of the Constitution of India, liberty is given to the writ petitioners to challenge the sale certificate, issued in favour of the 2nd respondent and registered vide, document No.2835/2016, dated 1.7.2016, on the file of Sub Registrar's Office, Thottipalayam, Tiruppur, in respect of the house property comprised in Survey Nos.339/1 and 339/2, Site No.8, S.V.Avenue, Tiruppur and the consequential proceedings, in the manner known to law, within a period of three weeks from the date of receipt of a copy of this order.

35. With the above directions, the writ petition is disposed of. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

skm

To

The Sub Registrar,
Thottipalayam,
Tiruppur District.

+ 1 cc to Mr.S.V. Karthikeyan, Advocate SR.74573
+ 2 ccs to Mr.K. Balaji, Advocate SR.74545
+ 1 cc to Mr.S. Sethuraman, Advocate SR.74601
+ 1 cc to the Government pleader Sr.74814

W.P.No.37638 of 2016

LRS(CO)
EU 04.1.17