

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.12.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MR.JUSTICE R.PONGIAPPAN

W.P.No.31896 of 2017
and
WMP Nos.35045 of 2017

Mrs.R.Padma ... Petitioner

vs.

Indian Overseas Bank,
Rep. by its Authorised Officer,
Tower Branch, AH1, 4th Avenue,
Shanthi Colony,
Anna Nagar, Chennai - 600 040. ... Respondent

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorarified mandamus, calling for the entire record pertaining to sale and auction notice dated 24.11.2017 issued by the Respondent under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 and quash the same and direct the respondent to consider the One Time Settlement proposal.

For Petitioner : Mr.R.Swaminathan

ORDER

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

M/s.VR Packers had borrowed a sum of Rs.485 Lakhs for starting biscuit manufacture facility. Subsequently, the said amount has been increased and renewed as Rs.820 Lakhs. Indian Overseas Bank has also been approached for financing Hotel Project at Courtallam and sanctioned a term loan of Rs.550 Lakhs. Project is stated to be half way. Petitioner has sought for a bank guarantee of Rs.1.5 crores in connection with biscuit factory in favour of ITC. Petitioner is stated to have made some payment and thereafter, defaulted.

2. Material on record discloses that when the petitioner filed W.P.No.14873 of 2017, to quash the auction notice dated 26.05.2017, a Hon'ble Division Bench of this Court granted conditional stay of auction of the property, subject to payment of Rs.1 Crore towards the loan amount, within a week. Petitioner has failed to comply with the said order. Bank has sold the property for Rs.1.35 Crores. However, having regard to the grievances expressed by the petitioner, a Hon'ble Division Bench of this Court at paragraph No.4 in W.P.No.14873 of 2017 dated 29.06.2017 ordered as hereunder.

"4. However, if the petitioner is having any grievance with respect to the sale of the remaining properties they may approach either the Debts Recovery Tribunal or the Debts Recovery Appellate Tribunal respectively. The grievance of the petitioner is that if the property is allowed to be sold for the upset price fixed by the respondent bank, they would be put to hardship. In this regard the petitioner may make representation before the respondent bank to extend some reasonable time to negotiate for payment of the remaining amount by bringing the persons for purchase of the property for highest price. It is for the respondent bank in the event of such representation is filed thereafter, take decision in accordance with law. We hereby direct the respondent bank to consider the representation, giving some breathing time to the petitioner before considering the negotiations going for to the sale of the remaining properties."

3. Thereafter, petitioner has sent a proposal dated 11.07.2017 to the bank as hereunder

Tuesday, 11 July 2017,
The Chief Regional Manager,
RO II, Indian Overseas Bank,
Circle Office, Chennai - 600 002.

Dear Madam,

Sub: Revised OTS Proposal.

Please refer to the request made by us and the Courts observation in connection with OTS.

1. As already informed to you it is very unfortunate that our firm was forced into NPA status based on a letter written by our business enemy.

2. The Term Loan sanctioned for our Hotel Project was stopped abruptly midway of the project and term loan disbursement was stopped on receipt of the above mentioned letter and the money invested by us and the bank in the project was completely became waste and the building value has become zero.

3. A well running small business unit by name Kanya Enterprises in your Thiruvananthapuram Branch was making

all its payment obligations in time. But this account was frozen even without giving any notice and classified as NPA.

In spite of the above, now we want to settle our dues under OTS as per the following proposal.

We have given the following properties as security and the list is given below with valuation.

Rs.In Lakhs

Sl .N o.	Property	FMV	Present Value	Remark
1	AD 10/1 Annanagar Flat	150.00	150.00	Fair market value fixed by the bank
2	Courtallam Land	250.00	250.00	Fair market value fixed by the bank
3	Pattukottai House	80.00	80.00	Civil dispute by one A.M.Sivaji, who is making a claim on the property
4	9 Acres of V.Rajendran land	600.00	600.00	Multiple Civil disputes with M/s.Subhiksha Trading Services Limited and restraint order from Sub Court Ponneri and Hon'ble High Court, Madras, Sale Agreement and Mortgage is the issue involved in the dispute
5	1 acre of Sathish Raj land	75.00	75.00	Same issues
	TOTAL		1155.00	

Properties 3,4 and 5 are under litigation and restraint order is there in Ponneri Sub Court and Hon'ble High Court, Madras. These properties can't be sold now and the civil cases may take another minimum of ten years.

As a matter of fact, we bought this property from IOB through public auction and whereas the original promoter has filed a suit CS 486 of 1997 with the Hon'ble High Court, Madras against the Bank to declare the sale as null and void and even after 20 years the trial is yet to start. Thus the bank is aware of the litigation which was already pending in Hon'ble High Court.

Taking this one into consideration the present value of these properties are to be discounted to today's value and which will be Rs.45.00, Rs.250.00 and Rs.40.00 Lakhs for properties 3,4 & 5 respectively. Thus, the total realisable value will be Rs.735.00 lakhs. (Please note for property 1 & 2, the FMV fixed by the Bank has been taken into account). Our account has already been credited by Rs.135.00 lakhs by sale of one of our property. This may be taken as an initial payment for the OTS proposal.

We will settle this amount in three instalments within five months. A sum of Rs.150.00 lakhs will be paid within thirty days from the date of your OTS approval letter and another Rs.250.00 Lakhs within 60 days from the date of your OTS approval letter and the balance payment of Rs.335.00 within five months from the date of OTS approval.

Irrespective of the legal impediments and restrain orders from courts, we agree to pay the above amounts either by raising a loan or by selling some other property. This will make a total payment of Rs.735.00 lakhs excluding the amount of Rs.135.00 lakhs that you have already realised from Nadhamuni Street Plot sale, towards the full settlement of all the liabilities of VR Packers and Kanya Enterprises. Please note on payment of Rs.150.00 lakhs the Annanagar flat is to be released. On payment of second installment, our Courtallam property is to be released.

Please confirm,
Thanking you,
Yours faithfully,

for VR Packers
Sd/-
V.Rajendran
Authorised Signatory.

Copy: 1) The Honourable Division Bench, WP.14873 of

2017

2) Chief Manager, Tower Branch.

4. Bank vide letter dated 18.07.2017 has rejected the above proposal and the same is extracted hereunder.

"M/s.VR Packers,
AJ-81, 3rd Street,
Anna Nagar,
Chennai - 600 040.

Sirs,

ONE TIME PROPOSAL

CC NO.2006: TL 381100003, 381000003

BRANCH: TOWER

We refer your letter dated 11.07.2017 on the captioned subject.

Your offer of Rs.735 lacs as one time settlement is too low and hence it is not acceptable to us.

You are advised to improve the offer amount to consider your OTS proposal.

The above is without prejudice to our rights to proceed against you legally and to continue our SARFAESI actions to recover our dues.

Thanking you,

Yours faithfully,

Sd/-

CHIEF REGIONAL MANAGER

CC to Tower"

5. Another letter of the bank dated 18.08.2017, addressed to M/s.V.R.Packers, Chennai is as follows:

"M/s.VR Packers,
AJ-81, 3rd Street,
Anna Nagar,
Chennai - 600 040.

Sirs,

ONE TIME PROPOSAL

TL No.381100003, 381000003 TOD 2006:

We refer your letter of OTS offer submitted to our Chief Regional Manager and advise that your offer is too low and hence it is not acceptable to the Bank.

You are advised to improve the offer amount.

The above is without prejudice to our rights to proceed against you legally and to continue our SARFAESI actions to recover our dues.

Thanking you,

Yours faithfully,

Sd/-

CHIEF MANAGER

6. Thereafter, bank has issued notice on 24.11.2017 to bring the property for sale under Rule 8 (6) and 9(1) of the Security Interest (Enforcement) Rules, 2002. Public notice has also been issued. Assailing the correctness of the e-auction sale notice dated 24.11.2017, petitioner has filed the instant writ petition, contending inter alia that bank has failed to consider the One Time Settlement proposal in proper perspective and bluntly rejected the same.

7. Supporting the prayer sought for, learned counsel for the petitioner further submitted that there is no case for classification of the account as Non performing asset and that the petitioner, is entitled to be treated on par with other customers and be given OTS. He has also alleged discrimination in the matter of one time settlement as between the petitioner and other customers.

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

9. Challenge in this writ petition is to the auction notice dated 24.11.2017 to quash the same and consequently, to consider the One Time Proposal for Settlement. Courts have consistently held that when there is an effective and alternative remedy, writ 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: – "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.

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.
....."

10. Proceedings impugned in this writ petition is e-auction notice dated 24.11.2017. From the reading of the notice, it could be deduced that, the petitioner has availed loan from Indian Overseas Bank, Chennai. Dues in the loan account is Rs.22,58,82,891/-. After issuance of notices under Section 13 (2) and 13(4) of the SARFAESI Act, 2002, e-auction notice dated 24.11.2017 has been issued under Rule 8(6) and 9 (1) of the Security Interest (Enforcement) Rules, 2002.

11. Though, the petitioner has contended that there is no fair treatment in the matter of considering OTS proposals submitted by her, this Court is not inclined to accept the said contention for the reason that on more than one occasion, this Court had held that in contractual matters, Court has no power to issue directions to the bank, as to how mode of repayment should be scheduled. In the above context, we deem it fit to consider the following decisions.

(a) After considering a catena of decisions on the legal right of a person to seek for a writ of mandamus, a Hon'ble Division Bench of this Court in Tamilnadu Industrial Investment Corporation Vs. Millenium Business Solutions Private Limited, reported in 2004 (5) CTC 689, at Paragraph Nos.7,8,16 and 18, held as follows:

"7.In our considered opinion it is not proper for the Court to interfere in such matters relating to recovery of loans. Such matters are contractual in nature and writ jurisdiction is not the proper

remedy for this. A writ lies when there is an error of law apparent on the face of the record, or there is violation of law. No writ lies merely for directing one time settlement or for directing re-scheduling of the loan or for fixing instalments in connection with the loan. It is only the bank or the financial institution which granted the loan which can re-schedule it or fix one time settlement or grant instalments. The Court has no right under Article 226 of the Constitution to direct grant of one time settlement or for re-scheduling of the loan, or to fix instalments.

8. No doubt Article 226 on its plain language states that a writ can be used by the High Court for enforcing a fundamental right or for 'any other purpose'. However, by judicial interpretation the words 'any other purpose' have been interpreted to mean the enforcement of any legal right or performance of any legal duty, vide *Calcutta Gas Co. v. State of West Bengal*, AIR 1963 SC 1044. In the present case, the writ petitioner has really prayed for a Mandamus to the Corporation to grant it a one time settlement, but no violation of any law has been pointed out. In our opinion, no such mandamus can be issued in this case, and hence the writ petition should not have been entertained. A mandamus is issued only when the petitioner can show that he has a legal right to the performance of a public duty by the party against whom the mandamus is sought.

16. A loan is granted in terms of the contract, and grant of one time settlement or re-scheduling of the loan amount is really a modification of the contract, which can only be done by mutual consent of the parties, vide Section 62 of the Contract Act, 1872. The Court cannot alter the terms of the contract.

18. Before parting with the case we would like to mention that recovery of tens of thousands of crore rupees of loans of banks and financial institutions has been held up by Court orders under Article 226 proceedings which were really unwarranted. However, much sympathy a Court may have for a party, a writ Court must exercise its jurisdiction on well settled principles, and not a mere sympathy or compassion. No doubt, there be hardship to a party, but unless violation of law is

shown the Court cannot interfere. Holding up recoveries of loans by unwarranted Court orders is causing incalculable harm to our economy, since unless the loan is recovered a fresh loan cannot be granted to needy persons. The Courts must keep these considerations in mind."

(b) In M/s.Digivision Electronics Ltd., Retistered Office at No.A5 & 6, Industrial Estate, Guindy, Chennai - 32 Vs. Indian Bank, rep. by its Deputy General Manager, Head Office, 31, Rajaji Salai, Chennai-1 and another, reported in 2005 (3) LW 269, a Hon'ble Division Bench of this Court, at paragraph No.42, held as follows:

"42. Some of the learned counsel submitted that the Court should direct one time settlement or fixing of installment or rescheduling the loan. In Tamilnadu Industrial Investment Corporation Vs. Millenium Business Solutions Private Limited, 2004 (5) CTC 689, it has been held that this Court cannot pass any such order in writ jurisdiction, since directing one time settlement or granting installments is really re-scheduling the loan, which can only be done by the bank or financial institution which granted the loan. This Court under Article 226 of the Constitution cannot reschedule a loan. A writ is issued when there is violation of law or error of law apparent on the face of the record, and not for rescheduling loans. The Court must exercise restraint in such matters, and not depart from well settled legal principles".

At paragraph No.46, in M/s.Digivision Electronics Ltd., Retistered Office at No.A5 & 6, Industrial Estate, Guindy, Chennai - 32 Vs. Indian Bank, rep. by its Deputy General Manager, Head Office, 31, Rajaji Salai, Chennai-1 and another, reported in 2005 (3) LW 269, the Hon'ble Division Bench further held as follows:

"46. Writ is a discretionary remedy, and hence this Court under Article 226 is not bound to interfere even if there is a technical violation of law, vide R.Nanjappan Vs. The District Collector, Coimbatore, 2005 WLR 47, Chandra Singh Vs. State of Rajasthan, JT 2003 (6) SC 20. The Managing Director, Tamil Nadu State Transport Corporation (Madurai Division-IV) Ltd., Dindigul Vs. P.Ellappan, 2005 (1) MLJ 639, Ramniklal N.Bhutta and Another Vs. State of Maharashtra,

1997 (1) SCC 134, etc."

12. As per the decisions of this Court in Tamilnadu Industrial Investment Corporation Vs. Millenium Business Solutions Private Limited, reported in 2004 (5) CTC 689 and M/s.Digivision Electronics Ltd., Registered Office at No.A5 & 6, Industrial Estate, Guindy, Chennai - 32 Vs. Indian Bank, rep. by its Deputy General Manager, Head Office, 31, Rajaji Salai, Chennai-1 and another, reported in 2005 (3) LW 269, Court cannot compel the bank for any rephasement or One Time Settlement.

13. Issue as to whether there was no case for classification of the account as Non performing asset and bank has resorted to arbitrary measures under the SARFAESI Act, 2002, without considering the OTS proposal in proper perspective, can be urged before the Debts Recovery Tribunal, if any application is filed under Section 17(1) of the SARFAESI Act, 2002. E-auction notice dated 24.11.2017, can be challenged on all tenable grounds.

14. Therefore, in the light of the decisions and discussion, we are not inclined to entertain the writ petition and the same is dismissed. No Costs. Consequently, the connected Writ Miscellaneous Petition is closed.

Sd/-
Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

ars
To

The Authorised Officer, सत्यमेव जयते
Indian Overseas Bank,
Tower Branch, AH1, 4th Avenue,
Shanthi Colony,
Anna Nagar, Chennai - 600 040.

+1cc to Mr.R.SWAMINATHAN Advocate, S.R.No. 87571

W.P.No.31896 of 2017
and
WMP Nos.35045 of 2017

(CO)
TR(26/12/2017)