BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11 .12.2023

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

Orders Reserved On 06.12.2023	Orders Pronounced On 11.12.2023

W.P.(MD)No.2186 of 2021

B.Alphonse Ligory ... Petitioner

Vs.

1.The Indian Overseas Bank,
Rep. by its Chief Manager,
Regional Office,
No. 8/2 and 8/3 First and Second Floors,
Chidambaram Nagar Main Road,
Thoothukudi - 628 008.

2.The Branch Manager,
Indian Overseas Bank, Main Branch -I,
No.21, Victoria Street,
Thoothukudi - 628 001.

3.The Annai Electricals,
Rep. by its Partner,
No.373, V.E.Road,
Thoothukudi - 628 003. ... Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Mandamus, directing the Chief Manager, Indian Overseas Bank, Regional Office, Thoothukudi, the first respondent herein to release the original documents relating to the property bearing Door No. 93-I/5 and No.93-I/5A, Ashok Nagar 3rd Street, Thoothukudi, being item No.4 of the Sale Notice, dated 09.03.2016, to the petitioner within a time frame fixed by this Court.

For Petitioner	: Mr.A.V.Arun
For R1 and R2	: Mr.N.Dilipkumar Standing Counsel
For R3	: No Appearance

ORDER

The petitioner has sought for the issuance of Writ of Mandamus, directing the first respondent to release the original documents relating to the subject property to him, within the time frame fixed by this Court.

2. The case of the petitioner is that he is the absolute owner of the property, bearing Door Nos.93-I/5 and 93-I/5A, Ashok Nagar 3rd Street, Thoothukudi, which was purchased by the petitioner through a registered sale deed, dated 22.02.1989. The petitioner is a retired Government employee and he had purchased the land and put up the construction and was residing with his family.

3. The further case of the petitioner is that the subject property was mortgaged towards the loan availed by the third respondent, which is a Partnership Firm. This property was offered as a security and it was valued at Rs.47.10 Lakhs. Apart from the subject property, six other properties were also taken as security for various loans that were availed by the third respondent Firm.

4. The loan amount was not repaid back and the account of the third respondent was classified as non-performing asset (NPA). Hence, the first respondent initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [hereinafter referred to as "the SARFAESI Act"].

5. The subject property was also brought for sale by the first respondent towards the recovery of the loan and the petitioner participated in the auction. According to the petitioner, the Bank officials had convinced him to participate in the auction and to submit his bid for the sale of the property. The reserve price was fixed as 60.97 Lakhs and the petitioner offered to purchase the property at Rs.61.97 Lakhs. Since the petitioner was the highest bidder, he was declared as the successful bidder and he paid a sum of Rs.15.50 Lakhs on 15.04.2016, being the 25% of the bid amount. The petitioner was advised to pay the balance consideration of Rs.46.47 Lakhs + 1% income tax within 15 days from the date of receipt of the letter dated 12.05.2016, issued by the first respondent.

6. The petitioner acted upon this letter and paid the entire amount. To the shock and surprise of the petitioner, he was informed that the original documents that were deposited as security for the subject property will not be returned back to the petitioner. The representations that were made by the petitioner also did not evoke any response. It is under these circumstances, the present Writ Petition was filed before this Court.

7. The first and second respondents have filed a counter affidavit. They have taken a stand that the son of the writ petitioner was one of the Partner in the third respondent Firm and this Firm had availed various credit facilities in the form of cash credit loans and term loans from the Bank. The petitioner stood as a Guarantor for the credit facilities and he also executed an agreement of continuing guarantee in favour of the Bank on 06.05.2011. The petitioner executed a registered mortgage by deposit of title deeds, dated 09.06.2011. Even thereafter, the petitioner executed a letter of continuing guarantee on 19.03.2012.

8. It is further stated in the counter affidavit that even though the sale was confirmed in favour of the petitioner and the entire sale proceeds was credited to the loan outstanding, a sum of Rs.2,06,51,084/- remained outstanding and the continuing guarantee given by the petitioner was in subsistence and therefore, the petitioner is not entitled for return of the original documents till the entire loan is settled by the third respondent Firm. The respondent Bank apart from relying upon their right to general lien under Section 171 of the Indian Contract Act, 1872, have also relied upon the confirmation letter for supplemental mortgage, dated 26.09.2011, and the continuing guarantee agreements, dated 30.04.2012 and 26.10.2012. Accordingly, the first and second respondents have prayed for the dismissal of this Writ Petition.

9. When the matter came up for hearing on 27.11.2023, this Court passed the following order:-

"The only issue that is involved in the present Writ Petition is as to whether the property that was purchased by the petitioner as an auction purchaser, can be a subject matter of a general lien under Section 171 of the Indian Contract Act, 1872 only on the ground that the petitioner had stood as a guarantor for the loan taken by the Partnership firm.

2. It is an admitted case that the property in question was also one of the property that was mortgaged towards the loan amount and this property was brought for sale by the Bank for recovery of the loan amount and the petitioner had participated in the auction and had purchased this property. After such purchase by the petitioner, without the sale being rendered to be bad in law, can the very same property be roped in once again by employing Section 171 of the Indian Contract Act, 1872?. Immediately after the sale of a mortgaged property, can the very same property be continued to be a subject matter of general lien or it goes out of the net and becomes the exclusive property of the auction purchaser?

3. Post this Writ Petition under the caption "Part Heard Case" on 29.11.2023."

10. Heard the learned counsel appearing on behalf of the petitioner and the learned Standing Counsel appearing on behalf of the respondent Bank.

11. The learned counsel for the petitioner submitted that the officials of the respondent Bank convinced the petitioner to participate in the auction, since it involves the residential house of the petitioner in which the family was living. Accordingly, the petitioner also participated and paid the entire consideration. On such payment, the property that was given as a security, automatically gets released and it cannot be once again held as a security by retaining the original title documents given as security. The leaned counsel further submitted that Section 171 of the Indian Contract Act will not apply to this case, since the act of the Bank in bringing the property for sale should be construed as a contract to the contrary and hence, the general lien cannot be exercised by the Bank. It was further contended that the continuing guarantee that was given by the petitioner can at the best, be construed only as a personal guarantee and the property that was already sold in the public auction cannot continue to be held as a security based on the continuing guarantee given by the petitioner. The learned counsel in order to substantiate his arguments, relied upon the following judgments:-

(a) **Zonal Manager, Central Bank of India** vs. **Devi Ispat Limited and others** reported in **2010 (11) SCC 186**

(b) **M.Shanthi** vs. **Bank of Baroda** reported in **2017 SCC Online Mad 37703**

(c) **State Bank of India and another** vs. **Jayanthi and others** reported in **2011 (2) CTC 465**

12. Per contra, the learned Standing Counsel for the respondent Bank submitted that the petitioner has given a continuing personal guarantee and that apart, he has also given a confirmation letter for supplemental mortgage, dated 26.09.2011, which covers not only the present loan but, also all the other liabilities / indebtedness of the third respondent Firm and the collateral security given by the petitioner will continue for the other loans also which are yet to be repaid. In view of the same, the Bank is entitled to exercise its general lien under Section 171 of the Indian Contract Act. The learned Standing Counsel further submitted that the petitioner is bound by the contractual liability as a personal guarantor and it continues till the entire amount is repaid back by the third respondent Firm. To substantiate his submissions, the learned Standing Counsel relied upon the following judgments:-

(a) **M/s.Sree Vadivambigai Ginning Industries Pvt. Ltd. and others** vs. **M/s.Tamil Nadu Mercantile Bank Limited** reported in **2015 (2) LW 792**

(b) **R.D.Saxena** vs. **Balram Prasad Sharma** reported in **2000 (7) SCC 264**

(c) **The Committee, Rep. RBF Nidhi Limited and others** vs. **Vipanchi Investments Pvt. Ltd.** reported in **2009 (2) CTC 1**

(d) **C.R.Ramachary and another** vs. **Indian Overseas Bank and others** reported in **2018 SCC Online Mad 3298**

(e) **Bank of Baroda** vs. **Karwa Trading Company and another** reported in **2022 (5) SCC 168**

13. This Court has carefully considered the submissions made on either side and the materials available on record.

14. It is an admitted fact that the petitioner stood as a guarantor for the credit facilities that were availed by the third respondent Firm.

Incidentally, one of the Partner in the Firm is the son of the petitioner. The property of the petitioner was valued at Rs.47.10 Lakhs. Apart from this property, some other properties were also given as a security by third respondent Partnership Firm. The account of the third respondent Firm was classified as non-performing asset and proceedings were initiated by the Bank under the provisions of the SARFAESI Act. Even though, initially, proceedings were initiated before the Debts Recovery Tribunal [DRT] under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Bank chose to expedite the recovery by initiating proceedings under the SARFAESI Act.

15. The petitioner executed a mortgage by way of Memorandum of Deposit of Title Deeds, dated 09.06.2011 and this document was registered as Document No.1913 of 2011. On going through this document, it is seen that this security was given towards the credit facilities upto an extent of Rs.1,80,00,000/- availed by the third respondent Partnership Firm. By virtue of this document, two title documents and seven other documents were deposited with the respondent Bank.

16. The petitioner also issued a confirmation letter for supplemental mortgage, dated 26.09.2011, wherein he has stated that he has already deposited the title deeds on 09.05.2011 with an intention to create a mortgage for the advances granted and/or to be granted to the third respondent Firm. The petitioner has also agreed that the subject property will be a continuing collateral security for the advances made and / or to be made to the third respondent Firm and for all other indebtedness and liabilities.

17. The petitioner has also executed guarantee agreements on 30.04.2012 and 26.10.2012, agreeing to stand as a continuing guarantor and this guarantee agreement is in the nature of personal guarantee given by the petitioner. The respondent Bank is attempting to read this continuing guarantee agreements along with the confirmation letter, dated 26.09.2011 and is taking a stand that even though the petitioner was the successful bidder in the auction and had purchased the subject property, this property will continue to be a security till the last pie is repaid back by the third respondent Partnership Firm.

18. It will be relevant to take note of the judgments that were relied upon by the learned Standing Counsel for the respondent Bank. In all those judgements, the scope of Section 171 of the Indian Contract Act was discussed and in none of those judgments, the property that was given as a security was brought for sale and the same property was attempted to be treated as a continuing guarantee for the other outstanding loans availed by the borrower.

19. In the instant case, the petitioner had participated in the auction and was the highest and successful bidder and the sale was also confirmed in favour of the petitioner. The petitioner had paid the entire amount, which was adjusted towards the outstanding loan availed by the third respondent Bank. This Court, during the course of the hearing, asked the learned Standing Counsel for the respondent Bank as to how the petitioner being the guarantor was allowed to participate in the auction and the sale was also confirmed in his favour. No convincing answer was forthcoming from the Bank and in fact, their letter dated 12.05.2016, shows that the SARFAESI Committee confirmed the sale in the name of the petitioner and the petitioner was directed to pay the balance consideration of Rs.46.47 Lakhs +

1% income tax within 15 days. Accordingly, the petitioner also made the payment. Therefore, the Bank was well aware of the fact that the petitioner being the guarantor for the loan and being the father of one the Partners of the Firm, was allowed to participate in the auction. The Bank has not taken any steps to cancel the sale made in favour of the petitioner, if at all, they allege any fraud played by the petitioner. Instead, they happily appropriated the amount from the petitioner and adjusted it towards the outstanding loan amount of the third respondent Firm. Therefore, this Court is not concerned about the circumstances under which the petitioner was allowed to participate in the auction and it must be taken that the Bank permitted the petitioner to participate in the auction in spite of knowing his status.

20. The peculiarity of this case is that the guarantor himself became the auction purchaser and he had virtually purchased his own property in the auction. Therefore, the auction and the consequent confirmation of sale merely reiterated the right and title of the petitioner. It is only because of this dual status, the Bank is now attempting to take advantage due to the continuing guarantee given by the petitioner and is refusing to release the documents pertaining to the subject property, which were deposited at the time of availing the loan. If this property had been sold in the auction to some other person, the stand that is now being taken by the Bank will not be available and the property will be free from encumbrance and the Bank will be bound to hand over the title documents to the successful bidder.

21. It must be borne in mind that the mortgage that was created by the petitioner pertained to the credit facilities availed by the third respondent Firm to an extent of Rs.1.80 Crores. This was the amount that was outstanding as on 09.06.2011 when the petitioner executed the mortgage deed. Section 60 of the Transfer of Property Act, 1882, deals with the right of the mortgagor to redeem the mortgage and he is entitled to collect the mortgage deeds and all other documents relating to mortgaged property. The mortgagee is under an obligation to return back the title deeds upon the payment of the money due. Hence, upon discharge of the mortgage loan, for which, the title deeds were secured, it can be treated as a contract to the contrary and hence, the right of general lien under Section 171 of the Indian Contract Act will not apply in such a scenario. The mortgage that has been created by deposit of title deeds, will attach itself to a particular loan transaction, which was intended to be secured at the relevant point of time.

That is the reason why, once the particular loan transaction is settled/ cleared, the right to retain the title deeds ceases to exist and it cannot be extended to a different transaction, which is not covered by the mortgage.

22. On going through the materials, there is no doubt in the mind of this Court that the personal guarantee of the petitioner continues till the entire loan amount is settled by the third respondent Firm. The question is as to whether the mortgage by deposit of title deeds also continues after the property was brought for auction sale and the sale is also confirmed in favour of the petitioner.

23. Once the property has been brought for auction sale and it is sold in favour of the successful bidder and the sale is also confirmed, the property automatically goes out of the net and becomes the exclusive property of the auction purchaser. This position will apply both when the auction purchaser is a third party or the auction purchaser himself was the guarantor as in the present case. The title to the property passes on in favour of the auction purchaser and makes him the exclusive owner of the property and the moment it takes place, such property cannot continue to remain as a security anymore. In none of the judgments that was cited by learned Standing Counsel for the respondent Bank, this scenario was dealt with. In all those cases, the property continued to maintain its status as a security and it never crossed that threshold and passed on in favour of an auction purchaser. Therefore, it was held that the security will continue, since the status of the mortgage continued with the property.

24. The defining difference in the factual scenario in this case is that the mortgaged property became the exclusive property of the auction purchaser after the confirmation of sale was done by the SARFAESI Committee. This confirmation of sale made by the SARFAESI Committee through letter dated 12.05.2016, must be taken to be the contract to the contrary and as a consequence, the respondent Bank looses its right of general lien under Section 171 of the Indian Contract Act. This position of law will not change just because the auction purchaser in this case also happens to be the same person, who created the mortgage by deposit of title deeds. The law does not treat a third party auction purchaser and an auction purchaser, who also happens to be the mortgagor, differently. No such differentiation is found under the provisions of the Transfer of Property Act.

25. Even insofar as the letter of confirmation, dated 26.09.2011, it will have an effect for the entire outstanding loan till the mortgage created by the petitioner continues. Once the property is brought for sale and the sale is also confirmed, the confirmation letter dated 26.09.2011, looses its enforceability. The guarantee agreements dated 30.04.2012 and 26.10.2012, at the best, will only act as a continuing personal guarantee against the petitioner and it will not enable to keep the property, which was already sold in auction, within the net of continuing guarantee. If the subject property is to be brought once again as a security, the petitioner must execute yet another mortgage by deposit of title deeds with respect to the subject property. This is in view of the fact that the status of the petitioner as on date is that of an auction purchaser and he has already moved out of his original status as a guarantor, when he initially created the mortgage by deposit of title deeds.

26. In the light of above discussion, this Court is inclined to allow this Writ Petition and accordingly, there shall be a direction to the first respondent to release the original documents relating to the subject property to the petitioner within a period of two weeks from the date of receipt of a copy of this order.

27. In the result, this Writ Petition is allowed with the above directions. No costs.

Index : Yes **11.12.2023**
NCC : Yes
Speaking order
SMN2

N.ANAND VENKATESH, J.

SMN2

Pre-delivery order made in

W.P.(MD)No.2186 of 2021

11.12.2023