IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.02.2016

CORAM:

THE HON'BLE MR. JUSTICE SATISH K. AGNIHOTRI
and
THE HON'BLE MR. JUSTICE M. VENUGOPAL

W.P. No.5870 of 2016 and W.M.P. No.5233 of 2016

R. Velusamy ... Petitioner

Vs.

The Chief Manager & The Authorised Officer
Asset Recovery Department
Bank of India
III Floor, STAR House
324, Oppanakara Street
Coimbatore 641 001 ... Respondent

Writ Petition filed under Article 226 of the Constitution of India seeking a writ of certiorarified mandamus calling for the records pertaining to the e-auction sale notice dated 12.01.2016 issued by the respondent vide Ref. No.ZO/CBE/ARB/SARFESI/2015-16/29 issued under Rules 8 & 9 of the Security Interest (Enforcement) Rules, 2002, in respect of the properties listed in the auction sale notice and quash the same as illegal, arbitrary and against the principles of natural justice.

For petitioner Mr. R. Lakshmi Narasimhan

ORDER

(delivered by SATISH K. AGNIHOTRI, J.)

Challenge in this writ petition is to the notice of sale to the borrower dated 12 January 2016 issued under Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002, whereunder, the auction is proposed to be held on 25 February 2016. However, by a subsequent communication dated 20 January 2016, the bank has postponed the date of e-auction as 29 February 2016.

2 Indisputably, the petitioner had availed credit facility from the respondent bank. In default to make the repayment of loan, a demand notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (for brevity “the SARFAESI Act”) was issued on 02 July 2015 calling upon the petitioner to make the payment of outstanding dues within 60 days from the date of the said notice, wherein, it was observed that in the event of failure, the secured creditor shall be

entitled to exercise all or any of the rights under the SARFAESI Act.

3 On receipt of the said notice, the petitioner has two options, viz., either to make payment of the outstanding amount within 60 days or make a representation under Section 13(3-A) of the SARFAESI Act, pointing out the defects, if any, in the notice or proceedings or other hardships/reasons, which made him not repay the amount due. It is not evident from the pleadings that any attempt was made on the part of the petitioner to make a representation. After the period of 60 days was over, the secured creditor proceeded to take possession of the secured asset by issuing possession notice on 04 September 2015.

4 According to the petitioner, he had preferred an application under Section 17 of the SARFAESI Act before the Debts Recovery Tribunal, Madurai in S.A. No. 382 of 2015. During pendency of the aforesaid application, the impugned sale notice was issued.

5 The primordial contention of the learned counsel for the petitioner is that the secured creditor is not entitled to enforce security interest under the provisions of the SARFAESI Act, in case, secured interest is created in agricultural land as a part under the provisions of Section 31(i), ibid.

6 We have examined the said contention as well as all facts of the case from all angles.

7 Firstly, it is to be seen whether the land in question was an agricultural land, when mortgage was made with the respondent bank and secondly, whether the land in question which was mortgaged, was converted subsequently as an agricultural land. The issue that the secured asset is an agricultural land ought to have been raised at the first instance on the heels of issuance of notice under Section 13(2) of the SARFAESI Act. But, the petitioner has raised the issue that the secured asset is an agricultural land for the first time before us. Even otherwise, there are disputed question of facts qua the nature of the land as posited by the petitioner in the pleadings. In such view of the matter, it is not for the High Court to examine the disputed facts and come to a particular conclusion. Rather, the Debts Recovery Tribunal is the proper forum to examine the pleadings and materials produced by the petitioner to establish his case.

8 The petitioner's second contention is that issuance of possession notice is not one of the measures which is assailable before the Debts Recovery Tribunal under Section 17 (1) of the SARFAESI Act. This contention is misplaced and noticed to be rejected, for, issuance of possession notice is a subsequent act to the taking over of constructive possession of the secured asset under Section 13(4). It is a measure as contemplated under Section 13(4), ibid and as such, appealable

under Section 17(1), ibid. The petitioner is quite aware of the maintainability of an appeal and as such, has preferred an appeal before the Debts Recovery Tribunal under Section 17(1) of the SARFAESI Act. We cannot be oblivious of the observations made by the Supreme Court in a catena of decisions in respect of interference by High Courts in proceedings under the SARFAESI Act.

9 The Supreme Court, in United Bank of India Vs. Satyawati Tondon and others[1], referring to with approval, various judicial pronouncements made in Modern Industries Vs. Sail[2], Raj Kumar Shivhare Vs. Directorate of Enforcement[3], Industrial Investment Bank of India Ltd. Vs. Biswanath Jhunjhunwala[4], City and Industrial Development Corpn. Vs. Dosu Aardeshir Bhiwandiwala[5], CCT Vs. Indian Explosives Ltd.[6], Mardia Chemicals Ltd. Vs. Union of India[7], Harbanslal Sahnia Vs. Indian Oil Corpn. Ltd.[8], Punjab National Bank Vs. O.C.Krishnan[9], Whirlpool Corpn. Vs. Registrar of Trade Marks[10], SBI Vs. Indexport Registered[11], CCE Vs. Dunlop India Ltd.[12], Titaghur Paper Mills Co. Ltd. Vs. State of Orissa[13], Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad[14], Bank of Bihar Ltd. Vs. Dr.Damodar Prasad[15], Thansingh Nathmal Vs. Supdt. of Taxes[16], Secy. Of State Vs. Mask & Co.[17], Attorney-General of Trinidad and Tobago Vs. Gordon Grant & Co. Ltd.[18] and Neville Vs. London Express Newspapers Ltd.[19], observed as under :

> "12. Section 13 of the SARFAESI Act contains detailed mechanism for enforcement of security interest. Sub-section (1) thereof lays down that notwithstanding anything contained in Sections 69 or 69-A of the Transfer of Property Act, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act. Sub-section (2) of Section 13 enumerates first of many steps needed to be taken

1 (2010) 8 SCC 110
2 (2010) 5 SCC 44
3 (2010) 4 SCC 772
4 (2009) 9 SCC 478
5 (2009) 1 SCC 168
6 (2008) 3 SCC 688
7 (2004) 4 SCC 311
8 (2003) 2 SCC 107.
9 (2001) 6 SCC 569
10 (1998) 8 SCC 1
11 (1992) 3 SCC 159
12 (1985) 1 SCC 260.
13 (1983) 2 SCC 433
14 AIR 1969 SC 556
15 AIR 1969 SC 297
16 AIR 1964 SC 1419
17 (1939-40) 67 IA 222.
18 1935 AC 532 (PC)
19 1919 AC 368 ; (1918-19) All ER Rep 61 (HL)

by the secured creditor for enforcement of security interest. This sub-section provides that if a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt and his account in respect of such debt is classified as non-performing asset, then the secured creditor may require the borrower by notice in writing to discharge his liabilities within sixty days from the date of the notice with an indication that if he fails to do so, the secured creditor shall be entitled to exercise all or any of its rights in terms of Section 13(4).

13. Sub-section (3) of Section 13 lays down that notice issued under Section 13(2) shall contain details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank or financial institution. Sub-section (3-A) of Section 13 lays down that the borrower may make a representation in response to the notice issued under Section 13(2) and challenge the classification of his account as non-performing asset as also the quantum of amount specified in the notice. If the bank or financial institution comes to the conclusion that the representation/objection of the borrower is not acceptable, then reasons for non-acceptance are required to be communicated within one week.

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55. 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 the 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.”

10 That apart, in Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Ltd. and Others[20], the precise issue, i.e., whether on issuance of possession notice under sub-rules 1 and 2 Rule 8 of the Security Interest (Enforcement) Rules, an application before the Debts Recovery Tribunal under Section 17(1) of the SARFAESI Act is maintainable, came up for consideration. It was observed that the borrower is entitled to file an application before the Debts Recovery Tribunal, having jurisdiction in the matter for restoration of possession, in case, he is dispossessed of the

20 (2014) 6 SCC 1

secured asset, illegally.

11 The other point urged by the learned counsel for the petitioner is that the quantum of dues is meagre. Even this point is sans merit, for, the quantum of default cannot be a criterion to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India.

For all the reasons mentioned hereinabove, the writ petition fails and is accordingly dismissed. No costs. Connected Miscellaneous Petition is closed.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

cad

To

The Chief Manager & The Authorised Officer
Asset Recovery Department
Bank of India
III Floor, STAR House
324, Oppanakara Street
Coimbatore 641 001

1 cc to M/s.V. Selvaperumal, Advocate, Sr. 10299

W.P. No.5870 of 2016

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