IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.07.2017

CORAM:

The Hon'ble Mr.Justice S.MANIKUMAR
and
The Hon'ble Mrs.Justice BHAVANI SUBBAROYAN

W.P.No.7259 of 2017 and
WMP.No.7891/2017

N.Ravikumar
.. Petitioner

Vs.

1. The IndusInd Bank
rep. by the Assistant Vice President/
Authorized Officer, Financial Restructuring
and Reconstruction Group,
Zonal Office Old No.115, 116, New No.34,
G.N.Chetty Road, T.Nagar,
Chennai-17.

2. The Branch Manager,
Customer Service and Operations,
The IndusInd Bank Limited,
No.656-662, Tristar Towers,
Avinashi Road,
Coimbatore-641 037.

3. Johnson P.Jose ... Respondents

Prayer:- This Writ Petition has been filed under Article 226 of the Constitution of India praying to issue a Writ of Declaration, declaring all the acts of the respondents 1 and 2 in relation u/s.13(2) of SARFASI, in Ref.No.FRR/CHN/13-2/009/2016-2017 issued on 01.12.2016, followed by corrigendum in Ref.No.FRR/CHN/13-2/009A/2016-2017 issued on 21.12.2016 and in Ref No. FRR/CHN/13-2/009B/2016-2017 issued on 02.01.2017 in spite of petitioner Reply Legal Notice dated 16.02.2017 and Rejoinder Notice dated 06.03.2017, in so far as the petitioner property situated in S.F.No.170 measuring of an extent of 5.78 acres in this as per sub-division in SF.No.170/2 measuring of an extent of 2.84 acres, in this as per sub-division in S.F.No.170/2B1 and 170/2B3 measuring of an extent of 1.50 Acres situated at Velayuthampalayam Village, Avinashi Taluk, Tiruppur District as unconstitutional, ultravires and illegal.

For Appellant : Mr.V.Raghavachari
for M/s.MAP.Thangavel

For Respondents : Mr.P.Elaya Rajkumar
for M/s.Ramalingam Associates

O R D E R

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

Notice issued under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as, ''the SARFAESI Act'') is challenged by the petitioner on the grounds that he is neither a borrower nor a guarantor and that he is a third party, whose property documents have been pledged, in collusion with bank officials.

2. Inviting the attention of this Court to the definitions of the word ''borrower'' in Section 2(f) of the Act and ''Secured Creditor'' under Section 2(z) of the SARFAESI Act, Mr.V.Raghavachari, the learned Counsel represented the Counsel on record for the petitioner submitted that the writ petitioner, who had not availed any financial assistance from any bank or financial institutions, would not fall under the definition of borrower, in so also, the respondent No.1, would not fall under the definition of ''secured creditor''.

3. Taking us through the bank statement, the General Power of Attorney dated 16.09.2014 stated to have been executed in favour of an individual, its subsequent cancellation, a criminal complaint lodged against several persons including the Manager of the IndusInd Bank, who has been arrayed as 5th accused, Mr.V.Raghavachari, learned Counsel for the petitioner submitted that when the bank has chosen to exercise the powers under Section 13(2) of the SARFAESI Act, the Writ Petitioner, who is aggrieved over the collusion and fraud committed by the bank with others, has every right to seek for indulgence of this Court under Article 226 of the Constitution of India and that, he need not wait till the bank proceeds with action under the provisions of the Act.

4. Learned Counsel for the petitioner further submitted that both in Mardia Chemicals v. Union of India reported in AIR 2004 SC 2381 and in the decision of this Court in W.P.No.27533/2016 in which one of us, is a party (Hon'ble Mr.Justice Manikumar), status of the borrower/secured creditor, as the case may be, is not disputed, whereas, in the case on hand, the Writ Petitioner, being a third party, and not a

borrower/guarantor can always approach this Court under Article 226 of the Constitution of India and thus, the Writ Petition is maintainable.

5. Heard the learned Counsel for the parties and perused the material available on record.

6. In Mardia Chemicals v. Union of India reported in AIR 2004 SC 2371, the Hon'ble Supreme Court has held that notice under Section 13(2) would not give rise to a cause to challenge. However, as per Section 13(3A) of the SARFAESI Act, 2002, if, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower: PROVIDED that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17A.

7. Section 13(4) of the SARFAESI Act reads as follows:

> ''13(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-
>
> (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
>
> (b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
>
> Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:
>
> Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;)

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

8. Section 17 of the SARFAESI Act deals with an application to be filed against measures to recover the secured debt. 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 authorized officer under this Chapter may make an application along with 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 measures had been taken. Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

9. Section 17 of the SARFAESI Act makes it abundantly clear that any person including the borrower can file an application under Section 17(i) of the Act, if he is aggrieved by any of the measures referred to in sub-section 4 of Section 13 of the SARFAESI Act Proviso to Section 17 also makes it clear that different fee is prescribed for making an application by the borrower and the person, other than the borrower.

10. The person aggrieved need not be a borrower/guarantor, but, he can also be a third party, aggrieved over any of the measures referred to in Sections 4 to 13 of the Act. To illustrate, a person may be put in possession of the property, by way of lease. He may not be the borrower or guarantor. If possession is sought to be under Section 13(4) of the Act, certainly, he would be an aggrieved person. Taking note of such persons and the leasehold rights, legislature has also introduced an amendment. Section 4A to Section 17 of the SARFAESI Act enabling the lessees to approach the Tribunal, if they are so aggrieved by any of the measures referred to in Sub-Section 4(14) of the Act which includes possession, sale etc.

11. Though Mr.V.Raghavachari, learned Counsel for the petitioner submitted that when the bank, in collusion with others, has issued a notice under Section 13(2) of the SARFAESI Act, the 3rd party/aggrieved person can always interdict the same, under Article 226 of the Constitution of India, this Court is not inclined to accept the said contentions, for the reasons stated supra.

12. Against any of the measure taken by the bank under Section 13(4) of the SARFAESI Act, remedy lies under Section 17 of the SARFAESI Act. If the bank has not taken action under Section 13(4) of the Act, then, there is no actionable claim, by a third party, to be enforced. Allegations of collusion and fraudulent activity are questions of fact, which this court, at this juncture, would not adjudge and it is always open to the petitioner to urge, if any action is taken under Section 13(4) of the Act. In view of the above, we are of the view that Writ Petition filed against the Demand Notice under Section 13(2) of the Act, is not maintainable.

13. In the result, the Writ Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Assistant Vice President/
Authorized Officer,
IndusInd Bank,
Financial Restructuring and Reconstruction Group,
Zonal Office Old No.115, 116, New No.34,
G.N.Chetty Road, T.Nagar,
Chennai-17.

2. The Branch Manager,
Customer Service and Operations,
The IndusInd Bank Limited,
No.656-662, Tristar Towers,
Avinashi Road,
Coimbatore-641 037.

+1cc to M/s.MAP.Thangavel, Advocate, S.R.No.47015
+2cc to M/s.Ramalingam Associates, Advocate, S.R.No.46476

W.P.No.7259 of 2017

SJ(CO)
CS/02/08/17