

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.02.2017

CORAM

THE HONOURABLE MR. JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.P.NO.4650 OF 2017
AND WMP NOS.4903 AND 4904 OF 2017

M/s. Hotel Milestonnez India Private Ltd.,
Rep. by its Managing Director M.Rajamanickam
No.34, Santhavelur, Sunguvarchatram Post,
Sriperumbudur,
Kancheepuram District - 602 106. .. Petitioner

VS.

- 1.The Authorised Officer
State Bank of India
Stressed Assets Management Branch
Office at "Red Cross Buildings"
No.32, Montieth Road,
Egmore, Chennai.
- 2.The Presiding Officer
Wilful Defaulter Identification Committee
State Bank of India
Corporate Centre, State Bank of India
19th Floor, State Bank Bhavan,
Madam Cama Road, Mumbai - 400 021.
- 3.Mrs.Arundhadhi Battacharya
Chairman and Managing Director
State Bank of India
Corporate Centre, State Bank of India
19th Floor, State Bank Bhavan,
Madam Cama Road,
Mumbai - 400 021. .. Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Mandamus, forbearing the first respondent herein from conducting any e-auction sale on 28.02.2017 in pursuance of the first respondent's auction notice dated 06.02.2017 in respect of the petitioner's schedule property, in view of the second respondent's direction to the petitioner to submit a One Time Settlement Proposal on or before 28.02.2017 and until such time, the petitioner's One Time Settlement Proposal is submitted on 28.02.2017.

For Petitioner : Mr.S.Vijayakumar

O R D E R

(ORDER OF THE COURT WAS MADE BY M.GOVINDARAJ, J.)

The writ petitioner has come up with the present writ petition seeking to forbear the first respondent from conducting any e-auction sale on 28.02.2017 in pursuance of the first respondent's auction notice dated 06.02.2017, in respect of the writ petitioner's schedule property, in view of the second respondent's direction to the writ petitioner to submit a One Time Settlement Proposal on or before 28.02.2017.

2. The case of the writ petitioner is that he is running Restaurants and Canteens in the private Hospitals in the peripheral area of Chennai City and catering the needs of the poor and downtrodden. He has purchased the land at Santhavelur Village, Near Sunguvarchatram, for the purpose of constructing a Hotel. Initially, Tamil Nadu Mercantile Bank Limited sanctioned a sum of Rs.6 Crores as Term Loan for his Hotel business. But the officials of the second respondent Bank has made promises and allured him with term loan of Rs.10 Crores and Rs.1 Crore as cash credit facility. He has mortgaged the immovable properties owned by him and his son on 27.01.2011 and the second respondent also secured the property documents of the petitioner and his family members towards collateral security. The value of the immovable properties is about Rs.50 Crores, which situate within the City jurisdiction. The family members of the petitioner have joined as Directors in the Hotel industry.

3. The writ petitioner was paying the equated monthly instalments promptly and in the process, the second respondent has paid money to the Tamil Nadu Mercantile Bank Limited, without the knowledge of the writ petitioner. On 15.05.2012, credit facilities were renewed by the first respondent under information to the petitioner. The writ petitioner has repaid

Rs.1,17,00,000/- between 01.04.2011 and 31.03.2012. The said payment was in excess of the dues. Thereafter, on 17.06.2013, the second respondent has sanctioned a sum of Rs.5,25,00,000/- as corporate loan. The writ petitioner has paid a sum of Rs.1,32,00,000/- between 15.05.2012 and 17.06.2013. Thus, he has repaid an excess amount of Rs.2,75,00,000/-. But to the shock and surprise of the petitioner, on 29.06.2013, the first respondent Bank officials have classified the account of the petitioner as "Non Performing Asset". The classification was not in accordance with the Reserve Bank of India guidelines, namely the Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003.

4. According to the writ petitioner, as per Section 3(vi) of the said guidelines, "Non Performing Asset" (NPA) means an asset in respect of which (a) interest and principal (or) instalments thereof) is overdue for a period of 180 days or more from the date of acquisition or the due date as per the contract between the borrower and originator and so on. Later, the Reserve Bank of India has reduced the period from 180 days to 90 days. The petitioner has paid the instalments in time. But, at the behest of competitors in the business, the second respondent purposely declared the petitioner's account as "Non Performing Asset". The first respondent Bank is not entitled to declare the account as "Non Performing Asset", as it was done within a period of 12 days from the date of sanctioning the corporate loan. The first respondent Bank, without following the Reserve Bank of India guidelines, has issued notice under Section 13(2) of the SARFAESI Act, followed by Section 13(4) as well as Rule 8(6) of the Security Interest (Enforcement) Rules, 2002.

5. The writ petitioner has challenged the action of the first respondent by filing a writ petition in W.P.No.30573 of 2016 for a declaration declaring Rule 8(5) and Rule 3 of Security Interest (Enforcement) Rules as unconstitutional. This Court has granted a conditional order. But the writ petitioner was unable to comply with the same. Therefore, any action taken pursuant to Section 13(4) of the SARFAESI Act is challenged as illegal in view of non adherence of the Reserve Bank of India guidelines in declaring the account as "Non Performing Asset".

6. The first respondent Bank issued a show cause notice on 12.07.2016 calling upon the petitioner to offer explanation as to why their name should not be included in the Willful Defaulters List, for which, the petitioner has submitted a detailed explanation. However, the first respondent Bank did not withdraw the show cause notice. Further, the first respondent Bank issued another notice dated 30.12.2016 requiring the petitioner to appear for a personal hearing before the second

respondent on 18.01.2017 and accordingly, the petitioner has also appeared before the second respondent. After considering the petitioner's personal request and representations, submissions and documents, the Presiding Officer and Members of the second respondent Committee has decided to drop the proposed inclusion of the petitioner's name in the Willful Defaulters List and the said Committee directed the petitioner to submit a One Time Settlement Proposal on or before 28.02.2017. In the meantime, the first respondent Bank blocked the petitioner's cash credit account.

7. The first respondent Bank sent another communication dated 30.01.2017 intimating the petitioner that the Bank has engaged one M/s.S.M. Associates, No.4/52nd Floor, 4th Cross Street, Seethammal Colony, Alwarpet, Chennai - 600 018, as Bank's Resolution Agent to assist them to take all necessary steps for recovery of its dues, for which, suitable reply was sent to the said Private Agency and they agreed that they will wait for the One Time Settlement Proposal to be submitted by the petitioner on or before 28.02.2017.

8. In the meanwhile, the first respondent Bank has brought the petitioner's Hotel property to e-auction sale to be held on 28.02.2017 by notice dated 06.02.2017. The petitioner alleges that if the first respondent is permitted to proceed with the contemplated e-auction sale of the Schedule property, the One Time Settlement Proposal to be submitted by the petitioner will become infructuous. Therefore, the petitioner has filed the present writ petition.

9. We have gone through the elaborate pleadings made by the writ petitioner.

10. It is an admitted case that the writ petitioner has secured loan in various forms from the first respondent and has executed documents before the Registration office by mortgaging the properties towards security of the loan advanced by the first respondent. The factum of declaring the writ petitioner's account as "Non Performing Asset" is also not disputed. But the allegation is that declaration of the account as "Non Performing Asset" is not in accordance with the Reserve Bank of India guidelines.

11. In sum and substance, the issue involved in this writ petition revolves around the factual aspects of the individual accounts and its transactions. The writ petitioner also states that he is very much aware of the remedy available under Section 17(1) of the SARFAESI Act to approach the Debts Recovery Tribunal for redressal of grievances against the measures taken

by the secured creditor. The writ petitioner, at the earlier instance, has approached this Court on the same set of facts, legal issues and similar relief. The only difference is that the date of auction gets varied. Otherwise, the parties to the dispute as well as the subject matter are one and the same. The approach of the writ petitioner by filing writ petitions before this Court for each other auction notice, clearly reveals the dilatory tactics adopted by him.

12. Rule (3), Rule 3(c) and 8(5) of the Security Interest (Enforcement) Rules 2002, has been upheld by various judgments of the Supreme Court. The writ petition is smacked with malafides as the ulterior motive of the writ petitioner is only to forbear the first respondent from conducting any e-auction and not the vires of the Act as disclosed. This Court considers the attempt of the petitioner as futile in exercise and abuse of Article 226 of the Constitution of India.

13. The Hon'ble First Bench of this Court in DIGIVISION ELECTRONICS LTD., VS. INDIAN BANK AND ANOTHER [2005 (3) L.W. 269] has held that when an alternative remedy is available, the writ petition is considered to be premature. The petitioner shall exhaust the alternative remedy of raising all the points in reply to the notice under Section 13(2) of the SARFAESI Act and thereafter, the auction under Section 13(4) before the appropriate forum. In the absence of any violation of law or error of law apparent on the face of the record, the writ petitioner cannot approach the High Court under Article 226 of the Constitution of India for redressal of their grievances.

14. Same view was expressed in the judgment of the Hon'ble Supreme Court in UNITED BANK OF INDIA VS. SATYAWATI TANDON AND OTHERS [Civil Appeal No. Nil of 2010 SLP (C) No.10145 of 2010 - decided on 26.07.2010]. In the said judgment, it has been categorically held that exercise of power under Article 226 of the Constitution of India is not available without exhausting the appeal remedy provided under Section 18 of the SARFAESI Act. Further, it is clearly held that the secured creditor has right to proceed under Section 13(4) of the SARFAESI Act and any interference by High Courts will have the effect of defeating the very object of the Act. The remedy available under Sections 17 and 18 of SARFAESI Act shall be exercised and the High Courts under the different circumspect in deviation from the rule to ensure that the statutory schemes are not defeated by exercise of their writ jurisdiction.

15. The Hon'ble Supreme Court in KESHAVLAL KHEMCHAND AND SONS PRIVATE LIMITED AND OTHERS VS. UNION OF INDIA AND OTHERS [2015 (4) SCC 770] has clearly held that the Non Performing

Asset is classified as (i) substandard (ii) doubtful or (iii) loss, depending on the length of time for which money is overdue. As the length of period of overdue increases, account of borrower is progressively classified from "substandard" to "loss".

16. In the instant case, the loan account of the writ petitioner was declared as "Non Performing Asset". But the factual circumstances as to which category it belongs, has necessarily to be dealt with in a fact finding Court. The High Court under Article 226 of the Constitution of India cannot conduct roving enquiry on facts. Therefore, the factual background as to the declaration of the account as "Non Performing Asset" is a matter to be dealt with by the Debts Recovery Tribunal and without any decision on that point, it is not possible to declare that the action of the second respondent is illegal. Furthermore, the writ petitioner has to canvas as to how the loan account was declared as a "Non Performing Asset" before the Debts Recovery Tribunal. Therefore, the past and present conduct of the writ petitioner clearly reveals that he has a habit of approaching this Court whenever there is an auction to sell the property and the same shall not be encouraged.

17. A mere perusal of the pleadings by itself clearly show that the writ petitioner has admittedly defaulted on account of some unnatural events like floods and consequential loss of business etc. The loss of business and the intervening circumstances are matters to be dealt with by the secured creditor and the writ petitioner himself. If at all the writ petitioner has any grievance, he has to approach the appropriate forum designated by the statute. Therefore, the writ petition does not merit consideration for non-exhaustion of alternative remedy.

18. In the result, this writ petition is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

tk

To

- 1.The Authorised Officer
State Bank of India
Stressed Assets Management Branch
Office at "Red Cross Buildings"
No.32, Montieth Road,
Egmore, Chennai.
 - 2.The Presiding Officer
Wilful Defaulter Identification Committee
State Bank of India
Corporate Centre, State Bank of India
19th Floor, State Bank Bhavan,
Madam Cama Road, Mumbai - 400 021.
 - 3.Mrs.Arundhadhi Battacharya
Chairman and Managing Director
State Bank of India
Corporate Centre, State Bank of India
19th Floor, State Bank Bhavan,
Madam Cama Road,
Mumbai - 400 021.
- +1 cc to Mr.S.Jayakumar Advocate sr 12030

W.P.NO.4650 OF 2017

ks(co)
aa22/06/2017

सत्यमेव जयते

WEB COPY