

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 5/1/2017

C O R A M

The Honourable Mr. Justice S. Manikumar
and
The Honourable Mr. Justice M. Govindaraj

Writ Petition No. 36106 of 2015

1. CMS Educational Trust
rep. By its Chairman
C. Muthusamy
S/o. Chinnasamy
CMS Nagar
Ernapuram
Namakkal 637 003.
2. C. Muthusamy
3. M. Shanthi ... Petitioners

Vs

1. The Chief Manager/Authorised Officer
Bank of Baroda
Namakkal Branch
107 Paramathy Road
Namakkal 637 001.
2. The Sub-Registrar - I
O/o. The Sub-Registrar Office
Namakkal
Namakkal District 637 001. ... Respondents

Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of mandamus, directing the first respondent Bank to give consent or no objection certificate to the petitioner for selling of portions properties mortgaged with the first respondent Bank viz., items 4, 5, 8, 9 and 11, viz.,

Schedule of Property

a. Lands measuring 4.26 acres comprised in S.Nos. 245/5b, 250/4, 8, 11, 15, 21, 25, 30, 31, 34, 5B2, 43, 34, 35 and 43, 245/5B2 situated in Marappanaikanpatty Village, Namakkal Taluk and District and S.No. 151/3 and 5 situated in Singilipatty village, Namakkal Taluk and District.

b. 6821 ½ sq feet commercial complex, Ward No.B, Block 9 Village SF No.92/2, T.S.No.37/3 Devendrapura colony, Rasipuram Town together with residential building belonging to C.Muthusamy. The equitable mortgage is registered with SRO on 27/8/2009 and extension of equitable mortgage is registered with SRO on 10/1/2011.

c. 23006 Sq ft of land in SF No.159/3 and 10 Muthukalipatty, Rasipuram, belong to Mrs.Santhi, the equitable mortgage is registered with SRO on 27/8/2009 and extension of equitable mortgage is registered with SRO on 10/1/2011.

d. 23567 sq feet of land in SR 211/1, 5 and New T.S.No.17/1A, 9A Ward B, Block 1 Ramapurampudur belong to Mrs.Santhi, the equitable mortgage is registered with SRO on 27/8/2009 and extension of equitable mortgage is registered with SRO on 10/1/2011

e. lands measuring 3.7975 acres comprised in S.No.245/1, 250/3, 10, 16, 26, 28, 41, 43 situated in Marappanaikanpatty village, Namakkal Taluk and District and lands measuring 6.08 acres of lands comprised in S.Nos.245/5A (1.79 acres), 250/6 (0.25 ac), 12 (1.86 ac), 19 (0.45 ac), 32 (0.53 ac), 43 (0.15 ac), 46 (0.22 ac) and 245/5b2 (0.83 acres), 46 (0.22 ac) and 245/5B2 (0.83 ac) at Marappanaikanpatty Village, Namakkal Taluk and District and 2.19 acres of land in S.F.No.151/1 at Singilipatty village, Namakkal Taluk and District in all 12.06 acres worth Rs.20 crores, to enable the first petitioner to raise funds to discharge the Loan liability to the first respondent Bank and to register the sale deed document dated 12/10/2015 executed by the petitioner in favour of Manimegalai, D/o. C.Muthusamy and also the Other.

For petitioner Mr.T.Dhanasekaran

For respondents Mr.TM.Pappiah
Special Government Pleader
for R.2

O R D E R

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

Subject properties in item Nos.4, 5, 8, 9 and 11 are admittedly mortgaged with Bank of Baroda, Namakkal Branch/first respondent for availing loan. For non-payment of Rs.24,24,93,000/- a demand notice, dated 8/5/2014 has been issued, under Section 13 (2) of the SARFAESI Act, 2002 to the borrower, calling upon him to pay Rs.26,33,86,662/-, with interest thereon within sixty days from the date of receipt of the notice. According to the petitioner, letter, dated

30/5/2014, has been sent to the Bank, to release a portion of the property mortgaged in item Nos.4, 5, 8, 9 and 11, so as to enable them to sell and repay the loan amount. Bank did not respond, but proceeded to issue notice under Sub-Section 4 of Section 13 of the SARFAESI Act, 2002. In the above said circumstances, the borrower has sought for a writ of mandamus to direct the first respondent Bank to give consent or no objection certificate to the petitioner for selling the portions of properties mortgaged with the first respondent Bank.

2. During the course of hearing, Mr.T.Dhanasekaran, learned counsel for the petitioner submitted that notice issued had already been challenged before the Debts Recovery Tribunal. His submission is placed on record.

3. Neither SARFAESI Act, 2002 nor the Rules framed thereunder, confer any right on the borrower or any other person aggrieved, to seek for no objection certificate from the Bank, to sell the mortgaged properties. On the contra, the Act confers absolute right on the secured creditor to bring the mortgaged property for auction.

4. In the absence of any right conferred under the statute, no duty is casted upon the Bank to respond and failure to do so, would not confer any right to seek for a writ of mandamus.

5. 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.

6. 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)

7. 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, the 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.

8. In the light of the above discussion and decisions, this writ petition is dismissed. No costs.

sd/
Assistant Registrar(CCC)

/true copy/

Sub Assistant Registrar

mvs.

To

1. The Sub-Registrar - I
O/o. The Sub-Registrar Office
Namakkal
Namakkal District 637 001.

+1cc to Government Pleader SR.No.1656

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SSK(CO)
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