

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.12226 OF 2015

M/s. V. Tej Road Lines through its
Prop. Tejas Valji Lodaya ... Petitioner
Vs.
The Special Recovery & Sales Officer attached to
Thane Bharat Sahakari Bank Ltd. and another ... Respondents
WITH
CIVIL APPLICATION NO.2900 OF 2016
IN
CIVIL APPLICATION NO.2184 OF 2016
IN
WRIT PETITION NO.12226 OF 2015

The Special Recovery & Sales Officer attached to
Thane Bharat Sahakari Bank Ltd. ... Applicant

In the matter between
M/s. V. Tej Road Lines through its
Prop. Tejas Valji Lodaya ... Petitioner
Vs.
The Special Recovery & Sales Officer attached to
Thane Bharat Sahakari Bank Ltd. and another ... Respondents
WITH
CIVIL APPLICATION NO.1336 OF 2017
IN
WRIT PETITION NO.12226 OF 2015

Paras Kushal Nisar and another ... Applicants

In the matter between
M/s. V. Tej Road Lines through its
Prop. Tejas Valji Lodaya ... Petitioner
Vs.
The Special Recovery & Sales Officer attached to
Thane Bharat Sahakari Bank Ltd. and another ... Respondents

ALONG WITH
WRIT PETITION NO.12225 OF 2015

M/s. VTR Freight Forwarders through its
Prop. Amita Datta Mane ... Petitioner

Vs.

The Special Recovery & Sales Officer attached to
Thane Bharat Sahakari Bank Ltd. and another ... Respondents

Mr. Uday Warunjikar a/w. Mr. Dilip H. Shukla for Petitioner in Writ Petition No.12225 of 2015 and Writ Petition No.12226 of 2015.

Mr. Ashish Kamat a/w. Mr. Nikhil Rajani i/b. M/s. V. Deshpande & Co. for Applicant in CA.2184 / 2016 and 2900 / 2016 and Respondent No.1 in Writ Petitions No.12225 of 2015 & 12226 of 2015.

Mr. Pankaj R. Thatte for Applicants in Civil Application No.1336 of 2017.

Ms K. R. Kulkarni, AGP for Respondent No.2-State.

CORAM : R. G. KETKAR, J.

DATE : OCTOBER 06, 2017

P.C. :

Heard Mr. Warunjikar, learned Counsel for petitioner in both the Petitions, Mr. Kamat, learned Counsel for Applicant in Civil Application No.2184 of 2016 and Civil Application No.2900 of 2016 and respondent No.1 in Writ Petitions as also Mr. Thatte, learned Counsel for applicants in Civil Application No.1336 of 2017 and Ms Kulkarni, AGP for Respondent-State at length.

2. By Writ Petition No.12226 of 2015 filed under Article 227 of the Constitution of India, petitioner has challenged the order dated 04.06.2015 passed by the learned Chief Metropolitan Magistrate, Esplanade, Mumbai in Case No.545/SA/2014. By that order, the learned Metropolitan Magistrate allowed the application filed by the first respondent, hereinafter referred to as 'Bank', under Rule 107 (11)(d-1)(b) of the Maharashtra Co-operative Societies Rules, 1961 (for short 'Rules') for taking possession of flat No.701, Pranav Apartment, Om Sai Complex, Phase 1, M. G. Road, Mulund (West), Mumbai 400 080 (for short 'suit property'). The learned Magistrate appointed Assistant Registrar of Kurla Centre of Courts, Mumbai as the Court Commissioner to take possession of the suit property and if necessary, by taking such steps and using such force including breaking open the

lock thereof or taking assistance of police, if required, at the expenses of the Bank and deliver possession thereof along with documents / articles, if any, found therein to the authorized officer of the bank after preparing panchnama and taking inventory of the suit property. The Assistant Registrar was directed to report compliance within one month from the receipt of the date of the writ of commission.

3. In support of this Petition, Mr. Warunjikar submitted that petitioner M/s. V. Tej Roadlines had obtained loan from the Bank for which (i) Smt Lodaya Damayanti Valji residing at Flat No.1304, 13th Floor, Building No.B/3, Lok Everest, Mulund, Mumbai - 80, (ii) Mrs Maisheri Bharati Leherchand residing at 701, 7th floor, Pranav Apartment, M. G. Road, Shiv Sena Office, Mulund, Mumbai and (iii) Mr. Lodaya Vijay Valji residing at Flat No.1304, 13th Floor, Building No.B/3, Lok Everest, Mulund, Mumbai - 80 stood sureties. The Bank had obtained recovery certificate against the petitioner and the sureties under Section 101 of the Maharashtra Co-operative Societies Act, 1960 (for short 'Act') on 31.10.2013. On 12.11.2013, Demand Notice under Rule 107(3) was served upon the principal and the sureties calling upon them to pay the sum of Rs.75,52,740.34/-. By order dated 31.01.2014, the suit property was attached as per Section 156 of the Act read with Rule 107(8)(i) of the Rules.

4. Mr. Warunjikar submitted that the proprietor of the petitioner, Tejas Valji Lodaya was arrested on 08.06.2014. He filed Bail Application No.1665 of 2014 for enlarging him. That application was rejected on 15.07.2014. He thereafter filed second bail application bearing Bail Application No.2360 of 2014, which was rejected on 07.11.2014. He submitted that in fact, he was arrested in pursuance of the complaint made by the Bank. He was in jail between 08.06.2014

and 19.05.2015. On 19.05.2015, Tejas Valji Lodaya was enlarged on bail. On 07.12.2014, Bank had published public notice in two newspapers and intimation was allegedly given to the petitioner and the sureties by hand delivery on 09.12.2014. He submitted that the Bank had played fraud in obtaining the order dated 04.06.2015 as admittedly, and to the knowledge of the Bank, Tejas Valji Lodaya was in judicial custody between 08.06.2014 and 19.05.2015. Thus, Tejas was not served personally the possession notice. He submitted that petitioner was not given opportunity when possession notice was issued on 07.12.2014. At that stage, he could have repaid the entire loan amount. The petitioner was not served possession notice as also notice of proceedings in Case No.545/SA/2014. The petitioner acquired knowledge of passing order on 04.06.2015 only on 25.06.2015 when Shri A. D. Kale, Assistant Registrar, Kurla Centre of Courts, Mumbai informed the petitioner and sureties that he will be executing the possession warrant on 24.09.2015 at 2.00 p.m. It is only thereafter on 17.07.2015, application for obtaining certified copy of the impugned order dated 04.06.2015 was made. He submitted that no notice and no opportunity was given to the petitioner for contesting the proceedings before the learned Chief Metropolitan Magistrate. Lastly, he submitted that the petitioner has made payment of Rs.14.50 crores against six loan accounts.

5. During the course of arguments, I enquired from Mr. Warunjikar as to whether petitioner and the sureties challenged the certificate dated 31.10.2013 issued under Section 101 of the Act. I also enquired as to whether the petitioner is ready and willing to pay the outstanding amount as on 15.07.2016, which is to the tune of Rs.10,00,28,000/- (Rs. Ten Crores Twenty Eight Thousand only). Mr. Warunjikar stated that petitioner and the sureties have not challenged the recovery certificate

and that he has no instructions to make statement as regards payment of Rs.10,00,28,000/-.

6. On the other hand, Mr. Kamat relied upon Rule 107 (11)(d-1)(ii) to contend that personal notice is not required to be served on the petitioner. In fact, notice was duly served on - (i) Damayanti Valji Lodaya (mother of Tejas V. Lodaya) and (ii) Vijay Valji Lodaya (brother of Tejas V. Lodaya), who are residing at Flat No.1304, 13th Floor, Building No.B/3, Lok Everest, Mulund, Mumbai - 80, where petitioner is also residing.

7. He further submitted that in terms of Rule 107(d-1) (iii), notice referred to sub-rule (ii) is also published in two newspapers. He submitted that neither the mother of Tejas nor his brother have made any grievance as regards not effecting service of possession notice as also service of proceedings in Case No.545/SA/2014. They have also not approached any Competent Court / Authority challenging the action of the Bank. In any case, on the petitioner's own showing, Tejas was enlarged on bail on 19.05.2015 and after release, did not participate in the proceedings before the learned Magistrate. He, therefore, submitted that no case is made out for interfering with the impugned order.

8. Mr. Thatte submitted that in pursuance of the auction held by the Bank, applicants in Civil Application No.1336 of 0217 have deposited entire sum of Rs.96,50,000/- (after deducting TDS Rs.96,500/- as applicable) towards the auction purchase price. He submitted that in pursuance of the order dated 27.07.2015, Bank has taken symbolic possession of the suit property. Though the applicants have deposited entire amount with the Bank on 21.07.2016, they are still not put in physical possession of the suit property. He, therefore, submitted that no

case is made out for interfering with the impugned order.

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The main grievance of the petitioner is that he was not given opportunity when the possession notice was issued on 07.12.2014 as he was in judicial custody between 08.06.2014 and 19.05.2015. If he had been served with the possession notice, he could have paid the entire outstanding amount of the Bank. The other grievance is that no notice was given of the proceedings before the learned Magistrate, and consequently, he was not heard. In order to appreciate this submission, it is necessary to refer to the relevant provisions of the Act and the Rules. Section 156 deals with the power of the Registrar to recover certain sums by attachment and sale of property. Rule 107 deals with the procedure for attachment and sale of property under Section 156. Rule 107(11)(d-1)(ii) and (iii) reads thus,

“(11) In the attachment and sale or sale without attachment of immovable property, the following rules shall be observed.-

(d-1) (i) ...

(ii) For sale of attached immovable property, the Recovery officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Form “Z” to these rules, to the judgment debtor and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(iii) The possession notice as referred to in sub-rule (2) shall also be published in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the Recovery officer.”

10. In the present case, it is not in dispute that Bank has obtained recovery certificate under Section 101 of the Act on 31.10.2013. Demand Notice under Rule 107(3) was issued on 12.11.2013. The petitioner does not dispute these facts. The suit property was attached under Rule 107(8)(i) on 31.01.2014. It is the case of the petitioner that

he was in judicial custody between 08.06.2014 and 19.05.2015 and that he was not served personally the possession notice. A perusal of Rule 107(d-1)(ii) shows that the possession can be taken by the recovery officer by delivering a possession notice prepared in Form “Z” to the judgment debtor by affixing the possession notice on the outer door or at such conspicuous place of the property. As noted earlier, petitioner is staying along with his mother and brother at flat No.1304, 13th Floor, Building No.B/3, Lok Everest, Mulund, Mumbai - 80. Mother and brother of the petitioner have not made any grievance about non-service of possession notice, or that the Bank has not complied requirements of clause (ii) of sub-rule (d-1) of Rule 107(11). Apart from that, the possession notice was also published in two local newspapers. In view thereof, I do not find any merit in the submission of Mr. Warunjikar that possession notice is required to be personally served on the petitioner, who was in judicial custody.

11. This brings me to his contention that no notice of proceedings before the learned Magistrate was given to the petitioner and consequently, he could not participate. I do not find any merit in this submission as well. The proceedings before the learned Magistrate are not challenged by the mother and brother of the petitioner who are residing at the same address where petitioner also resides. Petitioner has relied upon communication dated 25.06.2015 addressed by A. D. Kale, Assistant Registrar, Kurla Centre of Courts, Mumbai to the Senior Inspector of Police. Carbon copy was sent to 1) Tejas V. Lodaya, 2) Smt. Damayanti Valji Lodaya, 3) Smt. Bharati Leherchand Maisheri and 4) Vijay Valji Lodaya. It is interesting to note that the communication which is marked to Damayanti Valji Lodaya is annexed at exhibit-H (page 77). This fortifies the conclusion that petitioner, Damayanti and Vijay are residing at Flat No.1304, 13th Floor, Building No.B/3, Lok

Everest, Mulund, Mumbai - 80. In view thereof, I do not find that the petitioner had no notice and no knowledge about the proceedings before the learned Chief Metropolitan Magistrate. On the petitioner's own showing, he was enlarged on bail on 19.05.2015. He however did not participate before the learned Magistrate who passed the impugned order on 04.06.2015. Not only that, as on 15.07.2016, petitioner is liable to pay amount of Rs.10,00,28,000/-. The petitioner is not in a position to make any statement as regards payment of this amount. The petitioner has not challenged the recovery certificate as also does not dispute service of demand notice dated 12.11.2013 and passing of attachment order dated 31.01.2014. Considering the totality of the circumstances, I do not find that any case is made out for interfering with the impugned order. Hence, Writ Petition No.12226 of 2015 fails and the same is dismissed.

12. Learned Counsel for the parties submit that in view of the dismissal of Petition No.12226 of 2015, nothing survives in Writ Petition No.12225 of 2015 and the same may also be disposed of. In view thereof, Writ Petition No.12225 of 2015 stands disposed of.

13. Civil Application No.2184 of 2016 is taken out by the Bank for implementing the impugned order dated 04.06.2015 passed by the learned Magistrate. As I have dismissed the Petition challenging the same order, nothing survives in Civil Application No.2184 of 2016 and the same is disposed of accordingly.

14. Civil Application No.2900 of 2016 is taken out by the Bank for recalling the conditional order dated 26.10.2016 to the extent of directing Bank to pay a cost of Rs.10,000/- to Kirtikar Law Library for seeking prdouction. Mr. Kamat states that the costs is deposited and

therefore, he is not pressing this Civil Application. Civil Application No.2900 of 2016 is accordingly disposed of as not pressed.

15. Civil application No.1336 of 2017 filed by the auction purchasers also does not survive in view of the order passed by in the main Petition upholding order dated 04.06.2015. Liberty is reserved to the auction purchasers and Bank to approach the appropriate authority.

16. At this stage, Mr. Shukla orally applies for stay of this order for a period of four weeks from today and assures that within one week from today, petitioner and all the adult family members residing in / using the suit premises will give usual undertaking incorporating therein that,

- (i) that they are in possession of the suit property and nobody else is in possession;
- (ii) that they have neither created any third party interest nor parted with possession;
- (iii) that they will hereafter neither create third party interest nor part with possession;
- (iv) that in case they are unable to obtain suitable orders from higher Court within 4 weeks from today, they will vacate and hand over vacant and peaceful possession of the suit premises to the applicants in Civil Application No.1336 of 2017; and
- (v) that the petitioner shall not seek further extension of ad-interim order.

17. Mr. Thatte opposes extension on the ground that he has already paid entire amount while purchasing the suit property.

18. In view of the fact that the ad-interim order is operating from 27.07.2015 and the petitioner desires to challenge this order before the higher Court, I find that the request made by Mr. Shukla is reasonable.

Hence, notwithstanding dismissal of the Petitions, subject to the petitioner and all the adult family members residing in the suit premises giving undertaking in the aforesaid terms within one week from today with advance copy to the other side, this order shall remain stayed for a period of four weeks from today. It is expressly made clear that no further extension of ad-interim order shall be sought and entertained by this Court.

19. List the matter on 13.10.2017 for 'reporting compliance' as regards filing of undertakings.

(R. G. KETKAR, J.)

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