IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.07.2018

Pronounced on : 26.10.2018

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.O.P.No.3308 of 2011
and
M.P.No.1 of 2011

1.Ismath Batcha,
S/o.Abdul Majeed (Late).

2.Mrs.Noorjahan,
W/o.Ismath Batcha. ... Petitioners/Respondents

Vs.

The Authorized Officer,
The Hongkong and Shangai,
Banking Corporation Limited,
76, Cathedral Road,
Chennai - 86. ... Respondent/Petitioner

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to set aside the order dated 22.12.2010 made in Crl.M.P.No.3842 of 2010 on the file of the Chief Metropolitan Magistrate Court, Egmore, Chennai by allowing this Criminal Original Petition.

For Petitioners : No Appearance
[Party-in-person]

For Respondent : M/s.Hynul Fathima for
Mr.K.S.Natarajan

O R D E R

The petitioners, who are respondents on the petition filed by the respondent/petitioner under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFASI Act) before the learned Chief Metropolitan Magistrate, Egmore, Chennai in Crl.M.P.No.3842 of 2010.

2.The learned Chief Metropolitan Magistrate, Egmore, Chennai by order dated 22.12.2010 had held that the respondent/petitioner is entitled to take possession of the property and to bring the same for sale through the Court Officer or the Advocate Commissioner appointed by the Court, against the said order, the present quash petition is filed.

3.The petitioners had filed the petition as Party-in-person and have been pursuing the same, subsequently, there is no representation from the petitioners, despite the case has been listed under the caption “for dismissal”, then to no representation. The respondent bank has been regularly appearing before this Court. The above case is pending without any progress from the year 2010 hence, this Court proposed to dispose the case on merits, based on the documents and on the submissions of the respondent.

4.The contention of the petitioners is that the petitioners had applied for housing loan along with the financial documents and made a representation to the respondent bank, the respondent bank granted a home loan of Rs.19,25,000/- and Rs.26,78,000/- to the petitioners on 30.04.2008 and 25.05.2006. The said housing loan was secured by mortgage of property and the petitioners had executed necessary documents and also created equitable mortgage of the schedule property.

5.Further, the respondent bank promised and assured that they will issue insurance policy covering against the entire loan amount against permanent disability, partial disabilities, death and loss of employment in Dubai. For this purpose, the petitioner had issued nearly 25 cheques to the respondent bank. It is further averred that, as per the SARFAESI Act before taking recourse under Section 13(4) of the authorized bank officer has to strictly comply the provision under Section 13(2) of the SARFAESI Act. In this case the petitioners were not served any notice under Section 13(2) of the Act. The alleged acknowledgement card produced by the bank officer is a fabricated and forged one. It is further averred that the first petitioner is an NRI working in Dubai, UAE due to the world biggest recession, the entire world came under huge financial pressure, tremendous financial economical loss which happened after World War II after 70 years. Due to which the petitioner lost his permanent employment in Dubai and he was terminated from service on December 2008. The petitioner informed the respondent bank from Dubai that the petitioner and his family would come back to India during March 2009 and also informed about his loss of job and requested the respondent bank to waive the entire loan outstanding.

5.It is further submitted that the respondent bank had filed a petition under Section 14 of the SARFAESI Act before the learned Chief Metropolitan Magistrate, Egmore, Chennai mentioned in Page No.6 that the demand notice under Section 13(2) was not served and further at Page No.7 of paragraph No.8, it is mentioned that the petitioners on 20.02.2010 had issued a notice under Section 13(4) of the SARFAESI Act and immediately the petitioners had approached the Debt Recovery Tribunal and filed S.A.No.87 of 2010 initially stay was granted and it came to be dismissed on 19.10.2010 for non compliance of the interim order, giving liberty to the respondent bank to take proceedings under the SARFAESI Act.

6.Further, it is averred that the petitioners account was not declared as Non Performance Assets. On 24.03.2010, five officials of the respondent bank have invaded the first petitioner's house, where he was staying with his family and acted inhumanly. Further, for more than a year the petitioners' family was systematically harassed, due to which the first petitioner and his family members were looked down in front of others, which caused great embarrassment and sufferings in front of 204 Apartment owners and more than 1000 people living in that apartment.

7.It is further averred that the petitioners filed a petition under Section 17(1) of the SARFAESI ACT before the Debt Recovery Tribunal -I in S.A.No.89 of 2010 and prayed to set aside the order dated 22.12.2010 made in Crl.M.P.No.3842 of 2010.

8.Per contra, the learned counsel for the respondent bank submits that the principles and procedures enumerated under SARFAESI Act namely under Section 13(2) and Section 13(4) have been followed. The first petitioner herein has participated in the Section 13(4) petition in the Debt Recovery Tribunal in S.A.No.89 of 2010. The Debt Recovery Tribunal had granted him initial stay and granted time to make payments to the bank which the petitioner had failed to do so. Thereafter, only the Stay application of the petitioner was dismissed and the bank was granted liberty to take further proceedings, based on which Section 14 application was filed before the lower Court. The lower Court on ordering notice to the petitioner had appeared and participated in the proceedings. A typographical error was blown out of proportion which the lower Court had rightly clarified. Further, after giving opportunity to the petitioner and after full-fledged enquiry orders were passed in the Section 14 application by the lower Court. Further, the respondent bank had relied upon a decision of the KARNATAKA HIGH COURT in the case of K.S.NARAYANASWAMY VS. CORPORATION BANK Judgment dated 18.01.2018. In the said judgment, referring to various judgments of the Apex Court had held that normally any grievance against Section 14 application the aggrieved person has to appeal under Section 17 of the SARFAESI Act before the Debt Recovery Tribunal and the petition filed by these petitioners are not maintainable and to be dismissed.

9.Section 13 of the Act particularly, Section 13(4) of the Act, empowers the secured creditor to approach the jurisdictional Chief Metropolitan Magistrate to take possession of the secured asset of the borrower in case the borrower fails to discharge his liability in full within the period specified in sub section (2). The secured creditor may take recourse to one or more measures mentioned of sub section (4) of Section 13 particularly in this case, the said right has been exercised to take possession of the assets of the borrower in order to realize the dues.

10.Therefore, on combined reading of the above said two provisions, it is clear that the secured creditor has got a statutory right to take recourse under Section 14 of the Act irrespective of any other mode recognized for the purpose of taking possession of the secured asset.

11.Considering the submissions of the learned counsel for the respondent and on perusal of the petition and materials, this court finds that the lower Court had given opportunity, heard the petitioner and thereafter, issued a well reasoned order in Crl.M.P.No.3842 of 2010 dated 22.12.2010. Further, as rightly contended by the respondent, if the petitioner is aggrieved by the finding of the lower Court under Section 14 of the Act, he has to take recourse normally and generally under Section 17 of the SARFAESI Act. Further, the bank/secured creditor can approach directly the learned Chief Metropolitan Magistrate for the offence under Section 14 and under Section 17 of the Act when an alternative efficacious remedy is provided, the aggrieved person including the borrower can make an application to the Debt Recovery Tribunal within 45 days. Therefore, on plain reading of this section it gives an ample right and opportunity to the aggrieved person to approach Debt Recovery Tribunal on the order passed by the learned Chief Metropolitan Magistrate, Egmore, Chennai. Therefore, any aggrieved party affected by the order of the Magistrate under Section 14 of the Act has to take recourse normally and generally under section 17 of the SARFAESI Act.

12.On meticulous observation of the above said provisions and the rulings, it is clear that if an opportunity is given to the petitioner as contemplated under the Act and Rules to repay the debt and if he does not pay the amount, then Sections 13(4) and 14 of the Act creates a statutory right in favour of the secured creditor to exercise its remedy to take possession of the property.

13.Therefore, though the alternative efficacious remedy is available, it does not absolutely take away the powers of the High Court in dealing with the order passed by the Chief Metropolitan Magistrate under Section 14 of the Act.

14.In view of the above factual position the Court below was justified in allowing the petition filed by the respondent under Section 14 of the SARFAESI Act, I do not find any good ground to interfere in the impugned order.

15.In view of the fore going discussion, this Criminal Original Petition fails and accordingly the same is dismissed and Consequently, the connected Miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

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To

1.The Chief Metropolitan Magistrate,
Egmore, Chennai.

2.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.K.S.Natarajan, Advocate, S.R.No. 73968

Crl.O.P.No.3308 of 2011

VSNII(CO)
GN(27/11/2018)