

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.09.2007

CORAM:

THE HON'BLE MR.JUSTICE M.CHOCKALINGAM

W.P.NO.18903 OF 2007

and

M.P.NOS.1 AND 2 OF 2007

A.P.Shanmugaraj

....Petitioner

Vs.

1. L.I.C. Housing Finance ltd.,
rep. by its Authorised officer/
Deputy General Manager,
Tristar Towers I Floor,
657, Avinashi Road,
Coimbatore 641 037.

2. R.Gopalakrishnan,
Son of A.S.Ramasamy,
645, Dr.Radhakrishnan Salai,
Tatabad,
Coimbatore 12.

...Respondents

Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of declaration as stated within.

For Petitioner: Mr.Krishnan
for M/s Sarvabhauman Associates

For Respondent No.1: Mr. E.Omprakash
for M/s Ramalingam Associates

For Respondent No.2: Mr.K.Rajasekaran

O R D E R

Seeking to issue a writ of declaration declaring that the auction sale conducted on 15.3.2007 by the first respondent in respect of the property bearing D.No.459K, R.S.No.70/5, Andhiyur Road, Pulangulam Village, Kunnathur Town Panchayat is unconstitutional and consequently null and void.

2. Affidavit filed in support of the petition is perused.

3. The Court heard the learned counsel on either side.

4. The case of the petitioner in short is that while the petitioner was running his financial business, the Income Tax Department conducted a raid and thereafter they made an assessment of the petitioner's income. As against the same, the petitioner preferred an appeal before the Commissioner of Income Tax (Appeals) II, Coimbatore and the sum was reduced. This was followed by an order of attachment passed originally on 27.8.1999 which was extended periodically and final order of attachment was passed on 12.9.2002, in and by which, the properties of the petitioner, including the properties comprised in R.S.No.70/5. Pulangulam Village, Kunnathur Town were also attached. In November, 1998, the petitioner approached the first respondent for a housing loan for construction of house and the same was sanctioned to the extent of Rs.12 lakhs. Accordingly, the construction was made. Initially, the petitioner was regular in the repayment of the EMIs, but on account of the Income Tax raid, the petitioner was unable to repay the monthly instalment which resulted in the mounting of the arrears. Hence, the petitioner was forced to file a petition to adjudge him as an insolvent in I.P.No.3 of 2000 on the file of the Subordinate Judge, Tiruppur which is also pending. While the matter stood thus, the first respondent filed O.S.No.388 of 2000 on the strength of mortgage and got a preliminary exparte decree on 26.6.2000 followed by a final decree on 20.11.2000. The first respondent also filed E.P.No.272 of 2001 and on coming to know about the execution proceedings, the Income Tax Department filed E.A.No.66 of 2003 stating that they had a priority first charge over the property. The execution petition filed by the first respondent was dismissed for non-prosecution on 22.4.2004. Having failed in their attempt, the first respondent issued a demand notice on 27.12.2003 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter called as SARFAESI Act) and following the same, the property was brought for auction sale without any notice whatsoever and hence the above writ petition has been filed for a declaration declaring the SARFAESI ACT and the notice dated 27.12.2003 as ultravires the constitution, invalid and void .

5. In support of the writ petition, learned counsel would submit that though final decree was passed in favour of the first respondent in a suit for mortgage, execution petition was also filed for recovery, but it was dismissed for default, having failed in their attempt, the first respondent without any jurisdiction whatsoever, invoked the provision of SARFAESI Act and

also issued notice demanding the same and has also brought the property for sale. Before conducting the sale of the immovable property, the Rule would require that notice must be issued to the debtor and also to the secured creditors. It is also made clear that notice should be caused in two leading Newspapers, but in the instant case, it was not done so. Even without prior notice either to the petitioner or to the secured creditors or by way of making publication in two leading Newspapers, the auction sale was conducted and hence it would be violative of the provisions of the Act and Rules found in the SARFAESI Act. Under such circumstances, it has got to be set aside. Learned counsel would further add that the first respondent put a lock on the premises and subsequently it was broke open and the jewels and goods have been taken away and the properties are now lying with the first respondent which they have done illegally and the learned counsel would further add that in the instant case, the second respondent, pursuant to the auction sale conducted had taken possession, which is also illegal. Under such circumstances, the auction sale conducted by the first respondent has to be struck down.

6. Contrary to the above, learned counsel for the respondents would submit that the auction sale was conducted following the procedures and formalities, as envisaged in the SARFAESI Act and the second respondent had purchased the property in the auction sale held on 15.3.2007 for a sum of Rs.36 lakhs and also he was put in possession as on today. The first respondent only after giving sufficient opportunity to the petitioner to come forward and to settle and take back his property, proceeded to put up the property for auction sale for the legitimate dues. It is true that the premises was broke open and the first respondent has taken all the goods found therein and now it is in the custody of the first respondent and the sale has been done following the mandatory provisions of law. Learned counsel would further add that in the instant case if the sale conducted by the first respondent and the purchase made by the second respondent under the public auction sale to be challenged, it has got to be appealed before the appellate forum viz. Debt Recovery Tribunal, Chennai since there is an efficacious and effective alternative remedy available to the petitioner and hence the writ petition has got to be dismissed.

7. The Court paid its anxious consideration on the rival submissions made. In the instant case, what is challenged is the auction sale conducted by the first respondent under the provisions of SARFAESI Act and the purchase made by the second respondent. The second respondent is also put in possession as on today. It is admitted that the properties of the petitioner are kept under lock and key and all the goods were taken by the first respondent and now it is in the custody of the first respondent.

What is now challenged is the auction sale conducted by the first respondent, which according to the petitioner is violative of the mandatory provisions. Under such circumstances, if the petitioner is aggrieved over the procedure followed in conducting the auction sale, it is always open to him to approach the appellate forum for necessary relief and not to invoke the writ jurisdiction. Learned counsel for the petitioner would submit that reasonable time should be given to the petitioner to approach the appellate forum for preferring appeal. It is also brought to the notice of this Court that appeal should have been preferred within a period of 45 days from the time of making sale. The writ petition has been filed on 25.5.2007. Thus, it would be quite clear that the petitioner has filed the writ petition, instead of preferring appeal. The petitioner is directed to prefer an appeal before the appellate forum, within a period of four weeks here from. It is open to both the parties to raise their respective contentions on the merits of the matter before the appellate forum where the appeal has to be preferred by the petitioner within the stipulated time, if so advised.

8. The writ petition is disposed of. No costs. Consequently, M.P.Nos.1 and 2 of 2007 are closed.

VJY

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

The Authorised officer/
Deputy General Manager,
L.I.C. Housing Finance ltd.,
Tristar Towers I Floor,
657, Avinashi Road,
Coimbatore 641 037.

- + 1 cc to Mr. K. Rajasekaran, Advocate SR No. 61076
- + 2 cc to M/s. Ramalingam & Associates SR No. 60823
- + 1 cc to M/s. Sarvabhauman Associates SR No. 60592

TS(CO) SR/10.10.2007

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