

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.33557 of 2017
and WMP No.37080 of 2017

M/s.Supreme Sizing Industries,
Rep. by the Proprietor R.Gopalasamy

... Petitioner

vs.

1. The Authorised Officer,
State Bank of India,
Stressed Assets Management Branch,
No.1112, Raja Plaza, Avinashi Road,
Coimbatore.

2. The Debts Recovery Appellate Tribunal,
4th Floor, Anna Salai,
Chennai - 600 002.

... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorari, calling for the entire records relating to the proceedings of M.A.(S.A.) No.216/2017 pending before the 2nd respondent and quash the order passed in I.A.No.1730/2017 in M.A.(S.A.) No.216/2017 dated 13.12.2017 passed by the 2nd respondent.

For Petitioner : Mr.G.Murugendran
For Respondents : Mr.N.Sivabalan (for R1)

ORDER

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

Mr.N.Sivabalan, learned counsel appearing for the bank, instructed by the bank to take notice, was heard.

2. With the consent of both the learned counsel for the parties, writ petition is taken up for final hearing and disposed of.

3. Facts deduced from the supporting affidavit, indicate that M/s.Supreme Sizing Industries, Coimbatore, engaged in business of sizing textile, had availed cash credit facility

from State Bank of Hyderabad, subsequently merged with State Bank of India. There was default. Hence, loan account has been classified as non performing asset. E-auction sale notice dated 05.10.2017, has been issued to the borrower, M/s.Supreme Sizing Industries, Coimbatore and Shri.R.Gopalswamy, guarantor, contending inter alia that the outstanding dues, as on 30.09.2017, was Rs.63,43,935.51p, including accrued interest. By the said notice, State Bank of India, Stressed Assets Management Branch, Coimbatore, stated that the petitioner, M/s.Supreme Sizing Industries, is liable to pay future interest, w.e.f. 01.10.2017 together with incidental expenses, cost, charges, etc. Reserve price for the Property No.1, has been fixed as Rs.3,77,00,000/-. Paper publication to that effect, has been made.

4. Being aggrieved by the action of State Bank of India, Stressed Assets Management Branch, Coimbatore, bringing the property for e-auction sale, M/s.Supreme Sizing Industries, represented by its Proprietor, has filed S.A.No.325 of 2017, before the Debts Recovery Tribunal, Coimbatore, for a prayer to set aside the SARFAESI proceedings, initiated by the respondent bank. Pending disposal of S.A.No.325 of 2017, petitioner has sought for an interim order of stay of auction in I.A.No.2166 of 2017 in S.A.No.325 of 2017.

5. After hearing the learned counsel appearing for the petitioner and bank, vide order dated 08.11.2017, in I.A.No.2166 of 2017, the Debts Recovery Tribunal, Coimbatore, granted an ad-interim injunction against the bank not to confirm the sale till 09.01.2018, subject to payment of Rs.11,00,000/- to the respondent bank, on or before 08.12.2017, as 1st installment, and another sum of Rs.11,00,000/- to the respondent bank, on or before 08.01.2018, as 2nd installment.

6. Debts Recovery Tribunal, Coimbatore has also made it clear that in the event of failure to pay even a single installment, as ordered above, the ad-interim injunction granted not to confirm the sale till 09.01.2018, shall stand vacated automatically and thereafter, the respondent bank is at liberty to proceed against the secured assets, as per the law. Tribunal has also made it clear that bank is at liberty to proceed with the proposed sale fixed on 09.11.2017, subject to the above condition.

7. The Authorised Officer, State Bank of India has filed an appeal under Section 18 of the SARFAESI Act, 2002, in M.A.S.A.No.216 of 2017 against the order dated 08.11.2017, made in I.A.No.2166 of 2017 in S.A.No.325 of 2017, before the Debts Recovery Appellate Tribunal, Chennai.

8. Having regard to the amount mentioned in the auction notice dated 05.10.2017 i.e. Rs.63.43 Lakhs, and by observing that Mr.R.Gopalsamy was instrumental in both the loan accounts for payment of more than Rs.8 Crores, Debts Recovery Appellate Tribunal, Chennai, vide proceedings dated 13.12.2017, has modified the order of stay, directing the petitioner to deposit the entire Rs.63.43 Lakhs, within a week from 13.12.2017. The said order is impugned in this writ petition.

9. Material on record discloses that Managing Director of M/s.Supreme Cot-Spin Mills India Pvt. Limited, Tirupur District, has borrowed loan from State Bank of Hyderabad. Mr.R.Gopalswamy and Mrs.G.Jagathambal, of M/s.Supreme Cot-Spin Mills India Pvt. Limited, Tirupur District, have stood as guarantors, for the loan availed by M/s.Supreme Cot-Spin Mills India Pvt. Limited, Tirupur District, which defaulted in payment. Therefore, State Bank of Hyderabad, Coimbatore Branch, has issued a notice dated 17.02.2016 under Section 13(2) of the SARFAESI Act, 2002 calling upon the above to pay a sum of Rs.8,34,26,708.31p, with further interest and incidental expenses and costs, failing which, action would be taken under Section 13(4) of the SARFAESI Act, 2002.

10. S.A.No.325 of 2017 has been filed, on the file of Debts Recovery Tribunal, Coimbatore, challenging the auction notice dated 05.10.2017, wherein the outstanding dues borrowed by Ms/. Supreme Sizing Industries, Coimbatore, represented by its Proprietor, for which Mr.R.Gopalswamy, stood as guarantor, is Rs.63,43,935.51p. Considering the amount due and payable by Supreme Sizing Industries and its guarantor, Debts Recovery Tribunal, Coimbatore has granted interim injunction, against the bank, not to confirm the sale till 09.01.2018, subject to payment of Rs.11,00,000/- to the respondent bank, on or before 08.12.2017, as 1st installment, and another sum of Rs.11,00,000/- to the respondent bank, on or before 08.01.2018, as the 2nd installment. However, Debts Recovery Tribunal, Coimbatore, has made it clear that bank is at liberty to proceed with the proposed sale fixed on 09.11.2017.

11. Mr.N.Sivabalan, learned counsel for the bank submitted that sale certificate has been issued.

12. When the bank has filed M.A.S.A.No.216 of 2017, challenging the order made in I.A.No.2166 of 2017 in S.A.No.325 of 2017, Debts Recovery Appellate Tribunal, Chennai, has erred in taking note of the amount due and payable by M/s.Supreme Cot-Spin Mills India Pvt. Limited and others, and by observing that R.Gopalswamy was instrumental in both the loan accounts for payment of more than Rs.8 Crores, has directed the petitioner to

deposit the entire Rs.63.43 Lakhs mentioned in the sale notice dated 05.10.2017.

13. Merely because, Mr.G.Gopalswamy, stood as a guarantor in both the loan accounts, Debts Recovery Appellate Tribunal, Chennai, ought not to have directed the petitioner, which is a different entity, to deposit the entire loan amount of Rs.63.43 Lakhs, demanded under the sale notice dated 05.10.2017. Though the Appellate Tribunal is conferred to sustain or modify the conditional order, the question to be answered in this writ petition, whether the discretion has been exercised properly or not?

(i). Reiterating as to how the discretionary power has to be exercised, the Hon'ble Supreme Court in Sant Raj and another v. O.P.Singla and others reported in (1985)2 SCC 349, held that "whenever, it is said that something has to be done, within the discretion of the authority, then that something has to be done, according to the rules of reason and justice and not according to private opinion, according to law and not humour. It is to be not arbitrary, vague and fanciful but legal and regular and it must be exercised within the limit to which an honest man to the discharge of his office ought to find himself. Discretion means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful.

(ii) In Fasih Chaudhary v. Director General, Doordarshan and others reported in 1989 1 SCC 89, the Hon'ble Supreme Court held that exercise of discretion should be legitimate, fair and without any aversion, malice or affection. Nothing should be done which may give the impression of favouritism or nepotism. While fair play in action in such matters is an essential requirement, 'free play in the joints' is also a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere as the present one.

(iii) In Shiv Sagar Tiwari v. Union of India and others reported in 1997 1 SCC 444 the Hon'ble Supreme Court held that the discretionary power has to be exercised to advance the performance, to subserve for which the power exists.

(iv) In A.P. Aggarwal v. Govt. of NCT of Delhi reported in (2000) 1 SCC 600, the Hon'ble Supreme Court held as under:

"The conferment of power together with a discretion which goes with it to enable proper exercise of the power and therefore it is coupled with a duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred which undoubtedly is public interest and not individual or private gain, whim

or caprice of any individual."

(v) In *Union of India v. Kuldeep Singh* reported in (2004) 2 SCC 590, the Supreme Court while testing the correctness of the judgment rendered under the Narcotic Drugs and Psychotropic Substances Act, 1985, and the discretion to be exercised by the High Court, explained the principles governing the mode of exercise of the discretionary power for public functionaries, as follows:

"20. When anything is left to any person, judge or Magistrate to be done according to his discretion, the law intends it must be done with sound discretion, and according to law. In its ordinary meaning, the word "discretion" signifies unrestrained exercise of choice or will; freedom to act according to one's own judgment; unrestrained exercise of will; the liberty or power of acting without control other than one's own judgment. But, when applied to public functionaries, it means a power or right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. Discretion is to discern between right and wrong; and therefore, whoever hath power to act at discretion, is bound by the rule of reason and law.

21. Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons.

22. The word "discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care; therefore, where the legislature concedes discretion it also imposes a heavy responsibility. "The discretion of a judge is the law of tyrants; it is always unknown. It is different in different men. It is casual, and depends upon constitution, temper and passion. In the best it is often times caprice; in the worst it is every vice, folly, and passion to which human nature is liable,"

said Lord Camden, L.C.J., in Hindson and Kersey reported in (1680) 8 HOW St Tr 57.

23. If a certain latitude or liberty is accorded by a statute or rules to a judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him, it is judicial discretion. It limits and regulates the exercise of discretion, and prevents it from being wholly absolute, capricious, or exempt from review."

14. Out of Rs.63.43 Lakhs, demanded in the sale notice dated 05.10.2017, petitioner, M/s.Supreme Sizing industries, Coimbatore, borrower, has been directed to deposit Rs.22 Lakhs in two equated instalments, as stated supra. Out of which, one instalment had already been paid. Nearly 1/3rd of the amount demanded has been directed to be paid as a condition, for an order of interim injunction, not to confirm the sale. Said order is just and reasonable. Whereas, the direction of DRAT, Chennai to make deposit of Rs.63.43 Lakhs, within a week from 13.12.2017, is onerous.

15. Though in Vijay Kumar Madan v. R.N.Gupta Technical Education Society reported in 2002 (5) SCC 30, the Hon'ble Supreme Court held that the cost awarded in setting aside an ex parte order, should not be onerous, observation of the Hon'ble Supreme Court, can be applied to the facts of this case,

"In short, the court cannot exercise its power to put the defendant/applicant on such terms as may have the effect of pre-judging the controversy involved in the suit and virtually decreeing the suit though ex-parte order has been set aside or to put the parties on such terms as may be too onerous."

16. In Mardia Chemicals Ltd., v. Union of India reported in 2004 (4) SCC 311, one of the challenges to Section 17(2) of SARFAESI Act, 2002, was that the deposit of 75% of the amount, at the initial stage of SARFAESI proceeding, was unreasonable and oppressive, and therefore, unconstitutional. Dealing with the said submission, the Hon'ble Supreme Court, at Paragraphs 60, 62 to 64, held as follows:

"60. The requirement of pre-deposit of any amount at the first instance of proceedings is not to be found in any of the decisions cited on behalf of the respondent. All these cases relate to appeals. The amount of deposit of 75% of the demand, at the initial proceeding itself sounds unreasonable and oppressive more particularly when the secured assets/the management thereof along with the right to transfer such interest has been taken over by the secured creditor or in some cases property is also sold. Requirement of deposit of such a heavy amount on basis

of one sided claim alone, cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute. Merely giving power to the Tribunal to waive or reduce the amount, does not cure the inherent infirmity leaning one- sidedly in favour of the party, who, so far has alone been the party to decide the amount and the fact of default and classifying the dues as NPAs without participation/association of the borrower in the process. Such an onerous and oppressive condition should not be left operative in expectation of reasonable exercise of discretion by the concerned authority. Placed in a situation as indicated above, where it may not be possible for the borrower to raise any amount to make the deposit, his secured assets having already been taken possession of or sold, such a rider to approach the Tribunal at the first instance of proceedings, captioned as appeal, renders the remedy illusory and nugatory.

62. As indicated earlier, the position of the appeal under Section 17 of the Act is like that of a suit in the court of the first instance under the Code of Civil Procedure. No doubt in suits also it is permissible, in given facts and circumstances and under the provisions of the law to attach the property before a decree is passed or to appoint a receiver and to make a provision by way of interim measure in respect of the property in suit. But for obtaining such orders a case for the same is to be made out in accordance with the relevant provisions under the law. There is no such provision under the Act.

63. Yet another justification which has been sought to be given for the requirement of deposit is that the secured assets which may be taken possession of or sold may fall short of the dues therefore such a deposit may be necessary. We find no merit in this submission too. In such an eventuality the recourse may have to be taken to sub-section 10 of Section 13 where a petition may have to be filed before the Tribunal for the purpose of making up of the short-fall.

64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet (iii) the secured assets or its management with transferable interest is already taken over and under control of the secured creditor (iv) no special reason for double security in respect of an amount yet

to be determined and settled (v) 75% of the amount claimed by no means would be a meager amount (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution."

17. Reverting to the case on hand, for realizing Rs.63,43,935.51p, auction notice has been issued, and when the said notice is challenged in S.A.No.325 of 2017 with an interim prayer, DRT, vide interim order, dated 08.11.2017 in I.A.No.2166 of 2017, whereas directed the writ petitioner to deposit Rs.22 Lakhs, in two equal instalments, the appellate forum has directed that the entire amount of Rs.63 Lakhs, to be deposited and that too, within one week, from the date of passing of the order.

18. Observations of the Hon'ble Supreme Court, as to the unreasonableness and oppressive nature, in directing huge deposit, can be made applicable, even to a case, where an interim order is passed.

19. For the reasons stated supra, we are inclined to interfere with the same and proceedings dated 13.12.2017 in MA (SA) No.216 of 2017 on the file of the Debts Recovery Appellate Tribunal, Chennai is set aside. Order dated 08.11.2017, made in I.A.No.2166 of 2017 in S.A.No.325 of 2017, on the file of Debts Recovery Tribunal, Coimbatore, is restored.

20. Writ petition is allowed. No costs. Consequently, the connected Writ Miscellaneous Petition is closed.

Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

ars

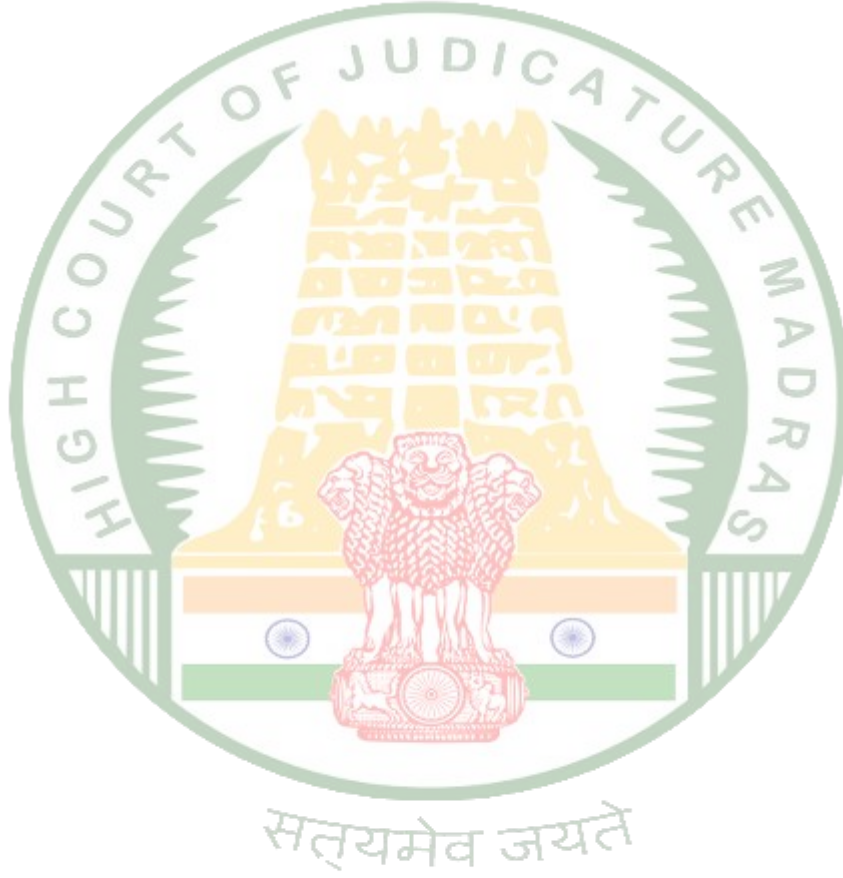
To

1. The Debts Recovery Appellate Tribunal,
4th Floor, Anna Salai,
Chennai - 600 002.

+1cc to Mr.G.Murugendran, Advocate, S.R.No.91584
+1cc to Mr.S.Sethuraman, Advocate, S.R.No.91851

W.P.No.33557 of 2017
and WMP No.37080 of 2017

RRK (31/01/2018)



WEB COPY