IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.04.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.29987 of 2016

S.Stalin .. Petitioner

versus

The Chief General Manager
Vijaya Bank
Asset Recovery Management Branch
No.182, P.H. Road, Kilpauk
Chennai - 600 010 .. Respondent

Writ Petition filed under Article 226 of the Constitution of India, for a writ of mandamus directing the respondents to execute the sale deed for the land and building measuring 1500 sq.ft. supported by land to an extent of 5600 sq.ft. comprised in old S. No.226/2, R.S. No. as per patta 226/2 (35/1 of 1982) block No.27, Konnur village situated at Plot No.370-D, 13th Street, Rajamangalam, Villivakkam, Chennai - 600 049, within time bound period.

For Petitioner : Mr.K.Mohanamurali
For Resondent : Mr.P.Elayaraj Kumar
for M/s.Ramalingam Associates

ORDER
(Made by S.MANIKUMAR, J.)

Challenge in this writ petition is to the letter dated 24.10.2017 issued by State Bank of India, Coimbatore, respondent No.1, forfeiting a sum of Rs.30,75,000/-, 25% of the bid amount, paid by the auction purchaser/writ petitioner.

2. Short facts leading to the filing of the writ petition are that the property at Plot No.370-D, 13th Street, Rajamangalam, Villivakkam, Chennai - 600 049, was subject matter of lien with the respondent, by the borrower K.A.Dhinachandran and Mrs.S.Sundarambal. When the account of borrower became Non Performing Account, the property was brought under SARFAESI proceedings. Respondent issued an e-auction notice dated

12.11.2010 for recovery of a sum of Rs.36,79,051.99P. Possession was taken by the bank on 12.11.2010.

3. Writ petitioner participated in the public e-auction held on 21.08.2013. He quoted a price of Rs.70,30,000/-. Accordingly, he deposited 25% of the bid amount, i.e. Rs.17,58,000/- on the same day, with the respondent bank and the respondent bank gave a letter to the petitioner, confirming the sale dated 06.09.2013 stating that the petitioner was declared as the highest bidder for Rs.70,30,000/- and he has deposited 25% of the bid amount of Sale price Rs.17,58,000/- and hence sale is confirmed in favour of the petitioner and that the balance amount of Rs.52,72,000/- shall be paid by the auction purchaser, within 15 days i.e. on or before 04.09.2013 and in default of payment as above, the deposit already made will be forfeited and the property will be resold and all the rights of the auction purchaser shall also be forfeited.

4. The petitioner has paid a sum of Rs.17,58,000/- on the day of e-auction and paid the balance sale consideration of Rs.52,72,000/- belatedly, but the same was accepted by the respondent/bank. But the bank has not executed sale deed, though the petitioner is entitled to the sale deed from the respondent.

5. On 22.11.2013, the petitioner sent a lawyer's notice seeking the respondent/bank to execute sale deed, as he had paid the entire sale consideration. Since the bank did not respond to the said letter, the petitioner sent another letter on 10.04.2015 seeking for execution of the sale deed.

6. Petitioner has further submitted that the respondent has let out the property to Airtel Communication and eking out income from the property. He further submitted that though he became the successful bidder and complied with all the requirements, the respondent is not fulfilling the obligation to execute the sale deed. The borrowers Mr.K.A.Dhinachandran and Mrs.S.Sundarambal have not taken any steps for redeeming the property. Hence, the petitioner has filed the writ petition for a mandamus as stated supra.

7. Refuting the contentions of the petitioner, bank filed a counter affidavit on 7.4.2018 contending inter alia that, if at all the petitioner is having any grievance, as an auction purchaser, he ought to have approached the Debts Recovery Tribunal under Section 17 of the SARFAESI Act, 2002, but the petitioner has failed to exercise the effective alternative remedy available under the statute and hence the writ petition is not maintainable in law and the same is liable to be dismissed on the above sole ground.

8. Bank has further contended that respondent sent a communication to the petitioner as early as on 06.09.2013 intimating that in view of non remitting the balance 75% within 15 days, the amount paid by him shall be forfeited. Thereafter, the petitioner on his own paid the balance 75% belatedly in three different dates as Rs.13 lakhs vide DD dated 27.09.2013, Rs.31 lakhs by way of DD dated 11.02.2014 and Rs.8.72 lakhs by way of DD dated 17.02.2014. Bank has received the said payments subject to the approval of their competent authority. Since the competent authority of the bank did not approve the said belated payment by the petitioner, they sent a communication as early as on 24.04.2015, communicating the order of forfeiture of 25% of the bid amount i.e. Rs.17,58,000/- and also asked the petitioner to collect the 75% of the balance amount paid by him, belatedly. The petitioner having accepted the order of forfeiture, never questioned the same in the manner known to law but has filed the present writ petition. As such, the present writ petition is devoid of merits in law and on facts.

9. Mr.K.A.Dhinachandran and Mrs.K.Sundarambal are the borrowers, who availed housing loan of Rs.19,50,000/- from the bank on 21.10.2004. The loan was repayable in 240 EMIs of Rs.15,926/- with interest @ 8.50% per annum. The loan was secured by way of mortgage of the subject property. The borrowers have purchased the property from one Mr.D.Babu, who had already mortgaged the said property with the respondent's bank in Vadapalani branch as security for the loan availed by one M/s.Prime Tech Enterprises.

10. It is the further contention of the bank that, on account of the default committed by the borrowers in repaying the dues, the loan account maintained by them with the bank had become Non Performing Account. Hence in order to recover the legitimate dues, bank initiated measures under SARFAESI Act by issuing a demand notice dated 06.09.2010 to the borrowers directing them to repay the outstanding dues within 60 days. Simultaneously, the bank also filed an original application before the Debts Recovery Tribunal - III, Chennai in O.A. No.160 of 2010. Even after lapse of the statutory period of 60 days of receipt of the demand notice, as the borrowers failed to pay the dues, bank initiated further measures under Section 13(4) of the SARFAESI Act by possession of the subject property, by strictly following the procedures/rules contemplated under the Act.

11. Bank brought the secured asset for sale by issuing an Auction Sale notice dated 24.12.2010. On receipt of the sale notice, the borrowers filed an appeal under Section 17 of the SARFAESI Act before DRT-III, Chennai in S.A. No.9/2011 and that the same was dismissed. In the meanwhile, the original application filed by the bank was also allowed on 07.09.2012.

Thereafter, the bank issued a fresh sale notice dated 05.07.2013 for the same property, fixing the date of auction on 21.08.2013. Petitioner, who has participated in the auction, was declared as the highest bidder. On the same day, he had paid 25% of the sale amount, i.e. a sum of Rs.17.58 lakhs. The balance 75% of the amount should have been paid within 15 days i.e. on or before 04.09.2013 as prescribed under Rule 9(4) of the Security Interest (Enforcement) Rules, 2002.

12. Respondent bank has further contended that the petitioner herein, after receipt of the sale confirmation letter from the respondent, had failed to pay the balance 75% on or before 04.09.2013. Hence the bank sent a communication on 06.09.2013 to the petitioner, as herunder:

> " As per confirmation of sale issued to you, you were supposed to pay the balance of Rs.52,72,000/- on or before 04.09.2013. Since you have defaulted in payment, the money already deposited by you on 21.08.2013, shall be forfeited and the property shall be put for sale afresh. This is for your information."

13. After receipt of the said communication, petitioner herein, made payment of Rs.13 lakhs vide DD dated 27.09.2013 along with a covering letter dated 28.09.2013. Thereafter a sum of Rs.31 lakhs by way of DD dated 11.02.2014 and a further sum of Rs.8.72 lakhs by way of DD dated 17.02.2014, with a request to extend time and accept the balance payment. The respondent bank received the said payments, subject to the approval of their competent authority.

14. Since the competent authority of the respondent bank did not agree to accept the belated payments made by the petitioner, the respondent/bank sent a letter dated 24.04.2015 to the petitioner stating his default in making full bid amount within the stipulated period and that therefore, as per SARFAESI Rule 9 (5), the initial payment of 25% of the bid amount i.e. Rs.17.58 lakhs was forfeited. The petitioner was also called upon by the bank to collect the balance 75% during any working hours of the bank. The said order of forfeiture was never questioned by the petitioner in the manner known to law. On the other hand, the petitioner has filed the present writ petition seeking a direction against the bank to execute sale deed in his favour.

15. Bank has admitted the contention of the petitioner in respect of remitting of 25% of the amount as true, but the other contra averments are suppression of the facts and denied. The balance amount was paid by him, belatedly i.e. Rs.13 lakhs vide DD dated 27.09.2013, Rs.31 lakhs by way of DD dated 11.02.2014 and Rs.8.72 lakhs by way of DD dated 17.02.2014 and the same were also directed to be collected by the petitioner from the

respondent as early as on 24.04.2015.

16. Respondent bank has denied the contention of the petitioner that no positive reply was given. On the other hand, the bank has already informed the petitioner expressing their inability to accept balance 75% paid by the petitioner. Further the bank had also sent a letter dated 24.04.2015 to the petitioner, informing forfeiture and also to collect back his belated payment of balance 75% of the sale amount. The further averments and allegations that the respondent let out the property to Airtel Communication and taking out the income from the property are denied and the petitioner is put to strict proof of the same. On the other hand, a portion of the property was let out to construct Airtel tower by the borrowers. Since physical possession of the property was taken over by the bank by invoking Section 14 of the SARFAESI Act, subsequently, the bank informed the concerned official of Airtel to deposit the rental amount to the loan account of the borrowers, till date the rents received from Airtel, are appropriated in the loan account of the borrowers.

17. Respondent bank has further contended that it is improper and incorrect on the part of the petitioner to state that 15 days period expired on 09.10.2014 and the bank was eager in compelling the petitioner to deposit balance sale consideration. Whereas, 15 days period expired on 04.09.2013 itself and the respondent bank sent a letter on 06.09.2013 intimating that the amount shall be forfeited. Further the respondent bank did not compel the petitioner to deposit the balance amount. It is the duty of any auction purchaser for that matter to deposit the balance amount within the prescribed time. On failure to do so, the bank can very well forfeit the initial payment. Moreover, the bank received the demand drafts for the balance 75% of the amount, without prejudice to the rights stipulated in the SARFAESI Act. In case if the time has to be extended beyond 15 days, the Authorised Officer does not have the discretion, but the same has to be only approved by the competent authority, who is the secured creditor. Hence the respondent bank sent a letter dated 24.04.2015 to the petitioner informing the rejection of the approval and also to collect back the balance 75% of the sale amount.

18. It is the further contention of the bank that bank never appropriated 75% of the balance belated amount paid by the auction purchaser into the loan account. Further the demand drafts sent by the petitioner are encashed and the same are kept in a no lien account. Bank has denied the other contentions of the petitioner. The petitioner herein having voluntarily paid the balance 75% of the sale consideration on his risk and cost, now cannot turn round and blame the bank and hence the bank prayed for dismissal of the writ petition.

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

20. Learned counsel for the petitioner and respondent, made submissions in support of the affidavit filed in support of the writ petition and the counter affidavit.

21. Physical possession is stated to have been taken in execution of the orders of the learned Chief Metropolitan Magistrate, Chennai. It is admitted fact that mobile tower is erected on the building and rent for the same is being paid to the bank. Though bank has contended that balance amount has been received, though made belatedly, and such payment was not approved by the Competent Authority, bank has not proved communication dated 24.04.2015, rejecting the approval and forfeiture of the amount. Unless and until, there is a clear communication of forfeiture, the same cannot be accepted.

22. In the case on hand, there are no materials indicating, as to whether the mortgagor has pursued any appeal remedy consequent to dismissal of the S.A.No.9 of 2011.

23. Having regard to the submissions made by the learned counsel for the parties and the facts and circumstances of the case, bank is directed to appropriate the amount paid/deposited towards the loan account.

24. In view of the same, we are inclined to direct the bank to execute the sale deed in favour of the auction purchaser/writ petitioner and to hand over actual physical possession of the property, as is where is condition, to the petitioner, within a period of eight weeks from today.

With the above direction, the writ petition is allowed. However, there shall be no order as to cost.

s/d-
Assistant Registrar(CS VII)

True Copy

Sub-Assistant Registrar

asr

+1 CC to Mr. Ramalingam & Associates sr 31951.

W.P.No.29987 of 2016

SP(21/06/2018)