IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.08.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.20993 of 2017
and
W.M.P.No.21878 of 2017

M.S.Thavamani ... Petitioner

Vs.

The Authorised Officer,
Cholamandalam Investment and Finance Fo., Ltd.,
Dare House, 2, N.S.C. Bose Road,
Parrys, Chennai - 600 001. ... Respondent

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorari, calling for the records of the respondent in Notice U/s.13(2) of SARFAESI Act, dated 6.4.2017 and the consequential Possession Notice under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 dated 22.06.2017 and quash the same.

For Petitioner : Mr.S.Xavier Felix

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

Orders impugned in this writ petition are notices issued under Sections 13 (2) dated 06.04.2017 and 13(4) dated 22.06.2017, of the SARFAESI Act, 2002, respectively.

2. Contending inter alia that when clause 26 of the loan agreement dated 29.09.2007, entered into between the petitioner and M/s.Cholamandalam Investment and Finance Company Limted, provides for an arbitration clause, proceedings under the SARFAESI Act, 2002 cannot be instituted, writ petitioner and two others, have filed a suit in O.S.No.2357 of 2015, on the file of the learned XV, Assistant City Civil Court, Chennai, for the following reliefs:

(a) for a permanent injunction restraining the Defendants, their men, agents, servants, subordinates, office bearers or any other persons acting on their behalf in any manner interfering by way of pasting any notices, pamphlets, or by obstructing through assembling in front of Plaintiff's property of ingress and egress of pathway leading to Gate and or in any manner interfering with the Plaintiff's peaceful possession and enjoyment of the suit schedule property:

(b) Permanent injunction restraining the Defendants, their men, agents, servants or anybody acting on behalf of them from disturbing the Plaintiff's property at Old No.118, New No.247, Suriya Narayanan Chetty Street, Royapuram, Chennai - 600 013, under the guise of collecting moneys without due process of law.

3. In the said suit, M/s.Cholamandalam Investment and Finance Company Limited, represented by its Manager/1st defendant therein, has filed IA No.15746 of 2015, contending inter alia that Clause 26 of the loan agreement dated 29.09.2007, entered into between the writ petitioner and the M/s.Cholamandalam Investment and Finance Company Limited, provides for an arbitration clause, and hence, matter be referred to arbitration and that under the arbitration clause, suit is not maintainable and therefore M/s.Cholamandalam Investment and Finance Company Limited, has prayed for reference to arbitration.

4. After considering the rival submissions, the learned XV Assistant Judge, City Civil Court, Madras, vide order dated 21.01.2016 in I.A.No.15746 of 2015 in O.S.No.2357 of 2015 allowed the abovesaid application and referred the matter to arbitration, in accordance with clause 26 of the loan agreement marked as Ex.P1, therein. Plaintiffs/writ petitioner, were granted liberty, to canvass all points and disputes, raised in the suit, before the Arbitrator.

5. Being aggrieved by the same, the writ petitioners, have filed CRP (NPD) No.2482 of 2016, on the file of this Court under Article 227 of the Constitution of India and that the same is stated to be pending. Writ petitioners have contended that before the Arbitration proceedings, considerable payments have been made.

6. While the matter stood thus, M/s.Cholamandalam Investment and Finance Company Limited, 1st defendant, has issued a notice dated 06.04.2017 under Section 13(2) of the SARFAESI Act, 2002. Responding to the above, the writ petitioner has sent a reply notice dated 01.06.2017, for which, a rejoinder dated 14.06.2017 has been sent by M/s.Cholamandalam Investment and Finance Company Limited.

7. Thereafter, possession notice, dated 22.06.2017 has been issued under Section 13 (4) of the SARFAESI Act, 2002 by M/s.Cholamandalam Investment and Finance Company Limited. Reply dated 12.07.2017 has been sent by the writ petitioner.

8. Contending interalia that the proceedings instituted by M/s.Cholamandalam Investment and Finance Company Limited, the respondent herein, under Sections 13(2) & 13(4) of the SARFAESI Act, 2002, is arbitrary, illegal and contrary to the provisions of the loan agreement, instant writ petition has been filed to quash the same.

9. Added further, Mr.S.Xavier Felix, learned counsel for the writ petitioner, placed reliance on a Hon'ble Full Bench decision of the Delhi High Court in HDFC Bank Limited Vs. Satpal Singh Bakshi, reported in (2013) ILR 1 Delhi 583 and contended that M/s.Cholamandalam Investment and Finance Company Limited, is not entitled to invoke the provisions of the SARFAESI Act, 2002.

10. We have heard the learned counsel for the parties and perused the materials available on record.

11. Notice under Section 13(2) is only a demand made by the Bank and the Hon'ble Supreme Court in Mardia Chemicals v. Union of India reported in AIR 2004 SC 2371 : 2004(4) SCC 311 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.

12. Time and again, Hon'ble Supreme Court, as well as this Court, have held that when there is an effective and alternative remedy provided under the statute, writ petition should not ordinarily be entertained, reference can be made to few 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 at paragraph Nos.16 to 18 and 27 to 29, 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.
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> 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. Above all, since the petitioner has violated the terms and conditions of the loan by transferring the property in favour of her son, this Court is not inclined to entertain the petition.

....

9. In the light of the above decision of the Honourable Supreme Court, the writ petition filed by the petitioner seeking to set aside the possession notice issued to her long back is legally not sustainable. We are of the considered view that this petition has been filed only to drag on the proceedings and to evade repayment of the loan. That be so, the petitioner has no legal right to compel the bank to accept the one time settlement offer made by her."

13. In Satyawati Tondon's case, the Hon'ble Supreme Court has held that the tribunals constituted under the SARFAESI Act, 2002, is competent to decide all questions of law and fact. Grounds raised before us, in the instant writ petition, can always be urged before the tribunal.

14. In the light of the above discussion and decisions, we are of the view that the petitioner has not made out a case for entertaining the instant writ petition. Writ petition is dismissed. No Costs. Consequently, the connected Writ Miscellaneous Petition is closed.

15. Registry is directed to return the original impugned notices issued under Section 13(2) dated 06.04.2017 and 13(4) dated 22.06.2017, under the SARFAESI Act, 2002, after getting attested copies of the same, from the learned counsel for the petitioner.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

The Authorised Officer,
Cholamandalam Investment and Finance Fo., Ltd.,
Dare House, 2, N.S.C. Bose Road,
Parrys, Chennai - 600 001.

+2cc's to M/s.S.Xavier Felix, Advocate, S.R.No.56379

W.P.No.20993 of 2017
and
W.M.P.No.21878 of 2017

RK(CO)
CA(28/08/2017)