BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED 18.03.2019
CORAM
THE HONOURABLE MR.JUSTICE **K.KALYANASUNDARAM**
AND
THE HONOURABLE MRS.JUSTICE **R.THARANI**
W.P.(MD)No.14302 of 2017
and
W.M.P(MD)No.11200 of 2017

M/s Everwin Apparels
rep. by one of its Partners
K.A.Sivakumar
S/o L.Kasirajan
1/6/405-A, Thambi Nadar Nagar,
Sivanantham Nagar Extention,
Sivakasi. .. Petitioner

Vs.

1.The Chief Manager/Authorized Officer,
Indian Bank,
IND MSME Branch,
Sivakasi.

2.The Branch Manager,
Indian Bank,
Sivakasi Branch,
Sivakasi.

3.B.Kala
4.B.Hariprasath
5.B.Sowmya
6.B.Niranjana(Minor)
(R3 to R6 are impleaded vide court order dated 26.06.2018 in WMP(MD)No.9177 of 2018) ..Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari to call for the records pertaining to the impugned notice of sale under private treaty issued by the first respondent dated 29.06.2017 and quash the same.

For Petitioner : Mr.Isaac Mohanlal
Senior Counsel for
Mr.D.Sadiq Raja

For Respondents : Mr.C.Jawahar Ravindran
(for R1 and R2)
Mr.N.Dilipkumar (for R3 to R6)

ORDER

[Order of the Court was delivered by **K.KALYANASUNDARAM, J**]

Challenge in the writ petition is the notice of sale issued by the first respondent dated 29.06.2017 under private treaty.

2.The undisputed facts of this case would run thus:

M/s Everwin Apparels and Tex Collections are the partnership firms, in which, one Kasirajan and his son Sivakumar are partners. The firms availed loan facilities with the respondent bank by mortgaging immovable properties in the year 2010. The loan accounts were converted as Non Performing Asset in the year 2015. In the case of Everwin Apparels, a demand notice under Section 13(2) of the SERFAESI Act was issued on 30.01.2015 followed by possession notice dated 25.04.2015 under Section 13(4) of the Act. The properties were brought for auction.

3.The dates and events furnished by the bank would show that the reserve price of Rs.29,21,000/- was fixed to sell the properties in Tiruppur and the efforts taken by the respondent to sell them through e.auction by issuing sale notices dated 25.06.2015, 02.09.2015, 20.11.2015, 07.03.2016 and 06.02.2017 ended in vain, as there was no bidders.

4.Thereupon, the bank initiated steps to sell the property through private treaty and hence, a notice under Section 8(6) r/w 9 (1) of the Security Interest (Enforcement) Rules dated 29.06.2017 was issued and the property was sold in favour of one K.Bala Thandapani for a sum of Rs.32,00,000/- and the sale was confirmed on 31.07.2017.

5.Mr.Isaac Mohanlal, learned Senior Counsel appearing for the petitioner would argue that the petitioner is a customer of the respondent bank and the respondent bank had fixed reserve price at Rs.29,21,000/- to sell the five items of the properties of the petitioner, but three days before the sale of the properties in favour of the purchaser K.Bala Thandapani, an offer was made by the petitioner to purchase the property for Rs.33,50,000/-. Hence, the sale of the property without accepting the offer of the petitioner is illegal and liable to be set aside. It is further contended that the respondent bank is a public authority and they have to act in all fairness to secure the interest of the customers and the sale was in contravention of the relevant rules.

6.A detailed counter was filed by the second respondent denying the allegations of the writ petitioner and it is stated that the loan account has become Non Performing Asset on 28.01.2015. Since the borrower failed to make the payment despite the demand notice, the property was sold. In paragraph 5 of the counter, it is stated that after receiving the sale notice dated 29.06.2017, the petitioner issued a letter dated 13.07.2017 by enclosing a Xerox copy of the Demand Draft for Rs.33,50,000/- and insisted the bank to accept OTS amount of Rs.90,00,000/-. But the petitioner has not submitted the original Demand Draft to the bank and hence, the proposal was not accepted. It is the case of the respondent bank that the property was sold by following the Rule 8(6) of the Rules and there is no violation.

7.The legal heirs of the auction purchaser filed a detailed counter stating that the writ petition is not maintainable and there is no violation in selling the property to the purchaser Bala Thandapani.

8.It is the submission of the learned counsel for the respondents that the mortgaged properties in Tiruppur were sold for a sum of Rs.32,00,000/- in private treaty, as there is no bidders in auction and the amount was credited to the loan of the petitioner. Only thereafter, the petitioner had approached the respondent bank to settle the loan account under OTS scheme and for the balance amount, the petitioner agreed to pay Rs.10,00,000/- and it was accepted by the respondent bank and the loan account was closed. In this regard, both the partners of the Firm had submitted a letter dated 16.02.2017 undertaking to withdraw this writ petition and hence, they are estopped from further prosecuting the case. It is also stated that in view of the latest Judgment of the Hon'ble Supreme Court of India in ICICI case, this writ petition is not maintainable.

9.In reply, the learned Senior Counsel appearing for the petitioner by placing reliance on the decisions of this Court reported in **2002-1-L.W.318 [Sripalani Dhandayuthapani Devasthanam vs. The Commercial Tax Officer]** and **2007(2) CTC 135 [M.S.Manivenkatappa vs. State Bank of India]** would submit that availability of alternative remedy is not a bar to entertain the writ petition. In the light of the latest Judgments of the Hon'ble Supreme Court, with respect, we are not agreeing with the decisions of this Court referred supra. The learned Senior Counsel further stated that the mortgagor does not loose right to redeem the property till the sale is completed by the registration of sale deed, by citing the judgment of the Hon'ble Supreme Court reported in **(2014)5 SCC 610 [Mathew Varghese vs. M.Amritha Kumar and others]**. The said Judgment has no application to the facts of the case for the reason that the borrower has not approached the bank to redeem the mortgage by settling the entire loan.

10.A perusal of the records would reveal that the accounts of Tex Collections and Everwin Apparels have been settled under OTS for payment of Rs.49,00,000/-. At the risk of repetition, it is mentioned that the sale proceeds of Rs.32,00,000/- was credited to the loan account of the petitioner and for the balance due, the borrower paid Rs.10,00,000/- and thereafter, the loan account came to be closed. The letter submitted by the partners of the firm dated 16.02.2017 would make it clear that after payment of Rs.49,00,000/- under One Time Settlement, they agreed to withdraw both the writ petitions. In the light of the above fact, we find no force in the contention of the learned Senior Counsel for the petitioner.

11.Further, it is to be noted that in the case of **ICICI Bank Ltd., vs. Umakanta Mohapatra** [2018 SCC OnLine SC 2349], the Hon'ble Supreme Court has held as follows:-

> "3.Despite several judgments of this Court, including a judgment by Hon'ble Mr. Justice Navin Sinha, as recently as on 30.01.2018, in Authorized Officer, State Bank of Travancore vs. Mathew K.C., (2018) 3 SCC 85, the High Courts continue to entertain matters which arise under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), and keep granting interim orders in favour of persons who are Non-Performing Assets (NPAs).
>
> 4.The writ petition itself was not maintainable, as a result of which, in view of our recent judgment, which has followed earlier judgments of this Court, held as follows:-
>
> > "18. We cannot help but disapprove the approach of the High Court for reasons already noticed in Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd. and Another, (1997) 6 SCC 450, observing:-
> >
> > > "32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops.""
>
> 5.The writ petition, in this case, being not maintainable, obviously, all orders passed must perish, including the impugned order, which is set aside.
>
> 6.The appeals are allowed in the aforesaid terms."

12.Normally, the writ petitions filed challenging the proceedings initiated under the SERFAESI Act, were permitted to be withdrawn with liberty to approach the appropriate forum. However, in the case on hand, as stated in para 10, the petitioner wants to have a cake and eat the same. After adjusting the sale proceeds for settlement under OTS, the petitioner challenges the same. Hence, on merits also, the writ petition is liable to be dismissed. Taking note of the facts of this case and keeping in mind the decision cited supra, this Court is of the opinion that there is no merit in this writ petition and it is accordingly dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar (CS I)

// True Copy //

Sub Assistant Registrar(CS)

skn

To

1.The Chief Manager/Authorized Officer,
Indian Bank,
IND MSME Branch,
Sivakasi.

2.The Branch Manager,
Indian Bank,
Sivakasi Branch,
Sivakasi.

2 CC to M/s.N.DILIP KUMAR, Advocate (SR-54722[F] 54859 ,dated 18/03/2019)

+1 CC to M/s.C.JAWAHAR RAVINDRAN, Advocate (SR-54844[F] dated 19/03/2019)

W.P.(MD)No.14302 of 2017
and
W.M.P(MD)No.11200 of 2017

18.03.2019

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