IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.12.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

W.P.Nos.44243 to 44248 of 2016
and
W.M.P.Nos.38088 to 38093 of 2016

V.Ellappan	..	Petitioner in WP.44243/16
V.Durga	..	Petitioner in WP.44244/16
P.Maheswari	..	Petitioner in WP.44245/16
G.Nagalakshmi	..	Petitioner in WP.44246/16
N.Amudha	..	Petitioner in WP.44247/16
R.Balasubramanian	..	Petitioner in WP.44248/16

versus

1. The Federal Bank Limited,
Rep. by its Branch Manager,
Salem Branch,
20, Ramakrishna Road,
Salem - 636 007.

2. The Authorized Officer,
Federal Bank Ltd.,
Salem Branch,
20, Ramakrishna Road,
Salem - 636 007.

3. The District Collector cum District Magistrate,
Namakkal District,
District Collectorate,
Namakkal.

4. The Revenue Divisional Officer,
Namakkal,
Revenue Divisional Office,
Namakkal.

5. The Tahsildar,
Namakkal Taluk,
Namakkal District.

6. The Superintendent of Police,
Namakkal District,
District Police Office,
Namakkal.

7. The Deputy Superintendent of Police,
Namakkal Sub-Division,
Namakkal District. ..R1 to R7 in All WPs

G.Gopalammal ..8th Respondent in WP.Nos.44243, 44245 to 44248/16

N.Rajagopal ..8th Respondent in WP.44244/16

WP.No.44243/16:

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of declaration, to declare that the respondents 1 and 2 are not entitled / empowered to take possession of the premises viz., a residential portion measuring 700 sq.ft., situated in the First Floor of the property bearing Door No.1/231-A, 3rd Street, Sivaji Ganesan Nagar, Kosavampatty, Namakkal 637 002, in which the petitioner is in occupation as lessee/tenant by invoking the provisions of SARFAESI Act through the respondents 3 to 7.

WP.No.44244/16: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of declaration, to declare that the respondents 1 and 2 are not entitled/empowered to take possession of the premises viz. a residential portion measuring 700 Sq.ft. situated in the First Floor of the property bearing Door No.1/231 3rd Street Sivaji Ganesan Nagar Kosavampatty Namakkal 637 002 in which the petitioner is in occupation as lessee/tenant by invoking the provisions of SARFAESI act through the respondents 3 to 7.

WP.44245/16: Writ Petition filed under Article 226 of the Constitution of India, to declare that the respondents 1 and 2 are not entitled/empowered to take possession of the premises viz. a residential portion measuring 100 Sq.ft. situated in the Ground Floor of the property bearing Door No.1/231-A 3rd Street Sivaji Ganesan Nagar Kosavampatty Namakkal 637 002 in which the petitioner is in occupation as lessee/tenant by invoking the provisions of SARFAESI act through the respondents 3 to 7.

WP.44246/16: Writ Petition filed under Article 226 of the Constitution of India to declare that the respondents 1 and 2 are not entitled/empowered to take possession of the premises viz. a residential portion measuring 1000 Sq.ft. situated in the Ground Floor of the property bearing Door No.1/231-A 3rd Street Sivaji Ganesan Nagar Kosavampatty Namakkal 637 002 in which the petitioner is in occupation as lessee/tenant by invoking the provisions of SARFAESI act through the respondents 3 to 7.

WP.44247/16: Writ Petition filed under Article 226 of the Constitution of India to declare that the respondents 1 and 2 are not entitled/empowered to take possession of the premises viz. a residential portion measuring 200 Sq.ft. situated in the Ground Floor of the property bearing Door No.1/231-A 3rd Street Sivaji Ganesan Nagar Kosavampatty Namakkal 637 002 in which the petitioner is in occupation as lessee/tenant by invoking the provisions of SARFAESI act through the respondents 3 to 7.

WP.44248/16: Writ Petition filed under Article 226 of the Constitution of India to declare that the respondents 1 and 2 are not entitled/empowered to take possession of the premises viz. a residential portion measuring 100 Sq.ft. situated in the Ground Floor of the property bearing Door No.1/231-A 3rd Street Sivaji Ganesan Nagar Kosavampatty Namakkal 637 002 in which the petitioner is in occupation as lessee/tenant by invoking the provisions of SARFAESI act through the respondents 3 to 7.

For Petitioner : Mr.K.Karthik Jagannath
in all W.Ps.

For Respondents : Mr.T.M.Pappiah (for R3 to R7)
in all W.ps. Special Government Pleader

COMMON ORDER

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

Common facts averred in the writ petitions are that the writ petitioners are tenants in respect of properties, offered as secured asset and that therefore, they should not be dispossessed.

2. Claiming themselves to be tenants under the borrower, and further contending inter alia that the District Collector cum District Magistrate, Namakkal, has passed an order under Section 14 of the Act, without notice to the writ petitioners and on the strength of the said order, petitioners/tenants would be dispossessed or their possession interfered with, writ of declaration to declare that the respondents 1 and 2 are not entitled / empowered to take possession of the premises, viz., a residential portion, bearing Door No.1/231-A, 3rd Street, Sivaji Ganesan Nagar, Kosavampatty, Namakkal 637 002, in which the petitioners are in occupation as lessee/tenant by invoking the provisions of SARFAESI Act through the respondents 3 to 7, is sought for.

3. Further contention of the learned counsel for the petitioners is that despite a representation being given to the District Collector, that a tenant in possession of the subject property mortgaged with 1st respondent bank cannot be evicted, he has not considered the representation. Reliance has also been made on the decision of the Supreme Court in Vishal N.Kalsaria Vs. Bank of India and others, reported in AIR 2016 Supreme Court 530.

4. Heard the learned counsel for the petitioners and perused the materials available on record.

5. Section 14 of the SARFAESI Act, 2002 sets out a procedure. If the petitioners are aggrieved over of any of the measures taken by the bank under Section 13(4) of the SARFAESI Act, 2002, he could always file an appeal under Section 17 of the Act. Decision in Vishal N.Kalsaria's case, is issued when there was no statutory provision enabling tenant to assail the correctness of the bank by invoking the provisions under the SARFAESI Act.

6. First of all, mandamus cannot be issued to set at naught a proceeding, issued under a statute. Secondly, under Section 17(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, 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: PROVIDED that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

7. By Act 44 of 2016, with effect from 01.09.2016, Parliament has inserted Section 4-A in Section 17 of the Act and it reads as follows:

> (i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purpose of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy, -
>
> (a) has expired or stood determined; or
>
> (b) is contrary to Section 65 A of the Transfer of Property Act, 1882 (4 of 1882); or
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> (c) is contrary to terms of mortgage; or
>
> (d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of Section 13 of the Act; and
>
> (ii). the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause

(i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act."

8. In the light of the recent amendment, by way of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 (44 of 2016), an effective and alternative remedy is provided to a person, who claims to be a tenant or has lease hold rights, on the secured asset and that if any application is filed, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties, in relation to such claim shall, for the purpose of enforcement of security interest, has jurisdiction to examine whether the lease or tenancy and other parameters, mentioned in Section 4 A of the Amended Act and to pass such orders, as deems fit, in accordance with the provisions of Securitisation and Reconstructions of Financial Assets and Enforcement of Security Interest Act, 2002, taking note of the amendment.

9. Repeatedly, the Hon'ble Supreme Court has held that when there is an efficacious and alternate remedy under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act or Securitisation And Reconstructions of Financial Assets Act, 2002, as the case may be, a writ petition is not maintainable. 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 (SC), the Hon'ble Apex Court has 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.
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> 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, the Court 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.

... 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."

10. Exercise of writ jurisdiction is extraordinary, only in the absence of alternate and efficacious remedy. If there is any attempt to forcibly evict the petitioners, they can always resort to the statutory remedy, as per the amended provision. In the light of the above, there cannot be any declaration, as prayed for. Writ Petitions are permitted to approach the tribunal within a period of three weeks from the date of receipt of the copy of this order, to take recourse, as provided for, under SARFAESI Act, 2002, and the amended Act 44/2016, by raising all the grounds available. No Costs. Consequently, connected, Miscellaneous Petitions are closed.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

To
1. The Branch Manager,
Federal Bank Limited,
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Salem - 636 007.

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Namakkal District,
District Police Office,
Namakkal.

7. The Deputy Superintendent of Police,
Namakkal Sub-Division,
Namakkal District.

+1 cc to mr.K.Karthick Jayanath, Advocate,sr.76747

+1 cc to Govt.Pleader,sr.76399.

gj(co)
krd 23/1

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