IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.07.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE TMT.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.10084 of 2017 and
WMP No.11070 of 2017

M.Nazneen ... Petitioner

versus

1.The Authorised Officer
Indian Bank,Thousand Lights Branch,
611, Anna Salai,Chennai - 600 006

2.The Authorised Officer
Indian Bank, ARMB, Ethiraj Salai,
Egmore, Chennai - 600 008

3.K.Chitra ... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for a Writ of Mandamus, to direct the first and second respondents to hand over physical possession of the petitioner's property at Old Door No.3, Shop No.8, GF/6, Rosy Towers, Nungambakkam, Chennai - 600 034 as directed by the Debts Recovery Tribunal - I in its order dated 29.08.2016 passed in S.A.No.51 of 2011.

For Petitioner : Mr.V.Lakshminarayanan
for Mr.Govind Chandrasekhar

For Respondents : Mr.Jayesh B.Dolia for
for M/s.Aiyar & Dolia for RR1 & 2
Mr.Praveen Kumar
for Mr.P.V.Muralidhar for R3

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O R D E R
(made by S.MANIKUMAR, J.)

Borrower has committed default. Bank has recalled the loan facilities and preferred O.A.No.438/1997 before the Debts Recovery Tribunal - I, Chennai. Bank also issued a Possession Notice dated 22.10.2010 followed by a Sale Notice dated 30.11.2010. During the course of hearing Mr.V.Lakshminarayanan, learned counsel appearing for Mr.Govind Chandrasekhar, learned counsel on record for the petitioner, submitted that physical possession of the said property has been taken.

2. Bank issued Sale Notice dated 30.11.2010. Questioning the same, borrower has filed S.A.No.51 of 2011 on the file of the Debts Recovery Tribunal - I, Chennai, under Section 17 of the SARFAESI Act, 2002, to call for the records pertaining to the SARFAESI action initiated by the bank, to set aside the Sale Notice dated 10.01.2011 and the sale conducted on 18.02.2011.

3. Bank has opposed the prayer sought for.

4. The Tribunal framed the following points for consideration:

> (1) Whether the sale notice dated 10.1.2011 issued by the first respondent bank is not in conformity with the mandatory provision of the SARFAESI Act and the rules made thereunder? If so, whether the same can be set aside?
>
> 2. Whether the Auction sale held on 18.02.2011 is valid and sustainable under law?

5. After hearing the learned counsel for the parties, materials on record and considering the statutory provisions, the Tribunal, vide Order dated 29.08.2016, in S.A.No.51 of 2011, ordered, and directed as hereunder:

> " 15. Hence, taking into consideration the aforesaid facts and circumstances and the law laid down in this regard by the Hon'ble Supreme Court of India and the Hon'ble High Courts, it is hereby declared that:
>
> (a) The Sale Notice dated 10.1.2011 issued by the 1st respondent for sale of the secured asset described in the schedule, is not in conformity with the provisions of SARFAESI Act and the rules made thereunder, hence the same is hereby set aside.
>
> (b) Consequently, the auction sale held on 18.2.2011 is liable to be set aside hence the same is hereby set aside.
>
> 16. In view of my above findings, I hereby further order and direct that:
>
> (a) The first respondent shall restore the possession of the secured asset described in the schedule annexed to the application to the applicant herein within 30 days from the date of this order.
>
> (b) The first respondent bank shall refund the entire sale consideration paid by the Auction Purchaser i.e. the 3rd respondent herein, pursuant to the Auction sale held on 18.2.2011 to the 3rd respondent together with prevailing interest payable

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for the Fixed Deposits of a period not less than five years, from the date of the deposit of the entire sale consideration till the date of payment.

c) The third respondent shall return the original title deed of the secured asset and other documents that were handed over to him by the first respondent bank within 30 days from the date of the order, and shall file the compliance memo before this Tribunal.

17. In the result, the appeal is allowed accordingly. No costs."

6. On the basis of the order made in S.A.No.51/2011 dated 29.08.2016 and contending inter alia that right to property is a constitutional right, guaranteed under Article 300-A of the Constitution of India and that respondents 1 and 2 cannot deprive the petitioner of the said right, instant writ petition has been filed for a mandamus directing the first and second respondents, to hand over physical possession of the petitioner's property, Old Door No.3, Shop No.8, GF/6, Rosy Towers, Nungambakkam, Chennai - 600 034 as directed by the Debts Recovery Tribunal - I in its order dated 29.08.2016 passed in S.A.No.51 of 2011.

7. Record of proceedings shows that earlier when the matter came up for hearing on 07.07.2017, on behalf of the Auction Purchaser/Respondent No.3, submission has been made that after taking possession, considerable expenditure has been incurred for renovation and regular works. Learned counsel for the Auction Purchaser/respondent No.3 further submitted that she would be willing to settle the disputes provided the borrower, agrees to pay the expenditure incurred.

8. Subsequently, when the matter came up for further hearing on 27.07.2017, Mr.Praveen Kumar, learned counsel appearing for Mr.P.V.Muralidhar, counsel on record for the Auction Purchaser/respondent No.3 submitted that he has incurred expenses for Registration charges and that if the bank agrees to pay the same, he would explore the possibility of settlement. According to him, a sum of Rs.28,50,000/- has been deposited with the bank towards sale consideration.

9. Mr.V.Lakshminarayanan, learned counsel appearing for the borrower submitted that his client would pay the sale consideration to the bank and the repair works.

10. However, Mr.Jayesh B.Dolia, learned counsel for the bank prayed for time, to ascertain as to whether money, more than the above, is still payable by the borrower, and also to verify as to whether any appeal is filed against S.A.No.51 of 2011 on the file of Debts Recovery Appellate Tribunal, Chennai.

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11. Reverting Mr.Jayesh B.Dolia, learned counsel for the bank submitted that other than the above said amount, no money is due and payable. However, he submitted that as against the directions of the Debts Recovery Tribunal - I, Chennai, an appeal has been preferred before DRAT, Chennai in AIR No.396/2016. Deficit court fee pointed out by the DRAT, Chennai has been paid on 05.07.2017. According to him, when the bank has exercised the right to challenge an order passed by the DRT, the appeal should come to a logical end and at this stage, mandamus if any issued, the same would scuttle the process taken.

12. Per contra, Mr.V.Lakshminarayanan, learned counsel for the borrower submitted that possession has been taken on 11.07.2016 and despite an order made in S.A.No.51 of 2011, for more than one year, bank has not taken any steps. According to him, as per the order dated 29.08.2016 passed in S.A.No.51 of 2011, the bank ought to have handed over the property, and when there is failure on the part of the bank to do so, mandamus would lie.

13. Learned counsel for the bank further submitted that, earlier bank filed O.A.No.438/1997 on the file of DRT-I, Chennai, for recovery of a sum of Rs.54,57,830/- together with interest with monthly rests from the date of OA till realisation. Vide order dated 31.01.2017, OA has been allowed with a direction to issue Recovery Certificate, in favour of the applicant bank, in terms of the final order. The said order has not been challenged by the borrower. Realising the balance amount, the bank was constrained to issue a Sale Notice dated 30.11.2010, which is challenged in S.A.No.51/2011. He further contended that if for any reason, the Debts Recovery Tribunal has set aside the auction notice and sale, nothing prevented the bank from bringing the property once again for auction.

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

14. True that right to property, is a constitutional right under the Constitution of India. Borrower has suffered an order in O.A.No.438/1997 dated 31.01.2017. As per the provisions of the SARFAESI Act, 2002, bank is entitled to take any measures under Section 13(4) of the SARFAESI Act, 2002 such as (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset; (b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset: PROVIDED that the right to transfer by way of lease, assignment

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or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt: PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt. (c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor; (d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

15. Material on record discloses that Possession Notice dated 22.10.2010 under Section 13(4) of the SARFAESI Act, 2002 and Rules 8 & 9 of the Rules, has been issued in respect of the property, namely, land building bearing shop premises at Old Door No.3, then7 present Shop NO.8/GF/6, Rosy Towers, Nungambakkam High Road, also known as Uthamar Gandhi Salai, Madras 34 measuring a plinth area of 330 sq ft together with an undivided 360/58000 sq ft share in the entire land of 7.50 grounds comprised in R S No.146 Nungambakkam Village is bounded on North by, Dr.Thirumurthy Road, South by, Smt.T.R.Alamelu Ammal Property, East by, Nugambakkam High Road and Petrol Bunk and Est by, Sri Paramanandam property.

16. Physical possession is stated to have been taken on 11.07.2016. Sale Notice dated 30.11.2010 has been challenged in S.A.No.51 of 2011 by the borrower and after contest, finding that there are some irregularities, and placing reliance on the decision of the Hon'ble Supreme Court in Mathew Vargheese v. M.Amirtha Kumar and others reported in 2014 (5) SCC 610, vide Order dated 29.08.2016, DRT-I, Chennai, has set aside the Sale Notice dated 10.01.2011 and the sale which took place on 18.02.2011 issued directions as stated supra.

17. S.A.No.51/2011 has been decided on 29.08.2016. Statutory appeal under Section 18 of the Act has been filed on 22.07.2016. From the arguments of the learned counsel for the bank, it could be deducted that earlier proper court fee has not been paid. On 05.07.2017 balance court fee has been paid. Appeal preferred by the bank is in the process. When recovery of public money is invovled, and when the bank has exercised its statutory right, challenging the order made in S.A.No.51/2011, as rightly contended, the same has to reach its logical conclusion. There is no delay on the part of the bank in filing appeal. Mandamus sought if issued, would scuttle the right of bank in seeking to set aside the original order in S.A.No.51 of 2011.

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18. Though Mr.V.Lakshminarayanan, learned counsel for the borrower has opposed that the bank cannot be allowed to prosecute the right of appeal without any time, endlessly, on the facts and circumstances of this case, we are not inclined to accept the said submission, as the bank has filed the appeal in time. But there appears to be some delay, in payment of deficit court fee.

19. Yet another factor to be taken note of is that even taking it for granted DRT has set aside the Auction Notice dated 10.1.2011 and sale held on 18.2.2011, right of the bank to bring the property for auction once again, is not taken away. On the contra, bank has filed an appeal, the bank has reiterated still that the procedure followed for bringing the property for auction by sale notice dated 10.01.2011 and sale held on 18.02.2011 in accordance with the statutory provisions.

For the above said reasons, writ petition is dismissed. However, there shall be no order as to cost. Conequently, the connected writ miscellaneous petition is closed. Appeal filed against the order dated 29.08.2016 made in S.A.No.51/2011 is stated to be listed before the DRAT on 04.08.2017. Appellate Authority is requested to expedite the disposal of the proceedings.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

asr
To

1.The Authorised Officer
Indian Bank,Thousand Lights Branch,
611, Anna Salai,Chennai - 600 006

2.The Authorised Officer
Indian Bank, ARMB, Ethiraj Salai,
Egmore, Chennai - 600 008

+1cc to Mr.Aiyar & Dolia, Advocate, S.R.No.53894

W.P.No.10084 of 2017
and
WMP No.11070 of 2017

PVS(CO)
GN(31/08/2017)

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