

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24/11/2017

C O R A M

THE HON'BLE Mr.JUSTICE S.MANIKUMAR
AND
THE HON'BLE Mr.JUSTICE R.SURESH KUMAR

Writ Petition No.9162 of 2017

M/s. Thirumalai Tile House
a Partnership Firm
rep. By its Partner
Mr.A.palanisamy
Coimbatore.

... Petitioner

Vs

The Lakshmi Vilas Bank Ltd
rep. By its Authorised officer
Ramanathapuram Branch
1678 Ground Floor
Trichy Road
Ramanathapuram
Coimbatore 641 045.

... Respondent

Petition filed under Article 226 of the Constitution of India
praying for the issuance of a writ of certiorari to call for the records
of the respondent Bank with respect to the sale notice dated
27/2/2017 under which the property was purchased on 22/3/2017 and
quash the same, as being illegal, prejudicial and violative of the

For petitioner	...	Ms.Ananda Gomathy
For respondent	...	Mr.A.V.Radhakrishnan for R.1.

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ORDER

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

M/s. Thirumalai Tile House, a Partnership firm, represented by its partner, A.Palanisamy, Coimbatore, has sought for a writ of certiorari, to quash the sale notice, dated 27/2/2017, and the consequential sale, on 22/3/2017, in which Lakshmi Vilas Bank Limited, Coimbatore, has purchased the property mortgaged for securing loan.

2. Material on record discloses that while securing loan, commercial land and building, situated at S.No.51/1B, Saravanampatty Village, Door No.202-D, Sathymain Road, Saravanampatty Post, Coimbatore, has been valued at Rs.930.10 lakhs. As there was default, on 29/5/2016, loan has been classified as, Non-Performing Asset. Notice, under Section 13 (2) of the SARFAESI Act, dated 9/6/2016, has been issued, calling upon the writ petitioner and others, to pay an aggregate sum of Rs.5,45,55,497.95,

as on 31/5/2016, within sixty days, from the date of notice. Thereafter, Lakshmi Vilas Bank Limited, issued possession notice, dated 18/8/2016, under Section 13 (4) of the Act. Possession notice, is stated to have been pasted in the conspicuous place of the mortgaged property. Public notice was also given in English and vernacular newspapers.

3. Thereafter, Bank has valued the mortgaged property, through the panel valuer. Market value of the property has been fixed at Rs.7,91,52,000/-, distress value as Rs.6,33,22,000/-, and the guidelines value at Rs.6,52,20,000/-. Bank has issued e-auction sale notice, dated 31/8/2016, fixing the date of auction, on 7/10/2016. Being aggrieved by the sale notice, petitioner has filed S.A.No.192 of 2016 and stay petition, before the Debts Recovery Tribunal, Coimbatore.

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4. There was no bidder, auction fixed on 7/10/2016, did not take place. Subsequently, Bank has issued another sale notice, dated 15/11/2016, fixing the auction, on 20/12/2016. Upset price was fixed at Rs.7,91,52,000/-. Here again, there was no bidder and

<http://www.judis.nic.in> therefore, auction as scheduled, did not take place. Thereafter, third

auction notice, dated 12/1/2017, was issued, fixing the auction, on 2/2/2017. Upset price was fixed at Rs.7,12,50,000/-. There was no bidder and auction did not take place. On 4/2/2017, there was another sale notice, fixing the auction, on 23/2/2017. It is the submission of the learned counsel for the Bank that the upset price for the said auction was fixed as 6,41,25,000/-. Auction did not take place. Thereafter, the auction notice, dated 27/2/2017, has been issued for bring the property for auction, on 22/3/2017. Upset price was fixed as Rs.6,41,21,000/-. Bank through its Officer submitted its offer, by bidding for a sum of Rs.6,41,30,000/-. Sale has concluded.

5. By inviting the attention of this Court, to the valuation of the subject property, Ms.Ananda Gomathy, learned counsel for the petitioner submitted that by grossly undervaluing the property, Bank has purchased the property and therefore, both the sale notice and sale, have to be set aside.

6. By inviting the attention to Section 13 (5 - A) of the SARFAESI Act, 2002, learned counsel for the petitioner submitted that when statute contemplates bidding, secured creditor, cannot

<http://www.judis.nic.in> purchase a mortgaged property, except going through the process of

public auction. According to her, sale by way of submission of tender is not envisaged, in Section 13 (5-A) of the SARFAESI Act, 2002 and therefore, the sale has to be set aside.

7. Taking this Court to Section 9 of the Banking Regulation Act, 1949, learned counsel for the petitioner further submitted that no Banking Company shall hold any immovable property, howsoever acquired, except such as is required for its own use, required such as is required for its own use, for any period exceeding seven years from the acquisition thereof or from the commencement of this Act.

8. Bank can retain the property, at the most for seven years and thereafter, would sell the property, to a higher value, prejudicial to the interest of the borrower. She further submitted that the subject property, cannot be acquired for the use of Bank, as it is a Commercial land and building, situated at S.No.51/1B, Saravanampatty Village, Door No.202-D, Sathymain Road, Saravanampatty Post, Coimbatore.

9. Referring to Order 21 Rule 7 of the Code of Civil Procedure,

<http://www.judis.nic.in> learned counsel for the petitioner submitted that the secured creditor

purchasing the property, require to take permission of the Court. Learned counsel for the petitioner further submitted that when there are no procedural safeguards, provided for, in SARFAESI Act, 2002, and when the Bank itself choses to purchase the mortgaged property, at a low price, gradually reducing from one auction to another, borrower has no other remedy, except to approach this Hon'ble Court, by way of a writ petition, under Article 226 of the Constitution of India.

10. Chief Manager, Ramanathapuram Branch, Lakshmi Vilas Bank Limited has filed a detailed counter affidavit, wherein, he has set out the details of the loan availed, non-payment, classification as Non-Performing Asset and the sale periodically notified, and concluded.

11. On the basis of the averments in the counter affidavit, Mr.A.V.Radhakrishnan, learned counsel for the Bank submitted that Section 13 (5-A to 5-C) of the SARFAESI Act, 2002, has been inserted by way of Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 (1 of 2013) and came into effect by S.O.171 (E), dated 15/1/2013. According to him, as per Section 13 (5-

A) of the SARFAESI Act, 2002, where the sale of immovable property

for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any office of the secured creditor, if so, authorised by the secured creditor on this behalf, to bid for the immovable property, on behalf of the secured creditor, at any subsequent sale. He further submitted that though Bank had fixed the upset price as 7,91,52,000/- at the time when it was brought for auction, for the first time, there was no bidder. In the subsequent sale, viz., 20/12/2016, 2/2/2017, 23/2/2017 and 22/3/2017, there was no bidder. Bank has to resort to reduction of 10% in the upset price, as there was no bidder in the first three auctions conducted. According to him, as per Section 9 of the Banking Regulations Act, 1949, property can be sold after seven years. He has denied the contention that the property was not acquired for the use of the Bank. For the above said reasons, he has prayed for the dismissal of the writ petition.

12. Heard the learned counsel for the parties and perused the materials available on record.

13. Section 13 (5-A, B & C) of the SARFAESI Act, reads as

<http://www.judis.nic.in> follows:-

5-A. Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorised by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.

5-B. Where the secured creditor, referred to in sub-Section (5-A) is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of Section 13.12.2017

5-C. The provisions of Section 9 of the Banking Regulation Act, 1949, (10 f 1949) shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-Section (5-A).

14. Section 9 of the Banking Regulation Act, 1949, reads as follows:-

Notwithstanding anything contained in Section 6, no banking Company shall hold any immovable property howsoever acquired, except such as is required for its own use, for any period exceeding seven years from the acquisition thereof or from the commencement of this Act, whichever is later or any extension of such period as in this section provided, and such property shall be disposed of within such period or extended period, as the case may be:

Provided that the banking company may, within the period of seven years as aforesaid, deal or trade in any such property for the purpose of facilitating the disposal thereof:

Provided further that the Reserve Bank may in any particular case extend the aforesaid period of seven years by such period not exceeding five years where it is satisfied that such extension would be in the interest of the depositors of the banking Company."

15. Question as to whether there should be an auction and sale

by way of tender is not contemplated, under Section 13 (5-A), of the Banking Regulation Act, 1949, retention of the property only for seven years and thereafter, if the Bank intends to sell the property, the

same would be cause prejudice to the borrower, that there has been

a gross reduction, in the upset price of the property, within one year, from the date of sanctioning of loan and all other issues raised, can be addressed before the Debts Recovery Tribunal, Chennai.

16. 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, 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.

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.

17. Though Ms.Ananda Gomathy, the learned counsel for the petitioner submitted that there are no procedural safeguards provided therefor, in sub-Section 13 (5-A and B) of the SARFAESI Act, 2002 and that therefore, instant writ petition, requires adjudication, the same cannot be countenanced, for the reason that the Tribunal is competent and efficacious under the Act. Auction sale is dated 27/2/2017. Instant writ petition has been filed, on 11/4/2017, well within 45 days. As per Section 17 of the SARFAESI Act, 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 the authorised officer, make an application along with such fee, as may be prescribed to the Debt Recovery Tribunal, having jurisdiction in the matter within 45 days from the date of sale such measures had been taken. Section 13 (5-A) of the SARFAESI Act, 2002, enables the secured creditor to bid the immovable property on behalf of the secured creditor at any subsequent sale.

18. In view of the above, we are not inclined to entertain the instant writ petition. Accordingly, this writ petition is dismissed. It is open to the petitioner, to challenge the sale notice and the subsequent sale, before the Debt Recovery Tribunal, in the manner known to law. As the writ petition has been filed well within 45 days, from the date of auction, if any application is filed, under Section 17 of the Act, Debt Recovery Tribunal, is directed to entertain the same, without raising the issue of limitation. Time spent in this litigation be excluded. No costs. Consequently, the connected Miscellaneous Petition is closed.

(S.M.K., J) (R.S.K.J)
24th November 2017

mvs.

Index : Yes

Internet : Yes

To

The Authorised officer
Lakshmi Vilas Bank Ltd
Ramanathapuram Branch
1678 Ground Floor
Trichy Road
Ramanathapuram
Coimbatore 641 045.

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S.MANIKUMAR,J

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