IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 31.10.2018

CORAM

THE HON'BLE MR.JUSTICE S.MANI KUMAR
&
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.4186 of 2018
and W.M.P.Nos.5131 & 5132 of 2018

1. Mrs.J.Indira
2. Mr.M.Jayasekaran ... Petitioners

Vs.

1. The Chief Metropolitan Magistrate,
Metropolitan Magistrate Court,
Allikulam, Chennai - 600 003.

2. The Senior Manager,
Aadhar Housing Finance Limited,
No.11 A, Chellamal,
109, 1st Floor,
Sri Thyagaraya Road,
T.Nagar, Chennai - 17.

(R2 amended as per order of this Court
dated 20.03.2018) ... Respondents

Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the 1st respondent, in respect of the impugned order dated 06.02.2018, made in Crl.M.P.No.3574 of 2017 and quash the same is arbitrary, unjustifiable and illegal, and consequently, direct the 1st respondent to give permission to the petitioners to defend the petition, Crl.M.P.No.3515 of 2017 filed by the 2nd respondent and to decide the same on merits in accordance with law.

For Petitioners : Mr.R.Munnuswamy

For R2 : Mrs.G.Shanthi Meenakshi
R1 - Court

ORDER

(Order of the Court was made by V.BHAVANI SUBBAROYAN)

This Writ Petition has been filed to call for the records of the 1st respondent, in respect of the impugned order dated 06.02.2018, made in Crl.M.P.No.3574 of 2017 and to quash the same as arbitrary, unjustifiable and illegal, and consequently, to direct the 1st respondent to give permission to the petitioners to defend the petition, Crl.M.P.No.3515 of 2017 filed by the 2nd respondent and to decide the same on merits in accordance with law.

2. The case of the petitioners are that the 1st petitioner, namely, Mrs.J.Indira, who is the absolute owner of the property, bearing Plot No.2288, Door No.AE-18, New Door No.18/1, New No.2/1, AE Block, Second Street, Arignar Anna Nagar, Chennai - 600 040, land measuring to an extent of one ground and 225 Sq.ft, comprised in R.S.No.163 Part of Naduvakkarai Village, New T.S.No.80 Part, as per Town Extract T.S.No.80/2, Block No.9A of Naduvakkarai Village, Egmore-Nungambakkam Taluk. The said property was purchased under a Sale deed, dated 24.11.2011, vide Document No.4106/2011 and registered at Sub-Registrar Office, Anna Nagar. The 2nd petitioner, namely, Mr.M.Jayasekaran, who is none other than the 1st petitioner's husband.

3. The petitioners would submit that since there was an old structure stood in the said purchased property and the same was in bad condition, they demolished the same by availing loan from the 2nd respondent and given the same as security for due repayment of the said loan. Thereafter, they created a memorandum of deposit of title deeds over the property in favour of the 2nd respondent on 28.12.2011.

4. The petitioners would further submit that they were remitting payments to the 2nd respondent without any default. While so, the 2nd respondent issued a demand notice dated 20.01.2014 stating that the petitioners had committed default in repayment of the loan. Immediately, on receipt of the said notice, the petitioners sent an explanation about the payments made by them till December 2013, to the 2nd respondent and also produced the proof for the same. However, the 2nd respondent issued a Possession Notice dated Nil along with a covering letter dated 14.05.2014. As per the said letter, the 2nd respondent has categorically admitted that the structure existing in the subject property was demolished. Therefore, the petitioners would contend that as on the date of issuance of demand notice as well as the possession notice, the building

which was given as security, was not in existence and hence, the 2nd respondent could not have taken possession of the alleged secured asset under the said possession notice. However, aggrieved by the action initiated by the 2nd respondent, the petitioners have filed an Application in S.A.No.43 of 2014 before the Honourable Debts Recovery Tribunal-I, Chennai, (hereinafter referred to as "DRT-I") and obtained an interim order. Subsequently, the said application was dismissed on 31.12.2016.

5. Furthermore, the petitioners would submit that even though, they have raised valid and legitimate grounds in the application filed by them, it was not considered by DRT-I and hence, they have preferred an appeal before the Debts Recovery Appellate Tribunal, Chennai, (hereinafter referred to as "DRAT") in AIR(SA).No.87 of 2017, but, it was also dismissed on the ground that the petitioners could not make the mandatory deposit for entertaining the appeal.

6. The petitioners would contend that it is known to the 2nd respondent, about the demolition of the building, which was existing in said property and in fact, the respondent has also categorically admitted the same in their earlier letter dated 14.05.2014 and also in their counter statement filed before the DRT-I. Despite the same, the 2nd respondent made an attempt to obtain an order from the 1st respondent, by filing a petition in Crl.M.P.No.3515 of 2017 under Section 14 of the SARFAESI Act, to appoint an Advocate Commissioner and to take physical possession of the schedule property. In the above petition, the petitioners filed Crl.M.P.No.3574 of 2017 and sought for permission from the 1st respondent, to issue notice to them in the petition filed by the 2nd respondent and to give opportunity to defend the petition before deciding the same on merits in accordance with law.

7. The petitioners would further contend that objecting to the permission petition filed by them, the 2nd respondent filed their counter statement before the 1st respondent, and the 1st respondent, without understanding the claim of the petitioners, dismissed the petition in favour of the 2nd respondent, which is unsustainable and untenable.

8. The petitioners would also contend that the 1st respondent, without giving an opportunity to the petitioner and without even considering the documents and the description of the property, allowed the petition filed by the 2nd respondent under Section 14 of the SARFAESI Act, which is in contravention of the provisions of the Act and also in violation of principles of natural justice.

9. Moreover, the petitioners would contend that they were advised to state that even though an order was passed under Section 14 of the SARFAESI Act, they can challenge the same under Section 17 of the Act, but, the impugned order passed, was not under Section 14 of the Act and it is only on order rejecting the petitioners' request for permission to have notice in the main petition filed by the 2nd respondent. Hence, the impugned order is not appealable under Section 17 of the Act, therefore, the petitioners, with no other alternative, has filed this Writ Petition by invoking Article 226 of the Constitution of India.

10. The petitioners would further contend that they were advised to state that there is no specific bar or express provision that the borrower is not entitled to any notice under Section 14 of the Act, but, it is only an interpretation given by the courts of law and which always can be changed depending upon the circumstances of the case and passage of time. There is no straight jacket formula which bars the borrowers to have notice in the proceedings under Section 14 of the Act. The impugned order of the 1st respondent is not based on any sound principles of law.

11. Denying all the averments put forth by the petitioners, the 2nd respondent has filed a counter statement and would contend that primarily, the application filed by the borrower for an opportunity of being heard under Section 14 proceedings is perse not maintainable in law and hence, the application has been rightly dismissed.

12. Heard the learned counsel for the petitioners and the learned counsel for the respondents, and perused the materials available on record.

13. It could be seen from the material on records that the petitioners had availed the loan for a sum of Rs.1,50,00,000/- on 11.11.2011 for the purpose of purchase of the property, bearing Plot No.2288, Door No.AE-18, New Door No.18/1, New No.2/1, AE Block, Second Street, Arignar Anna Nagar, Chennai - 600 040, land measuring to an extent of one ground and 225 Sq.ft, comprised in R.S.No.163 Part of Naduvakkarai Village, New T.S.No.80 Part, as per Town Extract T.S.No.80/2, Block No.9A of Naduvakkarai Village, Egmore-Nungambakkam Taluk. The said loan was to be repaid within a period of 15 years i.e. 180 months, along with the interest at the rate of 13.50% per annum. The unpaid EMI upto the month of January 2014, was Rs.7,79,400/-. The total dues which has to be paid by the petitioners were Rs.1,50,28,694/-.

14. It could be further seen from the records that the petitioners had executed a mortgage deed by way of deposit of title deeds to the respondent, hence, the contention of the petitioners that they had given only the building which was in existence in the subject property as security cannot be accepted by this Court. Since the petitioners had defaulted in repayment of the above dues, the respondent had sent a demand notice on 20.01.2014, requesting the petitioners to clear the dues within a period of 60 days from the date of the said notice. Despite the same, the petitioners have not chosen to pay the dues and hence, their account has been classified as Non-Performing Asset by the respondent and subsequently, notice dated 14.05.2014, was issued to the petitioners stating that the possession of the property has to be taken as per Section 13(4) of the SARFAESI Act, if the petitioners fail to repay the dues on or before 19.05.2014. But, the petitioners have not chosen to pay the dues and hence, the respondent has issued possession notice to the petitioners on 02.06.2014.

15. Even after possession notice, the petitioners have not chosen to clear the dues and instead of that, challenging the possession notice dated 02.06.2014, the petitioners had approached DRT-I, Chennai, by filing S.A.No.43 of 2014. But, it was dismissed by the DRT-I, by observing that there is sufficient compliance of the procedure under SARFAESI Act and Rules made thereunder on the part of the respondent, while initiating measures under SARFAESI Act and Rules, against the petitioners.

16. Furthermore, it could be seen from the material on record that challenging the order of the DRT-I, the petitioners have preferred an appeal before the DRAT, Chennai, in AIR(SA). No.87 of 2017, but, it was also dismissed on the ground that the petitioners could not make the mandatory deposit for entertaining the appeal. Meanwhile, the respondent has filed a petition in Crl.M.P.No.3515 of 2017 before the 1st respondent herein, under Section 14 of the SARFAESI Act, for taking physical possession of the secured assets and subsequently, on coming to know the action of the 2nd respondent, the petitioners have filed a petition in Crl.M.P.No.3574 of 2017 seeking for a direction, directing the 2nd respondent to issue notice in the main petition, Crl.M.P.No.3515 of 2017 and to give them an opportunity to defend the case, before deciding the same on merits in accordance with law. Thereafter, the 1st respondent, by order dated 06.02.2018, has dismissed the petition filed by the petitioners on merits.

17. It could be seen from the impugned order dated 06.02.2018, the 1st respondent was not inclined to entertain the

petition filed by the petitioners, as the same would contravene Section 17 of the SARFAESI Act, which provides for a remedy for any action taken under the SARFAESI Act, by the secured creditor. The 1st respondent has dismissed the claim of the petitioners as they have to approach only DRT as prescribed in the statute and they cannot contest proceedings, under Section 14 of the Act.

18. Moreover, it could be seen that the 1st respondent, placing reliance on Section 17 of the SARFAESI Act, dismissed the petition filed by the petitioners. Section 17 of the SARFAESI Act, reads as follows:

> "Any person (including borrower), aggrieved by any of the measures referred to in Sub-Section (4) of Section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having Jurisdiction in the matter within forty-five days from the date on which such measures had been taken"

19. In this Section, the words "any measures", would include any of the action taken by the secured creditor under Section 14, which is not an independent Section as it is a continuous process from Section 13(2). Hence, the learned Chief Metropolitan Magistrate, has given correct reasons for his action and the order could be only questioned under Section 17 and not as per the petitioners' desire to be heard in the petition under Section 14 filed by the secured creditor.

20. In the above circumstances, this Court is unable to accept the contention of the petitioners that the impugned order was not passed under Section 14 of the SARFAESI Act and it is only an order rejecting the request for permission to have notice in the main petition filed under Section 14 of the SARFAESI Act.

21. The learned counsel for the petitioners has relied on the decision reported in the case of [Hotel Amuthas Vs. The District Collector and Others] passed by this Court. The said decision is different from the case on hand, because, wherein, the order passed by the District Magistrate and District Collector, Coimbatore, in exercise of powers under Section 14 of the SARFAESI Act, had been obtained on misrepresentation and misleading facts and therefore, the same was held as a nullity. Hence, that impugned order was set aside and the matter was remitted back to the District Magistrate and District Collector, Coimbatore, to consider the matter and to pass appropriate

orders in accordance with the law laid down in Harshad Govardhan Sondagar case.

22. We are of the view that the petitioners ought to have approached DRT-I, to quash the order passed by the District Collector and the order is challengeable under Section 17 and not under Article 226 of the Constitution of India. The case cited by the petitioners is not relevant to the present case on hand, since it was a case, after creating a mortgage, the petitioner was inducted as a tenant and the issue was whether it is necessary to give any notice before taking orders by the District Collector and the measures, which is not relevant to the present case on hand. Hence, we find no merit in the petitioners' claim. Accordingly, the Writ Petition is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

To

1. The Chief Metropolitan Magistrate,
   Metropolitan Magistrate Court,
   Allikulam, Chennai - 600 003.

2. The Senior Manager,
   Aadhar Housing Finance Limited,
   No.11 A, Chellamal, 109,
   109,1st Floor, Sri Thyagaraya Road,
   T.Nagar, Chennai – 17.

+1cc to Mr.R.Munusamy, Advocate Sr.74941
+1cc to Mr.G.Adhivarahan, Advocate Sr.84712

W.P.No.4186 of 2018
and
W.M.P.Nos.5131 & 5132 of 2018

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srg 23/01/2019