BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 01.06.2017

Date of Reserving the Order	Date of Pronouncing the Order
27.04.2017	01.06.2017

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE P.VELMURUGAN

W.P.(MD) No.16358 of 2015
and
M.P.(MD) No.1 of 2015

Mekala Raj ... Petitioner

-vs-

1. The Presiding Officer
   Debt Recovery Tribunal
   Madurai

2. The Authorized Officer
   Tamilnadu Mercantile Bank
   TTK Road Branch
   No.4, TTK Road Royapettah
   Chennai-600 014

3. Manoj Kumar Dugar ... Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India, to issue a writ of certiorarified mandamus calling for the records pertaining to the order passed by the 1st respondent herein on 05.08.2015 made in S.A.No.304 of 2012 and quash the same and consequently direct the 2nd and 3rd respondents herein to re-deliver possession of the land and building in T.S.No.3, C-Block, No.22, Plot No.D-8, Kodaikanal Building Society Colony, Kodaikanal, Dindigul District.

For Petitioner : Mr.R.Vijayakumar
For Respondents : Mr.N.Dilip Kumar for R1 & R2
Mr.J.Lawrance for R3

O R D E R

Heard Mr.R.Vijayakumar, learned counsel appearing for the petitioner, Mr.N.Dilip Kumar, learned counsel appearing for the respondents 1 and 2 and Mr.J.Lawrance, learned counsel for the third respondent and carefully perused the materials placed on record.

2. This writ petition has been filed to quash the order, dated 05.08.2015, passed by Debts Recovery Tribunal, Madurai / first respondent, in S.A.No.304 of 2012 and to direct the second respondent - Bank and the third respondent - purchaser to re-deliver the possession of the property in question to the writ petitioner.

3. The writ petitioner stood as a guarantor for a cash credit and overdraft facility availed by one Mr.G.Radhakrishnan from the second respondent - Bank to the tune of Rs.48,00,000/-. The borrower defaulted in repayment resulting in issuance of a demand notice, dated 21.10.2010, under Section 13(2) of SARFAESI Act. A copy of the said notice was marked to the petitioner with an instruction to induce the borrower to repay the total outstanding within sixty days from the date of the notice, failing which steps would be taken under the provisions of the SARFAESI Act against the securities. The borrower as well as the petitioner failed to avail the opportunity granted in the notice, dated 21.10.2010 and did not repay the loan amount within the time stipulated, which resulted in a possession notice being issued under Section 13(12) of SARFAESI Act for taking over symbolic possession of the subject property owned by the petitioner herein.

4. The second respondent - Bank moved the Chief Judicial Magistrate Court, under Section 14(1) of the SARFAESI Act seeking assistance in taking over the possession of assets and an order was passed by the said Court, on 22.08.2012, appointing an Advocate Commissioner to take over the secured assets and to hand over the same to the second respondent - Bank. Neither the borrower nor the petitioner questioned the action initiated under Section 13(4) of SARFAESI Act, possession notice issued under Section 13(12) of the SARFAESI Act and the order passed by the learned Chief Judicial Magistrate, Dindigul.

5. The second respondent - Bank issued a notice for sale of the subject property on 17.10.2012 bringing the subject property for public auction to be held on 23.11.2012. The sale notice was published in the English Newspaper Business Line, dated 18.10.2012. At that stage of the matter, the petitioner preferred an appeal before the first respondent - Tribunal challenging the sale notice and the same was taken on file as S.A.No.304 of 2012. The first respondent - Tribunal passed an interim order of stay, on 22.11.2012, subject to the payment of Rs.30,00,000/- in three installments and also fixed a time limit within which the same has to be paid.

6. The petitioner did not comply with the conditional order of stay passed by the first respondent - Tribunal. In the meantime,

the subject property was brought for sale and sale certificate, dated 30.11.2012, was issued in favour of the third respondent by the second respondent - Bank. At that stage, the petitioner filed a writ petition, in W.P.(MD) No.2721 of 2013, before this Court praying for issuance of a writ of mandamus to forbear the second respondent - Bank from taking further action on the properties mentioned in the sale notice, dated 17.10.2012, which was mortgaged by the petitioner as a guarantor for the loan amount of Rs.48,00,000/- availed by the borrower Mr.G.Radhakrishnan.

7. The Division Bench of this Court, by an order dated 05.02.2013, while ordering notice of motion to the respondents therein, granted an order of interim injunction on condition that the petitioner deposits a sum of Rs.30,00,000/-, within a period of one week from the date of receipt of a copy of that order, failing which the interim order would be automatically vacated.

8. The petitioner complied with the condition imposed by the Court and paid a sum of Rs.30,00,000/-. When the writ petition came up for disposal, the Division Bench noticed that since the appeal is pending before the first respondent - Tribunal, writ petition filed under Article 226 of the Constitution of India cannot be entertained as factual aspects cannot be examined in a writ petition and liberty was given to the petitioner to workout her remedies in the pending appeal, in S.A.No.304 of 2012, on the file of the first respondent - Tribunal.

9. The petitioner sought for an interim order on the ground that the third respondent - purchaser is putting up a construction on the subject property. The Division Bench did not entertain such a plea and granted liberty to move the first respondent - Tribunal for appropriate interim relief and directed status quo to be maintained for a period of one week and disposed of the writ petition by an order, dated 09.04.2013.

10. Before the first respondent - Tribunal, the petitioner filed interlocutory applications, in I.A.Nos.587 and 588 of 2013, for amendment of the prayer in the appeal to set aside the sale, for re-delivery of possession of the subject property from the auction purchaser and for an order of injunction to restrain the third respondent / auction purchaser from proceeding with the construction work. Both the applications were dismissed by the first respondent - Tribunal, by an order dated 21.05.2013. Challenging the same, the petitioner filed writ petitions, in W.P. (MD) Nos.10505 and 10509 of 2013. The Division Bench, by an order dated 27.03.2014, allowed the writ petitions and set aside the order passed by the first respondent - Tribunal dismissing the amendment petition, consequently, allowed the petition to amend the prayer before the Tribunal and dismissed the petition filed challenging the dismissal of the injunction application. The

first respondent - Tribunal was directed to dispose of the main appeal within a time frame. Thereafter, the petitioner filed I.A.No.1230 of 2014 for redemption of the property, I.A.No.1231 of 2014 for a direction to the second respondent - Bank to furnish certain documents and I.A.No.2076 of 2014 to permit her to raise additional grounds. I.A.Nos.1230 and 1231 of 2014 were closed by the first respondent - Tribunal by an order, dated 14.07.2015 and I.A.No.2076 of 2014 was allowed and it was disposed of along with the main appeal by an order, dated 05.08.2015, which order is impugned in this writ petition.

11. Admittedly, the order impugned in this writ petition is an order passed by the first respondent - Tribunal as against which the petitioner has an effective alternative remedy of approaching the appellate Tribunal and without exhausting such remedy, the petitioner has filed this writ petition.

12. The petitioner's contention is that there is a defect in the publication of the sale notice as it was not published in a Newspaper having circulation in the area, where the subject property is situated. It is further submitted that thirty clear days notice as contemplated under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 has not been issued. That the public auction is vitiated by fraud and collusion when the petitioner was able to establish that all the bidders had obtained demand drafts from the same Bank and the third respondent, after being declared as the successful bidder, the demand drafts of other bidders were purchased by the third respondent and paid to the second respondent - Bank.

13. Further, the order passed under Section 14 of SARFAESI Act is vitiated on the ground of lack of jurisdiction. The petitioner also disputes the valuation of the subject property adopted by the second respondent - Bank while notifying the upset price in the auction notice.

14. After hearing the learned counsel appearing for the parties and carefully perusing all the above materials, we are of the clear view that the writ petition cannot be entertained as the grounds raised by the petitioner are all factual. Infact, this was the observation made by the earlier Division Bench of this Court in W.P.(MD) No.2721 of 2013, when the petitioner approached the Court to issue a writ of mandamus to forbear the second respondent - Bank from taking further action pursuant to the sale notice. The Division Bench, by order dated 09.04.2013, held that in a writ petition filed under Article 226 of the Constitution of India, factual aspects cannot be examined. The same reasoning would apply to the present case also as the only difference being the present writ petition has been filed challenging the final order passed by the first respondent - Tribunal.

15. The second respondent - Bank would state that the entire proceedings initiated under the provisions of SARFAESI Act are strictly in accordance with the provisions of the Act and the rules framed thereunder and the contentions raised by the petitioner were elaborately dealt with by the first respondent - Tribunal and were rejected as being devoid of merits. Thus, we are of the clear view that the petitioner is not justified in bypassing the appeal remedy available under the Act, which is not only effective, but efficacious. Therefore, we are not inclined to entertain the writ petition.

16. In the result, the writ petition is dismissed as not maintainable giving liberty to the petitioner to approach the DEBT Recovery Appellate Tribunal, Chennai by way of appeal as against the impugned order, dated 05.08.2015. The record of the proceedings show that the present writ petition was filed within 28 days from the date of receipt of a copy of the impugned order. Therefore, we grant 15 days (fifteen days) time from the date receipt of a copy of this order to enable the petitioner to move the Tribunal, if so advised. No costs. Consequently, connected miscellaneous petition is closed.

Amended vide order date.15.06.2017 madein WP(MD) No.16358/2015 by TSSJ & PVMJ.

Sd/-
Assistant Registrar(CS-II)

/True Copy/

Sub Assistant Registrar

To

1. The presiding Officer, Debt Recovery Tribunal,
   Madruai.

2. The Authorized Officer,
   Tamil Nadu mercantile bank,
   TTK Road Branch,
   No.4 TTK Road, Royapettah,
   Chennai-14.

+1cc to M/S. J.LAWRANCE, Advocate, SR.No.58147.
+1cc to M/S. N.DILIPKUMAR, Advocate, SR.No.58120.

W.P.(MD) No.16358 of 2015
and
M.P.(MD) No.1 of 2015
01.06.2017

ksrk

SDS/SV/SAR 4/19.06.2017/5P/5C