Pl.Arunachalam Vs. The Chief Manager-Cum-Authorised officer,

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SooperKanoon Citation : sooperkanoon.com/28072

Court : Chennai

Decided On : Dec-23-2014

Judge : V.Dhanapalan

Appellant : Pl.Arunachalam

Respondent : The Chief Manager-Cum-Authorised officer,

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

23. 12.2014 CORAM THE HONOURABLE MR. JUSTICE V.DHANAPALAN AND THE HONOURABLE MS. JUSTICE V.M.VELUMANI W.P.(MD) No.18129 of 2014 PL.Arunachalam ... Petitioner Vs. The Chief Manager-cum-Authorised Officer, Bank of Baroda, E.C. Street Branch, Chennai. ... Respondent PRAYER Writ Petition filed under Article 226 of the Constitution of India seeking issuance of a Writ of Mandamus, directing the respondent to redeliver possession of the dwelling house of the writ petitioner in Door No.35, Plot No.127, K.K.Nagar East 5th Street, Madurai, on a strict condition stipulated in terms of time bound remittance of the value of the property to the Bank. !For Petitioner : Mr.S.Sethuraman for Mr.A.R.M.Ramesh For Respondent : Mr.Pala.Ramasamy Date of reserving the Order :

08. 12.2014 Date of pronouncing the Order:

23. 12.2014 :

ORDER

V.M.VELUMANI, J.

The petitioner has filed the writ petition seeking a direction to the respondent to redeliver possession of the dwelling house of the petitioner in Door No.35, Plot No.127, K.K.Nagar East 5th Street, Madurai, on a strict condition stipulated in terms of time bound remittance of the value of the property to the respondent Bank.

2. The facts of the case: (i) The petitioner is carrying on business on a large scale in paper and paper boards, in the name and style of M/s.Palaniappa & Co., Chennai and five other sister concerns. He is also doing business in some other concerns as sole Proprietor and in some in Partnership with his wife-A.R.Porpavai. (ii) The petitioner and his wife availed various credit facilities in the year 2009 to the tune of Rs.21.5 Crores for their business purpose from five branches of Bank of Baroda. The petitioner and his wife executed necessary documents and mortgaged eleven immovable properties as securities for due repayment of the amounts sanctioned. (iii) According to the petitioner, he was properly operating the account till 2012. Due to the dull in the business and on account of over all depression, his health condition and labour problems, he could not repay the amounts due to the Bank. In the year 2012, the petitioner's account was categorised as Non-performing Asset. (iv) In spite of heavy loss in his enterprises, even after his loan account being categorised as Non-Performing Asset, he had paid substantial amounts into the loan account so as to reduce the burden of liability. A demand notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [hereinafter referred to as "the SARFAESI Act"]. was issued on 08.08.2012, quantifying the liability due was Rs.16,83,29,330/- as on 31.07.2012. Thereafter, the respondent Bank issued possession notice on 01.12.2012. (v) The petitioner with the consent of the Bank sold three properties given as security and paid the entire sale consideration to the Bank. In the year 2011, he paid a sum of Rs.6.25 Crores and in the year 2012, he paid another sum of Rs.5 Crores and totally a

sum of Rs.11.25 Crores had been remitted into the loan accounts i.e., equivalent to 70% of the total liability, being the sale proceeds of the properties mortgaged with the Bank. As he has paid 70% of the amounts due, he is entitled to One Time Settlement and by letter, dated 31.12.2012, he offered to pay the aggregate sum of Rs.8 Crores by way of One Time Settlement. The respondent Bank did not choose to respond the said offer. Thereafter, the petitioner increased his offer for One Time Settlement to Rs.10.85 Crores and again, Rs.11 Crores and subsequently, Rs.12 Crores as One Time Settlement. But, the respondent Bank rejected the petitioner's offer for One Time Settlement without any reasons. (vi) The respondent has issued a sale notice, dated 18.10.2014 in respect of three items of secured assets situated in Sivakasi, Ooty and Chennai. (vii) The petitioner offered to sell the property situated in Sivakasi and pay the sale consideration to the respondent Bank. The respondent Bank did not accept the said offer. Even though the petitioner was paying the due to the Bank and helping the Bank to sell the mortgaged properties to liquidate dues, the respondent Bank on 07.11.2014, took possession of his dwelling house at Door No.35, Plot No.127, K.K.Nagar East 5th Street, Madurai. However, the respondent Bank did not accept the offer of the petitioner to sell the property by private negotiation for more than the price fixed by the Bank. But, the respondent Bank issued possession notice on 01.12.2012. After that, the petitioner held talks of settlement. The respondent and the officials of the Bank assured that they will not take possession of the dwelling house at Door No.35, Plot No.127, K.K.Nagar East 5th Street, Madurai and sell the same only as a last resort. (viii) Thereafter, the respondent Bank issued the sale notice in respect of three other properties. While so, the respondent Bank without any notice, on 07.11.2014, took possession of the dwelling house of the petitioner referred to above. The request of the petitioner and his counsel for permission to take his personal belongings, cash on hand, medicines and other things, was rejected by the respondent Bank. There is no necessity to take possession of the dwelling house as other properties are available, which are more than sufficient to satisfy the entire demands to the Bank. The action of the respondent is mala fide and arbitrary. No notice under Section 14 of SARFAESI Act was issued. The respondent with an ulterior motive, has taken possession of the dwelling house taking assistance from the learned District Magistrate. The power of the learned

District Magistrate cannot be invoked in a routine manner. (ix) The petitioner has filed an affidavit of undertaking to pay the value of the dwelling house within 45 days by paying 25% within 15 days and the balance amount within 30 days thereafter. The petitioner undertook to hand over the possession of the dwelling house to the Bank, if the seal is removed as and when the respondent sells the said property. The relevant paragraphs of the said affidavit would run thus: "2.I submit that I have made a representation to the Bank to allow me redemption of my dwelling house in Door No.35, Plot No.127, K.K.Nagar East 5th Street, Madurai-20. However the Bank has taken possession of the same by locking the premises. I have sought to remove the seal and handover possession of my dwelling house in ground floor Door No.35, Plot No.127, K.K.Nagar East 5th Street, Madurai-20. I hereby undertake to handover possession of not only the ground floor portion but also the first floor portion of the property in Door No.35, Plot NO.127, K.K.Nagar East 5th Street, Madurai-20 as and when the sale takes place. In the meantime, I am myself ready to pay the value of the property within a period of 45 days, by paying 25% within 15 days and remaining 45% within 30 days therefrom.

3. I undertake to handover possession to the Bank if the seal is removed as and when the sale is taking place. Even otherwise I am ready to pay the value of the property within the period of one month.

4. I further submit that I have identified a credible party and a close relation of mine, who is willing to redeem the property for my sake, by paying the value of the property as determined by the Bank within a period of 45 days as stated above."

(x) The respondent in the counter affidavit, denied all the allegations made by the petitioner. According to the respondent Bank, the writ petition is not maintainable, as the petitioner has an alternative remedy and there is no mala fide, arbitrary and ulterior motive in taking possession of the property in question. The possession was taken only after due notice. The petitioner and his counsel were present, when possession was taken and they were asked to remove all the articles from the house, but they refused. It is not correct to state that the petitioner was not allowed to remove the personal belongings, cash on hand and medicines etc. (xi)

The petitioner was given time from 2010 to settle all the dues to the Bank. As and when he sought time to sell the property, he was given permission. He could not sell the properties as assured by him. For four years, the petitioner could not sell the properties and settle the dues. The dwelling house is given as security and the respondent has taken possession of the said property as per law after due notice. There is no arbitrariness, mala fide and ulterior motive. The respondent after obtaining the order from the learned District Magistrate, has taken possession of the property as per law. The petitioner is not entitled to the relief sought in the writ petition.

3. Heard Mr.S.Sethuraman, learned counsel for the petitioner and Mr.Pala.Ramasamy, learned counsel for the respondent.

4. The learned counsel for the petitioner vehemently argued that the respondent's action in taking possession of dwelling house is mala fide, arbitrary and with an ulterior motive. The petitioner had paid a sum of Rs.11.25 Crores, being 70% of the loan amount and hence, he is entitled to the benefit of one time settlement. The respondent, without properly considering the offer of the petitioner, has rejected the same. The sale proceeds of other properties mortgaged, are sufficient to settle the claim of the respondent Bank in full. The petitioner is co-operating with the respondent to sell the properties and pay the dues. The petitioner is making arrangements to sell the dwelling house also and pay the sale proceeds to the respondent Bank. The undertaking of the petitioner may be recorded and the seal put up the respondent may be directed to be removed in the interest of justice.

5. Further, he contended that the petitioner can get the relief only in the writ proceedings and he has no other remedy, since the respondent has obtained orders from the learned District Magistrate as per Section 14(2) of the SARFAESI Act, which is final as per Section 14(3) of the SARFAESI Act.

6. It will be useful to refer to Sections 14(2) and 14 (3) the SARFAESI Act hereunder. "14(2). For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary. (3) No act of the Chief Metropolitan Magistrate

or the District Magistrate done in pursuance of this section shall be called in question in any Court before any authority."

7. To substantiate this contention, the learned counsel for the petitioner relied on the Judgment of the Hon'ble Apex Court reported in 2014 [2]. D.R.T.C. 1 [S.C.]. [Harshad Govardhan Sondagar Vs. I.A.R.C. Ltd., & Others]., wherein at paragraph 22, it has been held as follows:- "22.Sub-section (3) of Section 14 of the SRFAESI Act provides that no act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of Section 14 shall be called in question in any Court or before any authority. The SRFAESI Act, therefore, attaches finality to the decision of the Chief Metropolitan Magistrate or the District Magistrate and this decision cannot be challenged before any Court or any authority. But this Court has repeatedly held that statutory provisions attaching finality to the decision of an authority excluding the power of any other authority or Court to examine such a decision will not be a bar for the High Court or this Court to exercise jurisdiction vested by the Constitution because a statutory provision cannot take away a power vested by the Constitution. To quote, the observations of this Court in Columbia Sportswear Company v. Director of Income Tax, Bangalore, (2012) 11 SCC224

"7. Considering the settled position of law that the powers of this Court under Article 136 of the Constitution and the powers of the High Court under Articles 226 and 227 of the Constitution could not be affected by the provisions made in a statute by the Legislature making the decision of the Tribunal final or conclusive, we hold that sub-section (1) of Section 245-S of the Act, insofar as, it makes the advance ruling of the Authority binding on the Applicant, in respect of the transaction and on the Commissioner and income-tax authorities subordinate to him, does not bar the jurisdiction of this Court under Article 136 of the Constitution or the jurisdiction of the High Court under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling of the Authority."

In our view, therefore, the decision of the Chief Metropolitan Magistrate or the District Magistrate can be challenged before the High Court under Articles 226 and 227 of the Constitution by any aggrieved party and if such a challenge is made, the High Court can examine the decision of the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, in accordance with the settled principles of law."

8. The contention of the learned counsel for the petitioner has considerable force and the ratio laid down in the Judgment referred to above, is squarely applicable to the facts of the present case. Hence, the relief sought for in the writ petition has to be considered in the light of the above stated position.

9. The next question is to be decided is, whether the petitioner is entitled to get the relief of direction to the respondent to remove the seal put up in the dwelling house in question and release the same to the petitioner.

10. The petitioner has stated that there are other properties mortgaged to the respondent and the sale proceeds of those properties would be sufficient to settle the entire dues to the respondent. Since already sale notice has been issued in respect of three properties, the respondent without waiting for the sale, has taken possession of the dwelling house of the petitioner in a hurried manner. The respondent did not deny that other properties are available for sale and the sale notice has been issued in respect three properties.

11. Whereas, the learned counsel for the respondent contended that the respondent did not receive any offer to purchase the properties.

12. Admittedly, the other properties mortgaged are available for sale and the respondent has already taken steps to sell the properties. Further, the respondent has not stated the necessity to take possession of the dwelling house of the petitioner. The respondent issued notice, dated 01.12.2012, demanding possession of the properties. The respondents did not take any steps to take possession of the dwelling house till 07.11.2014.

13. In view of this fact, the contention of the petitioner that he was trying to settle the amounts due and the respondent assured that possession and sale of dwelling house would be the last resort, is acceptable. The petitioner has offered to pay the value of the dwelling house to get the same released from the mortgage. He also

has given an undertaking that he would hand over possession to the respondent in the event of the said house is being sold to the third parties.

14. The affidavit of undertaking filed by the petitioner is recorded. Accordingly, the respondent is directed to remove the seal put up by him and hand over the dwelling house of the petitioner bearing Door No.35, Plot No.127, K.K.Nagar East 5th Street, Madurai, within two weeks from the date of receipt of a copy of this order. The affidavit of undertaking will form part of this order. If the property is sold, the petitioner must hand over possession to the respondent immediately without any objection.

15. In the result, the writ petition is disposed of accordingly. No costs. (V.D.P.,J.) (V.M.V.,J.) 23.12.2014 Index : yes/No Internet : Yes/No smn2 To The Chief Manager-cum-Authorised Officer, Bank of Baroda, E.C. Street Branch, Chennai. V.DHANAPALAN, J.

AND V.M.VELUMANI, J.

smn2 Pre-delivery order in W.P.(MD) No.18129 of 2014 23.12.2014