

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/8/2017

C O R A M

The Honourable Mr.JUSTICE S. MANIKUMAR
and
The Honourable Ms.JUSTICE V. BHAVANI SUBBAROYAN

Writ Petition No.22297 of 2017

P. Govindaraj ... Petitioner

Vs

1. The Authorised Officer
Dena Bank
Alwarpet Branch
Chennai 600 018.
2. Jabamani Joseph
3. Mr.Karthik
4. Meenakshi ... Respondents

Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of certiorari to call for the records pertaining to the impugned sale notice proceedings, issued by the first respondent in DB/ALWARP/SALE NOTICE/2017-18, dated 18/7/2017 and to quash the same and consequently, direct the respondent not to proceed further with the matter.

For Petitioner ... Mr.R.Thirumoorthy

O R D E R

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

Sale notice, dated 18/7/2017, issued by Dena bank, Chennai/first respondent is challenged on the grounds inter alia that the Power of Attorney, executed by the petitioner, in favour of the second respondent has been misused and that the petitioner's property has been sold to the third respondent, without his knowledge.

2. According to the petitioner, fraud has been committed. Respondent Nos.3 and 4 have obtained loan from Dena Bank, Chennai/first respondent, by mortgaging the property, owned by the petitioner. Possession notice, dated 8/6/2017, under Section 13 (4) of the SARFAESI Act, 2002, has been affixed on the petitioner's house, calling upon the borrower, to repay a sum of Rs.36,70,510/-, excluding interest from 1/9/2016, within sixty days from the date of receipt of the said notice. Sale notice, dated 18/7/2017, has been affixed on the door of the petitioner's house. When approached, the bank has given an evasive reply. In this regard, the petitioner has also contended that a Police complaint has been filed and CrI.O.P.No.16493 of 2017 has been filed for a direction to the Police, to register a case and that the same is pending.

3. In the above said circumstances, contending inter alia that the petitioner has no other alternative and efficacious remedy, instant writ petition, has been filed for a writ of certiorari, to call for the records, pertaining to the impugned sale notice, issued by the first respondent, in DB/ALWARP/SALE NOTICE/2017-18, dated 18/7/2017 and to quash the same and consequently, to direct the first respondent, not to proceed further with the matter.

4. Though Mr.R.Thirumurthy, learned counsel for the writ petitioner submitted that the petitioner is neither a borrower nor a guarantor to the loan obtained by the third respondent from Dena Bank, Chennai/first respondent, by mortgaging the petitioner's property, which according to him has been sold, without his knowledge, and that fraud has been committed by the second respondent by misusing the Power of Attorney, dated 23/11/2015, and sought for issuance of Rule Nisi, this Court is not inclined to entertain the writ petition, for the reason that time and again, 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, a 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:

—

"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:

"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.

5. On the aspect as to whether there was any fraud or misuse committed by the second respondent, perusal of the Power of Attorney, dated 23/11/2015, admittedly, said to have been executed by the petitioner, shows that under Clause 16 of the General Power of Attorney, dated 23/11/2015, the petitioner has authorised the second respondent, to execute any deed or documents i.e., sale settlement, lease, mortgage and present them before the Registrar of the registering authority, and pay such fees, as may be necessary.

6. The issue as to whether the second respondent has sold the subject property, to the third respondent, without his knowledge and fraud, if any committed, is a pure question of fact, which has to be substantiated before the forum.

7. In the light of the above decisions and discussion, we are not inclined to entertain the instant writ petition.

8. In the result, writ petition is dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed. Registry is directed to return the original sale notice, dated 18/7/2017, to the petitioner, after getting an attested copy of the same from the learned counsel for the petitioner.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

mvs.

To

1. The Authorised Officer
Dena Bank
Alwarpet Branch
Chennai 600 018.

+1cc to Mr.R.Thirumoorthy, Advocate Sr. 60100

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W.P.No.22297 of 2017

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