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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 28.04.2018

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THE HONOURABLE MR.JUSTICE S.MANIKUMAR

and

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Petition No.13893 of 2017

and

WMP No.15078 of 2017

1. G.Rajasekar

2. R.Jayamala

.. Petitioners

Versus

1. The Registrar
Debts Recovery Appellate Tribunal
Chennai.

2. The Registrar
Debts Recovery Tribunal
Madurai

3. The Authorised Officer
State Bank of India
Erode Main Branch
D-4, State Bank Road
Erode 638 011.

.. Respondents

Writ petition has been filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus calling for the records on the file of the 1st respondent in RA (SA) 131/2013 dated 16.01.2017 and quash the same as illegal and further direct the 3rd respondent bank to restore possession of the property to the petitioners.

For Petitioners : M/s.V.Raghavachari

For Respondents : R1 & R2 - Tribunal

: R3 Name Printed

: NA



ORDER

(Order of the Court was delivered by V.BHAVANI SUBBAROYAN, J.)

This Writ Petition is filed seeking a Writ of Certiorarified Mandamus calling for the records on the file of the 1st respondent in RA (SA) 131/2013 dated 16.01.2017 and quash the same as illegal and further direct the 3rd respondent bank to restore possession of the property to the petitioners.

2. The case of the petitioners is that the petitioners are doing business in Flex Printing since 2003 and approached the third respondent bank seeking credit facility for the expansion of the said business in August 2008 and on 01.09.2008, the bank has sanctioned a sum of Rs.20,00,000/- in loan Account No.3047393999270. The said loan has to be repaid in 60 monthly instalments with interest at the rate of 14.75% per annum. However, within a month of availing the credit facility, ie., on 27.09.2008, immediately after the loan was sanctioned, the petitioners met with an accident, which left them paralysed and their business was shut down. Despite the same, the petitioners submitted that, they have repaid a sum of Rs.15,00,000/- to the respondent bank. The petitioners further submitted that the third respondent bank issued a demand notice under Section 13(2) of SARFAESI Act on 08.03.2010. The said notice was never served on them and thereafter, the respondent bank proceeded to issue possession notice dated 18.05.2010. Therefore, the petitioners challenged the action of the respondent bank before the Debt Recovery Tribunal, Madurai in S.A.No.223 of 2010. The petitioners pleaded that the notice under Section 13(2) was not served on them and infact, they have alleged that the third respondent bank has not furnished the acknowledgment card or receipt for evidencing service before the Debt Recovery Tribunal, Madurai. The bank has proceeded to take symbolic possession of the property, without adhering to the statutory requirements. The acknowledgment card did not bear their signature nor the stamp of the postal authorities. In the mean while, when the SA was pending before the Debt Recovery Tribunal, third respondent approached the learned Chief Metropolitan Magistrate, Erode seeking police assistance and for appointment of an Advocate Commissioner to take physical possession of the property. Before the learned Chief Metropolitan Magistrate, Erode, before whom the proceedings regarding physical possession was pending, the third respondent submitted that they had complied with all the statutory provisions, notice envisaged under SARFAESI Act, had been served on the petitioners. The petitioners challenged the action of the bank before the Debt Recovery Tribunal, Madurai. The Tribunal passed a conditional order granting stay of all the proceedings on the payment of Rs.6,00,000/-. The petitioners also complied with the conditional order passed, by way of



depositing Rs.3,00,000/- each on 17.09.2010 and 12.10.2010 respectively. Thereafter on 12.06.2012, the Debt Recovery Tribunal, Madurai was pleased to dispose of the application filed by the petitioners overlooking the fraudulent action of the third respondent and the Tribunal has dismissed the petitioners' application. The order of dismissal passed by the Debt Recovery Tribunal, Madurai was challenged before the Debt Recovery Appellate Tribunal, Chennai in RA (SA) 131/2013, which also went against the petitioners. Challenging the mechanical order passed by the Debt Recovery Appellate Tribunal, Chennai confirming the order of the Debt Recovery Tribunal, Madurai, the petitioners have approached this Court by way of this Writ Petition.

3. Heard the learned counsel for the petitioners and perused the materials available on record including the records in RA (SA) No.131 of 2013 sent by the Debt Recovery Appellate Tribunal, Chennai.

4. Learned counsel for the petitioners submitted that notice under Section 13(2) of the SARFAESI Act, 2002 was not issued by the bank before issuing notice under Section 13(4) of the Act.

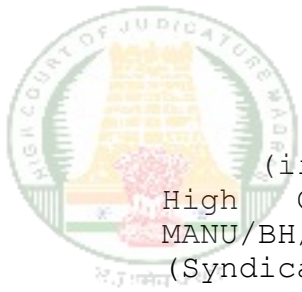
5. The issue in this Writ Petition entirely revolves on the issue whether notice under Section 13(2) of the SARFAESI Act was issued by the bank or not, for which this Court on 17.08.2017, upon hearing the arguments put forth by the learned counsel for the petitioners, directed the Registry to call for the records in RA (SA) 131 / 2013 from the Debt Recovery Appellate Tribunal. The records were received from the Debt Recovery Appellate Tribunal on 22.08.2017.

6. Learned counsel for the petitioners urged this Court that if notice under Section 13(2) of the SARFAESI Act is not served in the manner known to law, then the entire proceedings under SARFAESI Act itself is a violation of principles of natural justice and possession has to be restored back to the petitioners.

7. Learned counsel for the petitioners relied on various judgments, viz.,

(i) Judgment of this Court dated 10.08.2010 reported in Manupatra - MANU/TN/1707/2010 - W.P.No.15272 of 2009 (Sheeba Philominal Merlin and Esther Evelyne ..vs.. The Repatriates Co-op. Finance and Development Bank Ltd., (Govt. of India Enterprise), The General Manager, REPCO Bank, the Authorized Officer, Repco Bank and S.Sasikumar);

(ii) Judgment of the Hon'ble Division Bench of this Court dated 29.11.2016 reported in Manupatra - MANU/TN/3228/2016 - W.P.No.31009 of 2016 (P.Baskaran ..vs.. The Registrar, Debt Recovery Tribunal and others);



(iii) Judgment of the Hon'ble Division Bench of Patna High Court dated 11.05.2017 reported in Manupatra - MANU/BH/0289/2017 - Letter Patent Appeal No.1475 of 2014 (Syndicate Bank ..vs.. Rajesh Kumar and others);

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8. On a careful reading of the judgment referred to in the first case, it is seen that, in the said case, notice under Section 13(2) of SARFAESI Act 2002 was issued against a dead person and this Court held that the same is invalid. The above citation referred to by the learned counsel will not have any application to the present Writ Petition on hand, as the facts dealt with in the said case is totally different from the present case.

9. In the second case referred to by the learned counsel for the petitioners, the Debt Recovery Tribunal declined to accept the contention raised by the petitioners therein and has returned the petition filed by the debtor/borrower at the threshold and the same was challenged by way of a Writ Petition, to which the auction purchaser has taken a stand that the Writ Petition is not maintainable as the borrower has not approached the Debt Recovery Appellate Tribunal, as against the order passed by the Debt Recovery Tribunal. In the said case, this Court held that refusal to entertain a case by itself would tantamount to denial of a statutory right available to the petitioner under sec.17 of the SARFAESI Act. The relevant para of the said Judgment reads thus:-

"9. The Order of the Debts Recovery Tribunal when read closely would leave an impression that the Tribunal refused to consider the case of the petitioner by returning in the threshold itself the application filed by the writ petitioner. Refusal to entertain the case by itself would tantamount to denial of a statutory right available to the petitioner under sec.17 of the SARFAESI Act. "

From the above, it is clear that the second case referred to by the learned counsel also has no application to the present case, as in the present case, both the Debt Recovery Tribunal and Debt Recovery Appellate Tribunal have passed orders on merits by deciding the issue involved.

10. Insofar as the third judgment cited by the learned counsel for the petitioners is concerned, the same pertains to a case wherein the bank initiated 13(4) proceedings under the SARFAESI Act even before 13(2) notice was issued. It was a case where the debtor challenged the proceedings that 13(2) notice was not served upon them, thereby leaving the debtor deprived of



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filing statutory objections under Section 13(3)(a) of the said Act. Hence, notice and the auction of the bank were sought to be quashed. The Hon'ble Division Bench of High Court of Patna, at paragraphs - 6 of the said judgment, held as follows:-

"6. Private respondent contended that the notice sent under Section 13(2) of the SARFAESI Act was not received although the Bank in the counter affidavit in the writ had categorically stated that a notice under Section 13(2) was sent on 27.09.2011 through registered post on 22.10.2011, but the learned Single Judge observed that since the registered cover sent on 22.10.2011 did not return back to the Bank at any point of time, the presumption would be that notices were not served on the petitioner and had this to observe :

"In the considered opinion of this Court, presumption of a notice to be served under Section 13(2) of the SARFAESI Act, having a penal provision and capable of even dispossessing a person from his mortgaged property, cannot be so lightly inferred. The presumption of non-return of the registered cover, as envisaged under Order V Rule 19-A of the Code of Civil Procedure ipso facto cannot be made applicable to the proceedings under SARFAESI Act in absence of such a provision made in the Act and the Rules framed thereunder. In any event, when two notices were prepared and signed by the authorized officer on 27.09.2011 and yet only of them was said to be sent only on 22.10.2011, there would be itself a big question as to which whom the notices were sent because the such notices were required to be sent separately to borrower and guarantor. There is however nothing on record to show that notices were sent to both, borrower and guarantor even though the petitioner, Rajesh Kumar, was both borrower and guarantor.

In the present case, since notices were to be sent to the borrower and the guarantor, in terms of Section 13(2) of the SARFAESI Act, at least two registered covers were required to be sent. Therefore, this Court is not satisfied with the explanation of the authorities of the Bank



that merely on account of non-return of the registered cover, allegedly sent on 22.10.2011, there would be a presumption of service of notice under Section 13(2) of the SARFAESI Act.

The matter can be viewed from yet another angle. If the notices were deemed to have been served, the Bank was required to have at least gathered proof of such service. The Bank, therefore, could have approached the authorities of the Postal Department to know the fate of the registered cover No.5704 dated 22.10.2011 for being sure that the notices were actually served on the petitioner. No evidence however, has been sought to be collected by the Bank much less produced before this Court to satisfy that such notices under Section 13(2) of the SARFAESI Act were actually served on the petitioner."

The petitioner therein has also challenged the order of the District Magistrate under Section 14(1) of the SARFAESI Act. The Hon'ble Division Bench of High Court of Patna, while confirming the order of the learned single Judge, at paragraphs - 9 and 10 of the said Judgment held as follows:-

"9. Adverting to the provisions of Sections 14(1) and 14(2) of the SARFAESI Act, the intent and purpose of the District Magistrate is to assist the Bank in taking possession of secured asset and also take such steps or use such position, as may be necessary. Sections 14(1) and 14(2) of the SARFAESI Act are reproduced herein below:

"14(1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the



squarely to the present case.

12. The petitioners have challenged the proceedings of the bank before the Tribunal in S.A.No.223 of 2010 praying to set aside the possession notice dated 18.05.2010 issued under Section 13(4) of the SARFAESI Act, on the ground that no notice was issued under Section 13(2) of the SARFAESI Act before issuing notice under Section 13(4) of the SARFAESI Act and on the grounds that the bank has not followed the procedure contemplated under the statute, that apart no One Time Settlement was offered and when negotiation was going on between the bank and the petitioners, the bank had issued 13(4) notice.

13. On a careful perusal of the grounds in S.A.No.223 of 2010 before the Debt Recovery Tribunal, Madurai, it could be seen that the petitioners have stated that no 13(2) notice was issued by the bank. The respondent bank in reply filed before the Debt Recovery Tribunal, Madurai at paragraph-7 have stated that "..... Whereas the fact remains that the demand notice, possession notice dt.18.05.10 issued by the respondent bank is legally valid and that they have been only issued as per the provision of SARFAESI Act and that the possession notice has been properly issued and served on the applicant and affixed on the conspicuous part of the property even on the date of the issuance of the possession notice itself." In the reply, they have also stated that all the notices under Sections 13(2) and 13(4) of the Act were served on them and affixed in the conspicuous part of the property even on the date of issue of possession notice itself. But the petitioners have not chosen to file any rejoinder to the reply filed by the bank before the Debt Recovery Tribunal, Madurai. Based on the pleadings and arguments placed before it, the Debt Recovery Tribunal, Madurai, had passed an order dismissing S.A.No.223 of 2010 by its order dated 12.06.2012 and held that the petitioners are not in a position to make out a clear case for a favourable order nor they have paid total outstanding to have equitable right of redemption of the schedule mentioned property, except claiming that the schedule mentioned property is a residential building. The Tribunal further held that the respondent bank has proved that the measures taken by them under SARFAESI Act are in order and consequently, dismissed S.A.No.223 of 2010, as devoid of merits and also vacated the interim stay granted earlier.

14. As against the order passed by the Debt Recovery Tribunal, Madurai, the petitioners preferred an appeal before the Debt Recovery Appellate Tribunal, Chennai in R.A (SA) No.131 of 2013 and have taken a similar stand that 13(2) notice was not issued on the petitioners along with other grounds of attack, viz., on 08.03.2010, the bank has claimed that they have issued a notice to the petitioners; the same though was never received



by them; even in the typed set filed by the respondent bank before the first respondent, acknowledgment cards were blank and delivery is not reflected, which clearly shows the clandestine manner, in which, the bank has been acting, claiming to have served notice under Section 13(2) of the SARFAESI Act, 2002. Since the Debt Recovery Appellate Tribunal has also dismissed the appeal filed by the petitioners in R.A (SA) No.131 of 2013 holding on the same lines, as that of the Debt Recovery Tribunal, Madurai, the petitioners are before this Court.

15. The original records pertaining to the present case were called for from the Tribunal. On perusal of the records called for from the Debt Recovery Appellate Tribunal, it could be seen that there were various adjudication proceedings of the case, on various dates especially on 03.07.2015 wherein the Debt Recovery Tribunal has recorded that "Ld. counsel for the appellants and the respondent are present. The respondent produced the documents which are said to be the originals. Call on 13.08.2015." It could be seen that after the petitioners invented a ground that notice under Section 13(2) was not served on him, the bank has filed the originals to the perusal of the Debt Recovery Appellate Tribunal. The respondent was also present. Thereafter, the case was adjourned to several hearings. Only upon hearing both the parties, the Debt Recovery Appellate Tribunal, Chennai has passed an order, confirming the order passed by the Debt Recovery Tribunal, Madurai. The Debt Recovery Appellate Tribunal, while passing the order, has also made reference to the allegation of the petitioners with regard to non-service of 13(2) notice and dismissed the appeal filed by the petitioners.

16. The petitioners filed S.A.No.264 of 2012 under Section 17(1) of the SARFAESI Act, with a prayer to quash the entire SARFAESI Proceedings ending up with the tender-cum-auction sale notice dated 13.12.2010, published in Dhinanthanthi Daily newspaper on 14.01.2012 and to restore physical possession of the schedule property. The petitioners therein have averred that the entire measures initiated under SARFAESI Act are arbitrary, illegal, contrary to law and liable to be set aside and the respondent bank, without considering the fact that the possession notice dated 18.05.2010, was challenged before the Debt Recovery Appellate Tribunal, in AIR No.739 of 2012 cannot issue fresh possession notice dated 13.07.2012 and take physical possession of the property, which is a dwelling house; that the respondent bank cannot issue fresh possession notice, without withdrawing the earlier possession notice and the respondents failed to serve possession notice dated 13.07.2012 to the petitioners and nor it was published in two leading newspapers within the statutory period; that while taking physical possession, the respondent bank failed to prepare any inventory



or panchanama; The respondent bank has undervalued the said property and interest levied is against the principles laid down by Reserve Bank of India.

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17. On a careful perusal of the documents in the typed set of papers filed by the petitioners before this Court, We could find that in S.A.No.264 of 2012, the petitioners have not raised or made any grounds regarding the non-serving of 13(2) notice before the Debt Recovery Tribunal, Madurai, as questioned in this Writ Petition and before the Debt Recovery Appellate Tribunal, Chennai, and the same is evidenced from the order dated 20.01.2015, passed by the Debt Recovery Tribunal, Madurai in S.A.No.264 of 2012, wherein the Tribunal at paragraph-3, has stated the case of the applicants regarding the non-serving of 13(2) notice, as follows:-

"The case of the applicants is that The respondent bank issued demand notice under Section 13(2) of the Act on 08.03.2010 demanding a sum of Rs.21,42,536/-; Though the applicants after receipt of the notice gave a reply to reconsider and restructure the loan, the bank without considering the reply, went further and issued possession notice under Section 13(4) of the Act and took symbolic possession of the schedule properties on 18.05.2012."

18. It is seen from the materials on record that the respondent bank has taken physical possession of the property on 13.07.2012 through an Advocate Commissioner, based on the order passed by the learned Chief Judicial Magistrate, Erode in CMP No.842 of 2010 dated 30.06.2010 and affixed the said possession notice dated 13.07.2012 stating that 'physical possession of the property' has been taken. The notice dated 13.07.2012 is not a fresh possession notice and it is a continuation of the earlier possession notice dated 18.05.2010. It is seen that in the proceedings before the Debt Recovery Tribunal, Madurai, in S.A.No.264 of 2012, the respondent bank has filed 13(2) notice (demand notice) dated 08.03.2010, acknowledgment cards dated 09.03.2010 and no objections received from the petitioners. Symbolic possession notice issued on 18.05.2010 was also published in two newspapers. The bank has also produced possession notice and paper publications and photographs showing the affixture of possession notice, before the Debt Recovery Tribunal and also before the learned Chief Judicial Magistrate, Erode.

19. It is the contention raised by the respondent bank

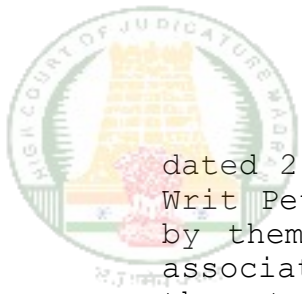


before the Debt Recovery Tribunal that the application under Section 17 of the SARFAESI Act ought to have been filed within 45 days from the date of measures taken, but the petitioners have not filed the application in time and on that ground also the application is liable to be dismissed. Based on the above ground also, the Presiding Officer, Debt Recovery Tribunal, by holding that the application in S.A.No.264 of 2012 lacks merit, dismissed the same without costs.

20. On a careful perusal of the materials and records available, We are of the view that even though the facts of the case in LPA No.1475 of 2014 of the Hon'ble Patna High Court (cited supra) are, to certain extent, similar to that of the case on hand, it cannot be applied to the present case, because in the cited case, the Hon'ble Patna High Court found that there was no proof filed by the bank for having served 13(2) notice, but in the present case, the factual matrix is totally different. For the plea that no 13(2) notice was at all issued, the bank has filed a reply that they have issued a notice under Sections 13 (2) and 13 (4) which have been duly served on the petitioners and the possession notice under Section 13(4) was also affixed on the conspicuous place of the subject property and though the respondent bank, has contended that procedures have been followed without any fault, the petitioners have not chosen to deny the same by way of filing a reply or rejoinder refuting the averments in the counter and they have not produced any evidence to that effect and the Debt Recovery Tribunal, on the available materials and pleadings, dismissed the application filed by the petitioners. The Debt Recovery Appellate Tribunal has also perused the original records filed by the bank on 03.07.2015 in the presence of the learned counsel for the petitioners and the respondent and then passed the order.

21. Insofar as the plea that the postal seal is missing on the acknowledgment card, the petitioners have not, anywhere in the proceedings, disputed the signatures on the acknowledgment cards. Having not disputed the signatures in the acknowledgment cards, merely because there is absence of the postal seal or seal is smudged, one cannot take the plea that the entire notice was not served. We perused the postal receipts dated 08.03.2010 found in the records called for. There is a proof for notice being sent with acknowledgment due and both the petitioners have been served with 13(2) notice. Having received the notice and signed the acknowledgment card, the plea that no 13(2) notice was issued by the bank, is nothing but an invention of a ground, taking advantage that no seal was found.

22. The petitioners have filed an additional affidavit



dated 29.07.2017 before this Hon'ble Court stating that when the Writ Petition is pending, a notice dated 19.07.2016 was received by them on 22.07.2017, sent by the Debt Recovery Tribunal, in association with the District Legal Services Authority, asking them to appear on 27.07.2017, for Lok Adalat before the Debt Recovery Tribunal, Madurai. Settlement talks were conducted in the presence of the learned Judge. The officials from the Zonal Office, Coimbatore of the third respondent herein and the petitioners were ready to settle the entire outstanding dues as "One Time Settlement" for Rs.10,00,000/- (Rupees ten lakhs only). The learned Judge has directed the petitioners to deposit a sum of Rs.1,000/- as token for settlement and the balance to be paid in full and final settlement on or before 31.08.2017 and the terms were finalised. Around 2 p.m, the respondent official were informed of the pendency of the Writ Petition and therefore, the settlement was not recorded. The petitioners further submitted that the total amount due was Rs.20,00,000/- and they have already paid Rs.16.5 lakhs and they are ready to pay Rs.10,00,000/- and settle the issue. Hence, they prayed this Court to direct the third respondent bank to consider the One Time Settlement proposal arrived at Lok Adalat on 27.07.2017.

23. This Court is not inclined to pass any order as prayed for by the petitioners in the additional affidavit. It is open to the petitioners to approach the respondent bank for One Time Settlement, if they are inclined to do so. The loan agreement is a contract between the bank and the petitioners and this Court cannot interfere in the issue.

24. In view of the above facts, there cannot be any reason to disbelieve the Debt Recovery Appellate Tribunal for having scrutinized and made reference to 13(2) notice in the judgment rendered by it. When the petitioners approached the Debt Recovery Tribunal, Madurai, their pleading of non-service of 13 (2) notice has been denied by the respondent bank and the bank had produced all the necessary documents to that effect that they have followed the procedure prescribed in the statute, this Court finds that the Debt Recovery Appellate Tribunal has passed an order and observed that the petitioners had approached the bank and promised to make payment within a week and the bank deferred the actual possession for a week and instead of making payment as per the promise, the appellants have preferred SARFAESI Appeal and entered into litigation and the appellants did not utilise the time granted by the Debt Recovery Tribunal and the Appellants are chronic defaulters and trying to drag the proceedings. The Debt Recovery Appellate Tribunal has held that the bank has served notice under Section 13(2) of the SARFAESI Act in a proper manner and also served 13(4) notice. The Debt Recovery Appellate Tribunal has meticulously examined the facts



and circumstances of the case and appreciated the documents in right perspective and dismissed the said Appeal.

25. In view of the above facts and circumstances, this Court is not inclined to interfere with the order passed by the Debt Recovery Appellate Tribunal and accordingly, the Writ Petition stands dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS)

//True copy//

Sub Assistant Registrar

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To

1. The Registrar
Debts Recovery Appellate Tribunal
Chennai.
2. The Registrar
Debts Recovery Tribunal
Madurai
3. The Authorised Officer
State Bank of India
Erode Main Branch
D-4, State Bank Road
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+1cc to Mr.V.Raghavachari, Advocate SR.No.31924

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and
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GMV (01/10/2018)