

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.08.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.23289 of 2017

and WMP No.24388 of 2017

V.Sunil Prasad

... Petitioner

vs.

1. Authorised Officer,  
Central Bank of India,  
2nd Floor, 48/49, Montieth Road,  
Egmore, Chennai - 600 008.

2. Authorised Officer / Chief Manager,  
S-7, Thiru Vika Industrial Estate,  
Guindy, Chennai - 600 032. ... Respondent

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorari, to call for the records pertaining to the Sale Notice dated 31.7.2017 vide RO:CHEN:RECV:2017-18:462 issued by the 1st respondent and quash the same and consequently direct the respondents to consider the letter dated 04.08.2017, written by the petitioner to the 2nd respondent.

For Petitioner : Mr.M.Bharath

ORDER

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

Petitioner and his wife have availed Housing Loan facility for a sum of Rs.30 Lakhs, from Central Bank of India, Guindy Branch, in October 2013. Thereafter, wife has availed an additional sum of Rs.10 Lakhs from the same bank. For securing the said loans, immovable property comprised in Plot No.119 Part and 120 full, Radha Avenue, Valasaravakkam, Chennai-7, owned by the petitioner and his wife, has been offered as security.

2. Petitioner has further contended that so far, they have paid Rs.23 Lakhs. Earlier, he was employed in "Shree Plan Your Journey Pvt. Ltd.," as Assistant Regional Manager and was relieved from the Company with effect from 02.11.2016. However, he managed to pay the monthly instalments. But, on 19.04.2017, loan account of the petitioner, has been declared as Non-

Performing Asset. Authorised Officer / Chief Manager, Central Bank of India, Chennai, issued a notice dated 20.04.2017 under Section 13(2), of SARFAESI Act, 2002 demanding a sum of Rs.39,18,843/- as outstanding amount, as on 20.04.2017. Petitioner approached, the 2nd respondent explaining his difficulty. He also prayed to regularise the loan account. After the issuance of notice under Section 13(2) to show his bonafide, petitioner has paid Rs.1,10,000/-. Again the petitioner wrote a letter dated 19.06.2017, explaining the difficulties. On 29.06.2017, 2nd respondent issued the possession notice under Section 13(4) of the SARFAESI Act, 2002. Again he approached the bank stating that now, he has secured employment in 'Allhind Tours and Travels', with effect from 05.06.2017.

3. Declining to accept the request of the petitioner, sale notice dated 31.07.2017 has been issued under Rule 8 of the Security Interest (Enforcement) Rules, 2002, bringing the property for auction on 11.09.2017. Petitioner sent a letter dated 04.08.2017 to the 2nd respondent explaining the factual background and requested to reschedule the loan, so as to enable him to repay without any default. Request of the petitioner has been rejected vide letter dated 05.08.2017. However, the bank has offered a One Time Settlement.

4. Contending inter alia that he has no other alternate remedy, instant writ petition has been filed under Article 226 of the Constitution of India, for a certiorarified mandamus, to quash the auction notice dated 31.07.2017 and consequentially, prayed for a direction to the respondents to consider his representation dated 04.08.2017.

5. On the basis of the averments and supporting the prayer sought for, Mr.M.Bharath, learned counsel for the petitioner reiterated that only due to the loss of employment, the petitioner could not repay the loan amount in installments as scheduled and that, taking note of his plight direction be issued to the respondents to reconsider his representation dated 04.08.2017.

6. Though averments have been made, assailing the sale notice dated 31.07.2017, during the course of hearing, Mr.M.Bharath, learned counsel for the petitioner did not urge the same, but insisted that the petitioner be given an opportunity to repay the loan in installments.

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

8. Loan availed has been admitted. As loan amount has not been paid, consequent to default, loan account has been

classified as Non Performing Asset as on 19.04.2017.

9. Thereafter, bank has issued notice under Section 13(2) dated 20.04.2017, demanding a sum of Rs.39,18,843/-, to be paid within 60 days from the date of receipt of the notice, failing which, bank would be exercising the powers under Section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 against the secured assets. Material on record does not disclose as to whether the petitioner has sent any reply/representation under Section 13(3-A) of the SARFAESI Act, 2002.

10. According to the petitioner, he was regular in making the payment, when he was employed and both the petitioner and his wife had approximately paid Rs.23 Lakhs. Earlier, he was employed in 'Shree Plan Your Journey Pvt. Ltd.,' as Assistant Regional Manager and that he was relieved from the company with effect from 02.11.2016 and because of that he could not pay the installments in time.

11. Material on record further discloses that on 05.06.2017, 'Allhind Tours and Travels' has issued him a letter of appointment subject to certain terms and conditions. As loan amount has not been repaid even after the receipt of the notice under Section 13(2) of the SARFAESI Act, 2002, Authorised Officer/Central Bank of India, has issued a notice dated 29.06.2017 under Section 13 (4) of SARFAESI Act, 2002, for possession of immovable property offered as security.

12. Petitioner has sent a letter dated 19.06.2017, explaining the difficulty in repayment. Bank has issued a sale notice dated 31.07.2017, bringing the property for auction on 11.09.2017. Thereafter, the petitioner has sent a letter dated 04.08.2017 to the Chief Manager, Central Bank of India, Chennai, reiterating the abovesaid position and sought for rescheduling. Responding to the letter dated 04.08.2017, bank has sent a reply to the petitioner as hereunder.

GUIN/ADV/2017-18/71

05/08/2017

Mr.V.SUNIL PRASAD,  
V.PRAVITHA, No.2, SGS Palace,  
Madurai Perumal Koil Street,  
Valasaravakkam, Chennai - 600 087.  
Sir/Madam,

Reg: Your House Building Loan accounts maintained with us.

Ref: Your Letter No.NIL Dated 04/08/2017.

We are in receipt of the captioned letter and acknowledged content of the same. In this respect, we submit the following.

Your account was slipped to Non performing Asset category on 19/04/2017 and we have been reminding to adjust the overdue amount to upgrade the account to Standard category and remit the future EMI regularly.

We have issued notice u/s.13(2) under SARFAESI on 21/04/2017 giving 60 days time to regularise the accounts and finally we have issued 13(4) on 29/06/2017 having failed to adjust to repay the amount as per the notice dated 21/04/2017 and taken symbolic possession of the property. We even met both of you personally several occasions and persuaded to remit the overdues to avert further legal proceedings. But all the efforts taken by us were not taken care of and we have left with no option but to proceed for sale of the property for recovery of the dues and hence put up for e-auction and as such we will not be in a position to consider your request favourably. However we are ready for One Time Settlement of these accounts and shall consider maximum benefits as per extant guidelines available under the scheme.

Yours faithfully,  
Sd/-  
Chief Manager,  
Guindy.

13. As stated supra, though, the petitioner has raised certain grounds assailing the action of the bank in bringing the property for auction, same were not urged. On the aspect, whether borrower / guarantor, can invoke writ remedy, when there is an alternative and efficacious remedy, in the Act, 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.  
....."

14. The latter portion of the prayer sought for, is to direct the bank to consider the letter dated 04.08.2017. Bank has already considered the letter dated 04.08.2017, and declined to accept his request. However, bank has offered One Time Settlement of the account and stated that it would consider the maximum benefit, as per the extant guidelines available under One Time Settlement scheme.

15. Representation of the petitioner dated 04.08.2017 has already been answered. There is nothing for this Court to direct the bank to onceagain consider the letter dated 04.08.2017. Submissions to permit the petitioner to repay the loan amount in installments would amount to rewriting the terms of offer made by the bank. Repeatedly, this Court has held that in contractual matters, Court has no power to issue directions to the bank as to how the 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."

16. 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.

17. In the case on hand, representation dated 04.08.2017, has been considered and reply has been given. Therefore, in the light of the decisions and discussion, we are of the view that the writ petition is not maintainable and accordingly, dismissed. No Costs. Consequently, the connected Writ Miscellaneous Petition is closed.

Sd/-  
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. Authorised Officer,  
Central Bank of India,  
2nd Floor, 48/49, Montieth Road,  
Egmore, Chennai - 600 008.

2. Authorised Officer / Chief Manager,  
Central Bank of India  
S-7, Thiru Vika Industrial Estate,  
Guindy, Chennai - 600 032.

+1 cc to Mr.M.Bharath Advocate sr 62326

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and  
WMP No.24388 of 2017

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