

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.02.2020

CORAM

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE MRS.JUSTICE R.HEMALATHA

Writ Petition No.34815 of 2019

1. P.Mageshkumar
2. Mrs.Asha Karthikeyan ..Petitioners

-vs-

1.Chief Manager/Authorised Officer
Bank of Baroda
George Town Branch
No.340, Mint Street
Chennai 600 079
(Cause title amended vide order of
Court dated 19.2.2020 made in
WMP No.718/2020 in WP No.34815/2019)
2.The Registrar
Debts Recovery Appellate Tribunal
4th Floor, Indian Bank Circle Office
55, Ethiraj Salai, Chennai .. Respondents

Petition under Article 226 of the Constitution of India,
praying for the issue of a Writ of Certiorari, calling for
records pertaining to the order dated 09.10.2019 and
consequential order dated 06.11.2019 in R.A.(S.A.) 165 of 2012
on the file of the Debts Recovery Appellate Tribunal and quash
the same.

For Petitioners :: Ms.V.V.Uthra

For Respondents :: Mr.G.R.Lakshmanan for R1
R2-Tribunal

ORDER

(Order of the Court was made by M.SATHYANARAYANAN, J.)

The petitioners claim to be the joint owners of the Flat
'A', Ground Floor, Block-I, Door No.10, Jothi Nagar Second

Street, Ekkattuthangal, Chennai together with half undivided share of land measuring to an extent of 2250 sq.ft., and the said property was purchased by them from Mr.Akbar Ali and Mrs.Zarena Begum for a valid sale consideration, vide registered sale deed dated 16.6.2006 and they claim to be in possession and enjoyment of the said property. The petitioners, to their shock and surprise, came to know that a possession notice dated 17.10.2008 was affixed, at the instance of the first respondent, in respect of the recovery proceedings initiated under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the SARFAESI Act").

2. The petitioners, on enquiry, became aware of the fact that Thiru.T.M.Varadarajan and Tmt.Mahalakshmi had availed financial assistance from the first respondent-Bank on the guarantee of Mr.E.T.Balaraman and the above said property, which was purchased by them vide registered sale deed dated 16.6.2006, was offered as collateral security, for the due repayment of the debt.

3. The petitioners, challenging the possession notice dated 17.10.2008, filed SARFAESI Application No.119 of 2008 on the file of the Debts Recovery Tribunal-II at Chennai and the Debts Recovery Tribunal, vide order dated 27.11.2009, having taken into consideration the factual aspect as well as the legal position, found that there is not an iota of evidence available on record to prove that the respondent bank committed irregularity or violated the mandatory procedure while taking recourse to Section 13(4) of the SARFAESI Act, and having come to the said conclusion, thought it fit to reject the SARFAESI Application.

4. The petitioners, aggrieved by the said order, filed appeal in R.A.(SA) No.165 of 2012 on the file of the Debts Recovery Appellate Tribunal at Chennai. The petitioners also filed I.A.No.707 of 2019 praying for waiver of pre-deposit, in the light of sub-section (1) of Section 18 of the SARFAESI Act. The Debts Recovery Appellate Tribunal (DRAT) at Chennai, vide proceedings dated 9.10.2019, directed the petitioners/appellants to make the pre-deposit of Rs.7,50,000/- within four weeks from the date of the order in the name of Registrar, DRAT, Chennai and directed the listing of the I.A.No.707 of 2019, for compliance. When the matter came to be listed on 6.11.2019, the Debts Recovery Appellate Tribunal, Chennai, having noted that the pre-deposit has not been complied with, and also in the light of the fact that the matter is pending for nearly seven to eight years and that the respondent bank is also looking for recovery of a sum of Rs.15,00,000/- for more than twelve years, found that no ground has been made out to grant time for hearing

the interim matters and accordingly, dismissed the appeal for want of compliance of pre-deposit.

5. The learned counsel appearing for the petitioners has invited the attention of this Court to the flow chart and would submit that the property in question was originally owned by Mr.Robert Rajasekaran, who in turn, through his power of attorney Mr.A.M.Nazeer, conveyed the property in favour of Mr.Akbar Ali and Mrs.Zarena Begum vide registered sale deed and they in turn, executed the registered sale deed in favour of the petitioners and however, the original owner, in respect of the same property, had executed yet another sale deed, in favour of Mr.T.M.Varadarajan, who in turn had mortgaged the property to the respondent-Bank and since a fraud has been practiced, the petitioners are having a good chance of success in the appeal and in the said circumstances, they cannot be termed as 'borrowers' and therefore, the order of pre-deposit and the consequential sequence of non-compliance and the order dismissing the appeal itself for want of compliance, are per se unsustainable and hence, prays for interference. The learned counsel appearing for the petitioners has also drawn the attention of this Court to the judgment rendered by a Division Bench of this Court, reported in 2019-5-MLJ 385 - Sree Jeya Soundharam Textile Mills Private Limited represented by its Managing Director, Perungudi Village, Sivagangai v. Canara Bank represented by its Manager, Tirupur and others, especially to paragraph-22 of the said decision, and would submit that the case of the petitioners, squarely falls under paragraph 22(ii), and therefore, the impugned orders are liable to be set aside.

6. The Court heard the submissions of Mr.G.R.Lakshmanan, learned counsel appearing for the respondent-Bank and he would submit that in the light of the dilatory tactics adopted, the bank is unable to recover its dues and, since the findings rendered by both the Debts Recovery Tribunal and the Appellate Tribunal are concurrent in nature, prays for dismissal of this writ petition.

7. This Court has considered the rival submissions and also perused the materials placed before it. It is relevant to extract paragraph-22 of the above cited Division Bench decision, as follows:-

"22. For the reasons stated above, we decide the issue with regard to making of pre-deposit for preferring an appeal before the Debt Recovery Appellate Tribunal as follows:

(i) The borrowers and guarantors are liable to make pre-deposit as per the provisions of Section 18 of the SARFAESI Act or under Section 21 of the Recovery of Debts

and Bankruptcy Act, 1993 for preferring an appeal before the Debt Recovery Appellate Tribunal.

(ii) The 3rd parties, who had purchased the property prior to the date of mortgage or derived/accrued title or right or tenancy right over the property prior to the date of mortgage, are not liable to make any pre-deposit for preferring an appeal before the Debt Recovery Appellate Tribunal, provided that they establish before the Debt Recovery Appellate Tribunal that they derived/accrued title or right or tenancy right over the property prior to the date of mortgage and that the property was mortgaged with the Bank without their knowledge. If such 3rd parties file applications for waiver and if they establish that they have purchased the property or that they derived/accrued title, right or tenancy right prior to the date of mortgage and the property was mortgaged with the Bank without their knowledge, the Debt Recovery Appellate Tribunal shall give a finding with regard to the same and give exemption to such 3rd parties from making pre-deposit.

(iii) The 3rd parties who had purchased the property either after the date of mortgage or derived/accrued title or right or tenancy right in respect of the property in question or after the initiation of SARFAESI proceedings are liable to make the pre-deposit and they should be treated on par with the borrower and the guarantor as per the provisions of both the Acts for the purpose of making pre-deposit.

(iv) The Debt Recovery Appellate Tribunal shall consider the waiver applications filed by the 3rd parties, on merits and in accordance with law, following the principles laid down in this judgment and pass appropriate speaking orders giving findings with regard to the rights of the 3rd parties.

(v) The secured creditors viz., the Banks and Financial Institutions or a Consortium or Group of Banks and Financial Institutions are not liable to make any pre-deposit for preferring an appeal before the Debt Recovery Appellate Tribunal.

(vi) The auction purchaser is not liable to make any pre-deposit while preferring an appeal to the Debt Recovery Appellate Tribunal as against the order passed by the Debts Recovery Tribunal.

(vii) The appellant who has filed an appeal before the Debt Recovery Appellate Tribunal as against the Interlocutory order passed by the Debts Recovery Tribunal, is not liable to make the pre-deposit if the liability is not determined by the Debts Recovery Tribunal in the interlocutory order.

(viii) In any other category other than the categories mentioned above, the Debt Recovery Appellate Tribunal shall decide the waiver application as per the principles laid down in this judgment."

8. A perusal of the order dated 27.11.2009 in S.A.No.119 of 2008 passed by the Debts Recovery Tribunal-II at Chennai would disclose that the petitioners had purchased the property in question from Mr.Akbar Ali and Mrs.Zarena Begum vide a registered sale deed dated 16.6.2006 and whereas, the security in respect of the property was created on 29.12.2004, in favour of the respondent-Bank, by Mr.T.M.Varadarajan and Tmt.Mahalakshmi. Though it is the vehement and forcible submission of the learned counsel appearing for the petitioners that the original owner, namely, Mr.Robert Rajasekaran had conveyed the property in question at the earliest point of time in favour of the predecessors in title of the petitioners and later on conveyed the property in favour of Mr.T.M.Varadarajan and as such, the execution of the security documents in favour of the respondent-Bank, has to be treated as per se void.

9. This Court is unable to accept the said submission, for the reason that the plea of fraud, submitted by the petitioners, requires pleadings, evidence and adjudication and the said exercise cannot be carried out by this Court, in exercise of its jurisdiction under Article 226 of the Constitution of India.

10. At this juncture, since the case of the petitioners squarely falls under paragraph-22(iii) of the above cited decision of the Division Bench, the learned counsel appearing for the petitioners would submit that if reasonable time is granted, the petitioners are prepared to make the pre-deposit, as ordered by the Debts Recovery Appellate Tribunal, Chennai, so that the appeal can be restored and can be given a disposal, on merits.

11. On the said submission, the Court heard the submission of the learned counsel appearing for the respondent-Bank also.

12. In the light of the fact that the property in question is a residential one, where the petitioners claim to be residing, and that apart, they are also not the borrowers, this Court is of the considered view that an opportunity shall be provided to the petitioners to contest the appeal on merits. In the result, the writ petition is allowed and the impugned orders dated 9.10.2019 and 6.11.2019 are set aside and the petitioners are granted four weeks time, from the date of receipt of a copy of this order, to make the pre-deposit of Rs.7,50,000/- on the file of the Debts Recovery Appellate Tribunal, Chennai and on such compliance, the Debts Recovery Appellate Tribunal may entertain the appeal, if the papers are otherwise in order and give a disposal, in accordance with law, as expeditiously as possible. In the event of failure/non-compliance on the part of the petitioners to make the pre-deposit of Rs.7,50,000/- within the time stipulated by this Court, the impugned orders, which are the subject matter of challenge in this writ petition, shall stand restored. Consequently, W.M.P.No.35574 of 2019 is closed. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

ss

To

1.The Chief Manager/Authorised Officer
Bank of Baroda
George Town Branch
No.340, Mint Street
Chennai 600 079

2.The Registrar

Debts Recovery Appellate Tribunal
4th Floor, Indian Bank Circle Office
55, Ethiraj Salai, Chennai.

+2cc to Mr.K.J.Parthasarathy, Advocate, SR.No.17422

+1cc to Mr.G.R.Lakshmanan, Advocate, SR.No.15047

AP(CO)

rli(21/05/2020)

W.P.No.34815 of 2019