IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.03.2016

CORAM:

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

W.P. No.7360 of 2016 and W.M.P. No.6568 of 2016

R. Tamilarasa ... Petitioner

vs.

1 The Kotak Mahindra Bank Ltd.
27-BKC, C-27, G-Block
Bandra, Kurla Compex
Bandra (E), Mumbai

2 The Authorised Officer
Kotak Mahindra Bank
Salem

3 The Senior Manager
Kotak Mahindra Bank Ltd.
1054-Avinasi Road
Coimbatore

4 The Joint Director
Reserve Bank of India
Chennai ... Respondents

Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of mandamus forbearing the first and second respondents from proceeding under Section 13(2) of the SARFAESI Act.

For petitioner: Mr. S. Raja
for M/s. S. Muthukrishnan

ORDER
(delivered by SATISH K. AGNIHOTRI, J.)

Heard Mr. S. Raja, learned counsel appearing for the petitioner. Notice to the respondents is dispensed with at this stage as no adverse order is passed against them in this writ petition. Thus, with the consent of the learned counsel appearing for the petitioner, this writ petition is taken up for final disposal.

2 This writ petition is filed seeking a writ of mandamus forbearing respondents 1 and 2 from proceeding further pursuant to the notice dated 18 December 2015 issued by the second respondent, viz., Kotak Mahindra Bank Ltd., under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act").

3 The petitioner availed a term loan of Rs.1 crore from the respondent bank. Due to his default in making repayment of the said loan, the second respondent issued a demand notice under Section 13(2) of the SARFAESI Act on 18 December 2015. Pursuant thereto, the petitioner has straightaway come up with the instant writ petition seeking the aforestated relief.

4 The main plank of contention of the learned counsel for the petitioner is that the secured asset, being an agricultural land, as per Section 31(i) of the SARFAESI Act, the provisions of the said Act will not apply to the petitioner's case and as such, the issuance of notice under Section 13(2), ibid, is without authority of law.

5 At the threshold, it is pertinent to point out that on receipt of the demand notice, the petitioner 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 other hardships/reasons, which made him not repay the amount due or his stand that the secured asset, being an agricultural land, is exempted from the proceedings under the SARFAESI Act. It is not evident from the pleadings that any attempt was made on the part of the petitioner to make a representation, as aforestated. Albeit the petitioner has averred in his affidavit that he has made a representation to the secured creditor seeking some time to settle the loan, a copy of the same is not filed in the typed set of papers.

6 Even otherwise, the Supreme Court, examining the provisions of Section 13 of the SARFAESI Act and taking a strong view of the adjudication of matters under the said Act by High Courts, held 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

1 (2010) 8 SCC 110
2 (2010) 5 SCC 44
3 (2010) 4 SCC 772
4 (2009) 9 SCC 478

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], 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 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).

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)

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."

7 In sync with the aforestated observation, in Kanaiyalal Lalchand Sachdev and others Vs. State of Maharashtra and others[20], the Supreme Court held as under :

"25. In the instant case, apart from the fact that admittedly certain disputed questions of fact viz. non-receipt of notice under Section 13(2) of the Act, non-communication of the order of the Chief Judicial Magistrate, etc. are involved, an efficacious statutory remedy of appeal under Section 17 of the Act was available to the appellants, who ultimately availed of the same. Therefore, having regard to the facts obtaining in the case, the High Court was fully justified in declining to exercise its jurisdiction under Articles 226 and 227 of the Constitution."

8 Thus, in view of the aforestated settled legal position, we are not inclined to interfere in the matter at this

20 (2011) 2 SCC 782

stage and it is for the petitioner, to bring to the notice of the bank, the aforestated facts, by making an application under the provisions of Section 13(3-A) of the Act, if so advised.

The writ petition stands disposed of with the aforestated observation. No costs. Consequently, connected W.M.P. is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

mmi/cad

To

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+ 1 cc to Mr. M. Sridhar, Advocate Sr.19310

W.P. No.7360 of 2016

VGI(CO)
Eu 22.04.16