

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.10.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P.No.5187 of 2017
and WMP No.5475 of 2017

K.S.Sriram

... Petitioner

vs.

1. Indbank Housing Limited,
Rep. by its Authorised Officer,
Khivraj Complex-I,
No.480, Anna Salai, 3rd Floor,
Chennai - 600 035.

2. The Debts Recovery Appellate Tribunal,
4th Floor, Indian Bank Circle Office,
No.55, Ethiraj Salai,
Chennai - 600 008.

... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorarified Mandamus, calling for the records in AIR No.215 of 2011 dated 17.01.2017 on the file of the 2nd respondent and quash the same and direct the Honourable Debts Recovery Tribunal to take on file the application in AIR No.215/2011 without any pre-deposit

For Petitioner : Mr.G.Ashokapathy
for M/s.Pass Asso.

For Respondents : Mr.Krishna Srinivasan (for R1)
for M/s.Ramasubramanian Asso.

ORDER

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

Challenge in this writ petition, is to the proceedings dated 17.01.2017 in I.A.No.36 of 2012 in AIR No.215 of 2011 on the file of the Debts Recovery Appellate Tribunal, Chennai, by which, the tribunal, taking note of the payment of Rs.22.83 Lakhs; sale of the mortgaged property in the year 2008, for a

sum of Rs.34.20 Lakhs, sale certificate issued on 11.07.2008, creating a third party interest, and for the purpose of appeal, holding that the debt amount, as Rs.22.83 Lakhs, directed the writ petitioner, to deposit a sum of Rs.11.45 Lakhs, as pre-deposit, in the name of the Registrar, Debts Recovery Appellate Tribunal, Chennai, within four weeks from the date of the proceedings dated 17.01.2017, to entertain the appeal. While doing so, the Debts Recovery Appellate Tribunal, Chennai, has also categorically observed that, in the event of failure to make pre-deposit of the said sum within four weeks, application, viz., I.A.No.36 of 2012, filed for waiver would stand dismissed and consequently, appeal in AIR No.215 of 2011, would also be rejected. Debts Recovery Appellate Tribunal, has directed Registry of the tribunal, to list the matter on 20.02.2017 for confirmation of pre-deposit. Writ petition has been filed on 28.02.2017.

2. Material on record discloses that the petitioner has availed housing loan of Rs.5 Lakhs from Indbank Housing Limited, Chennai, in 1994. There was default in repayment. Bank has instituted O.S.No.211 of 1997 for recovery, on the file of the learned Sub Judge, Palani. On 28.04.1997, a preliminary decree has been passed. Final decree has been passed on 25.10.1999. E.P.No.71 of 2004 has been filed before the said Court. When respondent has been notified as a financial institution, as per the provisions of SARFAESI Act, 2002, Bank has issued notice under Section 13(2) of the SARFAESI Act, 2002. W.P.No.5427 of 2006 has been filed before the Madurai Bench of Madras High Court, in which a conditional order has been passed, directing the respondent/petitioner herein, to deposit a sum of Rs.11 Lakhs, within a period of four months.

3. Supporting affidavit to this writ petition further reads that subsequently, petitioner has filed S.A.No.25 of 2017, on the file of Debts Recovery Tribunal-II, Chennai, challenging possession notice dated 18.09.2006, issued under Section 13(4) of the SARFAESI Act. Stay of possession notice was granted, on condition that the petitioner should pay a sum of Rs.1 Lakh, which is stated to have been paid, by bankers' Pay Order dated 26.10.2006. On 11.01.2008, an exparte order of dismissal was made in S.A.No.25 of 2007. To set aside the said exparte order, an application was filed. On 30.01.2008, the tribunal ordered restoration of S.A.No.25 of 2007, by directing the petitioner to deposit a sum of Rs.4 Lakhs. But, the petitioner could deposit only Rs.2 Lakhs and in I.A.No.248 of 2008, extension of time was sought for.

4. I.A.No.248 of 2008 was allowed and time was extended to pay the balance amount of Rs.2 Lakhs till 28.04.2008. As the petitioner could not comply with the conditional order, I.A.No.248 of 2008 has been dismissed.

5. Petitioner has filed I.A.Sr.No.2857 of 2008 in S.A.No.25 of 2007 to recall the order dated 28.04.2008, wherein, stay was vacated. Said application was also dismissed on 09.07.2008. According to the petitioner, by virtue of interim orders, he has made payment of Rs.9.50 Lakhs. When sale notice dated 29.04.2008, was issued by the bank, the same was challenged in S.A.No.42 of 2010. On 04.05.2010, DRT-III, dismissed S.A.No.25 of 2007.

6. Being aggrieved, petitioner has filed an appeal in AIR No.215 of 2011 alongwith I.A.No.36 of 2012, for a prayer, to waive pre-deposit. It is the contention of the writ petitioner that while directing pre-deposit, payment of Rs.9,50,000/- made periodically, has not been taken note of by the Debts Recovery Appellate Tribunal, Chennai. Petitioner has also contended that the appellate tribunal, has failed to see the merits of the case.

7. Heard Mr.Krishna Srinivasan, learned counsel for the bank and perused the materials available on record.

8. Though, before this Court, petitioner has contended that he had made payments to the tune of Rs.9.50 Lakhs, which the Debts Recovery Appellate Tribunal, Chennai, has not taken note of, perusal of the supporting affidavit filed to I.A.No.36 of 2012 in AIR No.215 of 2011 on the file of Debts Recovery Appellate Tribunal, Chennai, does not disclose details of payments made, and therefore, in the absence of averments and proof thereof, it cannot be said that the Debts Recovery Appellate Tribunal, Chennai, has committed any error. Courts/Tribunals, cannot be allowed to be blamed, if the litigant fails to make averments and adduce, supportive evidence, substantiating the averments. It is also the settled principle of law that mere averments do not satisfy the test of proof, without evidence.

9. What is challenged before us, in this writ petition, is an interim order passed in I.A.No.36 of 2012 filed for waiver. For brevity, the order is extracted hereunder.

PROCEEDINGS DATED 17.01.2017

M.Muthukumaran Ld. Counsel for the Appellant is present.

Kavitha representing S.Ramasubramaniam & Associates for the Respondent is present.

This Application IA 36/2012 has been filed by the Appellant to waive the pre deposit as required under Section 18(1) of the SARFAESI Act.

The Appellant has challenged the Order dated 4.5.2010 passed by the DRT-II, Chennai in SA.42/2010.

Ld. Counsel for the Appellant submits that notice under Section 13(2) was issued by the Authorised Officer

of the Respondent Bank demanding Rs.22.83 Lakhs and odd.

In response, the Ld. Counsel for the Respondent Bank submits that the property has already been sold in the year 2008 for sum of Rs.34.20 Lakhs and Sale Certificate has also been issued on 11.7.2008 by creating a 3rd party interest.

Admittedly, DRAT cannot entertain the Appeal, I hereby hold the debt amount to be Rs.22.83 Lakhs and accordingly direct the Appellant to deposit Rs.11.45 Lakhs within four weeks because no good ground is made out of waiver of amount.

For the aforesaid, the Appellant is directed to deposit a sum of Rs.11.45 lakhs in the name of Registrar, DRAT, Chennai, within four weeks from today, failing which the Application shall automatically stand dismissed, and consequently, the Appeal shall stand rejected.

List on 20.2.2017, for confirmation of pre deposit."

10. Perusal of the above, shows that under 13(2) notice, bank has demanded a sum of Rs.22.83 Lakhs. Subsequently, bank has sold the property, in the year 2008, for a sum of Rs.34.20 Lakhs. Sale certificate has been issued on 11.07.2008, by creating, a third party interest.

11. Tribunal has also ordered that a sum of Rs.10,96,447/- being the balance of sale proceeds be deposited to the Debts Recovery Officer, DRT-II, Chennai in O.A.No.1131 of 2001, in the matter of Punjab & Sind Bank Vs. Gremac Tea & Estates Ltd, pursuant to the order of Debts Recovery Tribunal-II, dated 14.05.2008. Supporting averments, to this writ petition, do not indicate, as to whether the petitioner, has taken steps to realize the balance amount.

12. Based on the demand of the bank, for tune of Rs.22.83 Lakhs, DRAT, Chennai, has directed the writ petitioner to deposit 50% of the debt amount i.e. 11.45 Lakhs, within a period of four weeks from the date of the proceedings dated 17.01.2017. Debts Recovery Appellate Tribunal, Chennai has directed dismissal of I.A.No.36 of 2012 filed for waiver, if the conditional order, is not complied with and consequential rejection of the appeal, if there is any default. Registry of DRAT, has been directed for listing of the matter on 20.02.2017. Writ petition has been filed on 28.02.2017. As per the interim orders, dated 17.01.2017, finality of the proceedings, would have reached on 20.02.2017, by which date, I.A.No.36 of 2012 would have been dismissed, and consequently, appeal, would have been rejected. There are no materials to indicate as to whether the final order made in AIR No.215 of 2011, has been challenged.

13. Needless to state that challenge to interim order does not survive, when the main appeal is rejected. If there was any challenge to the order of rejection of appeal, and ultimately, if such rejection is set aside, for any reasons, then orders, if any passed at the interim stage, would revive, but in our considered opinion, converse, is not permissible.

14. Third party right has been created, as early as on 11.07.2008. Petitioner has not complied with the interim / conditional order. For the reasons stated supra, challenge made in this writ petition, has already reached finality. For the reasons stated supra, writ petition is dismissed. No costs. Consequently, the connected Writ Miscellaneous Petition is closed.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

ars

To

The Debts Recovery Appellate Tribunal,
4th Floor, Indian Bank Circle Office,
No.55, Ethiraj Salai,
Chennai - 600 008.

1 cc to Mr.S. Ramasubramanian Associates, Sr. 71231

1 cc to Pass Associates, Advocate, Sr. 71274

W.P.No.5187 of 2017
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