BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 02.11.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.RAJA
AND
THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

W.P(MD)No.18566 of 2017
and
W.M.P(MD)No.14955 of 2017

B.Arumuga Pandian ... Petitioner

Vs.

1.Jeya Singh

2.The Authorised Officer,
Indian Bank,
Tirunelveli Town Branch,
Tirunelveli District. ... Respondents

PRAYER: 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 passed by the Debts Recovery Appellate Tribunal, Chennai, with respect to the right of redemption granted to the first respondent in RA(SA)No.77 of 2017, dated 08.09.2017 and quash the same.

For Petitioner : Mr.Veera Kathiravan
Senior Counsel for
M/s.Veera Associates

For Respondents : Mr.Mubarak Ahamed
for M/s.Ahamed Associates for R.1
Mr.Pala.Ramasamy for R.2

*****

ORDER

This writ petition is directed against the impugned order passed by the Debt Recovery Appellate Tribunal, Chennai, in RA(SA) No.77 of 2017, dated 08.09.2017, exposing the defect that the conditions mentioned under Rules 8(5) and 8(6)(a)(b) and (c) of the Security Interest (Enforcement) Rules, 2002 [hereinafter referred to as 'the Rules'], have not been reflected in the sale notice, which are provided as avenues to a borrower to protect his property by the Act.

2. Mr.Veera Kathiravan, learned Senior Counsel appearing for the petitioner/auction purchaser, assailing the reasons given by the learned Debt Recovery Appellate Tribunal, canvassed that the first respondent/borrower having borrowed a sum of Rs.5,00,000/- (Rupees Five Lakhs only) from the second respondent bank on 29.09.1989 mortgaging a four-storeyed building bearing Door No.1-B, S.N.High Road, Tirunelveli, measuring 2,808 sq. ft., comprised in T.S.Nos.1455/3, 98/2 and 98/3 situated at Tirunelveli Town, failed to pay the dues to the second respondent bank for a continuous period of 11 years, therefore, the second respondent bank classified the first respondent's loan account as NPA on 31.01.2000. Even in the year 2001 also, the second respondent bank filed a suit for recovery of possession in O.S.No.337 of 2001 on the file of the Sub Court, Tirunelveli. The said suit stood transferred to the file of the Additional District Court No.I, Tirunelveli and re-numbered as O.S.NO.72 of 2004 due to statutory change in pecuniary jurisdiction. Subsequently, the said suit was also decreed in favour of the second respondent bank on 06.12.2004. However, after coming into force of SARFAESI Act, 2002, the second respondent bank issued a demand notice under Section 13(2) of the SARFAESI Act, 2002, on 27.09.2002, to the first respondent who kept silent in initiating any steps neither to repay the loan amount nor to reply the notice. Therefore, the second respondent bank issued a possession notice under Section 13(4) of the SARFAESI Act, 2002 and that was challenged by the first respondent in Writ Petition(MD)No.4315 of 2005 before this Court and this Court directed the first respondent to deposit a sum of Rs.2,00,000/- (Rupees Two Lakhs only), but without complying with the same, the said writ petition was withdrawn on 07.04.2006. In view thereof, the second respondent bank issued an auction notice on 27.04.2006 fixing the date for auction on 02.06.2006. The first respondent/borrower also challenged the said auction notice in Writ Petition(MD)No.4310 of 2006 before this Court and the same was also dismissed with a liberty to work out his rights before the Debt Recovery Tribunal within a period of four weeks and until then, auction sale was stayed. Therefore, the first respondent/borrower filed an application in S.A.No.32 of 2006 before the Debt Recovery Tribunal - II, Chennai and that was entertained with a condition to deposit a sum of Rs.1,00,000/- (Rupees One Lakh only), but, again the first respondent failed to comply with the said order. Due to bifurcation of jurisdiction, the said application was transferred to the Debt Recovery Tribunal, Madurai and re-numbered as T.S.A.No.52 of 2007, which was dismissed for default on 27.10.2006 for his non-appearance. Only then, the second respondent bank proceeded with the auction and the petitioner took part in the auction and being the highest bidder, he purchased the said building and a sale certificate was also issued and registered on 30.12.2006. Only after six months, the first respondent restored the application in T.S.A.No.52 of 2007 on 30.12.2006 and in order to drag on the proceedings, the first respondent has shown his non-appearance before the Debt Recovery Tribunal, Madurai and hence, T.S.A.No.52 of 2007 was also dismissed for default for the second time on 15.06.2007 and once again, the same application was restored in the

year 2010. After seeing the records and evidence on both parties, the Debt Recovery Tribunal, Madurai, giving a finding that the first respondent wantonly and wilfully neglected, dismissed the application 05.11.2012. The first respondent/borrower instead of preferring an appeal, again preferred Writ Petition(MD)No.16744 of 2012 challenging the order passed by the Debt Recovery Tribunal, Madurai and this Court, while disposing of the said writ petition, by order dated 09.06.2016, directed the first respondent to prefer appeal before the Debt Recovery Appellate Tribunal within four weeks from the date of receipt of a copy of the order and accordingly, the appeal was preferred and it was allowed by the Debt Recovery Appellate Tribunal. Surprisingly, because of granting of right of redemption and failure to consider balance of convenience, the petitioner/auction purchaser has been put to severe and grave hardship.

3. Mr.Veera Kathiravan, learned Senior Counsel appearing for the petitioner further submitted that the Debt Recovery Appellate Tribunal failed to consider the right of redemption of the mortgage ceased to exist on the issuance of sale certificate in favour of the auction purchaser, therefore, when the right of redemption granted stood expired, the same cannot be restored by the Debt Recovery Appellate Tribunal. Again, assailing the impugned order, he pleaded that the Debt Recovery Appellate Tribunal has gravely erred in granting refund of the amount to the auction purchaser without considering the fact that the auction purchaser has spent amount in paying stamp duty for registration and the property tax assessed for the building for the past 11 years.

4. Finally, concluding his arguments, the learned Senior Counsel appearing for the petitioner would submit that when the Debt Recovery Appellate Tribunal has given a finding that the first respondent/borrower is frowned to litigations and also indulged in many litigations, it should have confirmed the order passed by the Debt Recovery Tribunal, rejecting the appeal filed by the first respondent/borrower. As the impugned order is against the law and ignored the right of the auction purchaser, the same is liable to be quashed by allowing the writ petition.

5. In reply, a detailed counter has been filed by the first respondent/borrower. Learned Counsel for the first respondent urging this Court to dismiss the writ petition, pleaded that the second respondent bank having provided the loan facility to the first respondent's business concern, initiated proceedings for recovery of dues by filing a suit for recovery of a sum of Rs.5,53,796/- (Rupees Five Lakhs Fifty Three Thousand Seven Hundred and Ninety Six only) due to default of repayment caused as his business suffered with a heavy loss. After classifying the Open Cash Credit Loan Account as Non-Performing Asset (NPA) on 31.03.2001, issued a demand notice under Section 13(2) of the SARFAESI Act, 2002, without even mentioning as to how the above account was classified as NPA. The said notice had no explanation as to how the said notice has been issued under the Ordinance after the said Ordinance was replaced

with SARFAESI Act, 2002. Thereafter, the first respondent filed Writ Petition(MD)No.4315 of 2005 citing various illegalities, however, the same was withdrawn. Later on, the second respondent bank issued a sale notice in the New Indian Express, Madurai Edition, on 27.04.2006. Challenging the same, the first respondent filed Writ Petition(MD)No.4310 of 2006 and this Court, while disposing of the said writ petition, directed the first respondent to approach the Debt Recovery Tribunal within four weeks with a liberty to the second respondent bank to go ahead with the auction scheduled on 02.06.2006, but to withhold the confirmation of sale for a period of four weeks. Accordingly, when the petitioner approached the Debt Recovery Tribunal - I, Chennai, with S.A.No.32 of 2006, a direction has been given to pay a sum of Rs.1,00,000/- (Rupees One Lakh only) to the second respondent bank within a period of six weeks and accordingly, the said amount was paid, but due to coma and brain related ailments, the first respondent was unable to follow the proceedings before the Debt Recovery Tribunal and due to the absence of his Counsel, the said S.A.No.32 of 2006 was dismissed for default and taking advantage of the above situation, the second respondent bank issued a sale certificate to the petitioner, who claims to be a lone bidder. However, on an application subsequently filed, S.A.No.32 of 2006 was restored to file and the same was transferred to the file of the Debt Recovery Tribunal, Madurai and re-numbered as T.S.A.No.52 of 2007 and that was taken up for hearing and it was dismissed on 05.11.2012. The Debt Recovery Tribunal, Madurai, failed to consider non-compliance of the provisions of SARFAESI Act, 2002 and the relevant rules by the second respondent bank in bringing the secured assets for auction, hence, the first respondent filed Writ Petition(MD)No.16744 of 2012 assailing the order passed by the Debt Recovery Tribunal, dated 05.11.2012 in T.S.A.No.52 of 2007 mainly on the grounds of law that the mandatory conditions mentioned in Rules 8(5) and 8(6)(a) of the Security Interest (Enforcement) Rules, 2002, to give notice of thirty days to the borrower for sale of the immovable secured assets including the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor and the secured debt for recovery of which the property is to be sold, have not been furnished. This Court taking note of the fact that there are various serious violations committed by the second respondent bank in issuing the sale certificate contravening Rules 8(5) and 9(3) of the Rules, granted an order of status quo. When a specific legal point was raised by the first respondent that as per Section 13(2) of the SARFAESI Act, 2002, notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower and one more violation of sub-section 3-A which mandates that if on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within fifteen days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower, without considering the same, the Debt Recovery Tribunal committed error and dismissed the same and therefore, these legal aspects were considered by this Court and finally, by order dated 09.06.2016, granting liberty to the first respondent to file an appeal within a period of 15 days, the writ petition was dismissed making it clear that no doubt, the benefit of the interim order dated 20.12.2012 not to confirm the sale shall continue till such time. Therefore, the first respondent filed an appeal before the Debt Recovery Appellate Tribunal in RA (SA)No.77 of 2017 and in the said appeal, the Debt Recovery Appellate Tribunal directed the first respondent to make a pre-deposit of Rs.3,20,000/- (Rupees Three Lakhs and Twenty Thousand only) with the Registry of the Debt Recovery Appellate Tribunal and the same was promptly complied with and finally, the Debt Recovery Appellate Tribunal finding that the second respondent bank has committed serious violations of Sections 13(2) and 13(3-A) of the SARFAESI Act, 2002 and Rules 8(5) and 8(6) of the Rules, mandating the Authorised Officer to serve a notice of 30 days to the borrower for sale of immovable secured assets under sub-rule 5; the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor and the secured debt for recovery of which the property may not be sold and taking note of the fact that the second respondent bank had to recover only a sum of Rs.4,00,000/- (Rupees Four Lakhs only) from the first respondent/borrower and that the claim mentioned by the second respondent bank in the demand notice dated 27.09.2002 is Rs.6,81,181/- (Rupees Six Lakhs Eighty One Thousand One Hundred and Eighty One only), whereas the repayment made by the first respondent to the second respondent bank till 02.08.2006 was Rs.5,08,350/- (Rupees Five Lakhs Eight Thousand Three Hundred and Fifty only) and he also made a deposit of Rs.8,20,000/- (Rupees Eight Lakhs and Twenty Thousand only) in the Registry of the Debt Recovery Appellate Tribunal during the pendency of RA(SA).No.77 of 2017 and thus, a total sum of Rs.13,28,350/- (Rupees Thirteen Lakhs Twenty Eight Thousand Three Hundred and Fifty only) was made as against the demand notice figure of Rs.6,81,181/- (Rupees Six Lakhs Eighty One Thousand One Hundred and Eighty One only), has rightly granted the right of redemption. Therefore, when the SARFAESI Act, 2002 has provided avenues to protect his property under Rules 8(5) and 8(6) of the Rules, that have been violated deliberately by the second respondent bank and this was found by the Debt Recovery Appellate Tribunal and secondly, even the petitioner/auction purchaser has not deposited 25% of the amount of sale price which is a mandatory condition mentioned in Rule 9(3) of the Rules, therefore, finding that there was a collusion between the petitioner/auction purchaser and the second respondent bank and the balance amount payable by the first respondent/borrower was only Rs.4,00,000/- (Rupees Four Lakhs only), the right of redemption was rightly given which cannot be found fault.

6. We find merits on the submissions made by the learned Counsel for the first respondent/borrower. When the SARFAESI Act, 2002 has provided avenues to protect the immovable secured assets under Rules 8(5) and 8(6) of the Rules, which are given as under:

"8. Sale of immovable secured assets.-

***** *****

***** *****

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:-

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction including through e-auction mode; or

(d) by private treaty:

Provided that in case of sale of immovable property in the State of Jammu and Kashmir, the provisions of Jammu and Kashmir Transfer of Property Act, 1977 shall apply to the person who acquires such property in the State.

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,-

(a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price, below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) depositing earnest money as may be stipulated by the secured creditor;

(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property."

auction notice barely failed to comply with the same. Further, the demand notice dated 27.09.2002 issued by the second respondent bank shows that for the claim of Rs.6,81,181/- (Rupees Six Lakhs Eighty One Thousand One Hundred and Eighty One only), the first respondent/borrower has made a repayment to the second respondent bank a sum of Rs.5,08,350/- (Rupees Five Lakhs Eight Thousand Three Hundred and Fifty only) till 02.08.2006 and he has also made a deposit of Rs.8,20,000/- (Rupees Eight Lakhs and Twenty Thousand only) in the Registry of the Debt Recovery Appellate Tribunal and as such, he has made a total payment of Rs.13,28,350/- (Rupees Thirteen Lakhs Twenty Eight Thousand Three Hundred and Fifty only) as against the claim figure of Rs.6,81,181/- (Rupees Six Lakhs Eighty One Thousand One Hundred and Eighty One only). Therefore, taking note of the periodical payment made by the first respondent/borrower till 02.08.2006 and the balance amount to be made by the first respondent was only Rs.4,00,000/- (Rupees Four Lakhs only), finding serious irregularity committed by the second respondent bank, which is against Rules 8(5) and 8(6) of the Rules and finding that the petitioner/auction purchaser has not even deposited 25% of the sale price, the Debt Recovery Appellate Tribunal has rightly set aside the order passed by the Debt Recovery Tribunal, giving right of redemption to the first respondent/borrower, therefore, we do not find any merit in the present writ petition.

7. Secondly, Section 13(8) of the SARFAESI Act provides an opportunity to the debtor/borrower to redeem the property before the sale, for which Rule 8(6) of the Rules mandates the secured creditor/bank to serve a notice of 30 days for the sale of immovable secured assets to the borrower. Sadly, in the present case, the Bank has deliberately not issued any notice as adumbrated under Rule 8(6) of the Rules read with Section 13(8) of the SARFAESI Act. Therefore, it is pertinent to extract Section 13(8) of the Act, which is quoted below:-

> "(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset."

A cursory reading of Section 13(8) vividly shows that if the dues of the Bank together with all costs, charges and expenses incurred, are tendered to the Bank at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the Bank and moreover, no further steps shall be taken for transfer or sale of that secured asset. In the instant case, the mandatory conditions warranting issuance of notice of 30 days for sale of immovable secured assets upon the borrower has not been effected, therefore, the sale is liable to be set aside.

8. Moreover, when the Bank has failed to establish that they have issued notice of 30 days for sale of immovable secured assets as per Rule 8(6) of the Rules, it has to be held that without serving of notice on the first respondent herein, the said sale is unknown to law by virtue of bar contained in Sub-rule 1 of Rule 9 of the Security Interest (Enforcement) Rules, 2002, and for better appreciation, the same is extracted below:-

> "9(1) No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower."

A bare perusal of Rule 9(1) clearly shows that no sale of immovable property shall take place before the expiry of 30 days from the date on which the public notice of sale is published in the newspaper or notice of sale has been served to the borrower. In the present case, the Bank has failed to substantiate their case that the first respondent/borrower was served with a notice of 30 days for sale of immovable secured assets.

9. In addition thereto, the Bank has not come forward to reveal any details with regard to total liability of the borrower in the auction sale notice published in the newspaper, as a result, the Bank has deprived the first respondent/borrower the paramount right of redemption ensured to a borrower under Section 13(8) of the Act.

10. Thirdly, the Bank has committed yet another infirmity in accepting the bid of the auction purchaser against the conditions stipulated in the auction sale notice for depositing of EMD by Demand Draft or Bankers Pay Order favouring Indian Bank. This is in total violation of the conditions stipulated by the Bank in the auction sale notice. Besides, Rule 9(3) of the Rules mandates the auction purchaser to deposit 25% of the amount of sale price to the authorized officer conducting the sale and in default of such deposit, the property shall forthwith be sold again. However, in the present case, neither the Bank nor the auction purchaser has proved before this Court or before the DRT or before the Appellate Tribunal that the auction purchaser, immediately after the sale, has deposited 25% of the sale price to the authorized officer. Therefore, the petitioner cannot be treated as an auction purchaser at all, hence, the Bank cannot sell the property. These vital and crucial issues raised by the first respondent before the Tribunal were completely lost sight of by the DRT for the reasons best known to it Therefore, the Appellate Tribunal, rightly interfering with the fallacious order passed by the DRT, set aside the same granting the right of redemption as per Section 13(8) of the Act, to which the borrower is entitled to.

11. Thus, for the reasons stated above, this writ petition stands dismissed. No costs. Consequently, the connected writ miscellaneous petition is also dismissed.

Sd/

Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar(CS-III)

+1 cc to Mr.N.Ganaga sabapathy,Advocate,SR.No.94460
+1 cc to M/s.Ahamed Associates, SR.No.94361
+1 cc to Mr.Pala.Ramasamy,Advocate,Sr.No.94584

Rsb/rkm
SS/BK/SAR 3/12.12.2018/9P/4C

W.P(MD)No.18566 of 2017
and
W.M.P(MD)No.14955 of 2017
02.11.2018