IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26/7/2017

C O R A M

The Honourable Mr.JUSTICE S. MANIKUMAR
and
The Honourable Mrs.JUSTICE V. BHAVANI SUBBAROYAN

Writ Petition No.19031 of 2017

1. A. Panner Selvam

2. V.Radha ... Petitioners

Vs

1. The Authorized Officer
Standard Chartered Bank
No.19 Rajaji Salai
Chennai 600 001.

2. The Authorized Officer,
Phoenix ARC Private Limited
7th Floor, Dani Corporate Park
158 GST Road
Kaline Santa Cruz (East)
Mumbai 400 098.

3. R.Mahesh ... Respondents

Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of certiorarified mandamus to call for the records relating to M.A (SA) No.4 of 2013, dated 11/5/2017, on the file of the Debts Recovery Appellate Tribunal, Chennai, and quash the same.

For Petitioner ... Mr.V.R.Karthikeyan

O R D E R

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

The first petitioner has availed personal loan from Standard Chartered Bank, Chennai/first respondent, in 2004. As he could not re-pay the loan, Bank threatened. He was constrained to lodge a complaint with the Police against the officials of the Bank. A compromise was worked out. The petitioner has further contended that the first respondent assigned loan to Phoenix ARC Private Limited, Mumbai/second respondent. Though no possession notice was served, the second respondent, brought the property for sale. There were no bidders. An other sale notice was issued, pursuant to which property was sold to the third respondent. Sale certificate, dated 28/7/2011 was issued, and registered as Document No.963 of 2011, on the file of the Sub-Registrar, Sowcarpet.

2. Third respondent has filed a suit, in O.S.No.6978 of 2011, on the file of the City Civil Court, against the writ petitioner, for a permanent injunction, restraining the petitioner from disturbing with the peaceful possession of the property and obtained an interim ex parte order.

3. Writ petitioner, filed S.A.SR.No.6530/2011, on the file of the Debts Recovery Tribunal - I, Chennai, to condone the delay of 315 days, in filing an application, under Section 17 (1) of the SARFAESI Act, 2002. Simultaneously, he has filed S.A.SR.No.6531 of 2011, to set aside the sale certificate. In S.I.A.SR.No.6531 of 2011, Phoenix ARC Private Limited, Mumbai/second respondent, the second respondent contended that the writ petitioner has availed housing loan/Motor vehicles loan of Rs.13.50 lakhs in December 2004 from first respondent Bank and created security interest over the schedule property, in favour of the first respondent Bank.

4. As the writ petitioner committed default in repayment of dues, the first respondent Bank, enforced the security interest and issued demand notice, dated 9/8/2005, under Section 13 (2) of the SARFAESI Act, 2002, calling upon the applicant's therein in S.I.A.SR.No.6531/2011, to pay the outstanding balance of Rs.14,21,107.85/- as on 21/7/2005. According to the second respondent, demand notice was duly served on the applicants therein, and despite the same, they have not discharged their liability within the stipulated time.

5. Before the Debts Recovery Tribunal - II, Chennai, it was also the contention of the second respondent that the first respondent had obtained an order, on 10/7/2006, in Crl.M.P.No.2073/2006, from the learned Chief Metropolitan Magistrate, Chennai, to take physical possession of the property. In the meantime, the first respondent Bank assigned the debts of the applicants/writ petitioners, in favour of the second respondent, vide Assignment Agreement, dated 17/12/2008.

6. Before the Tribunal, contention has been made by the second respondent that notice, under Section 13 (4) of the SARFAESI Act, 2002, dated 10/7/2010, was issued. Possession notice issued was delivered to the writ petitioners, affixed on the secured asset and published in two daily newspapers, as required under Rule 8 (1) and (2) of the Security Interest

(Enforcement) Rules, 2002. As the petitioners, did not repay the dues, sale notice, dated 22/11/2010, was issued and the same was also served on the writ petitioner, affixed on the secured asset and published in two daily newspapers. Sale did not take place, for want of bidders. Therefore, the authorised officer of the second respondent, issued the second sale notice, dated 17/1/2011, fixing the sale, on 18/2/2011. Second sale notice was served, affixed on the secured asset and published in two dailies. In the auction held, on 18/2/2011, the property was sold to the third respondent, for a sale consideration of Rs.20,52,000/- and that sale certificate, dated 19/5/2011 was also issued. Sale certificate was also duly registered in the office of the Sub-Registrar, Sowcarpet. The second respondent has submitted that the applicants therein, were fully aware of the action taken by the second respondent, under the provisions of the SARFAESI Act, 2002 and that therefore, writ petition has to be dismissed.

7. After hearing the learned counsel appearing for the writ petitioners as well as the second respondent, the Presiding Officer, Debts Recovery Tribunal - II, Chennai, vide order, dated 2/3/2012, in S.A.No.6531 of 2011 in S.A.SR.No.6530/2011, at paragraph Nos.4.2 and 4.3 of the order, held as follows:-

> "4.2. The applicants in the SARFAESI application have stated that they deposited the title deeds pursuant to the compromise worked out between the applicants and the first respondent Bank. If such contention raised by applicants is true, nothing prevented them from lodging a complaint against the Manager of the first respondent Bank to his higher official or prefer a complaint to the local Police. The applicants who remained a silent spectator for about 7 years, have now pleaded that they did not create a valid mortgage in favour of the first respondent Bank. The first applicant sent letter dated 3/1/2011 to the second respondent, which is subsequent to the first sale notice issued by the second respondent, proves the fact that, the applicants had full knowledge about the action taken by the first and second respondents. Further the R.2 had sent a reply to the notices sent by the applicant through their counsel on 27/1/2011 which is at page 6 of the SARFAESI application. The reply notice sent by R.2 dated 27/1/2011 is 10 days after the issuance of the second sale notice. The

applicants have received the said reply notice dated 27/1/2011 from the second respondent and they have filed the same at pages 6 to 8 of their type set of documents. In paragraph 11 of the reply notice, the second respondent has clearly stated that the outstanding amount in the loan account is rs.32,98,260/- as on 27/1/2011 and if the applicants do not repay the balance amount due, the second respondent would proceed to the sale of the secured asset. Thus, it is established to the hilt by the second respondent that the applicants were fully aware of the second sale notice dated 17/1/2011 issued by the second respondent.

4.3. Therefore, if at all, the applicants were aggrieved by the sale notice dated 17/1/2011 issued by the R2 bringing the schedule property to sale on 18/2/2011, the applicants should have invoked the jurisdiction of this Tribunal and filed an application under Section 17 (1) of the Act within 45 days from the date of sale notice i.e., 17/1/2011. The applicants, who were aware of the second sale notice dated 17/1/2011 did not challenge the same by filing an application under Section 17 (1) of the Act within the period of limitation of 45 days. Therefore, the applicants have forfeited their right to question the action taken by the second respondent under the Act to recover their legitimate dues. Having forfeited their right by not filing the SARFAESI application within the period of limitation of 45 days and allowed the auction to take place on 18/2/2011, the applicants have consented to the sale of the schedule property. Hence, there cannot be any justification for filing the SARFAESI application after an inordinate delay of 315 days. As already pointed out, the applicants have not given any valid and acceptable reasons for the delay of 315 days in filing the SARFAESI application. If applications of this nature are entertained and allowed, the very purpose for which the SARFAESI Act has been enacted for speedy recovery of the legitimate dues of secured creditors would be defeated."

8. Being aggrieved by the said order, borrower and another have filed M.A.No.4 of 2011 against S.I.A.SR.No.6531 of 2011 in S.A.SR.No.6530 of 2011, dated 20/3/2012, before the Debts Recovery Appellate Tribunal, Chennai. In the said appeal, the petitioner has filed Application, in I.A.No.435 of 2012, seeking waiver of pre-deposit. The said application has been allowed, on condition that the writ petitioner/appellant and another, should deposit a sum of Rs.7,10,554/-, into the Tribunal, paying 50% of the outstanding amount.

9. Contending inter alia that after appropriation of the sale proceeds, still the writ petitioner and another were liable to pay a short fall amount of Rs.25,34,594/-, and that the second respondent is entitled to recover the said amount, deposited at Rs.7,10,554/-, I.A.No.435 of 2012 in M.A.No.4 of 2011 has been filed before the Debts Recovery Appellate Tribunal, Chennai, for a direction, to the Registry, to pay a sum of Rs.7,10,554/-, deposited by the respondents/petitioners, therein, in compliance of the order passed in I.A.No.435 of 2012, in favour of the second respondent.

10. After hearing the learned counsel for the parties, Debts Recovery Appellate Tribunal, vide proceeding, dated 11/5/2017, in M.A. (SA) No.4 of 2013, has passed the following order:-

> "Without making any comments on the merits of the case and on going through the order of pre-deposit made in the year 2012 by this Tribunal, whatever appellants borrower is saying is nothing but a matter to be decided after final hearing of the Appeal only, hence, viewing the basis of five years of deposit of the waiver amount, no progress has been made so far. Hence, I hereby direct the Registry to release the amount of Rs.7,10,554/- to R-2 Phoenix ARC deposited by the appellants."

11. Though Mr.V.R.Karthikeyan, learned counsel for the petitioner contended that there was no mortgage of the title deeds, pertaining to the subject property sold in the auction to which a sale certificate, dated 28/7/2011 has been issued and subsequently, registered as Document No.963 of 2011, in the concerned Sub-Registrar's Office and further contended that what was availed from the first respondent Bank was only a personal loan, perusal of the averments made in S.A.SR.No.6531 of 2011 in S.A.SR.No.6530 of 2011, on the file of the Debts Recovery Tribunal - II, Chennai, shows that the writ petitioner himself has deposited the title deeds, relating to the immovable property described in the schedule to S.A.SR.No.6530 of 2011.

As there was default, the first respondent Bank has declared the loan as Non-Performing Asset and thereafter, taken action, under the provisions of the SARFAESI Act, 2002.

12. Contention of the writ petitioner on the above said aspect has been properly adverted to by the Debts Recovery Tribunal, at paragraph Nos.4.2 and 4.3 of the order made in S.A.SR.No.6531 of 2011 in S.A. SR.No.6530 of 2011, dated 2/3/2012. When the petitioner himself has candidly admitted that documents pertaining to the subject property were deposited with the first respondent, contra contentions made in the instant writ petition, cannot be countenanced.

13. Amount outstanding after realisation of the sale proceeds, on the date of filing of I.A.No.435 of 2012 in M.A.No.4 of 2011, was Rs.25,34,594/-. A sum of Rs.7,10,554/-, is stated to have been made by the writ petitioner, at the time of writ petitioner's pre-deposit.

14. Though Mr.V.R.Karthikeyan, learned counsel for the writ petitioner contended that unless and until the main appeal is disposed of on merits, amount deposited with Debts Recovery Tribunal, Chennai, as pre-deposit, should not be permitted to be withdrawn by the second respondent, on the facts and circumstances of this case, we are not inclined to accept the same, because the petitioner himself has voluntered to deposit the documents. In as much as a sum of Rs.25,34,594/- is stated to be the short fall, Phoenix ARC Private Limited/second respondent cannot be said to be enriched in realizing the said amount, towards the outstanding loan amount.

15. Reasoning of the Debts Recovery Appellate Tribunal, Chennai, directing to release a sum of Rs.7,10,554/- to the second respondent, cannot be found fault with. There are no merits in this writ petition and accordingly, the same is dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

To

1. Standard Chartered Bank
No.19 Rajaji Salai
Chennai 600 001.

2.Debts Recovery Appellate Tribunal,
Chennai.

+1cc to Mr.V.R.Karthikeyan, Advocate in sr.no.53946

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VGII(CO)
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