BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 20.04.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE S.S.SUNDAR

Writ Petition(MD)No.2929 of 2011
and
M.P(MD)Nos.1 and 2 of 2011

S.Murugesan ... Petitioner

Vs.

The Authorised Officer,
Indian Bank, Regional Office,
Jenny Plaza, Trichy. ... Respondent

Prayer: Writ Petition is filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari to call for the records relating to the impugned tender-cum-auction sale notice issued by the respondent under Rule 6(2) & 8(6) of the Security Interest (Enforcement) Rules, 2002 under SARFAESI Act, 2002 dated 10.02.2011 as published in the "Daily Thanthi" insofar as petitioner concern S.No.2 of impugned notice, fixing the auction sale on 15.03.2011 and quash the same.

For Petitioner : Mr.B.Jameel Arasu
For Respondent : Mr.S.Rengasamy

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

Borrower has sought for a Writ of Certiorari to call for the records relating to the impugned tender-cum-auction sale notice issued by the respondent under Rule 6(2) & 8(6) of the Security Interest (Enforcement) Rules, 2002 under SARFAESI Act, 2002 dated 10.02.2011 as published in the "Daily Thanthi" insofar as petitioner concern S.No.2 of impugned notice, fixing the auction sale on 15.03.2011 and quash the same.

2.Record of proceedings shows that on 14.03.2011, while ordering notice of motion returnable by twelve weeks, this Court has granted interim stay on condition that the petitioner has to deposit a sum of Rs.3,00,000/-(Rupees Three Lakhs only), with the respondent Bank, within a period of twelve weeks, from the date of passing of the order, failing which, the order of interim stay would stand automatically vacated.

3.Mr.B.Jameel Arasu, learned counsel for the petitioner submitted that the interim order has been complied with.

4.However, Mr.S.Rangasamy, learned counsel for the Authorised Officer, Indian Bank, Regional Office, Trichy, submitted that writ against auction notice is not maintainable and that the petitioner has to avail the remedy under the SARFAESI Act. Added further, he submitted that the auction sale fixed on 15.03.2011 has already expired and thus, the writ petition has become infructuous.

5.The question as to whether a writ petition is maintainable against an auction notice issued under Rules 6(2) & 8(6) of the Security Interest (Enforcement) Rules, 2002 read with Section 13(2) of the SARFAESI Act, 2002, is no longer *res integra*.

6.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

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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)

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).

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.

44.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.

45.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.

46.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.

47. In Thansingh Nathmal v. Superintendent of Taxes (1964) 6 SCR 654, the Constitution Bench considered the question whether the High Court of Assam should have entertained the writ petition filed by the appellant under Article 226 of the Constitution questioning the order passed by the Commissioner of Taxes under the Assam Sales Tax Act, 1947. While dismissing the appeal, the Court observed as under:

"7.........The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self- imposed limitations. Resort that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

7.Consequently, taking a strong view of the adjudication by the High Court, the Supreme Court observed as under :

"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."

8.As rightly contended by the learned counsel for the respondent, auction fixed on 15.03.2011 has already expired, writ petition has become infructuous. Accordingly, the Writ Petition is dismissed as infructuous. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar (Records)

/True Copy/

Sub Assistant Registrar

To

The Authorised Officer,
Indian Bank,
Regional Office,
Jenny Plaza,
Trichy.

+ 1 CC TO M/S.S.RENGASAMY, ADVOCATE IN SR NO. 22652

AKV
TE : 17/05/2016 : 6P/3C

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and
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