IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.04.2019

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Appeal No.1411 of 2019
&
C.M.P.No.9730 of 2019

The Chief Manager,
Punjab National Bank,
Branch:ARMB,
Chennai - 600 014. ...Appellant

-vs-

1. Mr.M.V.Dillibabu

2. Mrs.Kavi Dillibabu ...Respondents

Prayer: Writ Appeal filed under Clause 15 of Letters Patent against the order of this Court in W.P.No.31692 of 2017 dated 11.06.2018.

The Writ Petition is filed under Article 226 of the Constitution of India, praying to issue a Writ of Mandamus, directing the 1st respondent to refund the amount of Rs.50,05,000/- (Rupees fifty Lakhs and five thousand only) with interest at the rate of 18% per annum to the petitioners forth with.

For appellant : Mr.M.L.Ganesh

For respondents : Mr.Muthuappan

JUDGMENT

(Judgment of the Court was delivered by T.S.Sivagnanam, J.)

This appeal has been filed by the appellant/bank challenging the order and direction in W.P.No.31692 of 2017 dated 11.06.2018.

2. We have heard Mr.M.L.Ganesh, learned counsel for the appellant and Mr.M.Muthuappan, learned counsel for the respondents.

3. The said writ petition was filed by the respondents to direct the appellant/bank to refund the amount of Rs.50,05,000/- with the interest @ 18% per annum to the writ petitioners forthwith. The facts leading to filing of writ petition is an auction conducted by the appellant/bank bringing an immovable property for sale for recovery of the loan availed from Ms.NRS & Company owned by one E.Sekar Gunaseelan who was the guarantor. The said guarantor had purchased an extent of 19 cents of vacant land comprised in S.No.438/1A1, Perumal Koil East Street, Mel Ayyanambakkam, Thiruverkadu, Chennai – 77 by registered sale deed dated 03.05.2006 registered as Doc.No.5211 of 2006 on the file of the Sub-Registrar, Ambattur. The schedule of the property which was mortgaged by the guarantor with the appellant/bank as contained in the sale deed dated 03.05.2006 is as follows:

> “வட சென்னை பதிவு மாவட்டம், அம்பத்தூர் உப பதிவு மாவட்டம், திருவள்ளூர் மாவட்டம், அம்பத்தூர் வட்டம், அம்பத்தூர் நகராட்சி எல்லைக்குட்பட்ட, நெ.85, அயனம்பாக்கம் கிராமம், பழைய சர்வே எண் 438, புதிய சர்வே எண். 438/141 பட்டா எண். 371, கதவிலக்கம் 27, சார்ச் ரோடு, மேல் அயனம்பாக்கம், சென்னை 600 077 ல் அமைந்த 0.19 செண்ட் நிலத்திற்கு நான்கு பக்க எல்லைகள்
>
> வடக்கில்: காலி நலம்
> தெற்கில்: 12 அடி ரோடு
> கிழக்கில்: சுப்பிரமணிக்கு சொந்தமான காலி நிலம்
> மேற்கில்: அப்புலிங்கத்திற்கு சொந்தமா வீடு
>
> ஆக மொத்தம் சுமார் 0.19 செண்ட் காலிமனையானது இந்த விற்கிரைய பத்திரத்திற்கு உட்பட்டதாகும்.”

4. It is not in dispute that the borrower committed default in repayment of the loan and consequently appellant/bank issued a notification bringing the property for sale by a notice published in the English Daily on 15.02.2017. The owner of the property Mr.E.Sekar Gunaseelan was the guarantor for the loan availed by M/s.NRS & Company represented by its proprietor Mr.S.S.Manivannan. The total outstanding amount was Rs.1,34,18,657/- as on 31.12.2016 plus future interest/charges/other costs incurred by the appellant/bank thereon till final payment/realization with effect from 01.01.2017. The description of the property in the notification is as follows:

> “Description of immovable property:
> Name of the owner (Mortgagor):E.Sekar Gunaseelan
> All that piece and parcel of land with building thereon at D.No.27, Church Road, Mel Ayanambakkam,

Ambattur Taluk measuring 0.19 Cents comprised in OS No.438 and NS No.438/1A1,Patta No.37 bounded on North by vacant land; South by 12ft Road; East by Subramani's land; West by Appulingam House situated within Sub Registration District of Ambattur and Registration District of North Chennai."

5. The notification fixed to reserve price of the property tax as Rs.75.00 Lakhs and the Earnest Money Deposit payable by the intending bidder as Rs.7.50 Lakhs. The respondent/writ petitioner participated in the auction sale and it is admitted by the appellant/bank that they were the only bidders in the said auction. They have remitted the Earnest Money Deposit and their offer of Rs.75,05,000/- was accepted by the appellant/bank and in terms of the conditions of auction, the respondent/writ petitioner has paid a total sum of Rs.50,05,000/- and remaining balance is Rs.25,00,000/-.

6. The writ petitioners submitted a representation to the appellant on 03.04.2017 referring to their earlier letter dated 31.03.2017 stating that they have remitted a sum of Rs.15,00,000/- towards e-auction account and they have so far paid 67% of the sale cost and submitted their loan papers to the appellant/bank and there was an oral confirmation from the Senior Manager that the loan application will be positively considered and requested to release the amount of Rs.25,00,000/- as a loan. The appellant/bank appears to have not given any reply to the said letter. On 06.05.2017, the Senior Manager of the appellant/bank addressed the Tahsildar, Maduravoyal Circle, Thiruvallur District, concerning the location of the property with boundaries i.e., the property which brought up for sale and purchased in the e-auction by the respondents/writ petitioners. The appellant/bank informed the Tahsildar that they are unable to locate the property with exact boundaries and requested to help them to find exact location with boundaries and demarcation as soon as possible. To be noted that this communication sent to the Tahsildar dated 06.05.2017 is prior to the e-tender notification dated 13.12.2017. Thus, it is clear that as on 06.05.2017, the appellant/bank were unable to identify the property which was subject matter of mortgage and sought the assistance of the Revenue Officials. There is nothing on record to show that subsequently the Revenue Officials were able to locate the property and that was prior to issuance e-tender notification dated 13.12.2017. We shall keep this factual position aside for the present.

7. The writ petitioners submitted another representation dated 16.05.2017 expressing their shock and surprise, as they were unable to identify the property and the boundaries mentioned in the schedule as there is discrepancy or difference

in the property. Further, the writ petitioners stated that they participated in the e-auction only on the promise made by the Chief Manager, ARM Branch that the property is free from encumbrances and also arrange for purchase of property and sanction of loan. The respondents/writ petitioners sought for extension of time for payment of balance amount. They also made a specific request for identifying the property and also sought for erecting stones in four corners of the property and handover vacant and peaceful possession of the property to them. Further, the writ petitioner stated that, if for any reason, the bank is not able to identify the property and handover vacant possession, they requested that the amount paid by them may be refunded along with interest.

8. One more representation was made by the writ petitioners on 24.07.2017 addressed to the appellant and received by the appellant on 27.07.2017, reiterating their earlier request. This was followed by another representation dated 10.08.2017 wherein there was a reference to the earlier letters. The valuation report submitted by the Charted Engineer, as nominated by the appellant/bank who has stated that the approved lay out plan is not available, there is no demarcation and the property could not be identified and separate patta/sub division sketch is required. In the said representation dated 10.08.2017, writ petitioners referred to the earlier representations dated 03.04.2017, 16.05.2017, 10.06.2017, 03.07.2017, 24.07.2017 and the letter addressed by the appellant/bank to the Tahsildar dated 06.05.2017 and 12.06.2017.

9. Subsequently, the writ petitioners addressed the Managing Director and Chief Executive Officer of the appellant/bank at New Delhi vide representation dated 19.09.2017 setting out their plight. This was followed by another reminder dated 25.09.2017. Ultimately, the appellant/bank vide letter dated 25.10.2017 addressed the writ petitioners, referring to the terms and conditions that the sale shall be on "as is where is and as is what is" basis and that the parties interested in participating in the auction should physically inspect the schedule property on a specified date and also to procure the necessary documents in relation to the subject property. Further the appellant/bank stated that the respondents after satisfying with the personal inspection of the property site and declared as successful bidder for the sale price amount of Rs.75,05,000/- and remitted Rs.50,05,000/- through RTGS on various dates and thus left a balance sum of Rs.25,00,000/-. Further in the said letter, the action taken by the appellant/bank against the borrower were referred to and denied the allegation that no patta was obtained by the Tahsildar. Further the bank took a stand that patta and Revenue records do not confer any right and it is the title deed which confers one's possession and

ownership of the property. Thus, the appellant/bank stated that any acts, deeds of A.Subramaniam (guarantor's vendor) are not binding on the appellant/bank, as it is a secured creditor. They reiterated that at the time of sanctioning the loan and taking possession under Section 13(4) of the SARFAESI Act, the subject property remains intact and demarcation of the property is to be done by the buyer and for that the bank will extend their cooperation. Further the appellant/bank stated that since the respondent/writ petitioner has not remitted the balance amount within stipulated time, the bank is left with no other option than to forfeit the amount deposited by them.

10. In this factual background, the respondents approached the writ Court and filed the writ petition for the aforementioned relief. When the writ petition was heard by the learned Single Bench on 11.06.2018, there was no appearance on behalf of the respondent/bank.

11. The contention of Mr.M.L.Ganesh, learned counsel for the appellant is that after the order was passed in the writ petition, the appellant/bank has filed Review Application before the learned Single Bench in Rev.Appl.No.94 of 2018 pointing out as to why there was no appearance and also made a legal submission that the writ petition itself is not maintainable in the light of the alternate remedy available under Section 17 of the SARFAESI Act. Further it is submitted that the appellant/bank, as contended in the Review Application that the respondent/writ petitioners are aware of the terms and conditions of the sale as mentioned in the notice dated 13.02.2017 and after acquainting themselves with the conditions and participated in the auction and paid the money, they cannot turn around and ask for refund of the amount towards purchase of the property in auction. Apart from that, there were other grounds raised to review the order in the writ petition. The learned Single Bench by order dated 07.03.2019 dismissed the Review Application.

12. The appellants are before us by way of this appeal challenging the order in the writ petition which is the substantive order. The contentions which were advanced before the Review Court have been advanced before us and Mr.M.L.Ganesh, leared counsel for the appellant/bank vehemently contended that the learned Single Bench was swayed by certain subsequent events which were after the sale was notified and that cannot be a reason to entertain the writ petition and if the petition is allowed, it will open flood gates of litigation and same should not be encouraged.

13. An additional typed set of papers was filed by the appellant/bank containing the sale deed dated 03.05.2006, an

undated proceedings of the Thiruvergadu Municipality, photo copy of the planning permit, a copy of the Kisthi receipt, a copy of Chitta, though it is mentioned as patta in the index to the additional typed set of papers, a copy of encumbrance certificate dated 25.11.2010 and Memorandum of Deposit of title deeds executed by the guarantor Mr.E.Sekar Gunaseelan dated 14.12.2012.

14. Thus, it is the submission of Mr.M.L.Ganesh, learned counsel for the appellant/bank that the records of ownership of the property are clear and the bank is not responsible for any troubles or issues created by the legal heirs of A.Subramani, the vendor of the guarantor and the respondent/writ petitioner having participated in the auction after having fully acquainted themselves with the conditions, now cannot seek for refund of the amount much less by way of a writ petition.

15. We have heard Mr.M.Muthuappan, learned counsel for the respondents who has also filed a typed set of papers containing a copy of Valuation report submitted by valuer of the appellant/bank dated 23.11.2016, e-tender notification dated 13.12.2017, the letter to the Chief Manager dated 03.04.2017 letter from the appellant/bank to the Tahsildar dated 16.05.2017, copies of the representation sent by the writ petitioners to the appellant/bank dated 19.09.2017 & 25.09.2017 and their Managing Director and the reply dated 25.10.2017 by which they had stated that the amount paid by the writ petitioners would be forfeited.

16. The above factual position will clearly show that the conduct of the appellant/bank is far from being satisfactory. It is admitted that the valuation report has been submitted by the approved valuer of the appellant/bank and the report is dated 23.11.2016. In the said report in paragraph 13, the approved valuer has in no uncertain terms stated that the approved layout plan is not available. Further in the remarks column, the valuer states that there is no demarcation, property could not have been identified, separate patta/sub division sketch is required and he has submitted the said report is based on the previous valuation report. Thus, the valuation report which was obtained on 23.11.2016 is based upon the previous valuation report which obviously must have been obtained when the loan was sanctioned.

17. The e-tender notification was issued after the valuation report was prepared i.e., on 13.12.2017. Thus, the bank when it issued e-tender notification on 13.12.2017, was fully aware of the fact that there is no demarcation and the property could not be identified. The bank takes a stand before us stating that the disputes created by the legal heirs of vendor A.Subramani will not bind them.

18. Nevertheless, after obtaining the mortgage of the property by deposit of title deeds and the property has been put up for sale for recovery of the loan, the bank is bound to ensure that the property is identifiable and free from encumbrances. The conditions in the auction notice "as is where as and as is what is basis" will not absolve the appellant/bank from its liability. As pointed out earlier, the appellant is a Nationalized Bank and their own valuer has stated that the property could not be identified. Therefore, in all fairness, the appellant/bank should have deferred sale of the property and taken steps with the Tahsildar to identify the property. If there was no response, they should have restored to Section 14 of the SARFAESI Act and after having identified the property and secured the property, they should have notified for the auction. The respondent/writ petitioner participated in the auction and were virtually with a begging bowl before the appellant/bank, which can be seen from the representations made by the respondent/writ petitioner. None of the representations gained any response, probably after the respondents addressed Managing Director of the bank, the bank issued the letter dated 25.09.2017 in which they sought to forfeit the amount paid by the writ petitioners.

19. Thus, considering peculiar facts and circumstances, we are of the clear view that there was wholly unfairness on the part of the appellant/bank and the bank cannot take umbrage under the conditions which were incorporated in the auction notification, when the facts was admitted by the appellant/bank would reveal that the property is not identifiable as on date or as on the date and when the auction notification dated 13.12.2017 was issued.

20. The learned counsel for the appellant would vehemently contend that all that the appellant/bank was requesting the respondents is to enable them to take action under Section 14 of the SARFAESI Act, secure the possession of the property and then handover the vacant possession. The plea raised by the appellant/bank before us in this regard needs to be outrightly rejected. If the bank was unable to secure the property or there was no access to the property and they should have deferred the sale proceedings and after completing all formalities, they should have issued the auction notification and the blocking of the access in the opinion of the bank is illegal. Therefore, this will also clearly show that the conduct of the appellant/bank is wholly unreasonable. Added to all that, the appellant/bank has sent a letter to the writ petitioners stating that they will be left with no option except to forfeit the amount paid by the writ petitioners.

21. Thus, for the above reasons, we find that there is no

error in the order and direction issued by the writ Court and we have also assigned independent reasons as to why the writ petitioners are entitled for refund of the amount. We notice that the learned writ Court has directed the amount to be refunded along with interest @ 18% per annum. Interest @ 18% is the prime lending rate and the maximum interest paid to the Nationalized Banks on deposits is stated to be around 8% for persons other than senior citizens. Therefore, we are of the view that interest @ 8% would meet the ends of justice.

22. In the result, the appeal filed by the appellant/bank is dismissed and the appellant/bank is directed to refund the sum of Rs.50,05,000/- paid by the respondent/writ petitioner together with the interest at 8% to be calculated from the day on which the amounts were remitted by the respondent/writ petitioners, as the amount were remitted on different dates, and such interest shall be payable till the date on which amount is paid to the respondent/writ petitioners. The above directions shall be complied within a period of ten days from the date of receipt of copy of this judgment.

23. In the result, the writ appeal is dismissed. No costs. Consequently, the connected civil miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

Mrm

+1cc to Mr.M.Muthappan, Advocate, S.R.No.39221
+1cc to Mr.M.L.Ganesh, Advocate, S.R.No. 40030

Writ Appeal No. 1411 of 2019
&
C.M.P.No.9730 of 2019

MR(CO)
GN(23/05/2019)