IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.12.2016

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE N.AUTHINATHAN

W.P. Nos.42116 and 42117 of 2016
and WMP Nos.36039 & 36040 of 2016

M/s.Sipali Drugs,
Rep. by its Proprietor Mr.Rajiah ... Petitioner in both WPs

Vs.

Bank of India,
Asset Recovery Branch at Zonal Office,
Rep. by its Authorized Officer/Chief Manager,
Mr.R.Sridhar, "Star House", 1st Floor,
No.30, Errabalu Street,
Chennai - 600 001. ... Respondent in both WPs

Writ Petitions filed under Article 226 of the Constitution of India, to issue a Writ of certiorari, calling for the records relating to the order passed in Crl.M.P.Nos.6033 and 6034 of 2016 dated 13.05.2016 on the file of the Chief Metropolitan Magistrate, Allikulam at Chennai, quash the same.

For Petitioner : Mr.K.Sathyaraj
for M/s.M.Senthilkumar

COMMON ORDER
[Order of the Court was made by S.MANIKUMAR, J]

As facts and submissions made in both writ petitions are similar, by common order they are disposed of.

2. M/s.Sipali Drugs, represented by its Proprietor, Mr.Rajiah, Chennai has availed cash credit loan of Rs.2,43,38,000/-. Company is involved in manufacturing medicine and also a supplier of antibiotic capsules. There was misunderstanding in the company and hence, the partnership was dissolved. During 2013-14 company obtained Government Orders for supply of medicine. The petitioner approached the bank for financial assistance. A sum of Rs.2,25,00,000/- was sanctioned as cash credit facility. Son of the Proprietor, stood as a guarantor, by furnishing security of the property situated at No.105 and 109, Ellaya Mudali Street, Old Washermanpet, Chennai - 600 021 and Bank also sanctioned a term loan of Rs.58,78,000/-. According to the petitioner,

Company could not pay the dues regularly. There was some delay in repayment. On 01.06.2015, loan account was declared as NPA. Notice under Section 13(2) dated 30.06.2015 was issued. Possession notice under Section 13(4) dated 14.09.2015 was also issued.

3. According to the petitioner, bank issued a notification dated 07.12.2015 bringing the property for auction on 20.01.2016. The petitioner has stated that 'A' Schedule Property is worth Rs.301 Lakhs and 'B' Schedule property is worth Rs.190 Lakhs, respectively.

4. The petitioner has further contended that bank has filed O.A.No.218 of 2016 before the Debts Recovery Tribunal - II, Chennai, seeking for recovery of Rs.3,26,37,849.75p. Pending disposal of the abovesaid Original Application, bank resorted to hold another auction on 20.01.2016. The petitioner has further contended that the auction scheduled on 20.01.2016 stood cancelled. There were settlement talks. S.A.No.4 of 2016 filed seeking declaration of e-auction notice dated 07.12.2015 was adjourned. In the meanwhile, the bank issued notice dated 20.07.2016 fixing auction on 31.08.2016.

5. When the matter stood thus, bank has taken out two applications viz., Crl.M.P.Nos.6033 and 6034 of 2016, respectively, before the Chief Metropolitan Magistrate, Chennai, under Section 14 of the SARFAESI Act, enabling them to take possession of the secured assets, which are as follows:

Schedule of Property [Crl.M.P.No.6033 of 2016]
(Suthakar - R3's Property)

Industrial land to an extent of 4443 sq.ft. with 7173 sq.ft. of building consisting of Ground floor and First floor along with Shed constructed thereon at Old No.34, New No.109, Ellaiya Mudali Street, Old Washermenpet, Chennai - 600 021 comprised in S.No.3740 part, 3741 part, 3741/1 part, Block No.56 within the Sub-Registration district of Royapuram and Registration District of North Chennai, belonging to Mr.R.Suthakar and bounded on the
North by : Land and Pharma industrial building M/s.Sipali Pharma Industry
South by: Land and Building / Thulukkanam Property
East by: Land and Building / P.Subramanian Property and
West by : Ellaiya Mudali Street.

Schedule of Property [Crl.M.P.No.6034 of 2016]
(Rajiah - R2's Property)

Residential land to an extent of 2874 sq.ft. with 2874 sq.ft. of building consisting of Ground and First floor constructed thereon at New No.105/1, Old No.30-32, Ellaiah Mudali Street, Old Washermenpet, Chennai-21 comprised in S.No.3740 part, 3741 part, 3741/1 part in Tondiarpet Village, Fort-Tondiarpet Taluk within the Sub-Registration district of Royapuram and Registration District of North Chennai, belonging to Mr.Rajiah and bounded on the

North by : Property of Laqlitha Selvaraj & VeeraRagavan Property - Land and building & vacant house plot.

South by: Properties of P.Subramanian,New No.105, Old 30, 31 & 32 land & building

East by: Properties of P.Subramanian Land and Building and

West by : Ellaiya Mudali Street

6. It is the further contention of the petitioner that when arrangements were made for settlement of the outstanding amount, orders under Section 14 of the abovesaid Act, have been passed appointing an Advocate Commissioner to take possession of the subject properties offered as security, if necessary with the assistance of the police.

7. On the above facts, though Mr.K.Sathyaraj, learned counsel for the petitioner contended that the company is taking steps to settle the outstanding amount, from the material on record, we could not gather any information as to whether the petitioner had made any payments.

8. Material on record further discloses that earlier when the petitioner filed W.P.No.30180 of 2016, challenging the sale notice dated 20.07.2016, this Court has granted interim stay of the operation of the sale notice on condition that the petitioner should deposit a sum of Rs.50 Lakhs. Inasmuch as the conditional order has not been complied with, writ petition has also been dismissed on 28.09.2016. After satisfying with the factors to be taken note of, the learned Chief Metropolitan Magistrate, Allikulam at Chennai has passed orders in C.M.P.Nos.6033 & 6034 of 2016 dated 13.05.2016, respectively.

9. In KANAIYALAL LALCHAND SACHDEV vs. STATE OF MAHARASHTRA [(2011) 2 SCC 782], the Hon'ble Supreme Court held that an action under Section 14 of SARFAESI Act constitutes an action after the stage of 13(4) and therefore, the same would fall within the ambit of Section 17(1) of SARFAESI Act. It has also been held that SARFAESI Act contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the Debt Recovery Tribunal. Its a case arising under Section 14 of SARFAESI Act.

10. In the light of the said decision, it can be safely held that the impugned order would fall within the ambit of Section 17(1) of the SARFAESI Act. Any person including borrower aggrieved by any measure taken by the secured creditor (bank) can make an application under Section 17(1) of

the SARFAESI Act against the action taken by the Bank under Section 13(4) of the SARFAESI Act to Debts Recovery Tribunal. Section 17(3) of the SARFAESI Act reads thus: "If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order:(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and (b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section(1), as the case may be; and (c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13." A careful reading of Section 17(3) of the SARFAESI Act would clearly reveal that the Debts Recovery Tribunal will have jurisdiction to consider the representation or objections raised by the aggrieved person. If it finds that the measures taken by the secured creditors are not correct, it can order restoration and pass suitable orders in relation to the action taken by the secured creditors in terms of Section 17(3) of the SARFAESI Act.

11. Admittedly, the petitioner has chosen to approach the Debts Recovery Tribunal to challenge the auction notice dated 07.12.2015 by way of S.A.No.4 of 2016. However, in so far as the impugned order is concerned, he has approached this Court without exhausting the efficacious and alternative remedy provided under the SARFAESI Act. The issue raised by the petitioner has to be agitated before the Debts Recovery Tribunal, in the light of the dictum laid down by the Supreme Court in KANAIYALAL LALCHAND SACHDEV vs. STATE OF MAHARASHTRA [(2011) 2 SCC 782]. The petitioner cannot be permitted to bypass the statutory remedy available under the SARFAESI Act and take recourse to the proceedings under Article 226 of the Constitution of India. As the petitioner has the opportunity to work out its remedy before the Debts Recovery Tribunal, we are not inclined to entertain the Writ Petition.

12. Hence for the foregoing reasons, both the writ petitions are dismissed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

The Authorized Officer/Chief Manager,
Bank of India,
Asset Recovery Branch at Zonal Office,
(Mr.R.Sridhar),
"Star House", 1st Floor,
No.30, Errabalu Street,
Chennai - 600 001.

+1cc to Mr.M.Senthil Kumar, Advocate, S.R.No.70718

W.P. Nos.42116 and 42117 of 2016
and
WMP Nos.36039 & 36040 of 2016

NRJK(CO)
CA(26/12/2016)