

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH

* * * *

WRIT PETITION No.7645 OF 2018

Between:

B.Sravan Kumar and another ... Petitioners

and

M/s Allahabad Bank, Himayathnagar
Branch, Hyderabad and another ... Respondents

DATE OF JUDGMENT PRONOUNCEMENT: 28th JUNE, 2018

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

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1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No
 2. Whether copies of the judgment may be marked to Law Reporters/Journals Yes/No
 3. Whether His Lordship wishes to see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

T.AMARNATH GOUD, J

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AND
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> Head Note:

! Counsel for petitioners : Sri A.Venkatesh

^ Counsel for respondents : Sri Maganti Satyanarayana

? CASES REFERRED: --



THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

WRIT PETITION No.7645 OF 2018

ORDER

(*Per Sri Justice Sanjay Kumar*)

The petitioners are aggrieved by the action of the Allahabad Bank (*hereinafter*, 'the bank') in not returning the original title deeds along with link documents pertaining to the residential Flat bearing No.FF-II, First Floor, Sri Vaishnavi Apartments, D.No.40-9-12, Plot Nos.19 and 20, R.S.No.25/4, Municipal Ward No.28/3, Revenue Ward No.11, N.T.S.No.120, Block No.5, Patamata, Vijayawada, Krishna District. They also assail the Docket Order dated 09.01.2018 passed by the Debts Recovery Tribunal-I, Hyderabad (*for brevity*, 'the Tribunal'), in I.A.No.1245 of 2017 in S.A.No.102 of 2017 in so far as it restrains them from creating any third party interest over the aforestated residential flat.

The first petitioner is the son of the second petitioner. The second petitioner claims to be the absolute owner and possessor of the subject flat. BSLE-I Construction Private Limited, of which he is the Managing Director, availed a loan facility from the bank and he offered the subject flat as security in the capacity of a guarantor. The loan account having been classified as a non-performing asset, the bank initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*for short*, 'the SARFAESI Act'). Demand notice under Section 13(2) thereof was issued by the bank on 27.09.2016. Thereafter, the bank took steps to put to auction two of the secured assets, one being the subject flat, for realization of its dues. Aggrieved thereby, the borrower company filed S.A.No.81 of 2017 before the Debts Recovery Tribunal, Hyderabad. By Docket Order dated 14.02.2017, the said Tribunal

directed the bank not to confirm the sale in favour of the highest bidder subject to deposit of 30% of the total outstanding dues by the borrower company within a time frame. Admittedly, the borrower company failed to comply with this condition and the bank proceeded with the proposed sale. Efforts made by the second petitioner and other guarantors to secure a one-time settlement or to redeem the properties put to sale failed, constraining the petitioners herein to approach the Tribunal by way of S.A.No.102 of 2017 seeking to redeem the properties sold. Docket Order dated 07.03.2017 was passed therein by the Tribunal and it reads as under:

‘Applicant counsel filed a memo stating that the Applicant is ready to redeem the property by paying the highest bid price with costs and charges on or before 20.03.2017. Notice given to other side. Respondent counsel reported no objection. In view of the memo the applicant is directed to abide by undertaking given in the memo failing which, the Respondent bank is at liberty to proceed further by issuing sale certificate with regard to property No.1 of the application schedule. Call on 20.03.2017.’

Property No.1 of the application schedule referred to in the aforestated order is the subject flat. In compliance with the aforestated order, the second petitioner claims to have approached the bank on 13.03.2017 and submitted a letter requesting information as to the amount payable for redemption of the subject flat. Thereupon, the bank addressed letter dated 16.03.2017 in response to his letter dated 13.03.2017 informing him that he had to pay a sum of Rs.43,07,143/- before 20.03.2017. Significantly, in the said letter, the bank specifically referred to the Docket Order dated 07.03.2017 passed by the Tribunal in S.A.No.102 of 2017. It is not in dispute that the petitioners paid the aforestated sum within the time stipulated. Their grievance, however, was that despite payment of the amount in full as requested by the bank, the documents relating to the subject flat were not returned.

At this stage, it may be noted that the bank filed a petition in June, 2017 before the Tribunal seeking review of the Docket Order dated 07.03.2017. This review petition was filed with delay and the bank sought condonation thereof in I.A.No.2182 of 2017 in S.A.No.102 of 2017. However, the Tribunal dismissed the said I.A by Docket Order dated 14.11.2017.

While so, the petitioners filed I.A.No.1245 of 2017 in S.A.No.102 of 2017 before the Tribunal seeking a direction to the bank to return the title documents. By Docket Order dated 09.01.2018 passed in I.A.No.1245 of 2017 in S.A.No.102 of 2017, the Tribunal directed the bank to return the original title deeds to the petitioners. The Tribunal however added a rider that the mortgagors/petitioners should not create any third party interest over the subject flat till disposal of the Securitisation Application. The petitioners are aggrieved by this rider as they paid the total amount due for redeeming the subject flat and claim that it stood discharged from the mortgage thereupon. It appears that the bank filed a Memo before the Tribunal stating that the original title deeds relating to the subject flat were filed by it in the pending O.A. instituted by it before the very same Tribunal in June, 2017. The petitioners claim ignorance of the filing of the O.A. and state that they are taking independent steps to contest the same. It is in these circumstances that the petitioners approached this Court by way of the present writ petition.

In its counter affidavit, the Chief Manager of the bank at its Himayatnagar Branch, Hyderabad, stated that in furtherance of the proceedings initiated under the SARFAESI Act in relation to the loan account of the borrower company, it put to auction two of the properties mortgaged with it, one such property being the subject flat. He also admitted that the petitioners filed S.A.No.102 of 2017 before the Tribunal seeking redemption

of the two properties put to sale. Thereafter, a Memo was filed by the petitioners, whereupon Docket Order dated 07.03.2017 came to be passed by the Tribunal. The Chief Manager claimed that the bank immediately filed Memo dated 31.03.2017 informing the Tribunal that its counsel had vehemently opposed grant of relief in the matter and had not reported 'no objection' as recorded in the order and prayed for amendment of the Docket Order dated 07.03.2017 by deleting the words 'Respondent counsel reported no objection'. As no orders were passed on the said Memo, a review petition was filed by the bank on 30.06.2017 along with an application for condonation of delay. The Chief Manager admitted that the Tribunal dismissed the condone delay application and that the review petition was not taken up thereafter. He also admitted that pursuant to the Docket Order dated 07.03.2017, the second petitioner approached the bank on 13.03.2017 and submitted a letter seeking information as to the amount payable for redeeming the subject flat. He further admitted that the bank addressed letter dated 16.03.2017 referring to the Docket Order dated 07.03.2017 passed by the Tribunal and requiring payment of Rs.43,07,143/- by 20.03.2017. The Chief Manager did not deny the fact that the petitioners made the payment within the time stipulated. He then stated that the petitioners were not entitled to return of the title documents as they were the promoters and directors of the borrower company and were also guarantors for the loan facility in their personal capacity. He pointed out that the borrower company was indebted to the bank to the tune of Rs.5,21,56,465/- as on 23.12.2016 and asserted that the petitioners, being personal guarantors for the aforesaid loan, were liable to pay all such dues of the borrower company and therefore, not only the properties mortgaged by them with the bank but also other properties belonging to them could be

proceeded against for recovering the dues. He asserted that till the total liability of the borrower company was discharged, the petitioners could not seek redemption of the properties mortgaged to the bank. He however admitted that in compliance with the order passed by the Tribunal, the bank had accepted payment from the petitioners and cancelled the sale of the subject flat, which had already been confirmed in favour of the auction purchaser. He attempted to assail the correctness of the Docket Order dated 07.03.2017 passed by the Tribunal. He further claimed that the bank would have a general lien over the title documents under Section 171 of the Indian Contract Act, 1872 (*for brevity*, 'the Act of 1872'), and was entitled to retain them, notwithstanding the payment of the amount by the petitioners, until the total dues of the bank were cleared. He prayed for dismissal of the writ petition claiming that the bank never agreed to return the title documents.

Heard Sri A.Venkatesh, learned counsel for the petitioners, and Sri Maganti Satyanarayana, learned counsel for the bank.

The prayer of the petitioners is two fold – Firstly, they seek return of the title deeds and link documents pertaining to the subject flat on the ground that they paid the amount as directed by the Tribunal and as quantified by the bank within the time stipulated and thereby redeemed the subject flat. Secondly, they are aggrieved by the condition imposed by the Tribunal in its Docket Order dated 09.01.2018 passed in I.A.No.1245 of 2017 in S.A.No.102 of 2017 requiring them not to create any third party interest over the subject flat till disposal of the Securitisation Application.

Before considering these prayers, it is necessary to note that the bank, in its own wisdom, did not choose to challenge the Docket Order dated 07.03.2017 passed in S.A.No.102 of 2017 or the alleged inaction on the part of the Tribunal in passing orders upon the Memo dated 31.03.2017 filed by it

in S.A.No.102 of 2017 or the order passed by the Tribunal on 14.11.2017 dismissing the condone delay petition in I.A.No.2182 of 2017 filed by the bank in its review petition in S.A.No.102 of 2017 or the Docket Order dated 09.01.2018 passed by the Tribunal in I.A.No.1245 of 2017 in S.A.No.102 of 2017 requiring the bank to return the original title deeds along with link documents pertaining to the subject flat. Having failed to take lawful measures in relation to all the above, it is not open to the bank to launch any challenge against the same in this writ petition filed by the other side. If it was aggrieved by any of the directions of the Tribunal, it was for the bank to independently challenge the same. Without doing so, it cannot seek to raise any issue in relation to validity of any of the orders passed by the Tribunal.

It may also be noted that the only grievance raised by the bank in its Memo dated 31.03.2017 in relation to the Docket Order dated 07.03.2017 passed in S.A.No.102 of 2017 was that its counsel had not reported no objection. Thereafter, the bank sought review of the said order but as its attempt in this regard was saddled with delay, it necessarily had to file an application for condonation thereof and met with failure. Even at that stage, the bank did not choose to assail the correctness of the Docket Order dated 07.03.2017. On the other hand, acceptance of the said order by the bank is manifest by its communication dated 16.03.2017 in response to the second petitioner's letter dated 13.03.2017. Therein, the bank, having referred to the Docket Order dated 07.03.2017, implicitly accepted the direction therein by quantifying the amount payable by the petitioners for redeeming the subject flat in terms thereof. It may also be noted that this amount was quantified by the bank, duly taking into account the highest bid of the successful auction purchaser along with the interest payable to him for cancellation of the auction apart from other expenses. The total amount due

and payable, as quantified by the bank thereunder, being a sum of Rs.43,07,143/- was duly paid by the petitioners by 20.03.2017, as directed by the bank in its letter dated 16.03.2017. Having accepted the Docket Order dated 07.03.2017 and having led the petitioners to believe that they could redeem the subject flat, the question that arises now is whether the bank is at liberty to come up with the plea that it is still entitled to retain the title deeds and link documents pertaining to the subject flat.

The bank offers two grounds to justify this action. Firstly, it would claim that the petitioners offered personal guarantees for the loan facility availed by the borrower company and therefore, their personal properties which were not mortgaged with it could also be proceeded against to realize the loan dues. It may however be noted that in terms of the SARFAESI Act and the Rules framed thereunder, it is only a secured asset, i.e., an asset which has been mortgaged, be it by the principal borrower or a guarantor, as security interest for the secured debt, that can be proceeded against under Section 13(4) of the SARFAESI Act for recovery of the secured debt. If a creditor wishes to recover any dues by pursuing a personal guarantee without an accompanying mortgage or secured interest in the personal guarantor's property, the provisions of the SARFAESI Act would not be available to such a creditor. Therefore, once the bank allowed the second petitioner to redeem the subject flat by paying the amount quantified by it as due and payable for such redemption, the bank cannot continue to treat the subject flat as a secured or mortgaged asset. By its own actions, the bank is estopped from claiming so. Once the subject flat stood freed of any security interest or mortgage, it no longer falls within the ambit of the SARFAESI Act.

In this regard, it may also be noted that had the bank proceeded with the sale in favour of the auction purchaser, this property would have been

discharged upon payment by the auction purchaser of the very same amount paid by the second petitioner or even lesser. Merely because the second petitioner came into the picture by stepping into the shoes of the auction purchaser and redeemed the subject flat by paying the amount quantified by the bank on the strength of the highest bid, apart from other incidentals, the bank cannot claim that the subject flat continues to remain a secured asset. In the event the bank wishes to proceed on a personal guarantee, it necessarily has to take recourse to ordinary civil legal remedies and cannot unilaterally assert any rights over the properties of the personal guarantors without doing so. As matters stand, the bank has not secured any such relief whereby it can claim entitlement to retain the title documents/link deeds pertaining to the subject flat, which now assumes the character of property belonging to a personal guarantor which is not a secured/mortgaged asset. The first ground of justification offered by the bank is therefore without basis and is accordingly rejected.

The second ground of justification put forth by the bank is that it has the right of general lien over the documents under Section 171 of the Act of 1872. Section 171 of the Act of 1872 reads as under:

‘171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers.—Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.’

It may be noted that the aforestated legal provision operates in the absence of a contract to the contrary. As already stated *supra*, the bank had put the subject flat to sale under the provisions of the SARFAESI Act and if the sale had gone through in favour of the auction purchaser, the bank could

not have claimed any lien in relation to the documents pertaining to the subject flat, which would then have been transferred to the auction purchaser. However, by virtue of the Docket Order dated 07.03.2017 passed by the Tribunal, the second petitioner, being the owner of the subject flat, stepped into the shoes of the auction purchaser and redeemed the subject flat which was till then a secured asset in the hands of the bank.

In the light of its communication dated 16.03.2017, whereby the bank accepted the Docket Order dated 07.03.2017 passed by the Tribunal and called upon the second petitioner to pay the amount quantified by it for redeeming the subject flat, failing which, it claimed liberty to issue a sale certificate in favour of the auction purchaser, the creation of a contract to the contrary is manifest. Having allowed the petitioners to believe that upon payment of the quantified sum, the sale in favour of the auction purchaser would stand nullified and the subject flat would be released, the bank cannot withdraw from its commitment at this late stage. It is not open to the bank to approbate and reprobate to suit its own interest without reference to its earlier actions. The bank therefore cannot claim any general lien over the title deeds/link documents pertaining to the subject flat under the provisions of Section 171 of the Act of 1872. This ground of justification offered by the bank is therefore equally bereft of merit and is accordingly rejected.

Finally, it may be noted that despite suffering the Docket Order dated 09.01.2018 in I.A.No.1245 of 2017 in S.A.No.102 of 2017, the bank admittedly did not choose to challenge the same. Having suffered such an order, it is not open to the bank to baldly ignore the same and refuse to abide by it. The fact that the bank filed the title deeds/link documents in the O.A. said to have been preferred by it before the very same Tribunal is no

ground for it to disclaim responsibility to obey and implement the aforestated Docket Order dated 09.01.2018.

The second prayer of the petitioners is in relation to the condition imposed by the Tribunal while directing return of the title deeds/link documents pertaining to the subject flat. It may be noted that the Docket Order dated 07.03.2017 was passed by the Tribunal basing on the Memo filed by the second petitioner stating that he was ready to redeem the subject flat by paying the highest bid along with costs and charges on or before 20.03.2017. Having accepted this offer, the Tribunal passed the Docket Order dated 07.03.2017. The bank, in furtherance of the said order, addressed letter dated 16.03.2017 and in terms thereof, the petitioners paid the quantified sum of Rs.43,07,143/- by 20.03.2017. In effect, the petitioners were led to believe that by abiding by these directions they successfully redeemed the subject flat. Having committed itself to this action, it is surprising that the Tribunal while, on the one hand, directing return of the original title deeds and link documents pertaining to the subject flat, subjected the petitioners to the condition that they should not create third party interest over the same till disposal of the Securitisation Application.

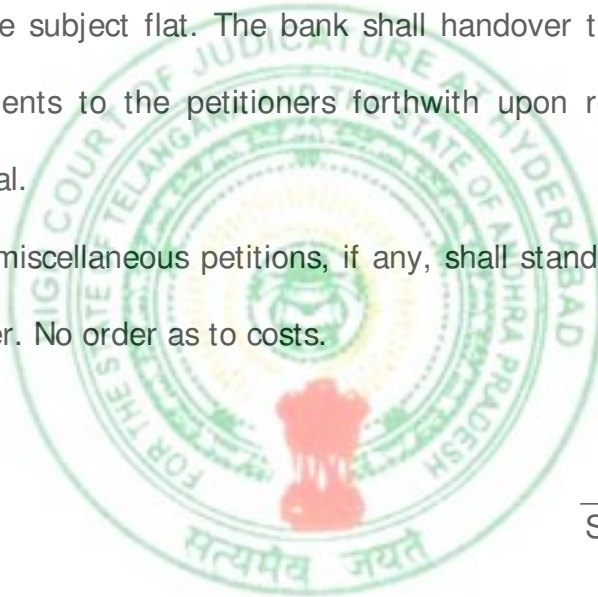
As already discussed *supra*, the events that transpired basing on the Docket Order dated 07.03.2017 passed by the Tribunal resulted in the subject flat standing discharged and it no longer remains a secured asset, whereby proceedings can still be initiated in relation to it under the SARFAESI Act. The Tribunal unfortunately failed to note this aspect of the matter while adding the offending rider in its Docket Order dated 09.01.2018. However, for the reasons stated *supra*, we find that the said rider has no legs to stand upon being without legal basis.

The writ petition is accordingly allowed deleting the following portion from the penultimate paragraph in the Docket Order dated 09.01.2018 passed by the Debts Recovery Tribunal-I, Hyderabad, in I.A.No.1245 of 2017 in S.A.No.102 of 2017:

‘... which is subject to the result of main SA. However, the mortgagors/Petitioners are directed not to create any 3rd party interest over the schedule property till the disposal of SA 102/17.’

The Allahabad Bank is directed to file an appropriate application within one week from today in the O.A. filed by it before the Debts Recovery Tribunal-I, Hyderabad, seeking return of the title deeds and link documents pertaining to the subject flat. The bank shall handover the said title deeds and link documents to the petitioners forthwith upon receiving the same from the Tribunal.

Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.



SANJAY KUMAR,J

T.AMARNATH GOUD,J

28th JUNE, 2018

Note: L.R. copy to be marked.
B/ o PGS