

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 5/7/2017

C O R A M

The Honourable Mr.Justice S.Manikumar

a n d

The Honourable Ms.Justice V.Bhavani Subbaroyan

Writ Petition No.11333 of 2017

R.Sathyannarayanan ... Petitioner

Vs

1. The State Bank of India
rep. by its Chief Manager
Retail Assets Central Processing Centre
(RACPC)
Door No.D128, III & IV Floors
D Block, Plot No.676
First Main Road, Near Chintamani Circle
Anna Nagar East
Chennai 600 102.

2. M. Naveen. ... Respondents

Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of mandamus to forbear the first respondent, their men, agents, servants, subordinates, or anybody acting on their behalf from in any way interfering with the peaceful possession and enjoyment of Old No.18, New No.10, Kamaraj 6th Street, West Gandhi Nagar, Avadi, Chennai, comprised in No.3, Punjai S.No.166/1A part as per T.S.Avadi to an extent of 1333 sq.ft of land and residential building constructed thereon in ground and first floor, situated in Villinjiambakkam Village, Poonamallee Taluk, Tiruvallur District.

For petitioner ... Ms.Selvi George

For respondents ... M/s.L.Poompavai for R1
No appearance (R2)

O R D E R

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

Borrower, who could not pay the monthly instalments due and payable to State Bank of India, Chief Manager, Retail Assets Central Processing Centre (RACPC), Anna Nagar East, Chennai, has sought for a writ of mandamus, directing the Bank and the auction purchaser/second respondent, from in any way, interfering with his peaceful possession and enjoyment of land in Old No.18, New No.10, Kamaraj 6th Street, West Gandhi Nagar, Avadi, Chennai, comprised in No.3, Punjai S.No.166/1A part as per T.S.Avadi to an extent of 1333 sq.ft of land and residential building constructed thereon, in ground and first floor, situated in Villinjiambakkam Village, Madura Avadi.

2. According to the petitioner, though he has settled the dues, as early as, in the year 2012, Bank has not come forward, to accept the same and after a lapse of 5 years fixed, a reduced upset price of Rs.30,37,000/-, though in the year 2012, the property was valued at Rs.39,36,000/-. According to the petitioner, as on 26/1/2017, Bank is entitled to a sum of Rs.2557,510/- only. Bank has sold the property to a lesser price. Added further, Ms.Selvi George, learned counsel for the petitioner submitted that though the first respondent, knew the address of the writ petitioner, no notice was served before bringing the property for auction.

3. Heard Ms.Selvi George, learned counsel for the petitioner and perused the materials available on record.

4. On 5/1/2016, demand notice under Section 13 (2) of the SARFAESI Act, 2002 has been issued to the borrower at No.18 Kamaraj Street, 6th Cross, West Gandhi Nagar, Avadi, Chennai, demanding payment of Rs.21,77,878.08, on 31/12/2015. Subsequently, possession notice, dated 26/4/2016, under Section 13 (4) of the SARFAESI Act, 2012 has been issued to the borrower.

5. On 3/10/2016, e-auction sale notice has been issued, fixing the auction on 15/2/2017. As there was no bidder, another e-auction notice, dated 27/1/2017 has been issued, followed by a paper publication, on 29/1/2017. Second respondent is stated to be the auction purchaser. Subject property under e-auction notice has been sold for Rs.30,57,000/- Thereafter, State Bank of India, Retail Assets Central Processing Centre (RACPC), Anna Nagar East, Chennai, vide letters dated 23/2/2007 and 23/3/2007, has requested the borrower, to vacate the house, so as to handover the same to the bidder-cum-Purchaser, no sooner, sale registration process is

completed. Letters, dated 23/2/2017 and 23/3/2017 have been addressed to the borrower, with Singapore address.

6. Though Ms.Selvi George, learned counsel for the writ petitioner submitted that notices under Section 13 (2) and 4 of the SARFAESI Act, 2002, respectively, have not been served on the borrower, and that there is a violation of principles of natural justice and further contended that property has been sold at a throw away price, from the material on record, it could be deduced that none of the proceedings have been challenged before the Tribunal, in the manner known to law.

7. When the petitioner is able to produce the copy of the possession notice, issued under Section 13 (4), e-auction notice, as stated supra, nothing prevented him from challenging the same before the Tribunal.

8. Mandamus cannot be issued, to scuttle the proceedings initiated and completed, in exercise of powers under a statute. Prayer sought for in the writ petition, to forbear the first respondent from in any way interfering with the petitioner's peaceful possession and enjoyment would in effect nullify the action taken by the Bank, under the provisions of the SARFAESI Act. Mandamus cannot be a substitute to certiorari.

9. Writ of mandamus cannot be issued merely because, a person is praying for. One must establish the right first and then he must seek for the prayer to enforce the said right. If there is failure of duty by the authorities or inaction, one can approach the Court for a mandamus. The said position is well settled in a series of decisions.

(a) In the decision reported in (1996) 9 SCC 309 (State of U.P. and Ors. v. Harish Chandra and Ors.) in paragraph 10, the Apex Court held as follows:

10. ...Under the Constitution a mandamus can be issued by the court when the applicant establishes that he has a legal right to the performance of legal duty by the party against whom the mandamus is sought and the said right was subsisting on the date of the petition....

(b) In the decision reported in (2004) 2 SCC 150 (Union of India v. S.B. Vohra) the Supreme Court considered the said issue and held that 'for issuing a writ of mandamus in favour of a person, the person claiming, must establish his legal right in himself.

Then only a writ of mandamus could be issued against a person, who has a legal duty to perform, but has failed and/or neglected to do so.

(c) In the decision reported in (2008) 2 SCC 280 (Oriental Bank of Commerce v. Sunder Lal Jain) in paragraphs 11 and 12 the Supreme Court held thus,

11. The principles on which a writ of mandamus can be issued have been stated as under in The Law of Extraordinary Legal Remedies by F.G. Ferris and F.G. Ferris, Jr.:

Note 187.-Mandamus, at common law, is a highly prerogative writ, usually issuing out of the highest court of general jurisdiction, in the name of the sovereignty, directed to any natural person, corporation or inferior court within the jurisdiction, requiring them to do some particular thing therein specified, and which appertains to their office or duty. Generally speaking, it may be said that mandamus is a summary writ, issuing from the proper court, commanding the official or board to which it is addressed to perform some specific legal duty to which the party applying for the writ is entitled of legal right to have performed.

Note 192.-Mandamus is, subject to the exercise of a sound judicial discretion, the appropriate remedy to enforce a plain, positive, specific and ministerial duty presently existing and imposed by law upon officers and others who refuse or neglect to perform such duty, when there is no other adequate and specific legal remedy and without which there would be a failure of justice. The chief function of the writ is to compel the performance of public duties prescribed by statute, and to keep subordinate and inferior bodies and tribunals exercising public functions within their jurisdictions. It is not necessary, however, that the duty be imposed by statute; mandamus lies as well for the enforcement of a common law duty.

Note 196.-Mandamus is not a writ of right. Its issuance unquestionably lies in the sound judicial discretion of the court, subject always to the well-settled principles which have been established by the courts. An action in mandamus is not governed by the principles of ordinary litigation where the matters alleged on one side and not denied on the other are taken as true, and judgment pronounced thereon as of course. While mandamus is classed as a legal remedy, its issuance is largely controlled by equitable principles. Before granting the writ the court may, and should, look to the larger public interest which may be concerned-an interest which private litigants are apt to overlook when striving for private ends. The court should act in view of all the existing facts, and with due regard to the consequences which will result. It is in every case a discretion dependent upon all the surrounding facts and circumstances.

10. When a Writ of Mandamus can be issued, has been summarised in Corpus Juris Secundum, as follows:

"Mandamus may issue to compel the person or official in whom a discretionary duty is lodged to proceed to exercise such discretion, but unless there is peremptory statutory direction that the duty shall be performed mandamus will not lie to control or review the exercise of the discretion of any board, tribunal or officer, when the act complained of is either judicial or quasi-judicial unless it clearly appears that there has been an abuse of discretion on the part of such Court, board, tribunal or officer, and in accordance with this rule mandamus may not be invoked to compel the matter of discretion to be exercised in any particular way. This principle applies with full force and effect, however, clearly it may be made to appear what the decision ought to be, or even though its conclusion be disputable or, however, erroneous the conclusion reached may be, and although there may be no other method of review or correction provided by law. The discretion must be exercised according to the established rule where the

action complained has been arbitrary or capricious, or based on personal, selfish or fraudulent motives, or on false information, or on total lack of authority to act, or where it amounts to an evasion of positive duty, or there has been a refusal to consider pertinent evidence, hear the parties where so required, or to entertain any proper question concerning the exercise of the discretion, or where the exercise of the discretion is in a manner entirely futile and known by the officer to be so and there are other methods which it adopted, would be effective." (emphasis supplied)

11. A prerogative writ, like, a Mandamus cannot be demanded ex debito justitiae, but it can be issued by the court, in its discretion, for which, it must be shown that, there is a non discretionary legal duty upon the authority against whom, relief is sought for and that the person approaching the High Court under Article 226 of the Constitution of India, has to prove that he has a legal right to be enforced against the authority, for the failure of performance of a legal or statutory duty, by the authority against whom, the relief is sought for.

12. In the light of the discussion and decisions stated supra, this Court is of the view that writ of mandamus is not maintainable.

13. Accordingly, this writ petition is dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS VI)

//True Copy//

Sub Assistant Registrar

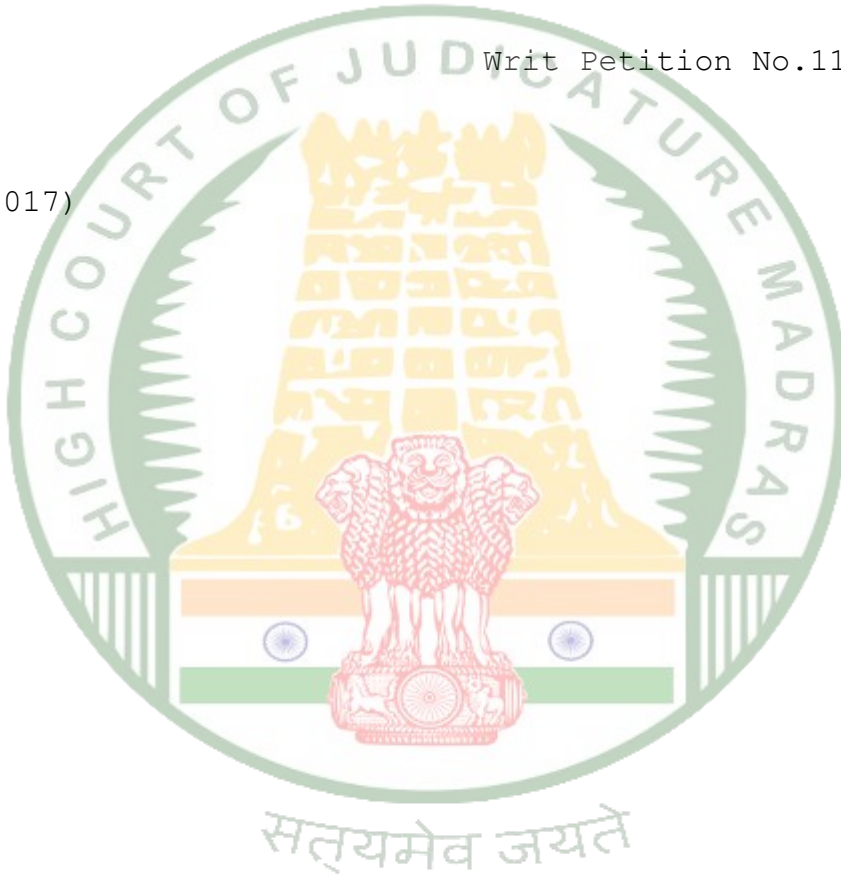
mvs

To

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KJ(CO)
CU(26/07/2017)



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