IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **03.10.2017**

CORAM:

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

W.P.No.4867 of 2017
and WMP No.5084 of 2017

P.S.Pushparaj ... Petitioner

vs.

1. The Authorized Officer,
Bank of India,
Thane Main Branch,
Shivaji Park, Post Box No.43,
Opp.M.H. High School,
Thane (W) - 400 602. Maharashtra State.

2. The Registrar,
Debts Recovery Tribunal-III,
"Deva Towers" V Floor,
770, Anna Salai, Chennai - 600 002. ... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorarified Mandamus, calling the records pertaining to the order dated 03.01.2017 in S.A.No.116 of 2016 of the Honourable Debts Recovery Tribunal-III, Chennai, the 2nd respondent herein, quash in so far as the finding that the property of treating the agricultural land of an area of about 1,56,000.060 situated at Vazhuthavur Road, comprised in R.S.No.128/5, 128/11 and 129/4 part of Thuthipet Village, Villanur, Puducherry State as on industrial property alone is concerned and consequently declare that the said property is only an agricultural property exempted under Section 31(1) of the SARFAESI Act and consequently, forbear the respondents from initiating any such proceedings under the said Act in respect of the said property.

For Petitioner : Mr.K.V.Subramanian,
for M/s.K.V.Subramanian Asso.
For Respondents : Mr.F.B.Benjamin George (for R1)

ORDER

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

Erstwhile Director of M/s.D.G.Power and Electrical Projects Private Limited, who had offered his property viz., land at R.S.No.128/5/1,12811 & 129/4 pt (area approx.1,56,060 sq ft) at Vazhudhavur Road, Thuthipet Village, Villanur SRD & Pondicherry RD, as security, by depositing the title deeds of the property, as Guarantor, has filed the instant writ petition, challenging the finding recorded in S.A.No.116 of 2015 dated 03.01.2017, on the file of the Debts Recovery Tribunal-III, Chennai, by which, the tribunal held that lands mortgaged with Bank of India, Thane Main Branch, Thane, the 1st respondent herein, has been put up for industrial use.

2. By inviting the attention of this Court to the finding recorded by the tribunal and Section 18 of the SARFAESI Act, 2002, Mr.K.V.Subramanian, learned senior counsel for the petitioner submitted that the said section contemplates that any person aggrieved by a final order made by the Debts Recovery Tribunal under Section 17 of the Act, to file an appeal under Section 18 of the Act and not the mere finding, recorded against such person. In the instant case, the final order, is in favour of the petitioner, and therefore, he cannot invoke Section 18 of the Act, on other issues

3. Taking this Court to the extracts of the Settlement Registers, permission granted by Pondicherry Ground Water Authority, for digging up of bore-well, and inviting the attention of this Court to Section 31(1) of the Act and also to the contents of the learned Advocate Commissioner's report, Mr.K.V.Subramanian, learned senior counsel further submitted that provisions of the SARFAESI Act, 2002, shall not be made applicable to any security interest created in agricultural land. He also drew the attention of this Court to few paragraphs in **Mardia Chemicals v. Union of India** reported in **AIR 2004 SC 2371 : 2004(4) SCC 311**, to contend that when there is an infringement of

Article 300-A of Constitution of India, writ petition under Article 226 of the Constitution of India, is maintainable.

4. In support of his contention that provisions of the SARFAESI Act, cannot be invoked on security interest in agricultural land, Mr.K.V.Subramanian, learned senior counsel also invited the attention of this Court to the decisions of Hon'ble Division Benches of High Court of Andhra Pradesh and this Court, in ***Neel Madhav Mining P. Ltd. & Ors Vs. Union Bank of India & Ors***, reported in **III (2006) BC 311 (DB)** and in ***Eshwar Purushothaman Gardens Vs. Indian Bank***, reported in **I (2013) BC 216 (DB)**, respectively.

5. Making a preliminary objection to the maintainability of the writ petition, Mr.F.B.Benjamin George, learned counsel for the 1st respondent bank submitted that though the final order, made in S.A.No.116 of 2015, on the file of Debts Recovery Tribunal-III, Chennai is in favour of the writ petitioner in setting aside a notice dated 20.12.2013, which according to him was only an intimation to handover possession and not possession notice, issued under Section 13(4) of the SARFAESI Act, 2002, yet, in any subsequent proceedings, if

the finding recorded in any proceedings, attract the principles of res judicata, then such a finding rendered, is certainly appealable. He therefore, submitted that the writ petition filed against the finding recorded by the tribunal is appealable. Supporting the said contention, he also relied on a decision of the Hon'ble Supreme Court in ***Smt. Ganga Bai Vs. Vijay Kumar and others***, reported in **(1974) 2 SCC 393**.

6. By way of reply, Mr.K.V.Subramanian, learned senior counsel for the writ petitioner submitted that the said decision rendered, as per the Code of Civil Procedure, cannot be made applicable to the instant case, which is covered by statutory provisions of SARFAESI Act, 2002. In this context, he also referred to Order 41, Rule 22 of the Code of Civil Procedure, which states as follows

> O.41 R.22. Upon hearing respondent may object to decree as if he had preferred a separate appeal
>
> (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree 1[but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour ; and may also take any cross-objection] to the decree which he could have taken by way of appeal Provided he has filed such objection in the Appellant Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as

the Appellate Court may see fit to allow.

2[Explanation.--A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]

(2) Form of objection and provisions applicable thereto.--Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

3[***]

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to appeals by indigent persons shall, so far as they can be made applicable, apply to an objection under this rule.

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

8. Admittedly, loan has been availed by M/s.D.G. Power and Electrical Projects Pvt. Ltd., and writ petitioner was one of the Directors/Guarantor. As there was default, loan account has been

classified, as Non Performing Asset and a notice dated 30.09.2013 under Section 13(2) of the SARFAESI Act, 2002, has been issued. According to the petitioner, he has resigned from the Directorship of M/s.D.G. Power and Electrical Projects Private Limited, on 05.01.2010. When bank issued a letter dated 14.12.2013, intimating the petitioner for taking possession, the same has been challenged in S.A.No.116 of 2015 on the file of the Debts Recovery Tribunal - III, Chennai. For brevity, intimation dated 14.12.2013, is reproduced.

INTIMATION FOR TAKING POSSESSION

Date: 14-12-2013

Mr.P.S.Pushparaj
Residence Address,
1307, 13th Main Road,
Anna Nagar West,
Chennai - 600 040.

Dear Sir,

Possession of the Securities charged to the Bank under Section 13(4) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

1. Please refer to our notice dated 30.09.2013 demanding from you within 60 days as sum of Rs.4,45,57,000.00 (Rupees Four Crores Fourteen Lacs Fifty Seven Thousand only) plus interest in respect of various credit facilities allowed to you as specified in the said letter and intimating you that in case of default of payment, Bank shall enforce the securities without intervention of court by taking recourse to one or more of the measures under chapter III of the above Act, 2002, including taking over the possession of the assets charged to the bank to realize the Bank's dues.

2. You have failed to repay the amount mentioned in the said notice.

3. The undersigned being the Authorised Officer of Bank of

India, under the said Act in exercise of the powers conferred under Section 13(12) of the said Act hereby demand from you to handover the possession of the secured assets, i.e. Land at R.S.No.128/5/1, 128/11 & 129/4 pt (area approx.1,56,060 sq.ft) at Vazhudavoor Road, Thuthipet Village, Villanur SRD & Pondicherry RD in the name of Mr.P.S.Pushparaj, to the undersigned on the following date & time.

Date: 20-12-2013
Time : 10.00 am to 4.00pm
Place: Pondicherry

Yours faithfully,
Sd/-
(S.V.Phadate)
Assistant General Manager &
Authorized Officer,
Bank of India

9. As rightly contended by Mr.F.B.Benjamin George, learned counsel for the 1st respondent bank, letter dated 14.12.2013, in strict sense is not a possession notice, issued under Section 13(4) of the Act. But the bank in exercise of the powers conferred under Section 13(12) of the SARFAESI Act, 2002, has demanded the petitioner to hand over possession of the secured assets.

10. Nevertheless, the tribunal has entertained the challenge in S.A.No.116 of 2015, and for not following the procedure, as contemplated, allowed the application. On the issue as to whether action can be taken as against the subject property, claimed to be an agricultural property, bank has filed the extract of the

characterization of the land, wherein, as against the particular survey number, it has been described, as industrial area.

11. When the writ petitioner had produced documents contending that the subject property is an agricultural land, perusal of the order made in S.A.No.116 of 2015, shows that during the course of hearing of the SARFAESI Application, both parties have admitted that there was no agricultural operation. Both parties have also consented for appointment of an Advocate Commissioner, who submitted his report. Upon considering the rival contentions and the report of the learned Advocate Commissioner, the Debts Recovery Tribunal-III, Chennai, while allowing S.A.No.116 of 2015, on other grounds, has recorded a finding, as hereunder.

> *"To set at rest the controversial claims, Tribunal has taken a stand to appoint an Advocate Commissioner with the consent of both parties who has visited the premises furnished report and whereunder for the schedule of the property, it is described that the boundaries to the property in the respective survey numbers are bounded by either the main road or godowns or engineering companies and it is also described by the Advocate Commissioner that there were only casuarina plants which are of six months old and some dhal plants which ware centimeters tall in length, which concludes that they are laid consequent to the issuance of possession notice to establish certain agricultural operations therein and that*

there are no agricultural activities and therefore the actions of the respondent bank and the contentions of the respondent bank are fortified by the existence of adjacent industries and consequently the question of land as being put up for industrial use has been upheld.

Further, Ld. counsel appearing for the appellant submits that the possession notice has not been served on the appellant and that the respondent bank could not furnish any evidence establishing service of possession notice on the appellant.

Although actions of the respondent bank under SARFAESI are valid, the respondent bank did not follow the procedure as warranted under law by serving the subject impugned possession notice and hence this appeal is liable to be allowed.

Accordingly, this SA stands allowed, however without costs. Interim stay if any granted and subsisting till this day stands vacated."

12. As per Section 18 of the SARFAESI Act, 2002, (1) Any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal alongwith such fee, as may be prescribed to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal: PROVIDED that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower: PROVIDED FURTHER that no

appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less: PROVIDED ALSO that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of debt referred to in the second proviso. (2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder.

13. Bare reading of Section 18 of SARFAESI Act, 2002, makes it clear that any person aggrieved by any order made by the Debts Recovery Tribunal under Section 17 may prefer an appeal alongwith such fee, as may be prescribed to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal. Though, on other grounds, DRT, Chennai has allowed S.A.No.116 of 2015, filed by the petitioner, indisputably, he is aggrieved over the finding recorded by the tribunal and that is why, he has filed the

instant writ petition. If he is aggrieved over the finding recorded by the Tribunal, certainly, he is aggrieved by the order made by the Debts Recovery Tribunal. Contention of the learned senior counsel for the petitioner that if only there is a final order, adverse to the interest of a party, he would be termed as 'any person aggrieved' and if there is a finding against such person, on any of the issues adjudged, no appeal is maintainable, cannot be accepted.

14. As rightly contended by Mr.F.B.Benjamin George, learned counsel for the bank, any person aggrieved over a finding recorded by the Debts Recovery Tribunal, may also file an appeal against such finding, if such adverse finding would have an impact, on any of the subsequent proceedings, between the same parties. Needless to state that even interim orders, inter-se is binding on the parties, if ultimately, the final decision, on the main petition, confirms the interim decision.

15. Though, Mr.K.V.Subramanian, learned senior counsel submitted that the decision rendered in ***Smt. Ganga Bai Vs. Vijay Kumar and others***, reported in **(1974) 2 SCC 393**, has been

considered in the light of the provisions of the Code of Civil Procedure, we are of the view that principles of res judicata, equally apply to proceedings under the SARFAESI Act, 2002.

16. Reliance on the decisions of the Hon'ble Division Benches of High Court of Andhra Pradesh in ***Neel Madhav Mining P. Ltd. & Ors Vs. Union Bank of India & Ors***, reported in **III (2006) BC 311 (DB)** and this Court in ***Eshwar Purushothaman Gardens Vs. Indian Bank***, reported in **I (2013) BC 216 (DB)**, at this juncture, would not lend any support, to the case of the petitioner, and the same can be considered, on the merits of the case, if any appeal is preferred before the Debts Recovery Appellate Tribunal.

17. In the light of our interpretation, to Section 18 of the Act, we are of the considered view that if the tribunal has recorded a finding against a person, in a proceeding under Section 17 of the Act, such person would fall within the expression "any person aggrieved". On facts and circumstances of the instant case, it is also seen that finding recorded by the tribunal, is on disputed facts, challenge to which, cannot be entertained in a writ petition, where there is an

effective and alternate remedy of an appeal, before the appellate forum, which the Hon'ble Supreme Court, in **Union Bank of India v. Satyawati Tondon,** reported in **2010 (5) LW 193 (SC)**, has held that the tribunals constituted under the SARFAESI Act, 2002, is competent to decide all questions of law and fact.

18. In the light of the above discussion and decision, writ petition against the impugned proceedings, by which the tribunal has recorded a finding against the interest of the writ petitioner, is not maintainable. Hence, it is open to the petitioner to move the appellate forum. Time consumed in this Court, be excluded, if any appeal is filed. Writ petition is dismissed. No Costs. Consequently, the connected Writ Miscellaneous Petition is closed.

(S.M.K., J.) (R.S.K., J.)
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