

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 17.01.2018

CORAM:

THE HON'BLE Mr.JUSTICE S.MANIKUMAR
and
THE HON'BLE Mr.N.AUTHINATHAN

W.M.P.No.23076 of 2016 in
W.P.No.4902 of 2016

Chitra, W/o.G.Vijayamani ... Petitioner/5th respondent

vs.

1.T.Govindasamy ...Respondent-1/Writ Petitioner

2.The Authorised Officer &
Assistant General Manager,
Indian Bank, No.91, 1st Main Road,
Gandhi Nagar, Adayar,
Chennai-600 020.

3.The District Collector,
Kancheepuram District,
Collectorate,
Kancheepuram.

4.The Tahsildar,
Kancheepuram Collectorate,
Kancheepuram Taluk,
Kancheepuram District.

5.G.Vijayamani ... Respondents 2 to 5/
Respondents 1 to 4

Petition under Article 226 of the Constitution of India to
recall the order in W.P.No.4902 of 2016, dated 24.02.2016.

Writ petition filed under Article 226 of the Constitution
seeking for the issuance of a Writ of Mandamus directing the
respondents 1 and 2 to continue further with the securitization
property admeasuring 2381.5 Sq.feet at Door No. 11-A
Kancheepuram 2nd Division Nelukara Street Alias Annai Indra
Gandhi Road Kancheepuram Comprised in old survey No. 1771 New
No.1771/2B in SRO Kancheepuram Kancheepuram District and hand
over the possession of remaining portion of land and building to
an extent of about approximately 800 Sq. ft of securitization

property which is subject matter of auction sale conducted by 1st respondent on 27.04.2012 and expeditiously within a time limit prescribed by this Court.

For Petitioner : Mr.R.Sakarasubbu

For Respondent-1 : Mr.S.Sethuraman

For Respondent-2 : Mr.Rajendran Raghavan

For Respondents 3 & 4 : Mr.P.S.Sivashanmugh Sundaram
Spl.Govt.Pleader.

ORDER

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

This writ miscellaneous petition has been filed to recall the order passed in W.P.No.4902 of 2016, dated 24.02.2016. The petitioner herein is not a party to the proceedings in W.P.No.4902 of 2016. Alleging that the order passed in the said writ petition is detriment to her interest and also her two minor children, the petitioner has filed W.M.P.No.20958 of 2016 seeking leave of this Court to file a petition to recall the order dated 24.02.2016, made in the writ petition. This Court, by order dated 21.07.2016, made in W.M.P.No.20958 of 2016, granted leave to the petitioner herein, proposed respondent No.5 in the main Writ petition, to file a petition to recall the order. Accordingly, W.M.P.No.23076 of 2016 has been filed by her to recall the order, dated 24.02.2016, passed in W.P.No.4902 of 2016.

2. According to the petitioner, her father-in-law, namely R.Govindasamy, was the absolute owner of property, which is the subject matter of the writ petition No.4902 of 2016, filed by the 1st respondent herein. She has further stated that in respect of the said property, her father-in-law executed a Will in favour of her minor daughters, namely V.Gayathri and Sanjana. While so, her husband G.Vijayamani, the 5th respondent herein, against the interest of their minor daughters, forcibly obtained the thumb impression of her father-in-law, when he was bed ridden, and created a Settlement Deed in his favour and on the strength of the said settlement deed, he stood as a guarantor to one Nedunchezian, who borrowed a sum of Rs.50,00,000/- from the 2nd respondent-Indian Bank. When the borrower made default in repayment of the loan, the 2nd respondent-bank initiated securitization proceedings against the property of the guarantor. On coming to know about the same, the petitioner and her two minor daughters filed a suit in C.S.No.297 of 2012 on the file of this Court. Along with the plaint, the petitioner

filed an Original Application being O.A.No.377 of 2012 praying for an order of interim injunction, restraining the 2nd respondent bank from bringing the suit schedule property (the subject matter of property in W.P.No.4902 of 2016) to sale in auction or otherwise encumber the property in any manner on the basis of the security created by the 5th respondent herein. On 26.04.2012, a learned Single Judge passed the following interim order in O.A.No.377 of 2012:

"That the Authorised Officer and Chief Manager, Indian Bank and the Chairman, Indian Bank, Head Officer, the 2nd and 3rd respondents herein be and are hereby restrained by an order of interim injunction until further orders of this court with regard to confirmation of the sale only.

2.That the notice of this Original Application returnable by 04/06/2012 be served on the respondents herein.

3.That the O.A.No.377 of 2012 be posted on 04/06/2012."

However, the said interim order was vacated by the order dated 03.01.2014, on an application filed by the 2nd respondent Bank in A.No.1350 of 2013, against which the petitioner filed intra-court appeal in O.S.A.No.57 of 2014. The said Original Side Appeal came to be disposed of by the Judgment dated 15.07.2014, which reads as follows:

"The appellant is a plaintiff in the suit. The suit was filed by the appellant in C.S.No.297 of 2012 seeking the following relief:

"(a)Declaring the Settlement Deed Document No.1598/2002 dated 24.05.2002 as void and inoperative in law and not binding on the plaintiffs.

(b)Granting a permanent injunction restraining the second and third defendants from enforcing the security of the schedule mentioned property in any manner including sale in public auction or any other mode.

(c)Directing the defendants to pay the costs of suit; and

(d)Granting such further or other reliefs as may be deem fit and proper."

2.The appellant filed O.A.No.377 of 2012. The respondent Nos.2 and 3 herein filed an application in application No.1350 of 2012 seeking to vacate the order of injunction granted. The learned Single Judge by way of a

common order was pleased to vacate the injunction granted earlier. Challenging the order passed in Application No.1350 of 2013, the present appeal has been filed before us.

3.The learned counsel for the appellant submitted that the property belongs to the minor. The learned Single Judge has erroneously allowed the application to vacate the injunction as several issues both on facts and legally are required to be considered in the suit. Therefore, he submitted that the order passed by the learned Single Judge will have to be set aside.

4.We do not find any merit in this appeal. Admittedly, the plaintiffs have filed S.A.SR.No.2903 of 2012 before the Debt Recovery Tribunal, Chennai challenging the sale made under the SARFEASI Act. By a detailed order, it was dismissed. The said fact has not been placed in the subsequent suit. Furthermore, the auction has already been confirmed in favour of the third party. Therefore, the relief sought for no longer survives for consideration. The learned Single Judge has taken into consideration of the above said facts while vacating the earlier order of injunction granted. Since the learned Single Judge has rightly exercised the discretion, we do not find any error warranting interference.

5.Accordingly, the appeal stands dismissed. No costs. The connected miscellaneous petition is also closed."

3. After the abovesaid order, on the request of the 2nd respondent/Bank, the 3rd respondent/District Collector passed an order under Section 14 of SARFAESI Act, directing the 4th respondent/Tahsildar to take possession of the securitization asset and hand over the same to the 1st respondent/auction purchaser, following which the 4th respondent/ Tahsildar filed a report. Immediately, the petitioner filed an application in the Civil Suit, numbered as A.No.5628 of 2014 in C.S.No.297 of 2012, seeking to implead the 1st respondent/auction purchaser herein, as a party to the suit. In the said application, on 07.10.2015, the following order has been passed,

"2.At the time of hearing the application on 21.07.2015, Mr.Sankara Subbu, learned counsel appearing for the applicants submitted that the applicants were apprehending that they would be

dispossessed of their property at any moment. However, the learned counsel appearing for the respondent Bank submitted that there was no proposal to dispossess the applicants at present. Recording the above said submissions, the matter was adjourned earlier.

3. Now, in view of the fact that the very application is allowed, there is no further order is necessary in this application with regard to the apprehension expressed by the applicants. The learned counsel appearing for the respondent Bank submitted that the applicants are not dis-possessed from their dwelling unit at any point of time. Therefore, it is made clear that the applicants are entitled to be in possession of their dwelling house however, subject to the following conditions:

1. The applicants shall negotiate with the Bank and work out for settlement of the dispute between the parties.

2. Such exercise shall be made within a period of four weeks from today."

4. When the above said application was pending, the petitioner filed another Original Application in O.A.No.1291 of 2015 in C.S.No.297 of 2012, seeking for an order of interim injunction, restraining the respondents from dispossessing Minors Gayathri and Sanjana the Applicants 2 & 3 from the Schedule mentioned property pending disposal of the suit. By order dated 21.12.2015, a learned Single Judge disposed of the said application, observing as under:

"3. The learned Counsel appearing for the respondents/defendants, would submit that the status-quo that existed on the date of passing the order dated 7.10.2015, in A.No.5628/2014, continues to exist as on today.

4. In the considered opinion of the Court, the order dated 7.10.2015, made in A.No.5628/2014, takes care of the interest of the applicants and therefore, no orders are necessary in this application. It is also made clear that the applicants taking advantage of the above said order, shall not create any third-party rights in respect of the property in their possession.

5. In the result, the original application is closed subject to the above observations."

5. It is further averred by the petitioner that inspite of the above injunction order granted by this Court, the 2nd respondent/bank dispossessed her from the property in question and therefore she filed a contempt petition in Cont.Petn.No.1893 of 2015 and pursuant to that possession was restored and now she is in possession of the property.

6. While the matter stood thus, it is the contention of the petitioner that suppressing all the above material facts, the 1st respondent/auction purchaser filed W.P.No.4902 of 2016, without impleading the petitioner and her daughters as parties, and obtained an ex parte order, detriment to their interest and contrary to the order made in O.A.No.1291 of 2015 in C.S.No.297 of 2012, dated 21.12.2015. It is her further allegation that the 1st respondent has misled the Court and obtained an-exparte order agaisnt her interest and therefore it is necessary to recall the order in W.P.No.4902 of 2016, dated 24.02.2016, otherwise she would be put to great hardship.

7. We have heard the learned counsel for the petitioner, the learned counsel for the 1st respondent/auction purchaser, learned counsel for the 2nd respondent/bank and the learned Special Government Pleader for respondents 3 and 4. We have also perused the materials on record and the order of the Division Bench which is sought to be recalled.

8. It is not in dispute that the property in question was mortgaged with the 2nd respondent/bank, as security, by the husband of the petitioner, namely the 5th respondent herein, while obtaining loan on 30.06.2018. Since there was default in repayment of the loan, proceedings were initiated under SARFAESI Act to recover the outstanding, in which the mortgaged property was brought for sale in public auction held on 27.04.2012 and the 1st respondent herein was declared as the highest bidder. Since possession of the entire property could not be secured, on 05.05.2014, the 2nd respondent/bank filed an application under Section 14 of the SARFAESI Act before the 3rd respondent/District Collector seeking necessary orders for taking possession of the secured assets, including the property in question. The 2nd respondent/District Collector on 13.07.2015 passed an order authorising the Tahsildar, Kancheepuram, to take possession of the property and hand over

the same to the Bank under proper acknowledgement. However, the 4th respondent/Tahsildar, in his Report, dated 22.07.2016, has stated that possession could not be taken in respect of the rear side portion of the property in question, as it was said to be locked by the owner of the building Mr.G.Vijayamani (5th respondent) and Tmt.T.L.Chitra, wife of the 5th respondent (the petitioner herein). At this stage, as the possession of the entire property was not handed over to him, the 1st respondent/auction purchaser filed W.P.No.4902 of 2016 seeking a writ of mandamus directing the 2nd respondent/bank and the 3rd respondent/District Collector to continue further with the securitization property, admeasuring 2381.5 sq.ft. at Door No.11-A, Kancheepuram 2nd Division, Nelukara Street @ Annai Indira Gandhi Road, Kancheepuram, comprised in old Survey No.1771, New No.177/2B in SRO Kancheepuram, Kancheepuram District and hand over possession of remaining portion of land and building to an extent about 800 sq.ft. of securitization property which is the subject matter of auction sale conducted by 1st respondent on 27.04.2012, within a time frame. When the above writ petition came up for hearing, a Hon'ble Division Bench of this court, by order dated 24.02.2016, has disposed of the writ petition, recording the submission of the learned Special Government, who appeared for respondents 2 and 3, namely District Collector and the Tahsildar. Submission of the learned Special Government before the Hon'ble Division Bench reads as under:

"4.Learned Special Government Pleader appearing for the second respondent would contend that the steps initiated to handover possession of the remaining portion of the land in question to the petitioner, could not be concluded on account of pendency of this writ petition. However, the second respondent will take necessary steps in accordance with law and ensure that the entire land in question is handed over to the Bank for handing over the same to the petitioner within a period of three weeks."

9. It is borne out of material on record that the petitioner, in respect of the same property, has filed a civil suit in C.S.No.297 of 2012 and the same is pending before this Court and in the said suit, this Court has protected the interest and right of the petitioner and she is in possession of the property. It is also seen that the 1st respondent/auction purchaser has also been impleaded as defendant No.4 to the suit and he is aware of all the orders passed by this court in the applications and original application filed by the petitioner in the suit. In such an event, we find every force in the

contention of the petitioner that while the matter stood thus, suppressing all the above facts the 1st respondent/auction purchaser, with an intention to dispossess her from the property, has approached this court by filing W.P.No.4902 of 2016 and obtained an order on the representation made by the official respondents that the securitization proceedings could not be completed due to the pendency of the writ petition. Perusal of the records show that the writ petition came to be disposed of on the same day when it was listed for admission i.e. on 24.02.2016. It is evident from the first paragraph of the order passed in the writ petition, which reads as under:

"Notice to the fourth respondent is dispensed with at this stage, inasmuch as no adverse order is passed against him in this writ petition. Thus, with the consent of the learned counsel for the petitioner and the learned counsel for the official respondents, the writ petition is taken up for final disposal."

10. Thus, even without sending notice to the 4th respondent in the writ petition, who is none other than the husband of the petitioner, writ petition has been disposed of by passing the order, as extracted above. Further, the 1st respondent/auction purchaser, being a party to the civil suit, ought to have impleaded the petitioner as a party to the writ proceedings, which he has failed to do so. Further, this Court has protected the interest of the petitioner in the property in question in the order, dated 07.10.2015 and 21.12.2015, passed in the applications filed in C.S.No.297 of 2012. Thus, it is clear that material facts have been suppressed by the 1st respondent/auction purchaser before the Hon'ble Division Bench. Further, representation has been made on behalf of the official respondents that steps initiated to handover possession of the remaining portion of the land in question to the 1st respondent/auction purchaser could not be concluded on account of pendency of the writ petition and in such circumstances, the District Collector has been directed to take steps to ensure that the entire land in question was handed over to the Bank for handing over the same to the 1st respondent/auction purchaser within a period of three weeks. This submission recorded by the Hon'ble Division Bench, is, in our considered opinion, detriment to the interest of the petitioner and therefore the order passed in W.P.No.4902 of 2016 is required to be recalled and the writ petition is to be restored to file for disposal, after hearing the petitioner, who has already been impleaded as 5th Respondent in the writ petition.

In the result, this Writ Miscellaneous Petition stands allowed and the order made in W.P.No.4902 of 2016, dated 24.02.2016 is recalled. The petitioner herein has already been impleaded as Respondent No.5 in the main writ petition. No order as to costs. Registry is directed to list the main writ petition before the court for hearing.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

asr

To

- 1.The Authorised Officer &
Assistant General Manager,
Indian Bank, No.91, 1st Main Road,
Gandhi Nagar, Adayar,
Chennai-600 020.
- 2.The District Collector,
Kancheepuram District,
Collectorate,
Kancheepuram.
- 3.The Tahsildar,
Kancheepuram Collectorate,
Kancheepuram Taluk,
Kancheepuram District.
- 4.The Section Officer,
Writ Section, High Court,
Chennai - 104.

+1 cc to Mr.R.Sankarasubbu, Advocate, S.R.No.3768

+1 cc to Mr.S.Sethuraman, Advocate, S.R.No.3596

W.M.P.No.23076 of 2016
in
W.P.No.4902 of 2016

MP(CO)
SSM(26/02/2019)