IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.03.2019

Delivered on : 11.04.2019

CORAM :

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

AND

The HON'BLE MR.JUSTICE M.DURAISWAMY

W.P.Nos.12007 & 12008 of 2018 and
W.M.P.Nos.13988, 13989, 13992, 13393 of 2018

1.Vishwanath M.Pai
2.Garima Chugh .. Petitioners in both the W.Ps

Vs.

1. Corporation Bank,
(A Government of India Enterprise),
No.40/1, Lady Curzon Road,
Shivaji Nagar,
Bangalore - 560 001.

2. Sanjib Kumar Biswal

3. M/s.Bhoomija Builders,
(A Partnership Firm carrying on business) at
No.154, Sy.No.35/1 & 35/2,
Kariyammana Agrahara Village,
Varthur Hobli, Varthur South Taluk,
Bangalore - 560 037.

4. State Bank of India,
Sarjapur Road Branch (10363),
No.13, Sy.No.19, RK Institute Building,
Ambalipura, Belandur Gate,
Bangalore - 560 012.

5. The Registrar,
Debt Recovery Appellate Tribunal
4th Floor, Indian Bank Circle Office Building,
55, Ethiraj Salai, Chennai - 600 008.

.. Respondents in both the W.Ps

W.P.No.12007 of 2018 filed under Article 226 of the Constitution of India praying for issue of Writ of certiorari to call for the records of the order of proceedings dated 20.12.2017 passed by the Debt Recovery Appellate Tribunal in RA (SA).No.135 of 2012 and to quash the same in as much as the impugned order is without consideration of the relevant material on record, appreciation of facts, beyond the powers of the Debt Recovery Appellate Tribunal and contrary to law.

W.P.No.12008 of 2018 filed under Article 226 of the Constitution of India praying for issue of Writ of certiorari to call for the records comprised in the possession notice dated 27.12.2011 issued by the 1st respondent Bank and to quash the same in as much as the same is illegal, ultra vires, unconstitutional and contrary to law.

For Petitioner (in both W.Ps) : Mr.Sathish Parasaran, Senior Counsel, for Mr.R.Parthasarathy

For Respondents (in both W.Ps) : Mr.S.Sethuraman (R1)
Mr.S.Arunkumar (R4)
R2 & R3 - no appearance
R5 - Tribunal

COMMON ORDER

W.P.No.12007 of 2018 has been filed by the petitioners to issue a Writ of certiorari to call for the records comprised in the order dated 20.12.2017 passed by the Debt Recovery Appellate Tribunal in RA(SA).No.135 of 2012 and to quash the same in as much as the impugned order is without consideration of the relevant material on record, appreciation of facts, beyond the powers of the Debt Recovery Appellate Tribunal and contrary to law. W.P.No.12008 of 2018 has been filed by the petitioners to issue a Writ of certiorari to call for the records comprised in the possession notice dated 27.12.2011 issued by the 1st respondent Bank and to quash the same.

2.It is the case of the parties that the 2nd respondent entered into an Agreement dated 15.08.2006 with the owners of the land represented by the 3rd respondent for the purchase of undivided share of land where the 3rd respondent agreed to construct residential apartments known as "Banyan Tree" in terms of Joint Development Agreement dated 16.04.2005. The 2nd respondent also entered into an Agreement for Construction on 15.08.2006 with the 3rd respondent for construction of a flat, which is the subject matter of the dispute.

2.1.The 2nd respondent availed housing loan of Rs.48 lakhs from the 1st respondent on 20.11.2006 for the purchase of the UDS in the land for the construction of flat bearing DS-04, 2nd Floor, D Block, Banyan Tree with super built up area of 2399.70 sq.ft. situated in Survey Nos.31/1 and 31/2, Kariyammana Agrahara, Vonthin Hobli, Bangalore South Taluk. The 2nd respondent executed loan documents in favour of the 1st respondent agreeing to repay the loan amount along with interest in 240 monthly installments. The 2nd respondent entered into an Agreement for Sale, Construction Agreement and Tripartite Agreement dated 31.10.2006 with the 3rd respondent and created security interest over the flat. As per the Tripartite Agreement dated 31.10.2006 entered into between the respondents 1 to 3, the 3rd respondent guaranteed the loan availed by the 2nd respondent and also agreed to execute Sale Deed for UDS in favour of the 2nd respondent and construct the flat. The 2nd respondent created a security interest over the flat and under the contract under which the credit is provided to enable the 2nd respondent to acquire the tangible asset. The 1st respondent disbursed the loan to the 2nd respondent and the original of Sale Agreement, Construction Agreement and Tripartite Agreement were deposited with the 1st respondent by a Memorandum dated 20.11.2006, thereby creating security interest over the flat in favour of the 1st respondent. The 2nd respondent also executed a pro-note dated 16.09.2009. In the interregnum, the 2nd respondent had registered the Sale Deed in his name. However, the Sale Deed was not handed over to the 1st respondent. Since the 2nd respondent defaulted in repaying the loan, the 1st respondent classified the loan account as Non Performing Asset.

2.2.According to the 1st respondent - Bank, when they wanted to initiate further action and on obtaining the Encumbrance Certificate, they found that the property purchased out of the loan proceeds has been registered in the name of the petitioners. The 1st respondent has also stated that on receipt of the notice from them, the petitioners who have availed the loan from the Syndicate Bank by depositing the Sale Agreement, Construction Agreement and Tripartite Agreement on 25.08.2009 and creating security interest and is also akin to what the 2nd respondent did with the 1st respondent, in connivance with the respondents 2 & 3 created a registered mortgage in favour of the State Bank of India, who had taken over the loan/liability from Syndicate Bank. The petitioners challenged the possession notice dated 27.12.2011 issued under Section 13(4) of the SARFAESI Act issued by the 1st respondent by filing S.A.No.135 of 2012 against the respondents 1 to 3 and also against the State Bank of India, from whom the petitioners availed the housing loan against the same security. The Debts Recovery Tribunal, Karnataka at Bangalore allowed the S.A. by order dated 31.08.2012 holding that no security interest was created. Against the said order, the 1st respondent filed an appeal before the Debt Recovery Appellate Tribunal, Chennai in R.A.(SA).No.135 of 2012 and the Debt Recovery Appellate Tribunal set aside the order passed by the Debts Recovery Tribunal and allowed the appeal on 20.12.2017. Challenging the order passed by the Debt Recovery Appellate Tribunal, the petitioners have filed the Writ Petition in W.P.No.12007 of 2018.

3.So far as the Writ Petition in W.P.No.12008 of 2018 is concerned, the petitioners have challenged the possession notice dated 27.12.2011, which was already challenged by them before the Debts Recovery Tribunal, Karnataka at Bangalore, which is also the subject matter of the Writ Petition in W.P.No.12007 of 2018. Therefore, the Writ Petition in W.P.No.12008 of 2018 is liable to be dismissed.

4.The petitioners challenged the possession notice issued to the respondents 2 & 3 before the Debts Recovery Tribunal, Bangalore on the ground that they are the owners of the property on the basis of the registered Sale Deed dated 21.05.2010 and are in actual possession of the property. Further, the petitioners contended that they are neither borrowers nor guarantors of the loan. The petitioners contended that they obtained loan for the purchase of the property from Syndicate Bank on 06.02.2010 and thereafter, the loan was taken over by the 4th respondent - Bank. The Debts Recovery Tribunal set aside the possession notice observing that on the basis of the Tripartite Agreement, there cannot be a secured mortgage, particularly, the property in question was not even in existence. The 1st respondent - Bank contended that the Debts Recovery Tribunal had failed to consider the element of security interest according to Section 2(1)(f) of the SARFAESI Act.

4.1.In these circumstances, it is appropriate to extract the definition of "security interest" as per Section 2(1)(zf) of the SARFAESI Act, which reads as follows:

> "Section 2(1)(zf) of the SARFAESI Act defines Security Interest as follows:
> "Security Interest" means right, title and interest of any kind, other than those specified in Section 31, upon property created in favour of any secured creditor and includes -
>
> (i)any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any

unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or

(ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset.

5.The contention of the petitioners that a charge was never created on the property because it was not in existence on the date of Tripartite Agreement, cannot hold good as per the provisions of Section 2(1)(zf) of the SARFAESI Act.

6.It is also pertinent to note that on 16.09.2009, the 2nd respondent also acknowledged the debt outstanding of Rs.48.18 lakhs and executed a demand pro-note and the 2nd respondent was also paying the monthly installments to the 1st respondent - Bank. The petitioners purchased the property from Mrs.Pratima Vijay Kumar and others on 06.02.2010 by availing loan from the Syndicate Bank, which was taken over by the State Bank of India subsequently.

7.From the materials available on record, it is clear that the 1st respondent - Bank had granted the loan of Rs.48 lakhs based on the same property. The respondents 2 & 3 conveniently remained exparte before the Tribunal below. The 3rd respondent viz., M/s.Bhoomija Builders were given Power of Attorney by the owners of the land viz., Mrs.Pratima Vijay Kumar and others, who sold the property to the petitioners. It is also clear that in respect of the same property, the 1st respondent - Bank and also the 4th respondent - Bank, sanctioned loans to the tune of Rs.90 lakhs. A sum of Rs.42.28 lakhs was obtained by the petitioners from the Syndicate Bank, which was subsequently taken over by the 4th respondent and a sum of Rs.48 lakhs was obtained by the 2nd respondent from the 1st respondent - Bank. At the time of availing the loan from the 1st respondent - Bank, the Tripartite Agreement, Construction Agreement and Agreement for Sale were given in respect of the property in question.

8.As per Section 58 of the Transfer of Property Act, where a person delivers to a creditor or his agent document of title to immovable property, should have intention to create a security thereon, the mortgage is created by deposit of Title Deeds. Therefore, with an intention to create mortgage in favour of the 1st respondent - Bank, the 2nd respondent had handed over the Tripartite Agreement, Construction Agreement and Agreement for Sale and also acknowledged the debt. The Sale Deed was executed in favour of the 1st respondent only on 21.05.2010. When the documents were handed over to the 1st respondent, which includes the Agreement for Construction of the property, with the consent of the land owners, now the petitioners cannot take a different stand and cause loss to the 1st respondent – Bank, which is dealing with public money.

9.The learned senior counsel appearing for the petitioners, in support of his contention, relied upon a judgment reported in (2012) 1 Supreme Court Cases 656 [Suraj Lamp and Industries Private Limited (2) through Director vs. State of Haryana and another] wherein the Hon'ble Supreme Court held as follows:

> "...
> 18.It is thus clear that a transfer of immovable property by way of sale can only be a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred.
> 19.Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 & 55 of the TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under Section 53-A of the TP Act). According to the TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of the TP Act enacts that sale of immovable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject-matter."

9.1.The said judgment relates to Sections 54 & 55 of the Transfer of Property Act and that Agreement of Sale does not create any interest or charge on its subject matter.

9.2.There cannot be any dispute with regard to the ratio laid down in the judgment cited supra. However, as per Section 58 of the Transfer of Property Act, since the 2nd respondent had an intention to create mortgage by deposit of Title Deeds, the loan advanced by the 1st respondent – Bank which is a public money, cannot be allowed to go un-recovered. In these circumstances, the judgment relied upon by the learned senior counsel appearing for the petitioners is not applicable to the facts and circumstances of the present case.

10.As already stated, the respondents 2 & 3, against whom the SARFAESI proceedings were initiated, did not choose to challenge the possession notice dated 27.12.2011 issued to them. That apart, they conveniently remained exparte before the Debts Recovery Tribunal, Bangalore as well as before the Debt Recovery Appellate Tribunal, Chennai. If the petitioners were cheated by the respondents 2 & 3 by not disclosing about the loan availed from the 1st respondent, the remedy open to the petitioners is to take appropriate proceedings against the respondents 2 & 3 for the recovery of the money. The Debt Recovery Appellate Tribunal, taking into consideration all these aspects, rightly upheld the possession notice dated 27.12.2011 by setting aside the order passed by the Debt Recovery Appellate Tribunal and allowing the appeal filed by the 1st respondent - Bank. In these circumstances, we do not find any ground to interfere with the order passed by the Debt Recovery Appellate Tribunal. The Writ Petition in W.P.No.12007 of 2018 is liable to be dismissed.

11.In the result, the Writ Petitions in W.P.Nos.12007 and 12008 of 2018 are dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

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To

1. Corporation Bank,
   (A Government of India Enterprise),
   No.40/1, Lady Curzon Road,
   Shivaji Nagar,
   Bangalore - 560 001.

2. State Bank of India,
   Sarjapur Road Branch (10363),
   No.13, Sy.No.19, RK Institute Building,
   Ambalipura, Belandur Gate,
   Bangalore - 560 012.

3. The Registrar,
   Debt Recovery Appellate Tribunal
   4th Floor, Indian Bank Circle Office Building,
   55, Ethiraj Salai, Chennai - 600 008.

+1 cc to Mr.R.Parthasarathy, Advocate, S.R.No.35832

+1 cc to Mr.M.L.Ganesh, Advocate, S.R.No.35668

W.P.Nos.12007 & 12008 of 2018
and W.M.P.Nos.13988, 13989,
13992, 13393 of 2018

SSM(11/04/2019).