IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.12.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE R.PONGIAPPAN

W.P.No.33417 of 2017
and
W.M.P.No.36903 of 2017

M.Mahalingam ... Petitioner

vs.

1.The Authorised Officer,
M/s.Shriram Housing Finance Limited,
Regd.Office: No.123, Angappa Naicken Street,
Chennai-600 001.

2.The District Collector,
Pudukottai District. ... Respondents

Prayer: WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorari, calling for records relating to the impugned notice issued by the 2nd respondent in Notice No.Na.Ka.T4/14834/2017 dated 21.11.2017 and to quash the same and consequently to forbears the 1st and 2nd respondents from further proceedings till the disposal of the S.A.190 of 2017 on the file of the Debts Recovery Tribunal - II.

For Petitioners : Mrs.M.E.V.Thulasi

ORDER

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

Facts deduced from the supporting affidavit to the instant writ petition are that the petitioner has availed loan from M/s.Shriram Housing Finance Limited, Chennai and stated to have that entered into an agreement dated 26.02.2015, to repay the loan at the rate of 8.9% interest within 120 months and that E.M.I was fixed as Rs.34,391/- per month.

2. According to the petitioner, due to calamity in the family and expenditure incurred for surgery, he could not repay the monthly installments regularly. A demand notice dated

28.04.2017 under Section 13(2) of the SARFAESI Act, 2002, was issued by M/s.Shriram Housing Finance Limited, Chennai, first respondent herein. In response to the same, the petitioner sent a letter dated 22.07.2017 to (1) Mrs.Asha Lukose, Mumbai, (2) Mr.Raja, Sri Complex, Shriram Housing Finance Ltd., Trichy, (3) Mrs.Asha Lukose, Chennai and (4) Mr.K.Uppili Srinivasan, Chennai, contending inter alia that the rate of interest and duration of the sanctioned amount, are not in conformity with the agreement.

3. On behalf of M/s.Shriram Housing Finance Limited, Chennai, reply dated 31.07.2017 has been given to the learned counsel for the petitioner. A Rejoinder dated 08.08.2017, has been sent, by the petitioner, seeking for copy of the agreement, sanction letter and copy of the cheques. M/s.Shriram Housing Finance Limited, has issued notice dated 08.08.2017, under Section 13(4) of the SARFAESI Act, 2002 read with Rule 9 of the Security Interest (Enforcement) Rules, 2002, for taking symbolic possession.

4. Being aggrieved, petitioner has filed S.A.No.190 of 2017, on the file of the Debts Recovery Tribunal - II, Chennai, to set aside the possession notice dated 08.08.2017, issued by M/s.Shriram Housing Finance Limited, and consequently, to restore possession. Supporting affidavit to the instant writ petition reads that on 20.09.2017, Debts Recovery Tribunal - II, Chennai, granted status quo on condition to pay 10% of the amount due, on or before 17.10.2017. According to the petitioner, extension of time was sought for and the matter has been adjourned to 20.12.2017.

5. In the meanwhile, on the application filed by M/s.Shriram Housing Finance Limited, Chennai, under Section 14 of SARFAESI Act, 2002, the District Collector-cum-District Magistrate, Pudukottai District, second respondent herein, has issued an enquiry notice instructing the petitioner to appear on 27.11.2017. The said notice is challenged in the instant writ petition and the petitioner has sought for a writ of certiorari, to quash the same and consequently, to forbear the 1st and 2nd respondents from proceeding further till the disposal of the S.A.190 of 2017.

6. Reiterating the above averments and placing reliance on the decision of the Hon'ble Supreme Court in Mardia Chemicals Ltd., and others Vs. Union of India and others reported in (2004) 4 SCC 311 and a decision of the Hon'ble Division Bench of the Orissa High Court, in Krushna Chandra Sahoo Vs. Bank of India & others, reported in AIR 2009 (Ori) 35 (DB), Mrs.M.E.V.Thulasi, learned counsel for the petitioner submitted that representation / objections sent by the petitioner dated 22.07.2017, stated supra, have not been considered by

M/s.Shriram Housing Finance Limited and in such circumstances, the District Collector-cum-District Magistrate, Pudukottai District, has no authority or jurisdiction to proceed further, on the application filed under Section 14 of the SARFAESI Act, 2002.

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

8. Fact that the petitioner has borrowed loan from M/s.Shriram Housing Finance Limited, is not disputed. Default is admitted. Though possession notice issued under Section 13(4) of the SARFAESI Act, 2002, dated 08.08.2017 has been challenged before the Debts Recovery Tribunal-II, Chennai, even the conditional order dated 20.09.2017, directing the petitioner to pay 10% of the amount due on or before 17.10.2017, has not been complied with.

9. As per Section 13(4) of the SARFAESI Act, 2002, in case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt: PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

10. In Mardia Chemicals Ltd Vs. Union of India reported in (2004) 4 SCC 311 at paras 45 to 47 and 77, the Hon'ble Apex Court held as follows:-

"45. The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non- compliance of notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfillment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly we must make it clear unequivocally that communication of the reasons not accepting the objections taken by the secured borrower may not be taken to give an occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non- acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debt Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub- section (4) of Section 13 of the Act.

46. We are holding that it is necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to notice under Section 13(2) of the Act more particularly for the reason that normally in the event of non-

compliance with notice, the party giving notice approaches the court to seek redressal but in the present case, in view of Section 13(1) of the Act the creditor is empowered to enforce the security himself without intervention of the Court. Therefore, it goes with logic and reason that he may be checked to communicate the reason for not accepting the objections, if raised and before he takes the measures like taking over possession of the secured assets etc.

47. This will also be in keeping with the concept of right to know and lender's liability of fairness to keep the borrower informed particularly the developments immediately before taking measures under sub-section (4) of Section 13 of the Act. It will also cater the cause of transparency and not secrecy and shall be conducive in building an atmosphere of confidence and healthy commercial practice. Such a duty, in the circumstances of the case and the provisions is inherent under Section 13(2) of the Act.

77. It is also true that till the stage of making of the demand and notice under Section 13(2) of the Act, no hearing can be claimed for by the borrower. But looking to the stringent nature of measures to be taken without intervention of court with a bar to approach the court or any other forum at that stage, it becomes only reasonable that the secured creditor must bear in mind the say of the borrower before such a process of recovery is initiated. So as to demonstrate that the reply of the borrower to the notice under Section 13(2) of the Act has been considered applying mind to it. The reasons howsoever brief that may be for not accepting the objections, if raised in the reply, must be communicated to the borrower. True, presumption is in favour of validity of an enactment and a legislation may not be declared unconstitutional lightly more so, in the matters relating to fiscal and economic policies resorted to in the public interest, but while resorting to such legislation it would be necessary to see that the persons aggrieved get a fair deal at the hands of those who have been vested with the powers to enforce drastic steps to make recovery."

11. In Krushna Chandra Sahoo Vs. Bank of India & others, reported in A.I.R.2009 (Ori) 35 (DB), at paras 6 to 11, a Hon'ble Disvision Bench held as follows:-

"6. Admittedly, initially the Act did not contain any provision to consider the objections filed by the borrower or guarantor in reply to the notice under Section 13(2). However, by amendment the provisions of Sub-section (3-A) of Section 13 were inserted with effect from 11.11.2004 and the said provisions read as under:

"(3-A) 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 17-A."

Corresponding change was also brought into the Rules by inserting Rule 3-A to the Rules of 2002, which reads as under:

"3-A. Reply to representation of the borrower-

(a) After issue of demand notice under Sub-section (2) of Section 13, if the borrower makes any representation or raises any objection to the notice, the Authorized Officer shall consider such representation or objection and examine whether the same is acceptable or tenable.

(b) If, on examining the representation made or objection raised by the borrower, the secured creditor is satisfied that there is a need to make any changes or modifications in the demand notice, he shall modify the notice accordingly and serve a revised notice or pass such other suitable orders as deemed necessary, within seven days from the date of receipt of the representation or objection.

(c) If on examining the representation made or objection raised, the Authorized Officer 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."

7. A conjoint reading of both the provisions referred to hereinabove makes it clear that it is obligatory on the part of the authority first to consider and dispose of the objection by a speaking and reasoned order and communicate the order to the person aggrieved i.e., the borrower/guarantor. It is a condition precedent for issuance of notice under Section 13(4) of the Act. The authority cannot ignore the statutory provisions treating them merely to be a decoration piece in the statutes rather they require strict adherence for the simple reason that the financial institutions have been conferred with certain privileges for making expeditious recovery from the borrowers by-passing the onerous and lengthy procedure of civil suits.

8. A Constitution Bench of the Hon'ble Supreme Court in Sukhdev Singh and Ors. v. Bhagatram Sardar Singh Raghuvanshi and Anr., AIR 1975 Supreme Court 1331, held that the statutory authorities cannot deviate from the statutory provisions and any deviation, if so made, is required to be enforced by legal sanction of declaration by the Courts invalidating such actions in violation of the statutory Rules and Regulations. A similar view had been reiterated by the Apex Court in Ambika Quarry

Works, etc. v. State of Gujarat and Ors., AIR 1987 Supreme Court 1073; Purushottam v. Chairman, Maharashtra State Electricity Board & Anr., (1999) 6 SCC 49 and Sultan Sadik v. Sanjay Raj Subba & Ors. AIR 2004 Supreme Court 1377.

9. Therefore, it is evident that when the action of the instrumentalities of the State is not as per the Rules and Regulations and supported by the statute, the Court must exercise its jurisdiction to declare such an act illegal and invalid. It becomes the duty of the Court to ensure compliance of such Rules and Regulations for the reason that they are binding on the authorities. Any order or action done by the authority in violation of the statutory provisions is constitutionally illegal and this cannot claim any sanctity in law. There can be no obligation on the part of the Court to sanctify such illegal act.

10. When the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. It has been hither to uncontroverted legal position that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim 'Expressio unius est exclusio alterius', meaning thereby that if a statute provides for a thing to be done in a particular, then it has to be done in that manner and in no other manner and following other course is not permissible. [Vide State of Bihar v. J.A.C. Saldanna AIR 1980 SC 327; Haresh Dayaram Thakur v. State of Maharashtra and Ors. : AIR2000SC2281 ; Prabha Shankar Dubey v. State of Madhya Pradesh AIR 2004 SC 486, and Indian Banks' Association v. Devkala Consultancy Service AIR 2004 SC 2615.]

11. The attitude adopted by the Opposite Party No. 1 that it was under no obligation to dispose of the objection filed by the Petitioner merely on the ground that it had been submitted through his Counsel shocks the conscience of the Court. The Petitioner had approached his Counsel for better drafting and understanding so that it may facilitate the work of Opposite Party No. 1 as the lawyer being a well equipped person can draft the objection precisely bearing in mind the statutory provisions. Mr. Tuna Sahu, Learned Counsel for the Opposite Party No. 1 could not point out any bar provided by the Opposite Parties issuing any notification/ guidelines/circular that reply cannot be sent through the lawyer. Therefore, it could not have been ignored on the ground referred to above."

12. Possession notice dated 08.08.2017 issued under Section 13(4) of the SARFAESI Act, 2002, read with Rule 9 of the Security Interest (Enforcement) Rules, 2002, has been challenged inter alia on the grounds that Section 13(3-A) of the SARFAESI Act, 2002, has not been followed. When the said issue is

pending before the Debts Recovery Tribunal, in S.A.No.190 of 2017, there cannot be any parallel proceedings before this Court on the same issue, and therefore, we are not inclined to delve into the same.

13. Pursuant to symbolic possession notice issued, as per Section 13(4) of the SARFAESI Act, 2002, it is always open to the Finance Company to seek for assistance, for taking physical possession. Section 14 of the SARFAESI Act, 2002 mandates that on receipt of an affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit, pass suitable orders for the purpose of taking possession of the secured assets, within a period of 30 days from the date of application. Proviso to the said Section states that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate, within the said period of thirty days, for the reasons beyond his control, he may after recording reasons, in writing, for the same, pass the order within such also period but not exceeding in aggregate 60 days.

14. Under Section 14 of the SARFAESI Act, 2002, District Magistrate cum District Collector, is mandated to provide assistance for taking physical possession of assets and documents, relating thereto and to forward such assets and documents to the secured creditor, subject to satisfaction of the parameters contained in Section 14 of the SARFAESI Act, 2002.

15. Section 14 of the SARFAESI Act, 2002 is extracted hereunder:-

"Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset:

(1) Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him--

(a) take possession of such asset and documents relating thereto; and

(b) forward such assets and documents to the secured creditor.

[Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that--

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavits pass suitable orders for the purpose of taking possession of the secured assets:

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.]

[(1-A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him,--

(i) to take possession of such assets and documents relating thereto; and

(ii) to forward such assets documents to the secured creditor.]

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) 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."

16. Notice issued under Section 14 of the SARFAESI Act by the District Magistrate cum District Collector, Pudukottai District, calling the petitioner for an enquiry, cannot be said to be without jurisdiction. No substantial grounds have been made warranting issuance of the writ of certiorari. It is open to the petitioner to place all materials before the District Magistrate cum District Collector, Pudukkottai District, in the enquiry.

17. With the above observations, writ petition is dismissed. No costs. Consequently, the connected Writ Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

dm

To

1.The District Collector,
Pudukottai District.

2.The District Magistrate,
Pudukottai District.

W.P.No.33417 of 2017
and
W.M.P.No.36903 of 2017

(CO)
RRK(/01/2018)