

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.11.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

and

THE HONOURABLE MR.JUSTICE N.AUTHINATHAN

W.P.No.37791 of 2016

and

WMP No.32384 of 2016

M/s.Talent Steelmelt Private Limited,
Rep. By its Director Sri.D.Prabhu Srikanth,
SF 476, K.G.Palayam Post,
Kariampalayam, Coimbatore - 638 697. .. Petitioner

versus

1. Canara Bank,
Represented by its Manager,
Oppanakara Street Branch,
Coimbatore - 641 001

2. Canara Bank,
Represented by its Authorised Officer,
Asset Recovery Management Branch,
Coimbatore - 641 002. .. Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for a Writ of mandamus, directing the respondents to consider the representation of the petitioner dated 20.10.2016 and 24.10.2016 in so far as the proposal for One time settlement of the dues is concerned.

For Petitioner : Mr.M.A.Gouthaman

ORDER

(Order of the Court was made by S.MANIKUMAR, J.)

When the borrower has not repaid the loans, Bank has declared the loan, as Non-Performing Account [NPA] and issued

notices under Sections 13(2) and 13(4) of the SARFAESI Act, 2002.

2. Mr.M.A.Gouthaman, learned counsel for the petitioner submitted that alleging that as on 31.03.2016, there was an outstanding amount of Rs.5,48,26,479.40p, two properties were sought to be auctioned, by e-auction notice dated 09.09.2016. In the e-auction fixed on 19.10.2016, 2nd item of subject property has been sold, less than the market value of Rs.2.50 crores. The said property is in Coimbatore. Item No.1 of the property situated in Kottivakkam, has not been sold. Learned counsel for the writ petitioner / borrower further submitted that sale has not been confirmed. Added further, he submitted that notice issued under Section 13(4) has been challenged before the DRT. The petitioner has made a representation dated 20.10.2016 and 24.10.2016 respectively, to settle the dues to the respondents and without considering the genuine representation, the respondents have refused to entertain the petition. It is also his submission that the writ petitioner is willing to pay Rs.50 Lakhs by tomorrow and in the abovesaid circumstances, seeks for a mandamus to the respondents to consider the representations stated supra, for one time settlement.

3. Heard the learned counsel for the parties and perused the materials available on record.

4. Section 17 of the SARFAESI Act, states that any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken.

5. As per Section 13(4) of the SARFAESI Act, 2002 in case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

PROVIDED that the right to transfer by way of lease,

assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

6. Possession notice issued under Section 13(4) is also one of the steps / measures, referred to in sub section 4 of Section 13. Admittedly, the petitioner has taken remedial measures to challenge Section 13(4) notice.

7. If the petitioner has any grievance over sale of item No.2 of the subject property mentioned in the e-auction notice dated 09.09.2016, he can also challenge the same before the forum.

8. A Hon'ble Division Bench of this Court in Tamilnadu Industrial Investment Corporation Limited Vs. Millennium Business Solutions Private Limited, reported in 2004 (5) CTC 689, held that Courts have no power to order for any OTS. While that be the case, the mandamus sought for to dispose of the representation, cannot be issued.

9. When an alternate and efficacious remedy is available to the petitioner, to challenge the sale, writ of mandamus, cannot be issued by this Court. On the aspect of alternate remedy, we deem it fit to consider the following decisions.

(i) In Precision Fastenings v. State Bank of Mysore, reported in 2010(2) LW 86, this Court held as follows:

"This Court has repeatedly held in a number of decisions right from the decision in Division Electronics Ltd. v. Indian Bank (DB) Markandey Katju, C.J., (2005 (3) C.T.C., 513), that the remedy of the aggrieved party as against the notice issued under Section 13(4) of SARFAESI Act is to approach the appropriate Tribunal and the writ petition is not maintainable. The same

position has been succinctly stated by the Hon'ble the Supreme Court in Transcore v. Union Of India (2006 (5) C.T.C. 753) in paragraph No. 26 wherein the Supreme Court has held as under:

—
"The Tribunal under the DRT Act is also the Tribunal under the NPA Act. Under Section 19 of the DRT Act read with Rule 7 of the Debts Recovery Tribunal (Procedure) Rules, 1993 (1993 Rules), the applicant bank or FI has to pay fees for filing such application to DRT under the DRT Act and, similarly, a borrower, aggrieved by an action under Section 13(4) of NPA Act was entitled to prefer an Application to the DRT under Section 17 of NPA." (Emphasis added) "

(ii) In Union Bank of India v. Satyawati Tondon, reported in 2010 (5) LW 193, at Paragraphs 16 to 18 and 27 to 29, held as follows:

"16. The facts of the present case show that even after receipt of notices under Section 13(2) and (4) and order passed under Section 14 of the SARFAESI Act, respondent Nos. 1 and 2 did not bother to pay the outstanding dues. Only a paltry amount of Rs. 50,000/- was paid by respondent No. 1 on 29.10.2007. She did give an undertaking to pay the balance amount in installments but did not honour her commitment. Therefore, the action taken by the appellant for recovery of its dues by issuing notices under Section 13(2) and 13(4) and by filing an application under Section 14 cannot be faulted on any legally permissible ground and, in our view, the Division Bench of the High Court committed serious error by entertaining the writ petition of respondent No. 1.

17. There is another reason why the impugned order should be set aside. If respondent No. 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression 'any person' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are

required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

18. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal,

revision, etc. and the particular legislation contains a detailed mechanism for re-dressal of his grievance. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad AIR 1969 SC 556, Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1-1999-2-L.W. 200 and Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order.

27. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

28. Insofar as this case is concerned, we are convinced that the High Court was not at all justified in injuncting the appellant from taking action in furtherance of notice issued under Section 13(4) of the Act.

29. In the result, the appeal is allowed and the impugned order is set aside. Since the respondent has not appeared to contest the appeal, the costs are made easy."

(iii) In *Saraspathy Sundararaj v. Authorised Officer and Assistant General Manager, State Bank of India*, reported in (2010) 5 LW 560, at Paragraphs 1, 5 to 7, 9 and 13, held as follows:

"The petitioner has filed this writ petition praying for a Writ of Certiorarified Mandamus calling for the records relating to the possession notice dated 16.09.2004 issued by the respondent under the SARFAESI Act and consequently direct the respondent to effect the settlement in accordance with the SBI OTS-SME 2010 Scheme as contained in its letter dated 18.03.2010 and unconditionally restore physical possession of the six rooms taken physical possession by it at No. 29, Sarojini Street, T. Nagar, Chennai - 17 with such damages.

5. At the outset, it is a clear case where the petitioner has come to this Court challenging the possession notice dated 16.09.2004 after a period of six years. The possession notice under Section 13(4) of the SARFAESI Act was issued on 16.09.2004 for which the petitioner has not sent any objection or reply. The possession notice was also published in the newspaper on the same day. Even thereafter, the petitioner has not come forward to make any payment. On 28.09.2004, the petitioner sent a letter requesting the respondent for accepting Rs. 30 lakhs towards full and final settlement, but that was negatived by the bank on 09.10.2004. Thereafter, by letter dated 22.02.2005, she increased the offer to Rs. 35 lakhs, which was also declined by the bank on 01.03.2005. The petitioner further increased the offer to Rs. 36 lakhs by her letter dated 01.03.2005 which was not accepted by the bank. The offer was further increased by the petitioner to Rs. 40 lakhs and thereafter she also deposited Rs. 20 lakhs over a period of time from 12.03.2005 to 23.09.2005 for a period of six months in a no lien account. Thereafter, by letter dated 26.06.2006, the petitioner increased the offer to pay Rs. 43 lakhs in full quit but it was not accepted by the bank. On 04.07.2006, the bank directed the petitioner to increase the offer and immediately she increased it to Rs. 45 lakhs and also offered to close the debt with C.I.T. Nagar Branch and close the personal loan accounts on 09.10.2006. Finally, after a period of one year, on 20.03.2007, she agreed to pay Rs. 44 lakhs towards

all the accounts. This was also ultimately rejected by the bank on 27.09.2007 and directed to make arrangement to liquidate the dues without any further loss of time. The bank also sent a telegram on 22.11.2007 directing the petitioner to close all the accounts. The petitioner has not challenged the orders of rejection of her proposal to pay or deposit the amount in one lumpsum before the competent forum namely Debts Recovery Tribunal. After a period of three years, now the petitioner has taken up the whole issue on the basis of a communication dated 18.03.2010 received from the respondents intimating her about the one time settlement offer introduced by the bank. Even for this, the petitioner would contend that she is willing to take up the offer, but she has not paid any amount towards the scheme, but only sent a letter stating that she is ready to deposit the amount provided all the loan should be closed and documents released to her. At this point of time, when the bank came to the knowledge regarding the sale of the secured assets by the petitioner to her son and created encumbrance, the bank declined to extend the benefits of one time settlement to the petitioner. In the counter, it was brought to the notice of this Court regarding clause 1.7 of the one time settlement scheme introduced by the bank wherein it was stated that fraud, malfeasance and willful default committed by the borrower are not not be eligible for OTS Scheme.

6. It is categorically brought out by the bank that pending the SARFAESI proceedings initiated by the bank, the petitioner, in order to deprive the right of the bank to recover the amount, has clandestinely transferred the secured assets in favour of her son and in that event, the bank has got every right to decline to extend the benefits of One time settlement scheme to the petitioner. Further, the possession notice sent to the petitioner way back in the year 2004, remains unchallenged by her till 2010 by approaching the competent Forum namely Debts Recovery Tribunal. When a specific forum has been created which enables the borrower to challenge the action of the financial institution by filing necessary petition under Section 17, the petitioner is not entitled to invoke the writ jurisdiction of this Court. What could not be achieved by the petitioner by filing a petition before the

appropriate Forum, which is at present barred by period of limitation, could not be permitted to be achieved by extending the jurisdiction conferred to this Court under Article 226 of The Constitution of India. Above all, since the petitioner has violated the terms and conditions of the loan by transferring the property in favour of her son, this Court is not inclined to entertain the petition.

7. In this connection, we are fortified by the decision of the Honourable Supreme Court reported in (United Bank of India v. Satyawati Tondon and others) III (2010) BC 495 (SC) = 2010-5-L.W. 193, wherein in para Nos. 17 and 18, it was held thus:-

"17. ...Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

18. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in

appropriate cases, any Government directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad AIR 1969 SC 556, Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1 and Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order, (underlining added).

9. In the light of the above decision of the

Honourable Supreme Court, the writ petition filed by the petitioner seeking to set aside the possession notice issued to her long back is legally not sustainable. We are of the considered view that this petition has been filed only to drag on the proceedings and to evade repayment of the loan. That be so, the petitioner has no legal right to compel the bank to accept the one time settlement offer made by her.

13. The present case is identical in nature and it is covered by the judgment of the Supreme Court mentioned supra. In this case, the petitioner has violated the condition of mortgage by transferring the secured asset in favour of her son and therefore, as per clause 1.7 of the OTS Scheme offered by the bank, the petitioner has to be excluded from extending the benefits of the scheme which was rightly done by the bank. In any event, without exhausting the alternative remedy, the relief sought for by the petitioner by invoking the discretionary remedy under Article 226 of The Constitution of India cannot be granted."

iv) In Simon's Foot Wear Pvt. Ltd. v. Indian Bank, reported in (2015) 2 MLJ 166, a Hon'ble Division Bench of this court held as follows:

"9.As against the confirmation of sale and issuance of the sale certificate, the writ petitioners did have their remedy of filing an appeal under Section 18 of the SARFAESI Act before the Debts Recovery Appellate Tribunal. The appeal remedy is an effective and efficacious remedy. When such an effective and efficacious remedy is available, this court will decline exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. जयते

10.So far as the challenge made to the order dated 24.06.2013 is concerned, since an appeal remedy is available the writ petitioners ought to have exhausted the appeal remedy before approaching this Court with this writ petition."

10. In the light of the decisions and discussion, we are of the view that the instant writ petition, is not maintainable and accordingly, the same is dismissed, reserving the right of the petitioner to take recourse to the statutory remedy, by raising all grounds available to the petitioner. No Costs. Consequently, connected, Writ Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

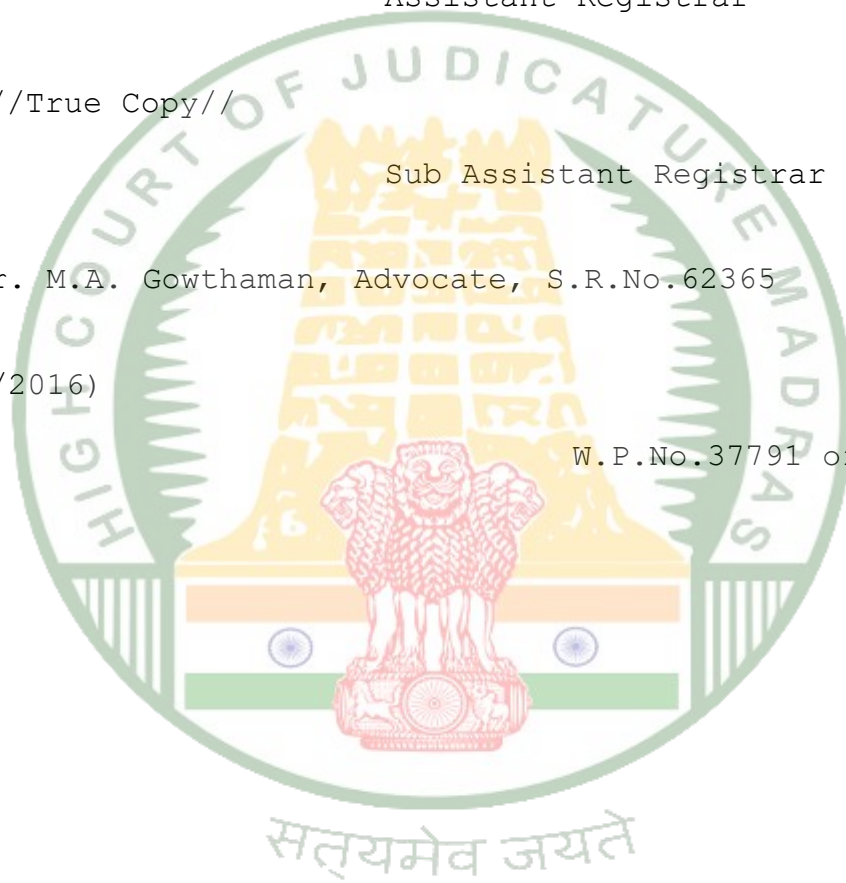
//True Copy//

Sub Assistant Registrar

+1cc to Mr. M.A. Gowthaman, Advocate, S.R.No.62365

skv (CO)
md (14/11/2016)

W.P.No.37791 of 2016



WEB COPY