IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 4/12/2017

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MR.JUSTICE R.PONGIAPPAN

Writ Petition No.31225 of 2017
a n d
W.M.P.No.34284 of 2017

K.Hajee Sheik Mohammed ... Petitioner

Vs

1. The Chief Metropolitan Magistrate
The Chief Metropolitan Magistrate Court
Allikulam
Chennai 600 003.

2. Tamil Nadu Mercantile Bank
TTK Road Branch
Chennai 600 014.

3. K .Vinoth Kumar
Advocate Commissioner
Egmore Bar Association
Allikulam
Chennai.

4. Sarfaraz Niaz & Co
Vaniyambadi 625 751.

5. A.B.Sarfaraz Ahmed

6. A. Saira Banu

7. Humira Parveen ... Respondents

Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorari to call for the records pertaining to the proceedings on the file of the learned Chief Metropolitan Magistrate, Allikulam, Chennai, the first respondent regarding the SARFAESI proceedings and records and quash the impugned order, dated 17/7/2017 in Crl.M.P.No.8823 of 2016 in Crl.M.P.No.997 of 2016 passed by the learned Chief Metropolitan Magistrate, Allikulam, Chennai, the first respondent.

For petitioners ... Mr.P.Jesus Moris Ravi

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O R D E R

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

Order, dated 17/7/2017, in Crl.M.P.No.8823 of 2016 in Crl.M.P.No.997 of 2016, on the file of the learned Chief Metropolitan Magistrate, Chennai, dismissing the petition filed, to recall the warrant issued, appointing an Advocate Commissioner, to take possession of the schedule mentioned asset, is impugned in the instant writ petition.

2. Material on record discloses that when Tamil Nadu Mercantile Bank Limited, represented by its Authorised Officer/second respondent herein, filed an application under Section 14 (1) and (2) of the SARFAESI Act, 2002, in order to enable the Bank, to take possession of the secured asset, the learned Chief Metropolitan Magistrate, Chennai, vide order made in Crl.M.P.No.997 of 2016, dated 10th June 2016, appointed an Advocate Commissioner, to take possession of the schedule mentioned property, with the assistance of the Police, after taking inventory of the articles, and handover to the Bank, so as to proceed to recover the dues.

3. Material on record further discloses that to recall the said order, writ petitioner has filed Crl.M.P.No.8823 of 2016 in Crl.M.P.No.997 of 2016. The said application has been heard and disposed of vide order, dated 17th July 2017, as hereunder:

> "It is an admitted fact that the third respondent had obtained loan facility from the first respondent bank and failed to repay the same as per the agreement entered into by them with the bank and consequently, the first respondent bank has filed a petition under Section 14 of the SARFAESI Act in Crl.M.P.No.997 of 2016 before this Court for taking physical possession of the secured asset given as security by the respondents 3, 5 and 6 and the same was allowed by this Court on 17/3/2016 itself.
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> 6. It is also an admitted fact that the respondents 3 to 6 had preferred an appeal

before the Hon'ble DRT - I in S.A.No.59 of 2012 against the measures taken by the respondent Bank and the same was dismissed. The provisions of Section 14 (3) reads as follows:-

"No act of the Chief Metropolitan Magistrate or the District Magistrate (any officer authorised by the Chief Metropolitan Magistrate or District Magistrate) done in pursuance of this Section shall be called in question in any Court or before any authority."

Further the petitioner, said to be the tenant, has no right to file any kind of petition before this Court, as per the provisions of SARFAESI Act. The first respondent bank, in the counter has stated that alleged tenancy agreement was executed by one Mr.Sarfaraz in favour of the petitioner, but the said authority was not at all owned by the said Mr.Sarfaraz, who is the fourth respondent and the said property is owned by the fifth and sixth respondents. Hence even assuming for the argument sake that the petitioner is the tenant, he can file a petition under Section 17 of the Act, only before the Hon'ble Debt Recovery Tribunal (DRT) and not before this Court. As such, the petition filed by the petitioner before this Court is not maintainable.

7. Once the order passed by this Court, on the petition filed by the bank under Section 14 of the SARFAESI Act, this Court has no power to review or revisit its own order. Considering the above stated circumstances and in the interest of justice, this Court finds that this petition is liable to be dismissed and the point is decided accordingly.

8. In the result, this petition is dismissed."

4. Order passed in Crl.M.P.No.8823 of 2016, dated 17/7/2017, on the file of the learned Chief Metropolitan Magistrate, Chennai, is assailed in this writ petition, on the grounds inter alia that the learned Chief Metropolitan Magistrate, Chennai, has exceeded in its jurisdiction in granting assistance by appointment of learned Advocate Commissioner. Submission is also made that no notice has been

given. Petitioner is stated to be a tenant.

5. Heard the learned counsel for the petitioner and perused the materials available on record.

6. On a specific question posed to Mr.P.Jesus Moris Ravi, learned counsel for the petitioner as to whether the subject property is mortgaged or not, with Tamil Nadu Mercantile Bank, Chennai, first respondent, answer is in affirmative.

7. As per Section 17 (4-A) of the SARFAESI Act, 2002,

> "Where -
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> (i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy
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> (a) has expired or stood determined; or
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> (b). is contrary to Section 65A of the Transfer of Property Act, 1882 (4 of 1882); or
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> (c). is contrary to terms of mortgage; or
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> (d). is created after the issuance of notice of default and demand by the Bank under sub-Section (2) of Section 13 of the Act; and
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> (ii). the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Court."

8. Question as to whether during the pendency of leasehold rights, notice has to be issued to a tenant by the learned Chief Metropolitan Magistrate, Chennai, can always be urged before the Tribunal.

9. 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: —
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> > "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:

"... 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."

10. In the light of the decisions stated supra and discussion, this Court is of the view that writ petition is not maintainable. Accordingly, this writ petition is dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

mvs.

To

1. The Chief Metropolitan Magistrate
The Chief Metropolitan Magistrate Court
Allikulam
Chennai 600 003.

+1cc to Mr.JESUS MORIS RAVI Advocate, S.R.No. 85941

Writ Petition No.31225 of 2017

KAN(CO)
TR(22/12/2017)