IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.01.2019

CORAM

THE HON'BLE MR.JUSTICE S.MANI KUMAR
&
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.2509 of 2018
and
W.M.P.Nos.3060, 3061 of 2018

1. Mr.R.Veeraraghavan

2. M/s.V.V.Home Makers Pvt Ltd.,
No.6, Rangarajapuram Main Road,
Kodambakkam, Chennai - 600 024.
by its Authorising Signatory
R.Veeraraghavan ... Petitioners

Vs.

1. ICICI Bank Ltd.,
Anna Nagar Branch
No.78-A, 1st floor,
3rd Avenue, Anna Nagar,
Chennai - 600 040.

2. Mr.V.Venkatesh

3. Mr.S.Balakrishnan (Deceased)

4. The Registrar,
Debts Recovery Appellate Tribunal,
Chennai - 600 008.

5. The Registrar,
Debts Recovery Tribunal I,
Chennai - 600 002. ... Respondents

Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the proceedings dated 29.12.2017 in M.A.No.122 of 2017 on the file of the 3rd respondent, confirming the order dated 03.08.2016 in M.A.No.22 of 2016 in O.A.No.132 of 2015 on the file of the 4th respondent and to quash the same.

For Petitioners : Mr.M.Theivakumar

For R1 : Mr.S.Vasudevan

For R2 : Served
No appearance

R3 & R4 - Tribunal

O R D E R

(Order of the Court was made by V.BHAVANI SUBBAROYAN.J.,)

This Writ Petition has been filed to call for the records of the proceedings dated 29.12.2017 in M.A.No.122 of 2017 on the file of the 4th respondent, confirming the order dated 03.08.2016 in M.A.No.22 of 2016 in O.A.No.132 of 2015 on the file of the 5th respondent and to quash the same.

2. The case of the petitioners is that they had approached the 1st respondent bank, seeking for housing loan facility, during May 2007 and entered into an agreement on 29.08.2007 for the housing loan of a sum of Rs.1,45,57,405/- with monthly installments commencing from September 2007. On that day itself, the 1st respondent bank sanctioned the loan to the petitioners and the petitioners executed guarantee deed in favour of the 1st respondent bank.

3. The petitioners would contend that as per the agreement dated 29.08.2007, they had been regularly paying the installment amounts without any default and they had excellent relationship with the 1st respondent bank. Subsequently, during the month of May 2015, the petitioners approached the 1st respondent bank for settling the entire balance amount of the housing loan, and accordingly, the 1st respondent bank gave a letter dated 27.05.2015 for One Time Settlement. Thereafter, in the month of February 2016, the petitioners again approached the 1st respondent bank for settling the balance loan amount of Rs.49,89,251/- through a letter dated 27.05.2015. When the petitioners were always willing to settle the entire balance amount of the loan, they were shocked to receive the copy of an Exparte Decree Order dated 31.03.2016, sent by the Debt Recovery Tribunal-I, Chennai, the 5th respondent herein.

4. The petitioners would further contend that the summons was received only by their servant and the same was never brought to their knowledge. Further, at the time when the summons was received, the 1st petitioner's father in law, who was the 3rd defendant in O.A. was very sick. The 1st petitioner had been taking care of his father in law from August 2015 to July

2016, who later died on 02.07.2016. The petitioners contended that only due to the above reasons, they failed to appear before DRT-I, which resulted in an exparte order dated 31.03.2016 against them.

5. The petitioners would also contend that after receipt of the above order on 11.04.2016, they immediately rushed before DRT-I and came to know about the case that an exparte decree was passed against them. The petitioners further would contend that pursuant to a one time settlement arrived between them and the respondent bank, they have made a payment of Rs.23,00,000/- on 28.09.2015, but, the respondent bank deliberately suppressed the said fact and had not given credit to the same.

6. The petitioners further would contend that the summons in the O.A. were sent to the defendants, but, it was duly served only on the 1st and 3rd defendants, and D2 and D4 summons were returned as unserved. Later, paper publications effected against all the defendants and the petitioners were called absent and set exparte on 10.12.2015. Since none appeared for the defendants, they were also set exparte on 10.12.2015 and exparte decree came to be passed on 31.03.2016.

7. The petitioners would further contend that when they came to know about the aforesaid order, immediately, they filed M.A.No.22 of 2016, seeking to set aside the exparte decree in O.A.No.132 of 2015 passed by DRT-I, but, the DRT-I, by its order dated 03.08.2016, dismissed the said application, declining to set aside the exparte final order dated 31.03.2016. Hence, the petitioners approached the DRAT, Chennai, by filing AIR 385 of 2016, for setting aside the order of DRT-I, declining to allow M.A.No.22/2016, filed for setting aside the exparte final order in the O.A. The petitioners have also filed an appeal in M.A.No.122 of 2017 before the DRAT, seeking to set aside the exparte final order, along with a waiver petition in I.A.No.422 of 2016. Even though, the said waiver application was considered by DRAT and a sum of Rs.23 lakhs paid by the petitioners was taken into consideration, the DRAT, by its order dated 29.12.2017, dismissed the application in M.A.No.122 of 2017, confirming the order of the DRT-I dated 31.03.2016. Hence, the petitioners have filed this Writ Petition to quash the same.

8. Denying all the allegations of the petitioners, the 1st respondent bank has filed a counter affidavit, wherein, it has been contended that the petitioners along with other defendants availed a housing loan from the respondent bank on 31.08.2007 for a sum of Rs.1,45,57,405/- with interest at 12.75% p.a., with the monthly installment commencing from September 2007. The petitioners and the other defendants executed a Facility Agreement and other documents, for the above said loan on

31.08.2017. Since the ECS given by the petitioners were bounced, the petitioners availed a one time settlement from the respondent bank and the bank also agreed to receive a sum of Rs.75,77,251/- in full settlement, by its letter dated 27.05.2015, which was repayable in 6 installments commencing from 31.05.2015 and ending on 23.10.2015. However, the 1st petitioner committed default in payment of due in 1st instalment itself, and therefore, the arrangement made for one time settlement, was cancelled and withdrawn by the respondent bank.

9. The respondent bank would further contend that in view of the failure of the 1st petitioner to comply with the terms of one time settlement, the bank, with no other option, initiated proceedings before the Debt Recovery Tribunal - I, for recovery of the amount due to the respondent bank, and thereafter, issued a demand notice to the petitioner, under Section 13(2) of the SARFAESI Act 2002 on 13.09.2014. Subsequently, a legal notice dated 26.08.2015 was also issued to the petitioner, but, the same was not complied with. The respondent bank further would contend that the bank filed O.A.No.132 of 2015 for recovery of a sum of Rs.92,62,782/- due as on 28.06.2015 with further interest and costs, and for sale of the mortgaged property against the defendants 1 to 4. Thereafter, summons were issued by the DRT-I and the same was duly served on the defendants. The 1st petitioner is the Chairman and Managing Director of the 2nd petitioner and he was served on 25.09.2015. The other defendants were also served. However, all the defendants were set exparte on 10.12.2015. The 3rd defendant, who is the son of the 1st petitioner, was duly served and other defendants were duly served by substituted service (by paper publication).

10. The respondent bank would also contend that on coming to know about the proceedings initiated by the bank, the 1st petitioner approached the bank on 28.09.2015 and paid a sum of Rs.23,00,000/- by cash followed by cheque payment of Rs.75,000/- on 31.10.2015. The other cheques issued by the petitioner were returned dishonoured as the account was closed. Further, these payments were made only after receipt of suit summons and the petitioners are aware of the suit proceedings initiated before the Debt Recovery Tribunal - I. Moreover, the respondent bank would contend that on 31.03.2016, O.A.No.132 of 2015 was decreed against the defendants and the mortgaged property was directed to be sold. Thereafter, the petitioners filed M.A.No.22 of 2016 on 27.04.2016, for setting aside the exparte order of the Debt Recovery Tribunal - I dated 31.03.2016. However, it was dismissed by DRT-I on 03.08.2016, since there was no supporting affidavit filed by the said servant and the name of the servant was also not mentioned anywhere, to prove the statement of the petitioners that the summons were received by their servant.

11. In addition, the respondent bank would contend that considering the payment of Rs.23,00,000/- made by the petitioners to the respondent bank in 2015, the appeal filed by the petitioners in M.A.No.122 of 2017 was heard on merits, however, it was dismissed by DRAT on 29.12.2017, confirming the order of the DRT-I. The respondent bank would contend that even though, the petitioners were provided facility for one time settlement, they had failed to comply with the terms of one time settlement, and therefore, the said facility was withdrawn and cancelled by the bank. The respondent bank would further contend that the petitioners had not even filed any supporting documents before the Tribunal, to prove their case that they were not issued with suit summons, that their servant only received the same and not effected on them, hence, the present petition deserves to be dismissed. On the above grounds, bank has sought for dismissal of the same.

12. Heard the learned counsel for the petitioners and the learned counsel for the respondents, and perused the materials available on record.

13. Perusal of the records, would show that it is not in dispute that the petitioners were sanctioned housing loan for a sum of Rs.1,45,57,405/- with 12.75% interest per annum, repayable in 135 monthly installments commencing from September 2007, and it is also not in dispute that the petitioners have committed default in payment of the loan and approached the 1st respondent bank for one time settlement as early as 27.05.2015, which is also accepted by the respondent bank.

14. It could be seen from the records that since the petitioners failed to comply with the terms of one time settlement, the respondent bank decided to recover the loan and Section 13(2) notice was issued as early as on 13.09.2014 and thereafter, a legal notice dated 26.08.2015 was also issued by the 1st respondent bank, calling upon the petitioners to pay the outstanding amount of Rs.92,62,782/- due as on 28.06.2015 together with further interest and penal interest, which the petitioners have received and acknowledged the same. Having not complied with the terms and payment, the respondent bank has initiated SARFAESI proceedings before the DRT-I. Thereafter, the petitioners have remitted a sum of Rs.23,00,000/- by cash on 28.09.2015 and Rs.75,000/- by cheque on 31.10.2015, and the bank has also received the same. Since the petitioners were set as exparte, DRT-I has passed an exparte decree on 31.03.2016.

15. A careful perusal of the exparte decree dated 31.03.2016, shows that there is no whisper or any discussion made by DRT-I, with regard to service of summons on the defendants in O.A.No.132 of 2015. After the receipt of the

decree in O.A.No.132 of 2015 dated 31.03.2016, the petitioners filed an application in M.A.No.22 of 2016 before DRT-I to set aside the exparte decree dated 31.03.2016 and pleaded that summons was received only by their servant and it was never brought to their knowledge. Since there was no supporting affidavit filed by the said servant and the name of the servant was not mentioned, DRT-I, dismissed the application filed by the petitioners, holding that the grounds pleaded by the petitioners were not established. The said order came to be challenged by the petitioners in M.A.No.122 of 2017 before the DRAT, which affirmed the order of the DRT-I.

16. It could also be seen from the materials on record that the petitioners have approached the DRT-I, Chennai, within 27 days from the date of passing of the exparte decree dated 31.03.2016. Even though, the reasons put forth by the petitioners may not be acceptable, DRT-I, Chennai, has failed to see that the petitioners have approached DRT-I to set aside the exparte decree dated 31.03.2016, within a short period of time, after they came to know about the exparte decree made in O.A.No.132 of 2015. Hence, DRT-I, could have very well imposed certain conditions, in order to give an opportunity to the petitioners to contest the case on merits.

17. No doubt, it reveals from the materials on record that the petitioners have approached the respondent bank for one time settlement and the bank also accepted for the same, at the earliest point of time. Hence, an opportunity could have been extended by DRT-I, Chennai, for arriving at a settlement between the parties. Had the petitioners approached the DRT-I, with a long delay, between the decree and the petition filed to set aside the decree, then the Tribunal could have exercised its discretion in dismissing the petition to set aside the exparte decree on account of uncondonable delay. But, when the petitioners have approached DRT-I, Chennai, within a shot span of time, to set aside the exparte decree dated 31.03.2016, DRT-I, Chennai, has failed to consider the same and dismissed the application filed by the petitioners. Considering the circumstances of the case, the Tribunal, instead of approaching the case in a pedantic manner, has to apply equity, when the petitioners have approached the Tribunal within 27 days of passing the exparte decree. Though Tribunals are established to recover the dues from the borrowers, the Tribunals should also to give some opportunity to the petitioners/borrowers to pay the same by imposing certain conditions, depending upon the merits of each case, and apply equity, and later on decide the issue on merits.

18. Perusal of the order of DRAT, Chennai, dated 29.12.2017, would show that the Appellate Tribunal has not given any reason,

for dismissing the application filed by the petitioners in M.A.No.122 of 2017, other than accepting the reason, stated by DRT-I, Chennai.

19. Judgment of the Honourable Supreme Court relied on by the petitioners in the case of [Albert Morris Vs. J.B.Simons] reported in 2017-4-L.W.283, is appropriate to the present case on hand, and at paragraph 4, the Hon'ble Supreme Court held as follows:

> "4. It is seen from the records that after the appellant was set ex-parte for not filing the written statement, the respondent herein (the plaintiff) was granted time to pay the balance Court Fee and for exparte evidence. Thereafter, the case was adjourned by 10 days for payment of balance Court Fee. In our view, when the plaintiff could be shown the indulgence, the same equity should have been meted out to the appellant (defendant). After all, this is a suit for recovery of money and in our view, the Court should have put the parties at least to terms and then disposed of the matter on merits expeditiously."

20. Though the other Judgments cited by the learned counsel for the petitioners are on the aspect of the procedures adopted while serving the summons, we are not inclined to delve with the same, as the petitioners themselves have accepted that summons were received by the servant and it was not informed to them.

21. Though the reasons given by the petitioners in M.A.No.22 of 2016 filed to set aside the exparte decree dated 31.03.2016 were not substantiated, instead of dismissing the same on that ground, the DRT-I could have imposed certain conditions on the petitioners to hear the matter on merits, when the delay in filing the set aside petition was very less and condonable.

22. Under these circumstances, we are of the view that both the order passed by DRAT, Chennai, dated 29.12.2017, confirming the order passed by DRT-I, Chennai, dated 03.08.2016 in M.A.No.22 of 2016 in O.A.No.132 of 2015 have to be set aside and accordingly, set aside. The petitioners are directed to deposit a sum of Rs.30,00,000/- to the account of O.A.No.132 of 2015, before the DRT-I, Chennai, within a period of eight weeks from the date of receipt of a copy of this order. Upon such deposit, DRT-I, Chennai, is directed to hear O.A.No.132 of 2015 on merits and dispose of the same as expeditiously as possible.

23. With the above directions, this Writ Petition is disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

raja

To

1. The Registrar,
   Debts Recovery Appellate Tribunal,
   Chennai - 600 008.

2. The Registrar,
   Debts Recovery Tribunal I,
   Chennai - 600 002.

3. ICICI Bank Ltd.,
   Anna Nagar Branch
   No.78-A, 1st floor,
   3rd Avenue, Anna Nagar,
   Chennai - 600 040.

+1 cc to Mr.S.Vasudevan, Advocate, S.R.No.1506

+2 ccs to Mr.M.Theivakumar, Advocate, S.R.No.1501

Order in

W.P.No.2509 of 2018
and
W.M.P.Nos.3060, 3061 of 2018

RV(CO)
SSM(11/03/2019).