BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 13.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE R.THARANI

W.P(MD)No.3623 of 2018
and
W.M.P.(MD)No.3754 of 2018

R.Erakkaperumal .. Petitioner

Vs.

1.The Union Bank of India,
ARMB, Chennai.

2.S.Abdul Wahab

3.The Recovery Officer,
Debts Recovery Tribunal II,
Chennai.

4.The Inspector of Police,
East Police Station,
East Gate, Thanjavur. .. Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari, to call for the records of the 3rd respondent in connection with the order dated 31.01.2018 in D.R.C.No.113 of 2009 in O.A.No.139 of 2007 issued to the 4th respondent and quash the same as being illegal and beyond his powers.

For Petitioner	:	Mr.C.Padmaraj
For R4	:	Mr.V.R.Shanmuganathan Special Government Pleader
For R1	:	Mr.V.S.Karthi
For R2	:	Mr.J.Maria Roseline
For R3	:	Court

ORDER

[Order of the Court was made by T.S.SIVAGNANAM, J.]

Heard Mr.C.Padmaraj, learned counsel appearing for the petitioner, Mr.V.R.Shanmuganathan, learned Special Government Pleader, appearing for the fourth respondent, Mr.V.S.Karthi, appearing for the first respondent and Mr.J.Maria Roseline, learned counsel, appearing for the second respondent.

2.This Writ Petition has been filed challenging the order passed by the Debt Recovery Tribunal in D.R.C.No.113 of 2009 in O.A.No.139 of 2007. The said proceeding was initiated by the respondent Bank under Rules 93 and 40 of the Income Tax (Certificate Proceedings) Rules, 1962. The petitioner claims to be a tenant in respect of the property in question, under the defaulter, who has availed loan from the 4th respondent Bank.

3.The property having been mortgaged, the action was initiated and the property was brought for sale and sold in a public auction and the second respondent herein is the auction purchaser in the public auction held on 25.11.2011. The question is whether the petitioner is entitled to take a defence that the recovery officer has no jurisdiction to pass an order directing to hand over possession of the property and that he can take only symbolic possession.

4.We need not labour much to decide this controversy as in the civil proceedings initiated against the same property this very issue was considered by this Court in S.A.No.753 of 2012 and by judgment dated 03.03.2017, the Court pointed out as to how the decision of the Division Bench cannot lend any support to the petitioner and his claim to be in possession of the property is only subject to the right of the first defendant, namely the respondent Bank.

5.At this juncture, useful reference may be made to the operative portion of the judgment in S.A.No.753 of 2012 dated 03.03.2017, which reads thus:-

> "...23.The fact that the suit property was mortgaged by the fourth defendant in favour of the first defendant long prior to the alleged othi deed dated 06.07.2005 is not in dispute. The appellant relies upon only the usufructory mortgage deed dated 06.07.2005. This mortgage is admittedly one created after the equitable mortgage created by the owner of the property in favour of the Bank is 1995. Rule 42 of the Income Tax (Certificate Proceedings) Rules 1962, clearly stipulates that the Tax Recovery Officer shall direct the applicant in the application filed under Rule 41 to put into possession of the property where the applicant is resisted or obstructed in taking possession and that the Tax Recovery Officer can take steps to put the auction purchaser into the possession of the property by removing the defaulter or any one acting under him. The Tax Recovery Officer can only entertain the obstruction by a bona fide claimant whose claim is bona fide and that his claim is independent and on his own accord or on account of some other person other than the defaulter. Rules 44 and 47 gives a right only to a third party who has an independent right. A person who claim right under the defaulter is not entitled to resist or obstruct when an application for delivery of possession is filed by

the auction purchaser. Similarly a suit can be filed only by a stranger who has got an independent right or title and no suit can be filed by any one claiming under the defaulter or the fourth defendant. In this case, on the admitted facts, the appellant is only a person who claims right under the fourth defendant as a mortgagee based on a mortgage created after the equitable mortgage in favour of Bank and he cannot maintain the suit. When the claim petition filed by the appellant is dismissed by the Tribunal, the Tribunal has passed an order rejecting his claim on the ground that he has no independent right. When the order of Tribunal rejecting the claim application filed by the appellant has reached finality the same issue cannot be raised once again in a separate suit. Hence, the unnumbered plaint cannot be entertained as the earlier order dated 29.12.2011 in the claim petition in M.A.No.193 of 2011 in DRC No.113 of 2009 in O.A.No.139 of 2007 on merits would operate as res judicata. The usufructory mortgage dated 06.07.2005 is only subject to the previous mortgage that was created by the fourth defendant and as such the plaintiff has only a personal claim under a defaulter / fourth defendant. In such circumstances, there is no merit in the contentions raised by the learned counsel for the appellant. The learned counsel for the appellant relied upon a judgment of the Hon'ble Supreme Court in the case of Nitin Gunwant Shah v. Indian Bank and others reported in (2012) 8 SCC 305. In the said judgment in paragraphs 37 and 38, the Hon'ble Supreme Court has held as follows:-

> "37.Rule 47 stipulates that any person other than the defaulter against whom an order under Rule 42 is passed is entitled to file a civil suit to establish his right for possession of the property.
>
> 38.The scheme of the above provisions clearly establishes an alternative procedure for the eviction of a person (third party to the proceedings) in occupation of a property which is brought to sale pursuant to a recovery certificate issued under the 1993 Act. We have already taken note that there is a possibility of a person other than the judgment-debtor being in possession of the property of the judgment-debtor which is recognised even under Order 21 of the Civil Procedure Code and under Rule 98. It provides for the eviction of such persons in an appropriate case where it is found that the person in possession is not legally entitled for the same. The Rules under the Income Tax Act which are adopted for the purpose of the recovery of debts due to the financial institutions and banks under the 1993 Act also provide a similar authority of law. The law further provides under Rule 47 that any person so evicted is entitled to file a separate suit to establish his legal claim. Obviously, such a right is acknowledged

in recognition of the fact that an enquiry of the claim of the third party under the Rules is summary in nature by a Quasi-Judicial Forum and therefore, an examination of the issue by a Judicial Forum would adequately protect the interests of such third party or the purchaser, as the case may be."

24.Appellant is not a tenant. The right provided under Rule 47 to a third party who has not claimed under the judgment debtor / defaulter cannot be claimed by the present appellant. The learned counsel for the appellant then relied upon a judgment of a Division Bench of this Court in the case of Stephen Samuel, A. v. Union of India reported in 2003 (3) CTC 95 wherein this Court has held that a person who is in possession of the property as a tenant and the tenancy is prior to the issuance of the recovery certificate, their possession is lawful. It was further held by the Hon'ble Division Bench of this Court that the auction purchaser in such cases is entitled to symbolic delivery only and not actual possession. The facts of the case are different. In that case, there was no mortgage of the property. The property was proceeded only pursuant to the recovery certificate issued by the Debt Recovery Tribunal. Hence, it was held therein that the possession of the tenant who was inducted prior to the recovery certificate is protected. Since the possession of the appellant as a mortgagee was subsequent to the mortgage that was created by the fourth defendant in favour of the first defendant, it is not protected and the claim of the appellant as a person in possession as a mortgagee is only subject to the right of the first defendant under the previous mortgage, there is no merit in the second appeal. In view of my conclusions, though the first question of law is answered in favour of the appellant, all the other questions of law are answered against the appellant in S.A.(MD)No.753 of 2012. Hence, the second appeal is dismissed with costs. Consequently, the connected miscellaneous petitions are closed.

6.In the light of the above finding rendered by this Court in the above referred second appeal, the challenge to the impugned proceedings and the grounds raised by the petitioner cannot be sustained. For the above reasons, this Writ Petition is dismissed.

Sd/-
Assistant Registrar(RTI)

/True Copy/

Sub Assistant Registrar

To
The Inspector of Police,
East Police Station,
East Gate, Thanjavur.

+1CC to M/s.J.Maria Roseline, Advocate, SR.No. 55228
+1CC to Mr.V.S.karthi, Advocate, SR.No. 55372
+1CC to Mr.C.Padmaraj, Advocate, SR.No. 55003
+1CC to the Special Government Pleader SR.No.55133

ORDER MADE IN
W.P(MD)No.3623 of 2018
13.03.2018

ta
AM/JC/SAR 4/17.04.2018/5P/6C