IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 20.01.2020

CORAM

THE HONOURABLE MR. JUSTICE M. SATHYANARAYANAN

AND

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

WP.No.519 of 2020 &
WMP.No.610 of 2020

N. Madhavan ... Petitioner

Versus

1. The Debt Recovery Appellate Tribunal,
Chennai,
4th Floor, Indian Bank Circle Office,
55 Ethiraj Salai, Chennai-8.

2. The District Collector,
Namakkal.

3. The Revenue Divisional Officer,
Namakkal.

4. R. Karthick Raja

5. The Chief Manager and Authorised Officer,
Indian Bank, Ranga Sannathi Street,
Namakkal 637 001.

6. M/s.Bhagvathi Transports,
represented by its proprietor
P.K.Selvaraj,
No.205, Nadu Street,
Kalappa Naicken Patti Post,
Namakkal Taluk and District. ... Respondents

PRAYER:- Writ petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus calling for the records on the file of the 1st respondent relating to the issue of the impugned order of the 1st respondent dated 17.12.2019 passed in I.A.No.754 of 2019 in A.IR.SA No.257 of 2019 and quash the same and consequently direct the 1st respondent to entertain the appeal filed by the petitioner in A.IR No.257 of 2019 without insisting pre-deposit.

For Petitioner : Mr. N. Subramaniyan

For Respondent : R1- Tribunal
Mr.R.Vijayakumar,
Addl. Govt. Pleader (R2 & R3)
Mrs. Sumathi,
Standing Counsel for R5
R4 & R6-no appearance.

ORDER

[Order of the Court was made by M.SATHYANARAYANAN,J.,]

The proprietor of the 6th respondent in this writ petition namely P.K.Selvaraj is the brother-in-law of the petitioner and the 6th respondent was granted secured overdraft limit of Rs.5 lakhs from the 5th respondent bank on 13.8.2002 and the petitioner herein stood as a guarantor and pledged his property therefor and created an equitable mortgage in respect of the immoveable property consisting of a land and residential building situate at New SF.No.47/5A Plot No.23, Old Door No.4/A/23, New Door No.5/14 NGGO's Colony, Chinnamudalaipatti Village, Namakkal Taluk and District.

2. The original borrower/6th respondent had committed default in payment of dues and therefore the loan account was declared as non performing asset and a notice under section 13 (2) of the SARFAESI Act was issued on 28.2.2004 and it was followed by a possession notice, issued under section 13(4) of the said Act. It appears that the immovable property offered by the petitioner herein, by way of equitable mortgage was brought for sale and it was sold in favour of one Karthik Raja on 27.5.2009 and sale certificate was also issued in favour of auction purchaser on 12.2.2010.

3. The petitioner herein through his minor son Ilamparuthi has filed a suit for partition in O.S.No.210 of 2007 on the file of District Munsif Court, Namakkal, wherein, the minor son of the petitioner took a stand that the property in question was not mortgaged for family necessity and it would not be binding on it and the said suit came to be dismissed on 9.2.2011 and the same has become final.

4. Perusal of the materials would disclose that the petitioner made very many attempts to prevent the respondent bank from taking possession of the secured assets and therefore the respondent bank filed a petition under section 14 of

SARFAESI Act before the District Magistrate and District Collector, Namakkal who vide proceedings dated 27.4.2011 in ROC.No.49185/2010/M4, had directed the Revenue Diivisional Officer, Namakkal to take possession of the said property with necessary police protection.

5. The auction purchaser namely the 4th responent herein has filed W.P.No.3183 of 2018 praying for issuance of writ of Mandamus directing the respndents 1 to 3 therein, to implement the order of the Collector of Namakkal District dated 27.4.2011 and evict the 4th respondent/petitioner herein from the said property and it was disposed of by directing the said official to proceed further in pursuant to the order dated 27.4.2011 for taking possession of the property from the 4th respondent as expedidtiously as possible. The petitioner who was arrayed as 4th respondent in the writ petition, has filed W.M.P.No.8567 of 2019 in W.P.No.31830 of 2018 for recalling the said order and it was also dismissed on 18.3.2019.

6. The petitioner aggrieved by the above said order dated 5.3.2019 and 18.3.2019 filed SLP.C.Nos.11337 and 11339 of 2019 before the the Honourable Supreme Court of India, wherein, notice was ordered to be issued and in the meantime, the Honourable Supreme Court, directed the Debts Recovery Tribunal, Madurai to dispose of the appeal S.A.No.8187 of 2018 filed by the petitioner and report compliance of the same by second week of July 2019 and ordered Status quo with regard to the suit property as on today to be maintained by the parties until the Debts Recovery Tribunal passes appropriate order in the said appeal and also granted liberty to the petitioner herein to make a challenge to the said order, if it is adverse to him.

7. The petitioner filed I.A.No.2712 of 2018 praying for condonation of daly of 61 days in filing the appeal before the Debt Recovery Tribunal, Madurai. The Debt Recovery Tribunal, vide order dated 8.7.2019, taking note of the factual aspects, found the delay in filing the appeal has not been properly explained, dismissed the said petition. The petitioner, aggrieved by the same, filed an appeal, under section 18 of SARFAESI Act before the Debt Recovery Appellate Tribunal and pending disposal of the appeal, the petitioner filed I.A.No.754 of 2019 for waiver of pre-deposit.

8. The Debt Recovery Appellate Tribunal, vide its proceedings dated 30.09.2019, had taken note of the legal position that it cannot entertain any appeal unless and until the appellant complies with the formalities on pre-deposit upto 50% of the debt amount, which can be reduced to 25%, but not less than 25%, directed the petitioner to make a pre-deposit of Rs.1,51,000/- with the Registrar of the Debt Recovery Appellate

Tribunal within a period of four weeks from that day and directed the listing of the said application on 29.10.2019 as to the compliance of the said order.

9. The petitioner filed W.P.No.30324 of 2019, by making a challenge to the said order, and it was diposed of on 23.10.2019 granting liberty to the petitioner to approach the Debt Recovery Appellate Tribunal with further direction, directing the Debt Recovery Appellate Tribunal, to pass appropriate orders in accordance with law.

10. The Appellate Tribunal, vide its impugned proceedings dated 17.12.2019 has taken the legal submission made on behalf of the petitioner, as well as the factual aspects, especially taking note of the fact that the sale certificate dated 12.2.2010 was issued in favour of the auction purchaser and various proceedings initiated by the writ petitioner herein in different forms, had disposed of the said application by directing the petitioner to make a predeposit of Rs.1,51,000/- with the Registrar of the Appellate Tribunal within a period of four weeks from that day, with the default clause and directed listing of the matter on 14.1.2020 for compliance of the same. The petitioner, challenging the said order once again, filed this writ petition.

11. Learned counsel appearing for the petitioner would submit that the order of the Debt Recovery Tribunal, dated 8.7.2019 in I.A.No.2712 of 2018 in SA.Sr.No.8187 of 2018 can not be construed as an order passed under section 17 of the SARFAESI Act and therefore the petitioner is not under the obligation to deposit any amount in terms of second proviso to section 18 of the Act and that too, prior to the entertainment of the said appeal and also invited the attention of this Court to the decision of the Honourable Apex Court reported in Mardia Chemical Vs. Union of India (2004) 4 SCC 311.

12. Per contra, Mrs.Sumathi, learned Counsel, who accepts notice on behalf of the 5th respondent Bank would submit that the petitioner was successful in stalling the proceedings especially with regard to handing over of possession of the assets in favour of the auction purchaser for nearly past nine years and would further point out in the light of the second proviso to section 18 of the Act, prior to the entertainment of the appeal, petitioner is under obligation to make the pre-deposit and the amount imposed by the tribunal is also reasonable and minimum and since the discretion has been exercised by the Debt Recovery Appellate Tribunal in a proper manner, this Court in exercise of its jurisdiction under Article 226 of Constitution of India, may not entertain the same and prays for dismissal of the writ petition.

13.In response to the above submission, learned counsel appearing on behalf of the petitioner would submit that the residue of the sale consideration has been credited to the account of the original borrower overlooking the fact that the proeprty of the petitioner, who is said to have created equitable mortgage, has been sold and thereore the bank has also committed one more grievous and grave error and prays for allowing of the writ petition.

14.This Court has carefully considered the rival submissions and also perused the materials placed before it.

15.The petitioner filed appeal before the Debt Recovery Tribunal, Coimbatore in SA.Sr.No.8187 of 2018 by making challenge to the order of the District Magistrate & District Collector, Namakkal, dated 27.4.2011 passed under section 14 of the SARFAESI Act and there was a delay of 61 days in filing the said appeal and thereafter invoked section 5 of Limitation Act by filing I.A.No.2712 of 2018 . It is to be noted at this juncture, the said appeal was filed under section 17 of the SARFAESI Act. The tribunal having taken note of the factual aspect, especially the date of issuance of notice under section 13(2) of the Act and the sale of the proeprty in favour of the auction purchaser, found that the delay has not been properly explained and therefore dismissed the appeal vide order dated 8.7.2019. The petitioner, aggrieved by the said order, filed an appeal in A.IR.No.257 of 2019 and filed I.A.No.754 fo 2019 seeking complete waive.

16. The primordial submission made by the learned counsel appearing for the petitioner is that the dismissal of the application filed under section 17 of the SARFAESI Act would not amount to an order passed under the said provision, and as such, the petitioner, before entertainment of the appeal by Debt Recovery Appellate Tribunal, is not under obligation to make any pre-deposit and only after entertainment of any appeal, it is open to the Debt Recovery Appellate Tribunal to pass an order for pre-deposit.

17. It is relevant to extract Sections 17 (1)(2) and (3) and Section 18 of SARFAESI Act, which reads as under;

> '17. [Application against measures to recover secured debts]. - (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this Chapter, (may make an application along with such fee, as may be prescribed,) to the Debts

Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]

[Explanation. - For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.]

(1-A) An application under sub-setion (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction-

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.]

[(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

[(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made threunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,-

(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section(1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.]

....

....

18. Appeal to Appellate Tribunal.- (1) Any person aggrieved, by any order made by the Debts Recovery Tribunal [under section 17, may prefer an appeal along with such fee, as may be prescribed] to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal:

[provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:]

[Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of debt referred to in the second proviso.]

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder.'

18. The petitioner made a challenge to the order of District Collector, Namakkal passed under section 14 of SARFAESI Act by invoking section 17 and delay had occurred in filing the said appeal and to condone the same, he filed an application, which was also dismissed and challenging the said order, he has invoked section 18 of the Act by filing an appeal.

19. As per section 18 of SARFAESI Act " any person agrieved by any order made by the DRT under section 17 may prefer an appeal along with such fee, as may be prescribed to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal". It is well settled position of law, the provisions of a statute is to be given a plain meaning and if it is so, any order "u/s.18" would also include order dismissing the condone delay application filed before Debt Recovery Tribunal, Coimbatore. In the light

of the 3rd proviso to section 18 of the SARFAESI Act, the tribunal is having discretion for the reasons to be recorded in writing to reduce the amount not less than 25% as against the stipulation of 50% under second proviso of the SARFAESI Act and taking note of the facts and circumstances, it has directed the petitioner herein to deposit Rs.1,51,000/- within the stipulated time.

20. In the cosnidered opinion of this Court, the tribunal, has exercised its discretion properly. Perusal of the impugned order passed by it would also disclose the factual as well as legal submission has been taken into consideration by the tribunal while passing the said order.

21.The amount of pre-deposit ordered by the tribunal, before entertainment of the appeal, is also sustainable for the reason that as per second proviso to Section 18 of the Act, no appeal shall be entertained unless the borrower has deposited with the appellate tribunal 50% of the debt due from him as claimed by the secured creditors or determined by the Debt Recovery Tribunal, whichever is less. Therefore the plain meaning is to be given is that the appeal cannot be entertained unless a pre-deposit is made.

22.At this juncture, the learned counsel appearing for the petitioner would pray for extension of time to make a pre-deposit as ordered by the tribunal in the impugned order and on the said submission, the Court heard the submissions of learned Standing Counsel appearing for the respondent Bank.

23.The power of original review, in respect of the order passed by the tribunal, is also very limited. This Court, having found that the tribunal has exercised its discretion properly in accordance with law, is of the considered view that the impugned order does not warrant interference. However taking into cosndieration the plea made by the learned counsel for the petitioner, the petitioner is granted two weeks time from the date of receipt of a copy of this order to make pre-deposit of Rs.1,51,000/- to the credit of Registrar, Debt Recovery Appellate Tribunal and on such deposit, the tirbunal may entertain the appeal, if the papers are otherwise in order. If the petitioner fails to make the pre-deposit within the time granted by this Court, the original impugned order, stands restored to file.

24.The Writ Petition is dismissed subject to above direction. No costs. Consequently WMP.No.610 of 2020 is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

msr

To

1. The Debt Recovery Appellate Tribunal,
   Chennai, 4th Floor, Indian Bank Circle Office,
   55 Ethiraj Salai, Chennai-8.

2. The District Collector,
   Namakkal.

3. The Revenue Divisional Officer,
   Namakkal.

4. The Chief Manager and Authorised Officer,
   Indian Bank, Ranga Sannathi Street,
   Namakkal 637 001.

+1cc to Mrs.SR.Sumathy, Advocate Sr.3427
+1cc to Mr.N.Subramaniyan, Advocate Sr.3573

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WMP.No.610 of 2020

ev[co]
srg 25/02/2020