

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 20.02.2020

Delivered On : 28.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

and

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

WP.No.32814 of 2019

and

WMP.Nos.33241 to 33243 of 2019

1.P.S.Sivaperumal,
C/O M/S Rathna Stores,
No.78, Pondy Bazaar, Sri Thyagarayar Road,
Chennai - 600 017.

2.Periyaperatti,
C/O M/S Rathna Stores,
No.78, Pondy Bazaar, Sri Thyagarayar Road,
Chennai - 600 017.

...Petitioners

vs.

1.Authorised Officer,
UCO Bank,
No.67, Mid Corporate Branch,
Burkit Road (Ground Floor),
T.Nagar, Chennai - 600 017.

2.P.Nachiappan

(R2, Suo-motu impleaded as per order
dated 25.11.2019 in WP.No.32814 of 2019)

...Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorarified mandamus calling for the records in AIR.No.5 of 2019 on the file of the Debt Recovery Appellate Tribunal, Chennai and quash the order dated 22.05.2019 dismissing the

appeal for non-compliance of pre-deposit in waiver application in IA.No.208 of 2019 and thereby direct the Debt Recovery Appellate Tribunal, Chennai to restore the appeal and adjudicate the matter on merits.

For Petitioners : Mr.S.R.Rajagopal
for M/s.Antony L.X.Selvam

For Respondents : Mr.V.Suthakar for R1
Mr.R.Thiyagarajan for R2

O R D E R

(Order of the Court was made by R.HEMALATHA, J.)

The petitioners have challenged the order dated 22.05.2019 in AIR.No.5 of 2019 on the file of the Debt Recovery Appellate Tribunal, Chennai dismissing the appeal for non-compliance of pre-deposit in the waiver application in IA.No.208 of 2019.

2. For a better understanding, running through the facts of the case briefly is essential:

The petitioners are husband and wife and along with their four sons have a group of firms / business entities and had availed loans from the first respondent bank for their different business entities. They are,

- 1) M/s.Rathna Stores Private Limited
- 2) M/s.Rathna Stores Firm (Partnership)
- 3) M/s.Rathna Stores (Sole proprietor)

All the entities were financed by the first respondent bank and the loans were collaterally secured by five properties, namely,

a) Land measuring 6000 sq feet and small commercial building in the name of Rathna Stores Private Limited situated at Plot No.4675, Old No.AA12, Present Door No.87, TS No.118, Naduvakkarai Village, Egmore Ward, Nungambakkam Taluk, Chennai Central District, 2nd Avenue, Anna Nagar, Chennai - 600 040.

b) Land measuring 8034 sq feet and commercial building with ground plus 5 floors totally measuring 30240 sq feet, in the name of Rathna Stores Private Limited situated at TS No.6044/1, 6063/1, 6064/1, T.Nagar Village, Mambalam Ward, Guindy Taluk, Chennai South District, New No.79, Usman Road & No.19, 20 part of Sarojini Street, T.Nagar, Chennai - 600 017.

c) Land measuring 17800 sq feet, in the name of Hotel Sivapriya situated at RS No.845/4, Block No.39, Egmore Village & Ward, Nungambakkam Taluk, Chennai Central District, New No.100,

Old No.18, Kennet Lane, Egmore, Chennai - 600 008.

d) Land measuring 3884 sq feet and building ground plus 5 floors measuring 20304 sq feet, in the name of Mr.P.S.Sivaperumal & Mrs.S.Periyaperatti, situated at TS No.7526 part, 7559, 7560, T.Nagar Village, Mambalam Ward, Guindy Taluk, Chennai South District, Door No.78, New No.91, Sir Thyagaraya Road, Chennai - 600 017.

e) Land measuring 40 cents and building thereon measuring 39058 sq feet, in the name of M/s.Hotel Sivapriya Kodaikanal situated at Convent Road Kodaikanal, Dindigul District, Tamilnadu.

out of which, the subject matter of this Writ Petition is the Hotel Sivapriya in Kodaikanal. The total dues from the group payable to the first respondent Bank was to the tune of Rs.45.33 crores as on the date of the issue of demand notice on 22.10.2013 after the accounts became non-performing assets on 21.10.2013. Since all the collateral securities were extended for all the facilities and all the family members were either the principal / co-borrower or the guarantors in all the accounts, the issue of notice under Section 13 (2) of SARFAESI Act on 22.10.2013 and subsequent possession notice on 28.01.2014 were sent and published for all the properties together.

3. However, it appears that the accounts were upgraded after Rs.18.81 crores was remitted by the petitioners by way of sale of the AnnaNagar property and the accounts turned non-performing assets again on 31.03.2015, after which notices under Section 13 (2) of SARFAESI Act were again issued on 20.04.2015 and thereafter a symbolic possession notice under Section 13 (4) of SARFAESI Act was issued on 09.07.2015. Simultaneously, the first respondent Bank also filed an Original Application before Debts Recovery Tribunal II, Chennai in respect of two accounts viz., M/s.Rathna Stores Private Limited and M/s.Rathna Stores Firm (Partnership) numbered as OA.No.649 of 2015 and OA.No.380 of 2016 respectively. Both the Original Applications were allowed by Debts Recovery Tribunal II, Chennai and Debt Recovery Certificates (DRC) were issued on 14.09.2017 and 23.10.2017 respectively. One of the five properties viz., the Egmore property was sold for Rs.26 crores on 20.10.2016 as per the compromise proposal approved by the first respondent Bank and the proceeds was credited to all the three accounts as requested by the borrower. Similarly, the commercial shop at Usman Road was also sold by Liquidator under NCLT for Rs.27.60 crores and credited to M/s.Rathna Stores Private Limited. Subsequently, on 16.10.2018, the first respondent Bank issued sale notice for the remaining two properties namely Hotel Sivapriya in Kodaikanal and Commercial shop property at Pondy Bazar, T.Nagar. The

Kodaikanal Hotel property was sold for Rs.8.71 crores in the auction on 02.11.2018 and the amount was credited to M/s.Rathna Stores Private Limited on 03.01.2019. Aggrieved over this sale, the petitioners being the actual owners of the Kodaikanal property have contested the sale in SA.No.287 of 2018 in Debts Recovery Tribunal II, Chennai and while the auction was allowed subject to confirmation of sale kept pending vide its order dated 31.10.2018. In the final order, the petitioners were directed to pay the entire bid amount of Rs.8.71 crores for the Kodaikanal property before 31.12.2018, failing which the first respondent Bank had the liberty to confirm the sale. The petitioners appealed to the Debt Recovery Appellate Tribunal, Chennai against this order of the Debts Recovery Tribunal II, Chennai in AIR.No.5 of 2019. The Debt Recovery Appellate Tribunal, Chennai concluded that the appeal cannot be considered without pre-deposit of Rs.10 crores vide its order dated 22.05.2019. This order is challenged in this Writ Petition. Another Writ Petition in WP.No.33677 of 2019 challenging an order of the Debt Recovery Appellate Tribunal, Chennai dated 25.03.2019 in IA.No.208 of 2019 in AIR.No.5 of 2019 was disposed of by this Court modifying the pre-deposit amount payable for appeal to be heard before Debt Recovery Appellate Tribunal, Chennai to be remitted within three weeks of the date of the order ie., 02.12.2019. The petitioners have not complied with it.

4. In the present Writ Petition, the second respondent was suo-moto impleaded by an order dated 25.11.2019. He is the successful bidder in the auction sale for the Kodaikanal Hotel Property.

5. Mr.S.R.Rajagopal, learned counsel for the petitioners would contend that there were many discrepancies causing serious doubt regarding the collusion of the second respondent with the first respondent in order to usurp the Kodaikanal property without following the due process of law.

6. Firstly, he has contended that the notices under Section 13 (2) of SARFAESI Act dated 22.10.2013 and 20.04.2015 have shown different due amounts like Rs.45.33 crore, in the first notice and Rs.16.75 crores in the second one which reflects substantial recovery and therefore, the pre-deposit condition of Rs.10 crores was unjust.

7. Secondly, it was contended that the second respondent had not complied with the condition No.7 in the sale notice. The condition reads as "10% of the upset price / reserve price must be remitted towards EMD through RTGS / NEFT / money transfer to the Bank a/c 19690210000663, UCO Bank, T.Nagar (MC), IFSC Code - UCBA0001969". The learned counsel for the petitioners would

contend that the appended statement of the second respondent's Savings Bank account does not show that the amount of Rs.87 lakhs was transferred to the account specified by the first respondent Bank and hence the second respondent ought to have been precluded from participating in the auction. This exposed the collusion between the second and first respondents.

8. It is further contended by the learned counsel for the petitioners that Debts Recovery Tribunal II, Chennai did not take cognizance of the above serious lacunae and disposed of SA.No.287 of 2018 in a routine manner, while the Debt Recovery Appellate Tribunal, Chennai insisted on pre-deposit of Rs.10 crores based on the erroneous calculation of the first respondent Bank. Further contentions on the side of the petitioners are that the properties were undervalued by the first respondent Bank thereby fixing lower reserve prices, there was no clear 15 days notice between the amendment to the sale notice and the auction sale date in that the sale notice was dated 15.10.2018, the corrigendum was dated 26.10.2018 but the auction was on 02.11.2018 which according to the petitioner was against the provisions of the Act, as the 15 days gap ought to have been provided after the corrigendum dated 26.10.2018.

9. Yet another contention on behalf of the petitioners is that the auction notice was not widely circulated as it was published only in New Indian Express and Dinamani of Chennai Editions with limited circulation in Kodaikanal, as the property was located in Kodaikanal.

10. Per contra, Mr.V.Suthakar, learned counsel for the first respondent Bank would contend that there was no such alleged lapse in the auction process as contended by the petitioners. He further contended that the petitioners and their sons have been thwarting the attempts of the first respondent Bank for recovery by initiating multiple legal proceedings since 2013 and also parallelly approaching the Bank with false promises of compromise settlement. The first respondent Bank have been very liberal with the sole intention of recovery, due to the long relationship of the petitioners with the Bank. Legal hurdles at every step has been the norm, it is contended. It is also contended that the Bank was so lenient that the Egmore property was sold by the borrower (son of the petitioners) himself for Rs.26 crores in a compromise arrived at with the first respondent Bank. The learned Counsel for the first respondent Bank further contended that the second respondent was the only bidder for the Kodaikanal property and that the averment of the petitioners that there is no evidence of Rs.87 lakhs being the EMD deposited in the prescribed account of the first respondent Bank has no basis. The contention that the properties were undervalued also has no basis. It was also contended that all

notices of Securitization were published in reputed dailies one in English and another in Vernacular and it is not necessary that prospective buyers would be only from Kodaikanal for the property in Kodaikanal. It was also contended that the second respondent was a hotelier himself already owning a Hotel in T.Nagar and in the same line of business. The petitioner, it is contended, were given umpteen chances to repay and they never had the intention to repay but only protracted the recovery proceedings by way of multiple litigations.

11. Mr.R.Thiyagarajan, learned counsel for the second respondent would contend that he was a bonafide purchaser through the Bank auction and the entire balance amount of Rs.8.71 crores was remitted by him and the sale certificate was issued in his favour on 03.01.2019. He would also contend that the EMD amount was properly remitted to the prescribed account of the first respondent Bank and only then, he was allowed to participate in the auction process. It is further contended that he came to know of the IT proceedings against the petitioners and the consequent attachment of the said property, only after the issue of sale certificate. Thereafter, the IT department issued a no objection certificate for registration of the sale certificate only after the second respondent filed a Writ Petition in WP.No.3847 of 2019. Subsequently, the sale certificate was registered in his favour.

12. Despite the registration in his favour, the second respondent has not been given the physical possession of the property due to the litigation initiated by the petitioners. The first respondent Bank, it is contended, had approached the District Magistrate for enabling physical possession but however this Writ Petition filed by the petitioners with the sole intention of protracting the entire process, has further delayed the possession putting the second respondent to loss and hardship and hence the prayer for dismissal of the Writ Petition.

13. After hearing the learned counsels on both sides, it can be deciphered that the petitioner and their sons being the borrowers have been litigating on various issues since the accounts were declared as non-performing assets first in 2013. The auction sale was challenged in SA.No.24 of 2014 before Debts Recovery Tribunal, Chennai. SA.No.24 of 2014 was dismissed for default on 05.11.2014. Subsequently, the borrowers filed WP.No.33718 of 2015 seeking time for four months for which the first respondent Bank was agreeable and the Writ Petition was disposed of. That the accounts were temporarily saved by way of sale of the fifth property in AnnaNagar for Rs.18.81 crores is on record. Once the accounts failed again due to default in repayment and mounting interest accumulation, the accounts became non-performing assets in 2015 and the notice under

Section 13 (2) of SARFAESI Act was again issued on 20.04.2015 and possession notice under Section 13 (4) on 09.07.2015, followed by sale notice dated 15.02.2015 and date of auction was fixed as 23.03.2015. The borrowers approached Debt Recovery Tribunal I, Chennai in SA.No.19 of 2015 which was disposed of as infructuous as the auction got no bidders. An OTS dated 27.09.2015 was arrived at between the borrowers and the Bank in which the property at Egmore was sold for Rs.26 crores and subsequent to the credit of this amount into the three loan account, there was a lull in repayment by which time the OTS period had lapsed. In the meanwhile, another Writ Petition in WP.No.28157 of 2016 was filed by the borrowers which was again dismissed for default on 14.02.2017. The borrowers filed WP.No.10018 of 2017 for extension of the OTS period and time was granted by this Court by way of interim orders. However, the failure in keeping up to the commitments led to this Court dismissing the Writ Petition. Again a fresh sale notice was issued by the Bank on 28.07.2017 which was again challenged in SA.No.173 of 2017 before Debt Recovery Tribunal II, Chennai. As there was no bidder again, SA.No.173 of 2017 was dismissed as infructuous. In the meanwhile, ICICI Bank as secured creditor had approached the NCLT against the company, M/s.Rathna Stores Private Limited which restrained the Bank to proceed further for about one year. Subsequently, the sale notice dated 15.10.2018 was issued followed by a corrigendum dated 27.10.2018, as there was some discrepancy in the date of outstanding dues. The corrigendum clarified that the outstandings were after appropriating the subsequent recoveries by way of sale of property. The sale of the Kodaikanal property took place on 02.11.2018. But the petitioners preferred to challenge the same in SA.No.287 of 2018 before Debt Recovery Tribunal II, Chennai. In the said SA.No.287 of 2018, the Debt Recovery Tribunal II, Chennai had stayed the sale confirmation to the second respondent and had given time for the petitioners to remit the entire bid amount with interest before 31.12.2018 in which again the petitioners failed. The Debt Recovery Appellate Tribunal, Chennai was approached challenging this order in AIR.No.5 of 2019 in which pre-deposit of Rs.10 crores was insisted upon by Debt Recovery Appellate Tribunal, Chennai to hear the appeal.

14. The petitioners filed two Writ Petitions in WP.No.33677 of 2019 and WP.No.32814 of 2019 (the present petitions) challenging the orders of the Debt Recovery Appellate Tribunal, Chennai. In WP.No.33677 of 2019, it was contended by the petitioners that the pre-deposit sum was erroneous and did not take into consideration the credit of Rs.26 crores sale proceeds in 2017. As the learned counsel for the first respondent Bank was unable to clarify on this, this Court had directed the Debt Recovery Appellate Tribunal, Chennai to accept a lesser amount of pre-deposit as claimed by the petitioners. However, it was

clarified in the Writ Petition that the merits of the claim projected was not gone into and now this Writ Petition.

15. In the present petition, the points of contention in a nutshell are,

a) The minimum statutory period of 15 days between the sale notice and sale was not followed.

b) The properties were undervalued.

c) The successful bidder (second respondent) in the sale on 02.11.2018 did not remit the EMD to the prescribed account and therefore there was a collusion between the second respondent and the first respondent Bank.

d) The sale notice was not widely publicised as Indian Express and Dinamani had no wide circulation.

e) The petitioners had a right of redemption to the mortgaged property and proper opportunity was not granted to them for the same.

16. The sale notice was dated 15.10.2018 fixing the sale date as 02.11.2018 which is clearly more than 15 days . The subsequent sale need to have only 15 days time, as per rule 8 (6) of SARFAESI Act and therefore there is no violation of the prescribed rule. Mr.S.R.Rajagopal, learned counsel appearing for the petitioners contended that there was a corrigendum dated 20.10.2018 to the sale notice and therefore 15 days notice period was violated. This argument does not hold good because the corrigendum was only in the form of correction of a date wrongly published. Therefore, this Court opines that the minimum statutory period of 15 days was followed in the sale. It is to be noted that many of the auctions since 2014 failed as there were no bidders.

17. The contention of the petitioners that there was undervaluation has to be substantiated by them. The fact that there were no bidders in all the earlier auctions goes to show that the reserve prices were competitive and so the valuation too. A comparison of the reserve prices as quoted by the different sale notices also portray a different picture. In 2014, what was quoted as the reserve price for the Kodaikanal Hotel property was Rs.6.65 crores which rose to Rs.7.76 crores on 11.09.2015 and Rs.8.70 crores on 02.11.2018. Generally, the failed auctions do force the secured creditors to reduce the reserve price but in the instant case, the reserve price has gone up over years. That the newspapers in which the sale notice was published were not reputed is not convincing nor the contention that the EMD was not credited to the account prescribed by the Bank. Both these are wild allegations without any basis. Indian Express and Dinamani are reputed newspapers with good circulation.

18. As regards the right of redemption, Section 13 (8) of the SARFAESI Act provides as follows:

"If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset."

19. In Mathew Varghese vs. M.Amirtha Kumar and others reported in (2014) 5 SCC 610; (2014) 3 SCC (CIV) 254, the Hon'ble Apex Court held that

"When we apply the above principles stated with reference to Section 60 of the T.P. Act in respect of a secured interest in a secured asset in favour of the secured creditor under the provisions of the SARFAESI Act and the relevant Rules applicable, under Section 13(1), a free hand is given to a secured creditor to resort to a sale without the intervention of the Court or Tribunal. However, under Section 13(8), it is clearly stipulated that the mortgagor, i.e. the borrower, who is otherwise called as a debtor, retains his full right to redeem the property by tendering all the dues to the secured creditor at any time before the date fixed for sale or transfer. Under Sub-section (8) of Section 13, as noted earlier, the secured asset should not be sold or transferred by the secured creditor when such tender is made by the borrower at the last moment before the sale or transfer. The said Sub-section also states that no further step should be taken by the secured creditor for transfer or sale of that secured asset. We find no reason to state that the principles laid down with reference to Section 60 of the T.P. Act, which is general in nature in respect of all mortgages, can have no application in respect of a secured interest in a secured asset created in favour of a secured creditor, as all the above-stated principles apply in all fours in respect of a transaction as between the debtor and secured creditor under the provisions of the SARFAESI Act".

The same has been applied in Dwarika Prasad vs State Of U.P . reported in (2018) 5 SCC 491. In the present case, the

petitioners failed to comply with the provisions of Section 13 (8) of the SARFAESI Act. The statute mandates that it is only where the dues of the secured creditors are tendered together with costs, charges and expenses before the date fixed for sale or transfer that the saved asset is not to be sold or transferred. In the decision in Mathew Varghese vs. M.Amirtha Kumar and others (cited supra), it is also held that the right of mortgagors to redeem the mortgage property survives until there has been a transfer of mortgage of interest by registered instrument of sale. Therefore, the right to redemption stood extinguished on the execution of a registered sale deed. In the instant case, since the registration of the sale certificate was already completed as early as January 2019, the right of redemption for the petitioners got extinguished.

20. In the result, the Writ Petition is dismissed. The sale stands confirmed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar

// True Copy//

Sub Assistant Registrar

mbi

To

Authorised Officer,
UCO Bank,
No.67, Mid Corporate Branch,
Burkit Road(Ground Floor),
T.Nagar, Chennai-600 017.

+1cc to Mr.V.Suthakar, Advocate , sr no 18781

+1cc to M/s.Antony L.X.Selvam, Advocate, sr no 18083

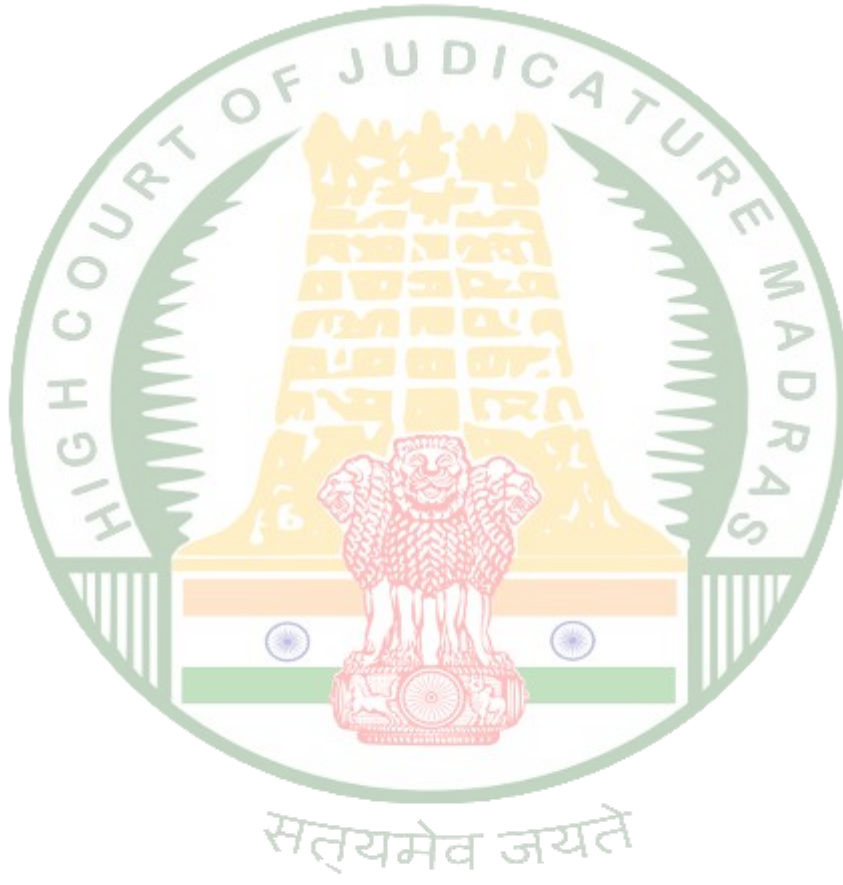
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MR(CO)
GS(19/05/2020)

28.02.2020



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