

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[Orders Reserved on 25.02.2015]

Dated:05.03.2015

Coram

THE HONOURABLE Mr. JUSTICE SATISH K.AGNIHOTRI
AND
THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

W.P.No.14994 of 2012

P.Ananda Baskaran

... Petitioner

Vs.

1. The Debts Recovery Appellate Tribunal,
Rep. By its Registrar,
24/2, Ethiraj Salai IV Floor,
Egmore, Chennai - 600 105.
2. The Debts Recovery Tribunal - I
Represented by its Registrar,
DEWA TOWERS VI Floor,
No.770-A, Anna Salai,
Chennai - 600 002.
3. M/s.Ind Bank Housing Limited,
2nd Floor, 480, Anna Salai,
Chennai - 600 035.
4. The Authorised Officer,
Ind Bank Housing Limited,
480, Anna Salai, Nandanam,
Chennai - 600 035.
5. The Authorised Signatory, Suriya Consultancy
Property Consultant and Legal Solutions,
No.8, 1st Floor, Annai Nagar,
Agraharam Korattur, Chennai - 600 076.
(Near DRJ Hospital)

... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India
praying for issuance of Writ of Certiorarified mandamus calling for
the records relating to the order dated 4th June 2012 passed in M.A.

(SA).No.37 of 2011 on the file of the Debts Recovery Appellate Tribunal, Chennai and forbear the respondents from initiating the provisions of SARFAESI Act as against agricultural lands contrary to the provisions of the statute.

For Petitioner : Mr.V.Raghavachari

For Respondents 1 & 2 : Tribunal

For Respondents 3 & 4 : Mr.B.Chandrasekar

ORDER

M.VENUGOPAL, J.

The Petitioner has preferred the present Writ Petition praying for passing of an order by this Court in calling for the records pertaining to the order dated 04.06.2012 in M.A.(SA).No.37 of 2011 passed by the Debts Recovery Appellate Tribunal, Chennai. Further, he has sought for passing of an order by this Court in restraining the Respondents from initiating the provisions of the SARFAESI Act as against the agricultural lands contrary to the provisions of the statute.

2.Writ Facts:

(i) According to the Petitioner, a private limited company viz., Space Makers Private Limited was incorporated under the provisions of the Indian Companies Act, 1956, which was promoted with a view to achieve the objects specified in the Memorandum. Even before the parties submitted proposals seeking credit facilities for business purposes, the Petitioner was holding immovable properties which are agricultural in character. As a matter of fact, the company was promoted to create and develop a Satellite Township in the Union Territory of Puducherry. The company submitted a proposal seeking for credit facilities from the 3rd Respondent for the purpose of purchase of 15 to 20 acres of land and develop a Satellite Township. The 3rd Respondent, after considering the proposal, sanctioned various credit facilities to the said company.

(ii) The stand of the Petitioner is that he had not created mortgage in favour of the 3rd Respondent, for the credit facilities sanctioned company. However, the 3rd Respondent produced an affidavit that the Petitioner is producing the sale deeds as security for the proposed loan to be sanctioned to M/s.Space Makers Private Limited, which is disputed by the Petitioner. Although the company purchased numerous extent of lands from and out of the credit facilities sanctioned to them by the 3rd Respondent, neither the said company

mortgaged those properties nor the 3rd Respondent took any steps to call upon the said company to create mortgage over the properties purchased by the company. It appears that the said company defaulted in keeping up the repayment schedule and in this connection, the 3rd Respondent filed a suit in C.S.No.904 of 2001 on the file of this Court, by recalling the entire loan together with interest and costs.

(iii) The Petitioner, in the said suit, filed a detailed written statement disputing the claim of the Bank and had also pointed out that there was no mortgage in law and the blank papers signed by the Directors and other persons were misused by the Bank for suiting their needs. A perusal of the document would reveal that the signature of the Petitioner on empty forms were taken and thereafter filled up by the Bank. The Bank, being aware of the fact that a contest in the civil suit would expose the fraud played by them and in order to avoid a proper trial of the case, had ingeniously chosen to initiate proceedings under the SARFAESI Act by issuing statutory notice under Section 13(2) on 04.04.2006 calling upon the Petitioner, the Company and its Directors to pay a sum of Rs.3,52,72,755/- together with future interest and costs.

(iv) The Petitioner sent a representation dated 12.05.2006 specifying his objections inter alia stating that he had never visited the 3rd Respondent's Office for execution of any documents nor for creation of mortgage and called upon the 3rd Respondent to produce the documents alleged to have been signed by them. By means of reply dated 31.05.2006, much beyond the statutory period of seven days as envisaged under Section 13(3-A) of the Act, the 3rd Respondent denied and disputed the objections raised by the Petitioner, but had not chosen to send the documents sought for by the Petitioner.

(v) The 3rd Respondent issued possession notice dated 02.08.2008 stating that they had taken symbolic possession of the secured assets. Since the 3rd Respondent took possession of the properties which were actually agricultural lands exempted under Section 31(i) of the SARFAESI Act, the Petitioners filed W.P.Nos.25167 of 2008 and 25816 of 2008 challenging the action of the 3rd Respondent.

(vi) By a common order dated 01.10.2009, this Court disposed of the aforesaid Writ Petitions along with W.P.No.27693 of 2008 wherein restoration of S.A.No.82 of 2008 was ordered and further an order was passed directing the said Appeal and to be heard along with the appeals to be filed by the Petitioner in W.P.Nos.25167 and 27693 of 2008 (if any such appeal was filed in time). All the said appeals were directed to be disposed of within a period of eight weeks from the date of receipt of a copy of this order. Moreover, in the

meanwhile, the Respondent therein was directed to keep the impugned proceedings in abeyance.

(vii) Since the Bank had initiated proceedings under SARFAESI Act, 2002, the Writ Petitioner filed S.A.No.21 of 2010 on various grounds in regard to the action initiated by the 3rd Respondent against agricultural properties. After hearing both sides, the Debts Recovery Tribunal - I, Chennai passed a conditional order which was challenged before the Debts Recovery Appellate Tribunal, Madras, wherein on 04.02.2011, an order of stay was granted. Indeed, the 1st Respondent/D.R.A.T. passed the following order:

"... R3 is given up. Issue notice to R1 and R2. Call on 30.03.2011. There shall be an order stay of the operation of the order of the Ld. Presiding Officer dt 19.1.2011 passed in SA.No.21/2011 and equally there shall be an order of restraint upon the Authorized Officer from in any way proceeding further under the provisions of the SARFAESI Act till further orders."

(viii) It comes to be known that the Bank filed an appeal earlier was taken up by the 1st Respondent/D.R.A.T., Madras in R.A.(S.A.) No.263 of 2010 challenging the order dated 26.02.2010. The 1st Respondent/D.R.A.T. on 28.03.2012, allowed the appeal inter alia holding that the Appellant was entitled to proceed against the secured assets as the secured assets were not agricultural lands and resultantly, the finding of the D.R.T.-I, Chennai made in S.A.No.232 of 2009 dated 26.02.2010 to the effect that the lands mortgaged are agricultural lands has to be set aside and resultantly, the appeal was allowed.

(ix) In the meanwhile, the Respondent/Bank sought to proceed further with the securitisation before the Tribunal and therefore, a petition/application was moved before the 1st Respondent/Appellate Tribunal for stay of further proceeding and for advancing the hearing and the 1st Respondent/Appellate Tribunal inter alia passed the following order:

"The petitioner is directed to deposit a sum of Rs.1,76,36,377.50 being 50% of the amount demanded in the Section 13(2) notice i.e., Rs.3,52,72,755/- into this Tribunal on or before 3.7.2012. Call on 4.7.2012 for verification. The interim order passed on 4.2.2011 is not extended any more. IA-582/2012 (Stay) - Call with MA(SA) on 4.7.2012."

Petitioner's Contentions:

3.The Learned Counsel for the Petitioner submits that the impugned order dated 04.06.2012 passed by the 1st Respondent is against law, weight of evidence and probabilities of the case.

4.The Learned Counsel for the Petitioner urges before this Court that the 1st Respondent/D.R.A.T. should not have modified its earlier order in the absence of any change in circumstances whatsoever. Also, it is represented that the Petitioner was compensated by the Union Territory of Puducherry for the loss sustained by him in respect of the agricultural lands in 'Thane Cyclone'.

5.The Learned Counsel for the Petitioner proceeds to state that the impugned order passed by the 1st Respondent lacks application of mind inasmuch as even by their own admission in the statutory notices, the 3rd Respondent had described the land in agricultural measurements and therefore should have dismissed the 'Appeal'.

6.The prime plea taken on behalf of the Petitioner is that a conditional order of stay was passed by the D.R.T. - I, Chennai on 19.01.2011 directing the payment of 5% of Rs.8,05,80,000/- on or before 4.2.2011 and another 10% of 8.05,80,000/- to be deposited on or before 03.03.2011 before entertaining the appeal putting an onerous condition is an arbitrary one and therefore, the same is liable to be set aside.

7.Yet another submission of the Learned Counsel for the Petitioner is that when a jurisdictional issue was raised, it is the duty of the Tribunal to ascertain whether at all the Bank was right in invoking the provisions of SARFAESI Act and instead of the same, directing the Petitioner to comply with the terms of the SARFAESI Act is only to put the cart before the horse.

8.The Learned Counsel for the Petitioner takes a legal plea that in the present case, on the alleged date of entering into contract, the Respondent/Bank was not a secured creditor within the meaning of Section 2(zd) of SARFAESI Act, 2002 and therefore, no 'security interest' within the meaning of Section 2(zf) of SARFAESI Act could be created in its favour. Consequently, the action taken by the Respondent against the Appellant by virtue of Section 13 of the Act is liable to be quashed.

9.The Learned Counsel for the Petitioner submits that the Petitioner, in the Memorandum of Grounds, had taken a stand that the Respondent was not a financial institution within the meaning of Section 2(m)(iv) of the Act and inasmuch as it is not a financial

institution, it is not a secured creditor and as such, it cannot invoke the provisions of the SARFAESI Act in respect of a loan transaction of a prior date.

10.The Learned Counsel for the Petitioner contends that on perusal of Section 13(1) and Section 13(2) of the SARFAESI Act, before it can be invoked, the Respondent/Bank must show that 'security interest' was created in favour of any 'secured creditor' and if it was so created, it could be enforced without the intervention of the Court or Tribunal, by such creditor in accordance with the provisions of the said Act.

11.The categorical submission of the Learned Counsel for the Petitioner is that when the civil suit in C.S.No.904 of 2001 pending on the file of this Court for recovery of amount and during its pendency and until it is withdrawn or permission is sought for instituting a fresh proceeding, it is not open to the Respondent/Bank to invoke the provisions of the SARFAESI Act.

12.The Learned Counsel for the Petitioner brings it to the notice of this Court that the Petitioner is a third party and had disputed the purported mortgage in the subject matter in issue and in this connection, one Shanmugasamy filed C.R.P.No.1844 of 2012 before this Court and stay of all further proceedings was granted by this Court on 27.04.2012.

13.Apart from that, the Learned Counsel for the Petitioner submits that since no possession notice was issued and no possession was taken, the valuation as contemplated under Rule 8 of SARFAESI Rules before effecting sale of the property referred to in sub-rule (1) of Rule 9, the Authorised Officer had not performed his duty.

14.The Learned Counsel for the Petitioner contends that the Petitioner's brother Natarajan submitted an application praying for sanction of Thane Cyclone Relief in which he had stated that he had cultivated paddy in S.No.10/5, 12/16, 24/5, 13/6, 12/17, 24/2 and 25/7 at Vadamangalam Village measuring a total extent of 01.57.75 out of which he had stated that an extent of 01.50.00 was subject matter of damage and the remaining extent of 01.57.75 was mentioned as Lease.

15.The Learned Counsel for the Petitioner submits that the Petitioner is arrayed as 10th Defendant in C.S.No.904 of 2001 filed by the 3rd Respondent/Bank and in fact, the Petitioner had filed a written statement inter alia stating that the 9th Defendant was enemically disposed towards him and had created the document No.4 by joining hand with the Plaintiff (3rd Respondent). Also that, it is the

plea of the Petitioner that a bare perusal of the document would show that the same was signed in a blank stamp paper and thereafter, it was typed and also that the stamp paper was purchased on 12.07.1993 in the name of one Natarajan of Kanuvapettai and the said document was purported to have been executed on 16.05.1995 in the presence of Notary. Moreover, on account of the novation of the contract heavy burden was imposed on the Writ Petitioner (10th Defendant) and in the absence of his consent, the entire contract under document No.4 stood automatically vitiated.

16.The Learned Counsel for the Petitioner cites the decision of this Court in Eshwar Purushothaman Gardens V. Authorised officer, Indian Bank, 2012 (5) CTC 257, wherein, in paragraph 9, it is observed as follows:

"9.Section 31 of the SARFAESI Act deals with certain items of property which are excluded from the purview of SARFAESI Act. Section 31(i) provides that the provisions of the Act shall not apply to any security interest created in agricultural land."

Also, in the aforesaid decision, at page 267, in paragraph 29, it is held as follows:

"29.Therefore, on a careful consideration of the entire factual matrix, we are of considered view that security interest was created by the Bank in an agricultural land and as such, the Bank has no authority to initiate proceedings under the SARFAESI Act. It is open to the Bank to recover the amount due in any other manner known to law. The invocation of the SARFAESI Act alone is held to be barred in view of Section 31(i) of the SARFAESI Act. Accordingly, the notice issued by the Bank under Section 13(4) of the SARFAESI Act is quashed."

17.He also relies on the decision Satish Chand Goel V. Oriental Bank of Commerce, IV (2014) BC 67 (DRAT), wherein, in paragraph 6, it is observed and held as follows:

"6.Considering the submissions of the parties' Counsel and looking to the circumstances of the case, I am of the view that since the Hon'ble Delhi High Court, after looking to the chain of original documents of the property in question as well as its certified copies obtained from the office of the Sub-Registrar and finding a prima facie case in favour of the

appellants/petitioners has put the deposit of the amount, as directed by the Tribunal below by the order impugned, on hold until this Tribunal finally examines the matter and takes a view in this appeal, therefore, there appears to be a strong prima facie case against the alleged equitable mortgage of the property in question, which raises serious questions about the existence of any security interest in favour of respondent Bank qua that property as well as qua the application of the provisions of the SARFAESI Act in the matter. These issues relate to disputed questions of facts which are yet to be decided in the S.A. by the Tribunal below and cannot be decided finally at this stage by this stage by this Tribunal without hearing the parties qua them. In view of the peculiar circumstances of this case, it would be expedient to keep the disposal of the instant application on hold for the time being until the Tribunal below dispose of the S.A. For which necessary direction may be given to it. The Tribunal below is accordingly directed to dispose of the S.A. within three months from the date of this order is placed before it."

Contentions of Respondents 3 & 4:

18.Per contra, it is the submission of the Learned Counsel for Respondents 3 and 4, the present Writ Petition filed by the Petitioner is a clear abuse of process of Court, because of the reason that the Petitioner, on earlier occasion filed W.P.No.27693 of 2008 before this Court and on 01.10.2009, this Court directed him to exhaust the alternative remedy of appeal provided under the SARFAESI Act.

19.The Learned Counsel for Respondents 3 and 4 brings it to the notice of this Court that in S.A.No.82 of 2008 filed by the Petitioner, the D.R.T. - II, Chennai on 07.09.2010 came to the conclusion that the properties mortgaged by the applicant to the Bank were not agricultural lands and therefore, the action taken to enforce recovery of the dues was perfectly valid and in accordance with the provisions of the Act and the Rules made thereunder. Moreover, the said order in S.A.No.82 of 2008 dated 07.09.2010 had become final and the same is unchallenged till date.

20.Continuing further, the Learned Counsel for Respondents 3 and 4 invites the attention of this Court to the fact that the Petitioner had projected S.A.No.21 of 2011 before the D.R.T.-I, Chennai on the same ground and obtained stay on condition that he makes a pre deposit of Rs.40.29 lakhs before 04.02.2011 and Rs.80.58 lakhs before 03.03.2011. As against the said pre deposit direction, he moved an Appeal in M.A.(SA).No.37 of 2011 before the 1st Respondent/ D.R.A.T. and obtained an order of stay.

21.The Learned Counsel for Respondents 3 and 4 takes an emphatic plea that the Petitioner together with his brother including Shanmugaswamy, Rajasekaran and Natarajan floated a company by name M/s.Space Makers Private Limited for the purpose of Real Estate Development to develop a Satellite Model Township at Villianur in Puducherry. The transaction was structured in such a fashion that on the strength of the mortgage of the properties standing individually in the names of Petitioner and his brothers aforesaid, the company would approach Indian Bank for finance and as and when the project takes off, the properties would be sold as housing plots through the company to the prospective purchasers and the loan would be liquidated in instalments from and out of the sale proceeds realised from the buyers. Further, to avoid conflict of interest and to keep the company distinct from the real owners of the land, the applicants and their brothers, as the actual promoters, avoided holding Directorial positions.

22.The Learned Counsel for Respondents 3 and 4 brings it to the notice of this Court that as an interim measure, pending approval of the Term Loan from Indian Bank for 300 lakhs for promoting the Satellite Model Township, the company approached the 3rd Respondent through letters dated 20.03.1995 and 08.06.1995, enclosing the minutes of the Board and the proposal given by them to the Indian Bank with a request for an Inter Corporate Deposit (ICD) of Rs.150 lakhs. The Petitioner along with his brothers offered to secure the aforesaid ICD by creating mortgage over the properties owned by them respectively in favour of the 3rd Respondent and the 3rd Respondent considered the said request and placed an Inter Corporate Deposit of Rs.50 lakhs alone on 12.06.1995 with the said M/s.Space Makers Private Limited for a tenor of six months on the security of the equitable mortgage by deposit of title deeds of the properties owned by the Petitioner and the said Shanmugasamy, Rajasekaran and Natarajan.

23.The Learned Counsel for Respondents 3 and 4 contends that ICD of Rs.50 lakhs placed on 12.06.1995 was rolled over on 09.12.1995 for

a further tenor of six months, the same being repayable with interest at 22% per annum, the date of maturity being 07.02.1996. Accordingly, the company executed a Demand Promissory Note as well as a receipt on 09.12.1995. After maturity, the borrower company sought further extensions through letters dated 17.04.1996, 27.07.1996 and 27.02.1998. In all the aforesaid requests for roll over, the company had reiterated and confirmed their intent and action in regard to the development of the said land for Satellite Township promotion and also applied for DPA Approval and advertised for sale of plots. In short, the lands which were sought to be developed and for which purpose the ICD was availed, were the very same lands which were mortgaged and which were now sought to be claimed by the Petitioner as agricultural.

24.The Learned Counsel for Respondents 3 and 4 submits that the Valuation Certificate issued by the Deputy Tahsildar of Villianur Village to the respective mortgagors (including the Petitioner) confirmed the land as no more agricultural one and since the company as well as the mortgagors including the Petitioner had defaulted in repayment of maturity proceeds despite due notice of demand, the Bank was constrained to file a civil suit C.S.No.904 of 2001 before this Court and the same is pending as on date.

25.Also, it is brought to the notice of this Court on behalf of the Respondents 3 and 4 that the 3rd Respondent/Ind Bank Housing Limited was notified as a financial institution under the SARFAESI Act with effect from 16.03.2006 and as such, it issued a notice of demand on M/s.Space Makers Private Limited Company as well as the mortgagors on 04.04.2006 and initially the Petitioner denied the very existence of mortgage and the replies were rejected and the reason for rejection was duly communicated to the mortgagors through reply dated 31.05.2006. In reality, neither the borrower company viz., Space Makers Private Company nor any of the mortgagors chose to comply with the notice of demand and therefore, possession was taken vide possession notice dated 02.08.2008, which was duly advertised on 03.08.2008 in Daily Thanthi (Puducherry Edition) and Business Line respectively. Subsequently, notice of intended sale under Section 13 (4) of the SARFAESI Act was issued on 25.09.2008 whereby the 3rd Respondent conveyed its intent to proceed with auction of the secured assets and the Auction Notices were published in Daily Thanthi (Puducherry Edition) and the Business Line on 26.09.2008 respectively.

26.The Learned Counsel for Respondents 3 and 4 submits that the Petitioner filed SARFAESI Appeal in S.A.No.82 of 2008 before the Debts Recovery Tribunal - II, Chennai which initially passed a

conditional order of stay on pre deposit of Rs.30 lakhs within eight weeks and since the condition was not complied with, the said order was vacated on 13.10.2008. Thereupon the 3rd Respondent gave advertisement for sale of the property on 20.10.2008 in the same Dailies. In the meanwhile, the Petitioner along with his co-mortgagors filed Writ Petitions before this Court which came to be dismissed on 01.10.2009 with a direction to exhaust their remedies by filing Statutory Appeals which were to be heard and disposed of by the Tribunal along with the earlier pending S.A.No.82 of 2008 on merits.

27.The Learned Counsel for Respondents 3 and 4 contends that contrary to the direction issued by this Court, two of the co-mortgagors viz., Shanmugasamy and Rajasekaran jointly filed S.A.No.232 of 2009 before the Debts Recovery Tribunal - I, Chennai and the Tribunal, through its order dated 26.02.2010, held that the lands are agricultural. Later, the 3rd Respondent preferred SARFAESI Second Appeal RA(SA).No.263/2010 before the 1st Respondent/ D.R.A.T., Chennai, which passed orders on 28.03.2012 by holding that the secured assets are not agricultural lands. Further, the said order was challenged by the co-mortgagors in C.R.P.No.1844 of 2012 before this Court and the same was dismissed by the Division Bench of this Court on 13.12.2012.

28.The Learned Counsel for Respondents 3 and 4 submits that the liability of M/s.Space Makers Private Limited is on the very higher side and the outstanding amount is pending for more than 21 years and except the mortgage security, there is no other way for the 3rd Respondent to realise the due in question. In fact, the Petitioner is to avoid and evade the condition in regard to the mandatory pre deposit of 25% of sum demanded to maintain the appeal as projected the present Writ Petition.

Analysis:

29.It is not in dispute that the 3rd Respondent/Ind Housing Bank, Chennai as Plaintiff had instituted a suit in C.S.No.904 of 2001 on the file of this Court against M/s.Space Makers Private Limited, Puducherry and 11 others praying for passing of a decree against the Defendants jointly and severally in respect of a sum of Rs.1,37,63,872.54 under the inter corporate deposit together with further interest at 22% per annum compounded at half yearly rests from the date of plaint till date of realisation and also sought the relief of passing of a preliminary decree against the Defendants 1 to 12.

30.The Writ Petitioner in C.S.No.904 of 2001 as 10th Defendant had filed a written statement, among other things, stating that the property described in 'B' schedule of the plaint belongs to him and further he had denied that he had given the property with an intention of creating security and further, in the loan originally availed, it was mentioned that a sum of Rs.50 lakhs was received, repayable with interest at 21% per annum and this was on 12.06.1995. It was alleged that Rs.50 lakhs would carry 22% interest with half yearly rests and before executing this document neither the Plaintiff nor the 1st Defendant informed him in regard to the terms and conditions and in short, any drastic charge without the consent of surety absolves him etc.

31.It cannot be gainsaid that the 3rd Respondent/Bank had sanctioned financial assistance to M/s.Space Makers Private Limited and an inter corporate deposit of Rs.50 lakhs on 09.12.1995 for a period of 180 days with interest at 21% per annum and the deposit was due for repayment on 07.02.1996. In fact, the said deposit was later rolled over on 06.03.1998 for a further period of 180 days and the deposit was due on 02.09.1998. Indeed, the inter corporate deposit was secured by depositing the title deeds of the properties of the Writ Petitioner and other Directors of the Company. In short, the Writ Petitioner (10th Defendant) in C.S.No.904 of 2001 had projected the written statement denying creation of equitable mortgage. Also, a plea is taken on behalf of the Writ Petitioner before this Court that the properties purported to have been mortgaged with the 3rd Respondent/ Bank are agricultural lands and therefore, they are exempted under Section 31(i) of the SARFAESI Act.

32.It is to be pointed out that the 3rd Respondent/Bank had filed a Memo on 02.03.2013 inter alia stating that it was unable to accept the Petitioner's one time settlement proposal dated 08.02.2013 for payment of Rs.2 crores (Rs.50 lakhs offered upfront and the balance Rs.150 lakhs in 12 monthly instalments of Rs.12.50 lakhs each) towards full and final settlement of the entire dues of Rs.13.45 crores as on 31.12.2012, as a sum of Rs.1.534 crores was recovered through auction sale of properties as a sum of Rs.1.534 crores was recovered through auction sale of properties belonging to two other mortgagors P.Shanmugasamy and S.Rajasekaran in this account as per the sale notice dated 12.01.2013 which took place on 13.02.2013 under SARFAESI Act and this sale was consented by the owner/mortgagor, pursuant to which, the respective sale certificates were issued on 26.02.2013 after full realisation of the auction proceeds. Further, the 3rd Respondent had proceeded to state that it was inclined to accept a sum of Rs.1.87 crores as one time settlement to release the properties standing in the name of the Petitioner alone from the

mortgage, provided that the Petitioner pays the amount within 30 days etc. That apart, the deposit of 50 lakhs deposited by the Petitioner is kept separately in a no lien account of the 3rd Respondent/Bank.

33.It is to be noted that pursuant to the direction issued by this Court in W.P.No.27693 of 2008 dated 01.10.200 (wherein he was directed to exhaust an alternative remedy of preferring an Appeal under SARFAESI Act), the Petitioner filed S.A.No.82 of 2002 and on 07.09.2010, the Debts Recovery Tribunal - II, Chennai passed an order by coming to the conclusion that the properties mortgaged by the applicant with the 3rd Respondent are not agricultural lands and resultantly, the action taken by the 3rd Respondent/Bank to enforce the security interest for recovery of dues was perfectly valid and in accordance with the provisions of the Act and Rules made thereunder. This order in S.A.No.82 of 2008 dated 07.09.2010 passed by the Tribunal had become conclusive and final and binding between the parties for the simple reason that the said order was not further challenged.

34.The Petitioner not being satisfied with the order passed in S.A.No.82 of 2008 dated 07.09.2010 by the Tribunal had once again filed S.A.No.21 of 2011 on the file of Debts Recovery Tribunal - I, Chennai and on 19.01.2011 an order of interim stay was granted, whereby and whereunder, the 3rd Respondent/Bank was restraint from taking further proceedings under the SARFAESI Act till 04.03.2011 in respect of the property mentioned in the Memorandum of Appeal subject to the condition that the Appellant (Writ Petitioner) shall deposit 5% of Rs.8,05,80,000/- on or before 04.02.2011 and another 10% of Rs.8,05,80,000/- to be deposited on or before 03.03.2011, either by way of Bank Draft/Pay Order or Cash in the loan account of the 3rd Respondent, without prejudice to his rights and further, the Bank was directed to defer further proceedings in pursuance of the impugned notice enclosed along with the Memorandum of Appeal.

35.In fact, being dissatisfied with the order dated 19.01.2011 passed in S.A.No.21 of 2011 by the Debts Recovery Tribunal - I, Chennai, the Petitioner filed an Appeal S.A.(MA).No.37 of 2011 before the Debts Recovery Appellate Tribunal wherein he was directed to deposit a sum of Rs.1,76,36,377.50 being 50% of the amount demanded in the Section 13(2) notice i.e., Rs.3,52,72,755/- before the Tribunal on or before 03.07.2012 and the matter was directed to be called on 04.07.2012 for verification and the interim order passed on 04.02.2011 was not extended any more from that date.

36.It transpires that the Petitioner along with his brothers P.Shanmugasamy and Natarajan filed W.P.Nos.27693, 25167 and 25816 of

2008 before this Court and on 01.10.2009 this Court directed the restoration of S.A.No.82 of 2008 (which was dismissed for default) and further directed the appeal to be heard along with the appeals to be filed by the Petitioners in W.P.Nos.25167 and 27693 of 2008 (if any such appeal was filed in time) and to dispose of all these appeals within a period of eight weeks from the date of receipt of a copy of this order. Further, in the meanwhile, the 3rd Respondent/Bank was directed to keep the impugned proceedings dated 17.10.2008 to be kept in abeyance. The Petitioner had filed another S.A.No.21 of 2011 [after disposal of S.A.No.82 of 2008 dated 07.10.2010 by the Debts Recovery Tribunal - II, Chennai], in which, interim orders were passed as stated supra. As against the grant of interim orders in S.A.No.21 of 2011 by the DRT-I, Chennai on 19.01.2011, the Petitioner projected M.A.(S.A).No.37 of 2011 before the Debts Recovery Appellate Tribunal, Chennai and in fact, the DRAT had passed an interim order on 04.06.2012 as mentioned supra.

37.That apart, two of the co-mortgagors one Shanmugasamy and Rajasekaran jointly filed S.A.No.232 of 2001 before the Debts Recovery Tribunal - I, Chennai and on 26.02.2010 the Tribunal passed an order holding that the lands are agricultural and in fact, R.A.(SA).No.263 of 2010 was filed before the Debts Recovery Appellate Tribunal, Chennai and the order of the Tribunal was reversed on 28.03.2012 by coming to the conclusion that the secured assets are not agricultural lands even C.R.P.No.1844 of 2012 challenged by the aforesaid co-mortgagors was dismissed by this Court on 13.12.2012. The 3rd Respondent/Bank had placed the inter corporate deposit (ICD) of Rs.50 lakhs on 12.06.1995 with the M/s.Space Makers Private Limited and even after a lapse of more than 21 orders it is not able to realise the money. At this stage, it is to be noted that except the mortgage security there is no other way to realise the outstanding amount.

38.It is to be borne in mind that Section 17 of the SARFAESI Act, 2002 speaks of 'Right to Appeal' aggrieved by any person (including borrower) aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor before the Debts Recovery Tribunal. As a matter of fact, Section 18(1) of the Act deals with filing of an 'Appeal to Appellate Tribunal', if any person is aggrieved, by any order made by the Debts Recovery Tribunal (under Section 17), within thirty days from the date of receipt of copy of the order of the Tribunal. As per Section 18(1) of the SARFAESI Act, requirement of pre deposit is a mandatory one. It is to be remembered that Right of an Appeal is not an inherent right to being a creation of statute. Indeed, Section 18(1) refers to the fact that no Appeal shall be entertained unless the borrower has deposited with the

Appellate Tribunal fifty percent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. Also that, the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five percent of debt referred to in the second proviso of Section 18(1) of the Act. To put it precisely, a statute which confers a Right of Appeal can put condition on exercise of that right.

39. At this stage, this Court aptly points out the decision in Poonam Manshani V. J. & K. Bank Limited and another, AIR 2010 Delhi 28 at special page 30, wherein, in paragraph 9, it is observed as follows:

"9. We are not interfering with the first two aspects of the Appellate Tribunal's consideration, but we find that insofar as the third aspect of the matter is concerned, the Appellate Tribunal has misdirected itself. After having rightly held in paragraph 10 of the impugned order that the liability of a guarantor is co-extensive with that of the principal debtor, the Tribunal could not have disallowed the advantage of recovery by the bank and the resultant reduction in the amount of debt due from the guarantor which advantage would have, in any event, been available to the principal debtor. When the principal debtor could have claimed advantage of the adjustment, there is no reason as to why a guarantor, whose liability is co-extensive, ought to be denied that advantage. At the same time, we do not agree with the submissions made by Mr Rawal that the sum of Rs 8.60 crores ought to be adjusted from the amount of Rs 10.21 crores. This is so because the expression used in Section 18 is "amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less". The amount of debt due, by ignoring the interest component, would be the amount specified in the notice under Section 13 (2), less any recovery made by the bank thereafter. Since the respondent No.1 bank has recovered 8.60 crores in the proceedings under Section 13(4), an adjustment would have to be made to arrive at the amount of debt due. Looked at in this manner, we feel that the amount of

debt due would be Rs 32.27 crores (Rs 40.87 crores - Rs 8.60 crores). Twenty five percent of that amount would come to Rs 8.07 crores (approximately)."

40.As far as the present case is concerned, this Court is of the considered view that there is no illegality in the 3rd Respondent/Bank in taking recourse of the provisions of the SARFAESI Act, 2002 although the suit in C.S.No.904 2001 is pending on the file of this Court (of course filed by the Bank). Also that, the remedy provided under SARFAESI Act is only an additional one and unless the same is barred by a statute it could be enforced at any time.

41.One cannot ignore a very vital fact that no Court much less an Appellate Tribunal being a creature of the SARFAESI Act itself can refuse to give full effect to its provisions. After all the aim of SARFAESI Act is to improve/facilitate the recovery process by conferring powers on the Banks and Financial Institutions to take possession of secured assets and sell them in the event of default committed by the borrower. Further, if security interest is created by deposit of title deeds, then, SARFAESI Act comes into operative play.

42.However, on going through the impugned order dated 04.06.2012 of the Debts Recovery Appellate Tribunal, this Court is of the considered view that the Petitioner cannot maintain a Writ Petition because of the fact that the impugned order is not an onerous or arbitrary one, when in fact the Appellate Tribunal had exercised its judicial discretion, taking note of the prevailing and attendant facts and circumstances of the present case. In fact, the impugned order passed by the Debts Recovery Appellate Tribunal does not suffer from any flaw. To put it precisely, a borrower/borrowers is/are not entitled to a complete waiver or total exemption from making a pre deposit.

43.Coming to the aspect of the plea taken on behalf of the Petitioner that the lands concerned in the mortgage are agricultural lands and therefore, it is exempted under Section 31(g) of the Act, when the same is denied on behalf of the 3rd Respondent/Bank and also when the Debts Recovery Tribunal - II, Chennai in S.A.No.82 of 2008 on 07.09.2010 had clearly held in paragraph 4.3 to the effect that '... the properties mortgaged by the Appellant (Petitioner) to the Respondent/Bank are not agricultural lands etc.' and also, when the said order had remain unchallenged on behalf of the Petitioner, at this stage, this Court is of the considered view that it is open to the Petitioner to raise a plea that the lands in question are

exempted from the SARFAESI Act before the Debts Recovery Tribunal in M.A.(SA).No.37 of 2011. Moreover, the disputed questions of fact like, whether the lands in question are agricultural lands and therefore, they are to be exempted from the purview of Section 31(g) of the SARFAESI Act and also a plea taken on behalf of the Petitioner that he had not given the property with the intention of creating security are all factual matters which are to be gone into by the Tribunal and these disputed questions of fact cannot be gone into or investigated by this Court in a summary jurisdiction under Article 226 of the Constitution of India. To put it succinctly, a Writ Court cannot be converted into a fact finding Court. Looking at from any angle, the Writ Petition filed by the Petitioner is devoid of merits.

44.In the result, the Writ Petition is dismissed, leaving the parties to bear their own costs. However, it is made clear that the dismissal of the Writ Petition will not preclude the Petitioner to urge all factual and legal grounds before the Debts Recovery Appellate Tribunal where M.A.(SA).No.37 of 2011 is pending and to seek appropriate remedy in the manner known to Law and in accordance with Law. Liberty is also granted to the 3rd Respondent/Bank to put forward its contentions/grounds and the Debts Recovery Appellate Tribunal shall provide due opportunity to both parties by adhering to the principles of natural justice and directed to dispose of M.A.(SA).No.37 of 2011 pending on its file within a period of six weeks from the date of receipt of copy of this order.

Sd/-
Assistant Registrar

//True Copy//

Sgl

Sub Assistant Registrar

To

1. The Registrar,
Debts Recovery Appellate Tribunal,
24/2, Ethiraj Salai IV Floor,
Egmore, Chennai - 600 105.
2. The Registrar,
The Debts Recovery Tribunal - I
DEWA TOWERS VI Floor,
No.770-A, Anna Salai,
Chennai - 600 002.

3. M/s.Ind Bank Housing Limited,
2nd Floor, 480, Anna Salai,
Chennai - 600 035.

4. The Authorised Officer,
Ind Bank Housing Limited,
480, Anna Salai, Nandanam,
Chennai - 600 035.

+1cc to M/s.V.Raghavachari, Advocate, S.R.No.12126
+1cc to Mr.B.Chandrasekaran, Advocate, S.R.No.12668

W.P.No.14994 of 2012

SAI (CO)
CA(18/03/2015)



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