

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.12.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND

THE HON'BLE MR.JUSTICE R.PONGIAPPAN

W.P.No.33326 of 2017

and

W.M.P.No.36767 of 2017

1.Chemtech Industry,
Proprietor: K.K.Ramesh
S/o.K.P.Krishnan,
B-20 Bm SIDCO Industrial Estate,
Phase II, Hosur, Krishnagiri District,
Tamil Nadu-635126

2.K.K.Ramesh

3.Gayathri.R

... Petitioners

vs.

1.The Authorized Officer,
Central Bank of India,
19-A, M.G.Road, Hosur-635 109.

2.The Authorized Officer,
Central Bank of India,
Regional Office: 14/15,
Variety Hall Road,
Coimbatore-641 001.

3.The Regional Manager,
Central Bank of India,
Regional Office: 14/15, Variety Hall Road,
Coimbatore-641 001.

4.S.Selvaraj, S/o Vathalya Pillai Sangili
Assistant General Manager,
Credit Department,
Central Bank of India,
Head of Officer, Chandermukhi,
Nariman Point, Mumbai-400 021.

5.Mohanraj, Proprietor,
M/s.Sree Automotive Industries,
Hosur.

... Respondents

Prayer: WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorarified Mandamus, calling for the records on the file of the Debts Recovery Tribunal-III, Chennai in connection with the order dated 23.10.2017 passed by the learned Presiding Officer, Debts Recovery Tribunal-III in S.A.No.248 of 2017 and quash the same by holding that it is perverse and illegal, inasmuch as he failed to consider the serious allegations of fraud committed by them in disposal of secured assets of the petitioner and it was passed without following the principles of natural justice and due process of law, and direct the Debts Recovery Tribunal, to adjudicate the application filed by the petitioner under Section 17 of the SARFAESI Act, 2002, afresh, considering all the grounds raised by the petitioner, therein, including the allegations of fraud and collusion against the respondent bank by following due process of law.

For Petitioners : Mr.P.Ulaganathan

ORDER

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

Petitioners are the borrowers. They have challenged the sale notice, dated 21.09.2017, issued by Central Bank India, Hosur, in S.A.No.248 of 2017. Petitioners have contended that they have availed loan facilities from the bank. They volunteered for sale of the secured assets, with the approval of the respondent bank. However, in the process, Bank, went back on the principle agreement, to release the documents, pertaining to one of the immovable assets. Bank had appropriated the sale proceeds and utilised for liquidating the term loan alone.

2. Petitioners have further contended that the Manager of the respondent bank colluded with fifth respondent, in selling away the machinery hypothecated by the petitioners with the respondent bank, for Rs.3.36 crores, accepting Rs.2 crores from fifth respondent. By fraudulently creating two documents in the form of affidavits, dated 30.03.2016, as if executed by the writ petitioners, respondents 4 and 5, sought to prove that the petitioners had agreed for sale of machinery, for a sum of Rs.3.36 crores, to the fifth respondent. Petitioners are not aware that Rs.2 crores had been deposited by the fifth respondent, against the loan account. Though, allegations of fraud were made, the Tribunal failed to address the same.

3. Learned counsel for the petitioners further submitted that without issuing notice to the respondents 2 to 5, in a hurried manner, without adverting to fraud, Debts Recovery

Tribunal-III, Chennai, dismissed SARFAESI application. Learned counsel for the petitioners further submitted, when the Tribunal failed to exercise the jurisdiction, this Court can entertain the instant writ petition.

4. Heard, learned counsel for the petitioners and perused the material available on record.

5. Fraud which is the main challenge in S.A.No.248 of 2017, is a question of fact and hence to be substantiated before the fact finding authority. Yet another aspect, as to whether bank has dis-honoured the principle agreement, to release the documents, pertaining to sale of one of the immovable assets is also a question of fact. If the Debts Recovery Tribunal-III, Chennai, has declined to advert to the aspect of fraud, it cannot be contended that the petitioners are remediless and therefore, writ is the only remedy.

6. 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...."

7. In the light of the above discussion and decisions stated supra, when there is an effective and alternative remedy under the SARFAESI Act, 2002, we are not inclined to entertain the instant writ petition. Hence, the writ petition is dismissed. No costs. Consequently, the connected Writ Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

dm/mvs
To

- 1.The Authorized Officer,
Central Bank of India,
19-A, M.G.Road, Hosur-635 109.
- 2.The Authorized Officer,
Central Bank of India,
Regional Office: 14/15,
Variety Hall Road,
Coimbatore-641 001.
- 3.The Regional Manager,
Central Bank of India,
Regional Office: 14/15, Variety Hall Road,
Coimbatore-641 001.
4. The Section officer, V.R.Section, High Court Madras.
+1cc to Mr.P.Ulaganathan, Advocate, S.R.No.91338

W.P.No.33326 of 2017 and
W.M.P.No.36767 of 2017

MG (CO)
RRK(19/01/2018)