IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.01.2019

Delivered on : 24.01.2019

CORAM :

THE HON'BLE MRS.V.K.TAHILRAMANI, CHIEF JUSTICE

AND

The HON'BLE MR.JUSTICE M.DURAISWAMY

W.P.Nos.31639 & 31640 of 2015
and M.P.Nos.1 & 1 of 2015

V.K.Kennedy Kumar .. Petitioner
in both W.Ps

Vs.

1.Standard Chartered Bank,
rep by its Authorized Signatory
and Power of Attorney Holder,
No.58, Armenian Street,
Chennai - 600 001.

2.D.Babu

3.The Registrar,
Debts Recovery Appellate Tribunal,
Chennai. .. Respondents in both W.Ps

Petitions filed under Article 226 of the Constitution of India praying for issue of Writ of certiorari to call for the records of the 3rd respondent relating to the order dated 14.09.2015 passed in RA(SA). Nos.120 & 121 of 2010 in setting aside the order dated 13.04.2010 passed by the Debts Recovery Tribunal in S.A.Nos.19 & 20 of 2010 and quash the same.

For Petitioners (in both W.Ps) : Mr.Om Prakash, Senior Counsel, for Mr.S.Saravanan

For Respondents (in both W.Ps) : Mr.V.Jayachandran (R1)
Mr.A.Thiagarajan, Senior Counsel for Mr.S.Ramesh Kumar (R2)
R3 - Tribunal

C O M M O N   O R D E R

THE HON'BLE MRS.V.K.TAHILRAMANI, CHIEF JUSTICE

W.P.No.31639 of 2015 has been filed by the petitioner to issue Writ of certiorari to call for the records of the 3rd respondent relating to the order dated 14.09.2015 passed in RA(SA).No.120 of 2010 in setting aside the order dated 13.04.2010 passed by the Debts Recovery Tribunal in S.A.No.19 of 2010 and to quash the same.

2.W.P.No.31640 of 2015 has been filed by the petitioner to issue Writ of certiorari to call for the records of the 3rd respondent relating to the order dated 14.09.2015 passed in RA(SA).No.121 of 2010 in setting aside the order dated 13.04.2010 passed by the Debts Recovery Tribunal in S.A.No.20 of 2010 and to quash the same.

3.Since the issues involved in both the Writ Petitions are identical between the same parties, the Writ Petitions are disposed of by this common order.

4.The petitioner availed housing loan of Rs.8 lakhs and Rs.11 lakhs from the respondent - Bank for purchasing properties by deposit of Title Deeds. Since the petitioner committed default in repaying the loan amount, a notice dated 15.11.2007 under Section 13(2) of the SARFAESI Act was issued to him. Thereafter, the 1st respondent issued a sale notice dated 10.10.2009 fixing the auction on 10.11.2009. However, the auction did not take place on 10.11.2009 since there were no bidders. Thereafter, the 1st respondent issued another sale notice dated 18.12.2009 fixing the auction on 19.01.2010. According to the petitioner, he received the notice only on 05.01.2010, therefore, 30 days notice was not given to the petitioner before bringing the property for sale as contemplated under Rule 8(6) of the Security Interest (Enforcement) Rule, 2002. The petitioner filed appeals in S.A.Nos.19 & 20 of 2010 before the Debts Recovery Tribunal - III, Chennai challenging the possession notice dated 16.09.2009 as well as sale notice dated 10.10.2009. The auction was conducted on 19.01.2010 and the sale was confirmed in favour of the 2nd respondent. The Sale Certificate was also issued on 29.01.2010 in favour of the 2nd respondent. By order dated 13.04.2010, the Debts Recovery Tribunal allowed the appeals in S.A.Nos.19 & 20 of 2010 by setting aside the sale notice dated 10.10.2009, the possession notice dated 16.09.2009 and also the 2nd sale notice dated 18.12.2009. Aggrieved over the same, the 1st respondent - Bank preferred appeals in R.A.(SA).Nos.120 & 121 of 2010 before the Debt Recovery

Appellate Tribunal, Chennai and the Appellate Tribunal, by order dated 14.09.2015, set aside the orders passed by the Debts Recovery Tribunal and allowed both the appeals. Aggrieved over the order passed by the Debt Recovery Appellate Tribunal, the petitioner has filed the above Writ Petitions.

5.Heard Mr.Om Prakash, learned senior counsel for Mr.S.Saravanan, learned counsel for the petitioner on record, Mr.V.Jayachandran, learned counsel for the 1st respondent and Mr.A.Thiagarajan, learned senior counsel for Mr.S.Ramesh Kumar, learned counsel for the 2nd respondent on record.

6.On a careful consideration of the materials available on the record and submissions made by the learned counsel on either side, it could be seen that the petitioner filed appeals in S.A.Nos.19 & 20 of 2010 on the file of Debts Recovery Tribunal III Chennai challenging the possession notice dated 16.09.2009 issued under Section 13(4) of the SARFAESI Act and the sale notice dated 10.10.2009. However, the sale did not take place on 10.11.2009 pursuant to the sale notice dated 10.10.2009 since there were no bidders. Therefore, the 1st respondent - Bank issued 2nd sale notice dated 18.12.2009 fixing the date of auction as 19.01.2010. It is pertinent to note that the petitioner did not challenge the sale notice dated 18.12.2009 before the Debts Recovery Tribunal. However, the Debts Recovery Tribunal even without a prayer, had set aside the sale notice dated 18.12.2009. Further, the petitioner has not stated anything in the affidavit filed in support of the Writ Petitions that he has also challenged the auction sale notice dated 18.12.2009 before the Debts Recovery Tribunal. Therefore we are not going into the correctness of the sale notice dated 18.12.2009 in these Writ Petitions.

7.The grievance of the petitioner is that the 1st respondent has taken physical possession of the property by filing an application under Section 14 of the SARFAESI Act before the District Magistrate and District Collector, Kancheepuram without issuing notice under Section 13(4) of the SARFAESI Act.

8.The next contention raised by the petitioner is that while issuing the sale notice dated 10.10.2009 the 1st respondent has not followed the procedure mandated under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002, which contemplates service of 30 days clear sale notice upon the borrower.

9.So far as the sale notice dated 10.10.2009 is concerned, the sale was scheduled to take place on 10.11.2009. Admittedly, the sale did not take place on 10.11.2009 as there were no bidders. The petitioner has challenged only the auction sale notice dated 10.10.2009 before the Debts Recovery Tribunal in S.A.No.20 of 2010 and also the auction scheduled to be held on 10.11.2009.

10.On a perusal of the copy of the appeals filed in S.A.Nos.19 & 20 of 2010, it could be seen that the appeals were filed on 09.11.2009. Since the sale, which was scheduled to be held on 10.11.2009, pursuant to the notice dated 10.10.2009, did not take place on the said date, the prayer sought for before the Debts Recovery Tribunal with regard to the sale notice dated 10.10.2009 has become infructuous. As already stated, the 2nd sale notice dated 18.12.2009 was not challenged by the petitioner before the Debts Recovery Tribunal. Therefore, the petitioner cannot now canvass the correctness of the sale notice dated 18.12.2009 in these Writ Petitions. The 2nd respondent was the successful bidder in the auction held on 19.01.2010 and the 1st respondent - Bank also issued the sale certificate and handed over the physical possession of the property to him on 29.01.2010. The Debts Recovery Tribunal even without a prayer to set aside the sale notice dated 18.12.2009 had erroneously set aside the sale notice dated 18.12.2009. The Debt Recovery Appellate Tribunal has rightly set aside the order passed by the Debts Recovery Tribunal with regard to the sale notice dated 18.12.2009.

11.So far as the other contention, namely, with regard to the possession notice is concerned, admittedly, the 1st respondent has taken possession of the property by obtaining an order from the District Magistrate and District Collector, Kancheepuram by filing an application under Section 14 of the SARFAESI Act. The District Magistrate ordered delivery on 03.07.2009. Admittedly, the petitioner has not challenged the said order dated 03.07.2009 passed by the District Collector under Section 14 of the Act. Thereafter, the 1st respondent issued a possession notice dated 16.09.2009 informing that a demand notice under Section 13(2) was issued to the petitioner on 15.11.2007 calling upon him to repay a sum of Rs.18,59,026.90p within 60 days time. However, the petitioner did not repay the loan amount. Further, it has been stated in the notice that under Section 14 of the SARFAESI Act, possession has been taken pursuant to the orders from the District Collector/District Magistrate, Kancheepuram. Though the possession was taken pursuant to the order dated 03.07.2009, the petitioner did not challenge the said order. The petitioner has challenged only the Section 13(4) notice dated 16.09.2009. In view of the scheme of Sections 13, 14 & 17 of the Act, it is clear that possession of the secured property can be taken over either from the borrower/guarantor or any other person and the right of appeal under Section 17 against the order passed under Section 14(2) of the Act is available to any such party.

12.Section 14 provides for taking assistance of the District Magistrate in the process of taking possession of the secured assets of the borrower by the secured creditor under Section 13(4) of the Act. Once a notice is issued to a borrower under Section 13(2) and he fails to comply with the notice within the stipulated period, in view of Clause-13(4)(a), the secured creditor is entitled to take possession of the secured assets of the borrower. Therefore, once the secured creditor is entitled to take possession in view of the provisions of Section 13(4), the only thing he is required to do is to make an application in writing to the District Magistrate or the Chief Metropolitan Magistrate. If the two conditions stipulated in Section 14 are satisfied, then the Chief Metropolitan Magistrate or the District Magistrate has no other option except taking possession of the secured assets and the documents relating thereto and forward such assets and documents to the secured creditor.

13.In the judgment reported in 2013 9 SCC 620 [Standard Chartered Bank vs. V.Noble Kumar], the Hon'ble Supreme Court held as follows:

> "...
>
> 36.Thus, there will be three methods for the secured creditor to take possession of the secured assets:-
>
> (i) The first method would be where the secured creditor gives the requisite notice under rule 8(1) and where he does not meet with any resistance. In that case, the authorized officer will proceed to take steps as stipulated under rule 8(2) onwards to take possession and

thereafter for sale of the secured assets to realise the amounts that are claimed by the secured creditor.

(ii) The second situation will arise where the secured creditor meets with resistance from the borrower after the notice under rule 8(1) is given. In that case he will take recourse to the mechanism provided under Section 14 of the Act viz., making application to the Magistrate. The Magistrate will scrutinize the application as provided in Section 14, and then if satisfied, appoint an officer subordinate to him as provided under section 14(1)(A) to take possession of the assets and documents. For that purpose the Magistrate may authorize the officer concerned to use such force as may be necessary. After the possession is taken the assets and documents will be forwarded to the secured creditor.

(iii)The third situation will be one where the secured creditor approaches the Magistrate concerned directly under Section 14 of the Act. The Magistrate will thereafter scrutinize the application as provided in Section 14, and then if satisfied, authorize a subordinate officer to take possession of the assets and documents and forwards them to the secured creditor as under Clause (ii) above."

From the ratio laid down by the Apex Court in the above referred judgment, it is clear that it is open to the secured creditor to approach the District Magistrate concerned directly under Section 14 without resorting to the procedure contemplated under Section 13(4) of the SARFAESI Act.

14.Following the judgment reported in 2013 9 SCC 620 [Standard Chartered Bank vs. V.Noble Kumar] (cited supra), a Division Bench of this Court by order dated 19.04.2018 in W.P.No.7154 of 2015 held as follows:

"...

There cannot be a quarrel over the pronouncement of the Hon'ble Supreme Court that without resorting to issuance of notice, under Section 13(4) of the SARFAESI Act, 2002, secured creditor/Bank can always approach the District Collector-cum-District Magistrate/Chief Judicial Magistrate, for assistance in taking physical possession of the secured asset by filing an application under Section 14 of the SARFAESI Act, 2002."

15.The secured creditor is competent to take possession of secured assets on its own following the procedure laid down under Rule 8 of the Security Interest (Enforcement) Rule 2002. Only when the secured creditor finds it difficult to take possession of the secured assets, it may take the assistance of the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the Act. The measures taken under Section14 amounts to measures taken under Section 13(4) of the Act. The time factor, as to when an application under Section 14 of the SARFAESI Act is to be made, becomes immaterial, as the right to take possession of the secured asset can be exercised by the secured creditor at any point of time after the expiry of the period of 60 days from the date of notice under Section 13(2) of the SARFAESI Act. Admittedly, the notice under Section 13(2) was issued on 15.11.2007. Since Section 14 application was filed only in the year 2008 before the District Collector, (i.e.) beyond 60 days time stipulated in Section 13(2) notice, the initiation of the proceedings cannot be faulted and the same is legal and valid. Therefore, taking possession of the secured assets by the 1st respondent – Bank under Section 14 of the SARFAESI Act, without resorting to issuance of notice under Section 13(4) of the SARFAESI Act, is proper.

16.That apart, the petitioner has not challenged the order dated 03.07.2009 passed by the District Magistrate/District Collector, Kancheepuram. Therefore, the said order has become final. When the District Magistrate had taken possession of the secured assets from the petitioner, the petitioner's possession cannot be restored without setting aside the order passed by the District Magistrate. The Debt Recovery Appellate Tribunal, following the ratio laid down by the Apex Court in the judgment reported in 2013 9 SCC 620 cited supra, rightly set aside the orders passed by the Debts Recovery Tribunal.

17.In these circumstances, we do not find any ground to interfere with the order passed by the Debt Recovery Appellate Tribunal. The Writ Petitions are liable to be dismissed. Accordingly, the same are dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

To,

To

1.The Registrar,
   Debts Recovery Appellate Tribunal,
   Chennai.

2.The Registrar,
   Debts Recovery Tribunal,
   Chennai.

+1cc to Mr.V.Jayachandran , Advocate SR.No. 5412
+2ccs to Mr.S.Saravanan , Advocate SR.No. 5681
+1cc to Mr.S.Ramesh Kumar , Advocate SR.No. 5717

W.P. Nos.31639 & 31640 of 2015
and M.P.Nos.1 & 1 of 2015

A.SK(14/02/2019)