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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19/4/2018

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Petition No.7154 of 2015

1. Dr.J.A.Sachidanandan
2. Mrs.S.Malliga ...Petitioners

Vs

1. The Authorised Officer
ICICI Bank Ltd
DSMG Mortgages
RAPG Section
No.10 A, Lakshmi Arcade, III Floor
11th Cross Main Road
Thillai Nagar
Trichy 620 018.
2. The Registrar
Debts Recovery Appellate Tribunal
Chennai 600 008. ...Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of certiorari to call for the records pertaining to the impugned order dated 28/10/2014 passed in R.A.(SA) No.99 of 2013, on the file of the second respondent herein and quash the same.

For petitioner ... Ms.Anuradha Balaji

For respondents... Mr.S.Suresh
for Mr.Srinivasaraghavan
for R.1.
R2 Tribunal

O R D E R

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

Writ petitioners have availed loan for a sum of Rs.17 crores, on 7/3/2002, repayable in 36 equal instalments at Rs.8,526/-. During the existence of the said loan account, Bank had offered a further loan of Rs.7 crores, repayable in 36 equal



instalments at Rs.10,997/-. There was default. Bank, initiated action, under Section 14 of the SARFAESI Act, 2002. Petitioner has challenged the same by filing writ petition No.6689 of 2011 and prayed for an interim order. Writ Court, by order, dated 28/6/2011, in M.P.Nos.3 and 4 of 2011, granted interim stay and injunction for a period of four weeks, on condition that the petitioners therein had to pay a sum of Rs.12,50,000/- to the Bank, within a period of fifteen days, from the date of receipt of the copy of the said order. Conditional order has not been complied with.

2. Bank is stated to have taken possession of one portion of the property mortgaged, through an Advocate Commissioner. Thereafter, Bank, issued a letter, dated 20/12/2009, intimating the petitioner for taking over possession. Bank has also issued a pre-sale notice, dated 20/12/2011, to bring the properties for auction.

3. Being aggrieved, petitioner has filed S.A.No.14 of 2012 before the Debts Recovery Tribunal - 3, Chennai, for the following reliefs:-

(i). To set aside the intimation of possession taken notice, dated 20/12/2011 issued by the respondent in respect of the schedule mentioned property.

(ii). To direct the respondent not to sell the schedule mentioned property subsequent to the pre-sale notice, dated 20/12/2011 issued by the respondent in any manner pending disposal of this appeal.

(iii). To order costs of this application to be paid by the respondent herein.

(iv). To pass such further or other orders as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case.

4. In S.A.No.14 of 2012, Authorised Officer, ICICI Bank, Trichy, filed written statement.

5. One of the grounds of challenge to the proceedings, dated 22/11/2011, viz., "intimation for taking over possession" is that the Bank did not serve notice on the borrower, affix and publish in two dailies, as per the procedure.

6. Adverting to the above, Debts Recovery Tribunal, vide, order made in S.A.No.14 of 2012, dated 11/7/2013, at paragraph Nos.5 to 8, ordered as hereunder:-

"5. Page Nos.72 and 76 of the respondent's typed set contain copy of the demand notice, dated 20/9/2010. The postal envelopes were



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returned unexecuted. It is evident from page Nos.84 & 85 of the respondent's typed set. No step was taken by the respondent Bank to effect the service by affixing a copy of the demand notice on the outer door or some other conspicuous part of the house wherein the borrower is residing. The bank did not comply proviso to Rule 3 of Security Interest (Enforcement) Rules, 2002. It is illegal. No document is available to establish that Section 13 (2) notice was properly served to all borrowers. But the bank published Section 13 (2) notice in two dailies without affixing the same as provided in Rule 3. It is illegal.

6. The petitioner has a case that possession of the property was taken without delivering Section 13 (4) notice to the borrower. According to them, Advocate Commissioner visited the site on 10/12/2011. No section 13 (4) notice was delivered to them and affixed in the property. Page No.96 of the respondent's typed set contains copy of the possession notice dated 17/12/2011. According to the respondent, possession was taken on 17/12/2011. No document is available to establish that the impugned possession notice was properly delivered, affixed and published in dailies as per sub-Rule (1) & (2) of Rule 8 of Security Interest (Enforcement) Rules, 2002. Point is found accordingly.

7. Point No.(ii): In view of the foregoing discussion, S.A is to be allowed. Accordingly, S.A is allowed. No order as to costs.

8. In the result, S.A.No.14 of 2012 is allowed. No order as to costs. Possession notice and pre-sale notice dated 20/12/2011 is hereby set aside and possession is restored. All the costs, charges and expenses in respect of the impugned notice incurred by the bank and any other expenses incidental thereto shall not be recoverable from the applicant."

7. Being aggrieved, the Authorised officer, ICICI Bank Limited, Trichy, has filed an appeal, in R.A (SA) No.99 of 2013, before the Debts Recovery Appellate Tribunal, Chennai. Justifying filing of an application, under Section 14 of the SARFAESI Act, 2002, taking over possession, and while narrating the facts, Bank at paragraph Nos.(f) and (g), averred as follows:-

"(f). At this juncture, the respondents



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approached the Hon'ble Madurai Bench of Madras High Court, Madurai, in W.P.(MD) No.6689 of 2011 for an interim stay of the operation of the order of the Hon'ble CJM, Pudukottai and for grant of order of interim injunction restraining the appellant Bank, their men and agents including the Court Commissioner from in any manner proceeding against the respondents in taking possession of the said property. The Hon'ble High Court, Madurai Bench, by an order, dated 28/6/2011, was pleased to pass an order of interim stay and an interim injunction for a period of four weeks on the condition that the respondents had to pay a sum of Rs.12,50,000/- within a period of 15 days from the date of receipt of a copy of the order. It was also stated in the order that on failure to pay the said amount by the respondents within the time stipulated in the order, interim stay and injunction granted therein, would automatically stand vacated without any further reference to the Hon'ble Court. The respondents failed to comply with the condition imposed by the Hon'ble High Court and hence the order stood automatically vacated. Under the circumstances, the officials of the appellant Bank and the Advocate Commissioner appointed by the Hon'ble CJM, Pudukottai, visited the said property and at that time, the respondents pleaded for time to settle the loan accounts. On 10/12/2011, when the Authorised Officer of the appellant Bank visited the premises along with the Advocate Commissioner, the respondents requested for time of three days for making a partial payment of Rs.20.00 lakhs and further undertook to pay the balance amount of Rs.43.00 lakhs on or before 15/1/2012. It was also undertaken by the respondents in the said letter that failure to make the said payment, they would hand over the said property to the appellant Bank. The said letter was signed by the respondents in the presence of three witnesses. Therefore, the appellant Bank waited for a week. But the respondents were evading. Under these circumstances, the appellant Bank was left with no other option except to proceed further under the provisions of the SARFAESI Act. The Advocate Commissioner went to the schedule property on 17/12/2011 to executed the warrant of commission issued to the Advocate Commissioner by the Hon'ble CJM, Pudukottai. The respondents in a high handed manner and having scented the Advocate Commissioner's visit, locked the premises of the said property and absconded from the scene. Hence,



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the Advocate Commissioner had no other alternative except to take the physical possession of the property as per the order of the Hon'ble CJM, Pudukottai by over locking in the premises, except the first floor. Overlocking the premises is an evidence of taking possession of the said property. The first floor was occupied by one, Mr.R.Johnson, who claimed to be an Othidar and the Othidar in and by his letter dated 17/12/2011 requested time till 16/1/2012 and undertook to deliver vacant possession of the premises on or before 16/1/2012. The appellant Bank pasted the possession notice under Rule 8 (1) of the Security Interest (Enforcement) Rules, 2002. On the same day, another notice was also sent to the respondents calling upon them to vacate the premises. At the time of taking physical possession of the said property, a panchnama was also drawn in compliance with Rule 4 (1) of the Security Interest (Enforcement) Rules, 2002 and the Appendix I therein. The Advocate Commissioner has also recorded the proceedings in taking possession of the property. The appellant Bank also by its letter dated 20/12/2011 addressed to the respondents, informed the fact of having taken possession of the property and informed to the respondents, the amount due and payable under the loan facilities as per demand notice, under Section 13 (2) of the Act. Since the respondents were absconding at that time, the notice was served upon the authorised representative of the respondents. The said possession notice was also published in two local dailies, namely, 'Indian Express' and 'Dhina Thanthi' dated 22/12/2011. Thus, the appellant Bank has complied with all the requirements of the SARFAESI Act in letter and spirit.

(g). The respondents having filed a writ petition before the Madurai Bench of Madras High Court and having failed and neglected to comply with the conditional order passed by the Madurai Bench of Madras High Court and having allowed the interim order passed by the Madurai Bench of Madras High Court to get automatically vacated, in sheer abuse of the process of law, filed the above SARFAESI Application No.14 of 2012 before the Debt Recovery Tribunal - III, Chennai, thereby seeking a relief of setting aside the enforcement of the possession notice dated 20/12/2011 and for a direction to the appellant Bank not to sell the schedule property consequently to the pre-sale



notice, dated 20/12/2011 and the appellant bank resisted the said application by filing a detailed written statement."

8. As regards failure to comply with the conditional order passed by the Madurai Bench of Madras High Court in W.P.No.6689 of 2011, Bank, in the memorandum of grounds, stated as follows:-

"(d). The Tribunal below failed to note that the respondents herein had filed a writ petition in W.P.No.6689/2011 before the Madurai Bench of Madras High Court and that the respondents had also prayed for interim orders and that Madurai Bench of Madras High Court, on 28/6/2011 passed a conditional order, thereby directing the respondents to deposit a sum of Rs.12,50,000/-, within a period of 15 days with the usual default clause. It is also overlooked that the respondents failed to comply with the conditional order and the interim order passed by the Madurai Bench of the Hon'ble Madras High Court automatically got vacated. Overlooking all these facts the Tribunal had passed the order, which is vitiated.

(e). The Tribunal failed to note that the respondents, having filed a writ petition before the Hon'ble Madurai Bench of Madras High Court, are prohibited to come before the Tribunal below with a SARFAESI Application. Once the High Court was seized of the matter and passed an order, it is impermissible for the respondents to revert to the proceedings under the SARFAESI Application after proceedings before the High Court amounted to clear abuse of the process of law.

9. On the aspect of service to the borrower, Bank in memorandum of grounds, from (j) to (m), stated as hereunder:

(j). The Tribunal below in its impugned order has stated that the Provision to Rule 3 of the Security Interest (Enforcement) Act, 2002 was not complied with. In this context, the Tribunal failed to note that as per the decision in the case reported in AIR 1989 SC 630. The Tribunal failed to properly appreciate the purpose of scope of Rule 3 of the Security Interest Enforcement Act, 2002.

(K). The Tribunal failed to note that when admittedly, the appellant Bank sent a notice in question by Registered Post Acknowledgment Due (RPAD) to the last known addresses of the respondents, the appellant cannot have any control



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over the change of addresses of the respondents.

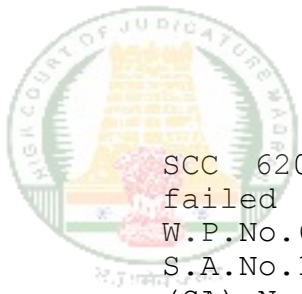
(1). The Tribunal below failed to note that the expression "Service" occurring in Rule 3 of the Security Interest Enforcement Act, 2002 had to be read as "sent by post", it is not open to the respondents to complain that there was non-service of the notice.

(m). The Tribunal below erred in holding that the possession notice was not delivered to the respondents. As a matter of fact, the possession notice was issued on 17/12/2011 and the same was published in Indian Express and Daily Thanthi both dated 21/12/2011. The Tribunal failed to note that there was valid compliance of the Rules."

10. Apart from the above, Bank has also made averments, touching upon the bona fide of the writ petitioners in making re-payment, as hereunder:-

"The Tribunal below also failed to note that the respondents herein on 11/12/2011 in a handwritten letter engrossed on the letter-head of Jayaraja Hospitals, addressed to the Authorised officer, ICICI Bank Ltd., (the appellant herein), clearly admitted that the appellant Bank came to take possession of the property along with a Advocate Commissioner. In the said letter, the respondents had also admitted the mortgage of the property and non-payment of dues by them. The respondents also requested the Authorised officer, ICICI Bank Ltd., (the appellant herein) to grant time for 3 days for making partial payment of Rs.20.00 lakhs, i.e., on or before 13/12/2011. In that letter, the respondents also undertook to pay the balance amount of Rs.43.00 lakhs to the appellant Bank on or before 15/1/2012, as per the settlement arrived at between the respondents and the Bank. The respondents also undertook that in the event of their not complying with the undertaking within the stipulated time, they would handover the property to the appellant bank. The above facts clinchingly show that the respondents had full and complete knowledge about the proceedings under the SARFAESI Act."

11. When the Authorised Officer, ICICI Bank Limited, Trichy, appellant, in R.A.(SA) No.99 of 2013, challenged the order made in S.A.No.14 of 2012, dated 11/7/2013, on the above grounds, stated supra, in particular, service of the possession notice, taking note of the decision of the Hon'ble Supreme Court in STANDARD CHARTERED BANK Vs. V. NOBLE KUMAR & ORS {2013 (9)



SCC 620}, and of the fact that the respondent/borrower had failed to comply with the conditional order made in W.P.No.6689/2011, set aside the order of the Tribunal in S.A.No.14 of 2012, dated 11/7/2013 and accordingly, allowed R.A. (SA) No.99 of 2013, filed by the Bank.

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12. Being aggrieved, by the order of the Appellate Forum, instant writ petition has been filed by the borrower, on the grounds inter alia that

(i). Tribunal below, failed to appreciate the relief sought for and the scope of S.A., and also failed to consider that the petitioners had come before the Tribunal for a substantial relief in respect of their right to property, which is a constitutional right under Article 300 (A) of the Constitution of India.

(ii). DRAT, Chennai, ought to have considered the fact that the order challenged in the writ petition is no more valid, in view of the Full Bench decision that the secured creditor does not have a right to approach the CJM under Sec.14 of the SARFAESI Act. As such, the order of the CJM has become infructuous and cannot be taken note of.

(iii). The Appellate Tribunal, ought to have held that it is a well established principle of law that any person can approach the Court/Tribunal, to seek for a remedy based on a cause which arose for consideration. But in the instant case, the cause for the petitioner to approach the High Court was different. The cause for approaching the Tribunal arose on receipt of a letter, dated 17/12/2011, which brought to the notice of the petitioners, about the alleged possession notice and pre-sale notice.

(iv). The Appellate Tribunal should have considered the fact of sending a letter, dated 17/12/2011, informing about the issuance of alleged possession notice, is not disputed by the first respondent and on the other hand, the contentions raised by the first respondent was that the petitioner was aware of taking possession, and approached the High Court and therefore, he cannot have any grievance on the measures.

(v). DRAT ought to have considered that the measures had been taken in gross violation of the provisions of the SARFAESI Act, 2002 and hence the petitioners right to adjudicate the same cannot be crippled on mere technicality.

(vi). DRAT should have considered that DRT has recorded the fact that the first respondent has not served the demand notice as required under the Rules and possession notice was also not served. Letter termed as pre-sale notice cannot satisfy the compliance of Rule 8 and 9 of the Security Interest (Enforcement) Rules.

13. Respondent Bank has filed a detailed counter. Relevant



portions are extracted hereunder:-

"3. Even at the outset I submit that the allegations contained in Writ Petition itself is not maintainable in Law. The Writ Petition filed for Writ Of Certiorari to call for the records of the 2nd respondent herein and to quash the order dated 28/10/2014 passed in RA(SA) NO. 99 of 2013. ICICI Bank Limited filed the appeal in RA(SA) NO. 99 of 2013 against the order of the DRT III, Chennai passed in S.A. NO. 14 of 2012 dated 11/07/2013 exceeded its jurisdiction and passed the illegal order. Therefore aggrieved by the said order the ICICI Bank Limited filed the said appeal RA(SA) NO. 99 of 2013.

4. The petitioner herein had deliberately failed to set out the facts and circumstances on which ICICI Bank Ltd. filed the appeal referred to above. Therefore it is necessary to set out the factual matrix of the case.

5. The petitioner herein has approached ICICI Bank to avail Housing loan under two loan agreements namely LBTR100000813793 DATED 31/01/2004 and LBTR10000087386 dated 31/08/2004. The petitioner herein initially requested for a loan of Rs 17 lakhs for the purchase of the property and availed the same under the said loan agreement, the loan amount together with interest at the rate of 7.75% p.a. (floating rate) was repayable in 156 monthly installments with an EMI at the rate of Rs. 17092/- p.m. The first installment commenced on 01/03/2004. The respondent herein purchased the schedule property on 14/06/2004 for a sale consideration of Rs.

26,00,100/- from Mr S. Srinivasan and others vide a sale deed dated 14/06/2004 registered as document No. 683 of 2004 in the office of the Joint- II, Sub registrar, Pudukottai. The sale deed in question recites and mentions about the loan availed by the petitioners from the first respondent bank.

6. I state that the petitioners created an equitable mortgage over the schedule property in favour of the first respondent by deposit of original title deeds with an intention of create equitable mortgage in respect of the schedule property so purchased. Subsequently the petitioners requested the first respondent bank for a further loan facility of Rs. 7 lacs on the same property which request was acceded to by the bank. Thereupon the respondent entered into a loan agreement dated 31/08/2004 with the respondent bank, wherein a sum



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of Rs. 7 lacs together with interest at the rate of 7.75% p.m.(floating interest) was repayable in 180 monthly installments at the rate of Rs. 6490/- p.m. commencing from 07/09/2004.

7. The petitioners herein were highly irregular in payment of installments and due to the non-payment of EMIs, which had remind due for over a period of 90 days, the loan was classified by the first respondent bank as Nonperforming Asset. Hence the respondent bank had issued loan recall notice dated 30/11/2009 and 09/06/2010 calling them to settle the said loan accounts.

8. As on 09/09/2010 a sum of Rs. 33,78,207/- was payable under the first loan agreement dated 31/01/2004 and a sum of Rs. 14,09,681/- was payable under loan agreement dated 31/08/2004. Therefore the first respondent bank sent a demand notice dated 30/09/2010 under section 13(2) of the SARFEASI Act to the petitioners for the respective loan account, to the two addresses of the petitioners. The petitioners did not receive the said notice in one of the addresses and the fate of the second address was not known. Hence, as a mandate under the Act and Rules made thereunder, the said notice was published in Indian Express and Daily Thanthi both dated 12/11/2010.

9. After waiting for a statutory period of 60 days the first respondent had no other alternative remedy except to approach the Hon'ble Chief Judicial Magistrate, Pudukottai seeking for an order to appoint an advocate commissioner to take physical possession of the property. The Hon'ble Chief Judicial Magistrate, Pudukottai was pleased to appoint an advocate commissioner, vide order dated 11/05/2011, appointed an advocate commissioner with a direction to him to inspect and take possession of the schedule property.

10. At this juncture the petitioners had filed W.P.(MD) NO. 6689 of 2011 was filed before the Hon'ble High Court, Madras, Madurai Bench for an interim stay of operation of the order of the Hon'ble Chief Judicial Magistrate, Pudukottai and for grant of order of interim injunction restraining the first respondent bank their men and agents including the Court commissioner from in any manner proceedings ahead in taking possession of the property. The Hon'ble High Court Madras, Madurai Bench by an order dated 28/06/2011 was pleased to pass an order or interim stay and interim injunction for a period of four weeks on the condition that the



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vide its letter dated 20/12/2011 addressed to the petitioners, informed the factum having taken possession of the property and informed to the petitioners, the amount due and payable under the loan facilities as per the demand notice under section 13(2) of the SARFEASI Act. Since the petitioners were absconded at that time the notice was served upon the authorized representative of the petitioners. The said possession notice was also published in two local dailies namely Indian Express and Daily Thanthi dated 22/11/2011. Thus the first respondent bank has complied with all the requirements of the SARFEASI Act in letter and spirit.

14 The petitioners approached the DRT III, Chennai and thereby seeking a relief to set aside of the intimation of the possession taken notice dated 20/12/2011 issued by the first respondent bank in respect of the schedule mentioned property and to direct the first respondent bank not to sell the schedule mentioned property. Subsequent to the pre-sale notice dated 20/12/2011 issued by the first respondent bank in any manner pending disposal of this appeal and the respondent bank resist the said application by filing a detailed statement. Even before the Debts Recovery Tribunal-III, Chennai the petitioners have not chosen to challenge the possession taken by the 1st respondent bank but what they sought is only to set aside the intimation of possession taken notice dated 20/12/2011.

15. The Hon'ble DRT- III, Chennai by its order dated 11/07/2013 for reasons hardly sustainable under Law allowed the subject SA and ordered restoration of possession. Hence the first respondent bank approached DRAT, Chennai by filing an appeal in RA(SA) NO. 99 of 2013 against the order "dated 11/07/2013 of the Hon'ble DRT-III Chennai in SA NO. 14 of 2012 on the file of the Hon'ble DRT-III, Chennai.

16. The first respondent bank humbly submits that "before DRT-III, Chennai in the objections one of the main grounds that was taken was the petitioners having approached the Hon'ble High Court in W.P. NO. 6618 of 2011 and having invited a conditional order and not complied the same are not entitled to approach the DRT-III, Chennai. Similarly this objection was not at all considered by the DRT-III Chennai. Once the High Court was seized of the mater and passed an order it is impermissible for the respondent to revert to the proceedings under SARFEASI Act.



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17. On 15/12/2011 the petitioners herein, in hand written letter engrossed on the letter head of Jayaraja Hospital clearly admitted that the first respondent bank came to take possession of the property along with an advocate commissioner. The petitioners also requested the authorized officer of the first respondent bank to grant time for 3 days for making partial payment of Rs.20 lakhs on or before 13/12/2011. In the said letter the respondents also undertook to pay the balance amount of Rs. 43 lakhs to the first respondent bank on or before 15/01/2012. In the said letter it was also stated by the petitioners that in the event of their not complying with the undertaking they would hand-over the property to the first respondent bank. The above facts clinchingly show that the petitioners had full and complete knowledge about the proceedings under the SARFEASI Act.

18. I state that one Mr.Jojn, by his letter, dated 17/12/2011 who is the lessee under the petitioners agreed to vacate and hand over the possession on or before 15/01/2012 and these facts are not considered by the DRT-III.

19. I state that the impugned order passed by DRT-III without considering the objections raised by the first respondent bank was challenged rightly by the first respondent bank.

20. I state that the averments made in para 1,2,3 and 4 are matter of records and it need not be traversed.

21. I state that the allegations mentioned in paragraph n0.5 with regard to loan availed are matter of records and the allegations with regard to a security cheque given by the petitioners are denied.

22. I deny the allegations mentioned in paragraph no. 6 and 7 except the particulars of availing loan and EI"II particulars. The other allegations are denied as mischievous and a tissue of falsehood and the petitioners are put to strict proof of the same.

23. The conduct of the Writ petitioners is relevant. The writ petitioners borrowed money from the first respondent bank and created security interest. The writ petitioners had created equitable mortgage over the property in question in favour of the first respondent bank by depositing the original title deeds relating to the property and with intend to create an equitable mortgage in respect of the



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property in question.

24. The borrowing under two loans is a matter of admission. When the writ petitioners defaulted in repayment of the loan the first respondent bank approached the Chief Judicial Magistrate Pudukottai and the commissioner was appointed to seize the first respondent bank taking possession of the secured assets. When the advocate commissioner so appointed went to inspect the property for taking possession, both the writ petitioners in a hand written letter dated 10/12/2013 addressed to the authorized officer

of the first respondent bank clearly admitted the loan with the first respondent. The writ petitioners in and by the said letter offered to settle the loan amount and clearly stated that the advocate commissioner came to take possession of the mortgage properties and that was due to nonpayment of the dues by the writ petitioners. In the said notice dated 10/12/2011 admit their liability and requested the authorized officer of the first respondent bank to give them 3 days time for making partial payment of Rs. 20 lakhs and also undertook to make the balance payment of Rs. 43 lakhs on or before 15/01/2012 as per the settlement arrived at between the writ petitioners and the bank, Therefore it is clear that the writ petitioners had settled with the first respondent. It is not open to the writ petitioners to challenge the action of the first respondent on procedural grounds. The said letter is very clear evidence that the writ petitioners are admitted the borrowing and also admitted their fault in making payment. The writ petitioners were aware of the actions taken by the first respondent bank. They clearly admitted that the advocate commissioner appointed to take possession of the mortgage properties. The notice, contemplated under SARFEASI Act are primarily intended to be a notice to borrowers about the actions being taken by the secured creditors and by the bank. In the instant case when beginning from the borrowing till the appointment of advocate commissioner by the Chief Judicial Magistrate, Pudukottai had been clearly admitted, and the writ petitioners cannot therefore question the action of the first respondent bank in taking possession.

25 It is significant to note that none of the grounds that are being stated in the above writ petition had been set out in the earlier writ petition filed by them before Madurai Bench of the Madras High Court.



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26 It is submitted that the writ petitioners having approached, by filing of the writ petition before Madurai Bench of the Madras High Court cannot fall back upon the provisions of Section 17 of the SARFEASI Act. In the case of Standard Chartered Bank Vs. Noble Kumar reported in (2013 (9) SCC 620 Supreme Court) has clearly held that the secured creditors can take possession of the secured assets under three methods namely.

A. Whether the secured creditors gives notice under Sec 8(1) security interest rules and does not make with any resistance;

B. Whether the secured creditors is made with resistance from the borrowers after the notice under Rule 8(1) of SARFEASI Act;

C. The secured creditors approached the Magistrate under Section 14 of the SARFEASI Act.

27 Ultimately Supreme Court came to the conclusion that the secured creditor can approach the District Magistrate or the Chief Metropolitan Magistrate without exhausting his rights under Section 13(4) of the SARFEASI Act.

28 The final conclusion of Supreme Court in the case that reported is that", the borrower had without availing the remedy under Section 17 of the SARFEASI Act who approach the High Court under Article 226 of the Constitution of India. It is not open to the borrower to fall back upon Section 17 of the SARFEASI Act.

29 Further the frame of writ petition No. 6689 of 2011 on the file of Madurai Bench of the Madras High Court, the writ petitioner cannot invoke Article 300(a) of the Constitution of India claim that the right to property is the constitutional right and by the action of the first respondent bank in taking possession that constitutional right is violated. It is submitted that once the writ petitioners had executed a mortgage in respect of the property in question, then there is a right created on the secured creditors i.e. the first respondent bank given right to take possession of the secured interest without intervention of the Court.

30 Therefore the claim of the writ petitioners that they have a constitutional right under Article 300(a) of the Constitution of India is misconceived.

31. It is submitted that the conduct of the writ petitioners in admitting loan amount and in admitting their default in repayment of the dues, they cannot call any question in ~ taking possession of the assets by the first respondent bank.



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Admittedly the writ petitioners approached the Madurai Bench of Madras High Court for filing W.P. NO. 6689 of 2011 wherein they sought for quashing the order of the Chief Judicial Magistrate Pudukottai. The Madurai Bench of Madras High Court by an interim order directed the writ petitioners to pay Rs. 12.50 lakhs within a period of four weeks. The writ petitioners did not comply with the order and therefore they subsequently withdrew the application. Therefore this conduct of writ petitioners would go to show they approached the High Court under Article 226 of the Constitution of India and they did not even obey the orders of the High Court in W.P. the petitioners herein are not entitled for any indulgence whatsoever.

32 The writ petitioners want to make a difference between the relief prayed for in the earlier writ petition and relief for which the S.A. was filed. According to the writ petitioners the S.A. was filed challenging the possession taken intimation notice dated 17/12/2011. In this connection it is submitted that Section 14 is also one for taking possession and it is for the writ petitioners to challenge the factum of taking possession and not any other notice which are merely the consequential. The writ petitioners cannot also contained that in view of the judgment of Full Bench of this Hon'ble Court the order of Chief Judicial Magistrate Pudukottai became infructuous. This overlooks the established prospective overruling. The prospective overruling means that the Law declared by the Court applies to the case arising in future only and it is applicability not to cases which are attained finality is saved. In the instant case the Full Bench Judgment dated 27/08/2013 the order of the Chief Judicial Magistrate Pudukottai dated 11/05/2011.

Therefore, when the order of the Chief Judicial Magistrate was much earlier to the Full Bench judgment, dated 27/8/2013, the same is not bound by the Full Bench judgment applying the doctrine of procedural overruling.

33. The Full Bench judgment operates only the cases which are future in point of time to 27/8/2013. This is the law laid-down by the Supreme Court in the case reported in AIR 2003 SC 1475/ Any decision ignorant of the Supreme Court judgment referred to above is only the per incuriam.

34 In any view of the angle the present writ petition filed by the petitioners is only to drag the recovery of money due to the bank. I state that



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the first respondent had acted lawfully to recover its dues. I state that the petitioners are stalling this first respondent bank from recovering its dues. I state that the Debts Recovery Appellate Tribunal, Chennai has rightly dismissed the S.A. filed by the petitioners. Ends of justice therefore require that the petitioners are not entitle for any relief and this first respondent bank humbly submits that this Honourable court may be pleased to dismiss the above writ petition to enable the 1st respondent bank to recover its dues from the petitioners.

It is therefore prayed that this Honourable court may be pleased to dismiss the above writ petition filed by the petitioners and thus render justice.

14. Supporting the prayer sought for in the writ petition, Ms.S.Anuradha Balaji, learned counsel for the petitioner made submissions.

15. Opposing the prayer sought for and inviting the attention of this Court, to the decision in Standard Chartered Bank Vs. V.Noble Kumar and Ors {2013 (6) CTC 683}, Mr.Srinivasaraghavan, learned counsel for the respondent Bank submitted that the Hon'ble Supreme Court has held that secured creditor can seek assistance of the Court in taking possession of the secured assets, without resorting to procedure contemplated under Section 13 (4) of the SARFAESI Act, 2002 and that in the case on hand, when such proceedings under Section 14 of the Act was taken, the learned Chief Judicial Magistrate, Pudukottai, passed an order, dated 11/5/2011, granting assistance and when the learned Advocate Commissioner, visited the property to take possession, the borrower sought time, for making partial payment and to pay the balance. There was a settlement arrived at between the parties and the Bank, but the borrowers failed to honour. He further submitted that the learned Advocate Commissioner has also taken possession of a portion of the property. He further added that there is no bona fide on the part of the writ petitioners, in protracting the matter, on one ground or the other. Based on the above, he prayed to sustain the order impugned.

16. Heard the learned counsel for the parties and perused the materials available on record.

17. There cannot be a quarrel over the pronouncement of the Hon'ble Supreme Court that without resorting to issuance of notice, under Section 13 (4) of the SARFAESI Act, 2002, secured creditor/Bank can always approach the the District Collector-cum-District Magistrate/Chief Judicial Magistrate, for assistance in taking physical possession of the secured asset,



by filing an application under Section 14 of the SARFAESI Act, 2002.

18. Before the Debts Recovery Tribunal - 3, Chennai, writ petitioners have sought for two specific prayers:-

(i). To set aside the intimation of possession taken notice, dated 20/12/2011 issued by the respondent in respect of the schedule mentioned property.

(ii). To direct the respondent not to sell the schedule mentioned property subsequent to the pre-sale notice, dated 20/12/2011 issued by the respondent in any manner pending disposal of this appeal.

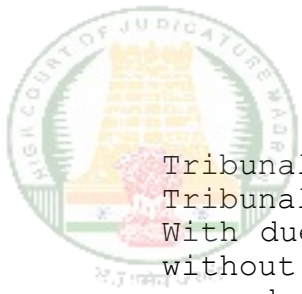
19. As stated supra, before the Debts Recovery Tribunal - III, Chennai, contention has been made by the writ petitioner that Rule 9 (1) of the Security Interest (Enforcement) Rules, has not been followed.

20. Bank has filed a written statement opposing the said contention.

21. As pointed out earlier, Debts Recovery Tribunal - III, Chennai, vide order, dated 11/7/2013, in S.A.No.14 of 2012 has observed that no step was taken by the respondent Bank to effect the service by affixing a copy of the demand notice, on the outer door or some other conspicuous part of the house, wherein the borrower is residing. Debts Recovery Tribunal - III, Chennai has further observed that Bank did not comply with the proviso to Rule 3 of the Security Interest (Enforcement) Rules, 2002. Tribunal has observed that no document was available to establish that Section 13 (2) notice was properly served to all the borrowers. Ultimately, at paragraph No.2 of the order made in S.A.No.14 of 2012, dated 11/7/2013, Debts Recovery Tribunal - III, Chennai, has set aside the intimation of possession notice and pre-sale notice, dated 20/12/2011.

22. No doubt, the Debts Recovery Tribunal - III, Chennai, has stated that possession notice, dated 17/12/2011 has been set aside and as rightly pointed out by the learned counsel for the Bank that it was only an intimation to the petitioner, for taking over possession of the property.

23. Be that as it may, sale notice as well as the intimation notice, both dated 20/12/2011 have been set aside. On appeal, Bank sought to justify the intimation notice and sale notice, by raising the grounds extracted supra. Without adverting to the abovesaid grounds, by taking note of the non-compliance of the order of the High Court, Madras, decision rendered in Noble Kumar's case, the Debts Recovery Appellate



Tribunal has simply set aside the order of the Debts Recovery Tribunal - III, made in S.A.No.14 of 2012, dated 11/7/2013. With due respect, such a tangent view of the Appellate Tribunal, without advertng to the grounds of challenge, and on the procedure to be followed, cannot be sustained. Specific grounds raised and argued, ought to have been addressed. On the above aspect, we deem it fit to consider the following decisions:-

(i) The Hon'ble Apex Court in HVPNL v. Mahavir reported in (2004) 10 SCC 86, while dealing with an order passed by the State Consumer Disputes Redressal Commission, held that the appellate forum is bound to refer to the pleadings of the case, submissions of the counsel, necessary points for consideration, discuss the evidence, and then to dispose of the matter by giving valid reasons.

(ii) In Tata Engineering & Locomotive Co. Ltd., v. Collector of Central Excise, Pune reported in 2006 (203) ELT 360 (SC), the Hon'ble Supreme Court, dealing with a case, wherein, by a cryptic and non-speaking order, the Tribunal upheld the order passed by the Commissioner, by applying the ratio of the decision of a Larger Bench in TISCO Ltd., v. CCE, Madras [2000 (118) ELT 104 (T-LB)], without recording any findings of fact. On the facts and circumstances of the case, the Hon'ble Apex Court, while holding that it is not sufficient in a judgment, to give conclusions alone, but it is necessary to give reasons, in support of the conclusions arrived at, set aside the order of the Tribunal, holding that the findings recorded by the Tribunal therein, were cryptic and non-speaking, and remitted the matter to the Tribunal for taking a fresh decision, by a speaking order, in accordance with law, after affording due opportunity to both the parties.

(iii) In Commr. of Central Excise, Bangalore-II v. Fitwel Tools & Forgings (P) Ltd., reported in 2010 (256) ELT 212 (Kar.), a Hon'ble Division Bench of Karnataka High Court, at Paragraph 5, held as follows:

"After careful perusal of the order impugned, it is manifest on the face of the order that the Tribunal has committed a grave error in passing the order impugned

without assigning any valid reasons and without any discussion. By merely following the order passed in similar matters, it has proceeded to pass the impugned order, allowing the appeal filed by the respondent. Hence, we are of the opinion that the impugned order is cryptic in nature and such a non-speaking order cannot be sustained."



24. In the light of the above decisions and discussion, we are of the view that the Debts Recovery Appellate Tribunal, has failed to consider the actual challenge of service of notice and procedural violations, but allowed the Bank's appeal by taking note of the failure to comply with the conditional order passed by the High Court, Madras. For the above said reasons, impugned order requires interference. Accordingly, it is set aside.

25. Instant writ petition is allowed and the matter is remitted back to the Debts Recovery Appellate Tribunal, Chennai, for fresh consideration. Debts Recovery Appellate Tribunal Chennai, is requested to dispose of the appeal in R.A (SA) No.99 of 2013, within a period of two months, from the date of receipt of a copy of this order. No costs. Consequently, the connected Miscellaneous Petition is closed.

-s/d-

Assistant Registrar(CS-II)

True Copy

Sub-Assistant Registrar

mvs.

To

1. The Authorised Officer
ICICI Bank Ltd
DSMG Mortgages
RAPG Section
No.10 A, Lakshmi Arcade, III Floor
11th Cross Main Road
Thillai Nagar
Trichy 620 018.

2. The Registrar
Debts Recovery Appellate Tribunal
Chennai 600 008.

+1 CC to Mr.T. Srinivasan Raghavan Associates sr 30066.

W.P.No.7154 of 2015

KAN(CO)
SP(22/05/2018)