

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.09.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.24758 of 2017
and WMP Nos.26137 & 26138 of 2017

Mr.Francis George Petitioner

vs.

Indiabulls Housing Finance Ltd.,
Rep. by its Authorised Officer,
No.20, Apex Chamber, Sir Thyagaraya Road,
3rd Floor, T.Nagar,
Chennai - 600 042. Respondent

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorari Mandamus, calling for the records of the respondent in respect of the impugned Sale Cum E-Auction Notice dated 22.08.2017 bearing file No.1403/HLAPCHE00109347 at the instance of the respondent in respect of the property bearing Municipal Door No.18, New Door No.2, Bhaskera Sastri Street, (also known as Syed Khan garden 1st Street, Puliyur, Rangarajapuram, Kodambakkam, Chennai - 600 024, comprised in Paimash No.1033 to 1039, T.S.No.49/9, Block No.48, measuring in all 3800 square-feet, scheduling the auction of the aforesaid property on 15.09.2017 at 1.00pm and quash the same and consequently restrain the respondent from any manner subjecting the property to auction by arbitrarily fixing the reserve price of the property without following the due process.

For Petitioner : Mr.A.Palaniappan

ORDER

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

Properties of the borrower, who had committed default has been brought for auction, in 2015, by sale cum e-auction notice dated 27.01.2015. Borrower has questioned the same, by filing an application under Section 17 (1) of the SARFAESI Act, 2002, before the Debts Recovery Tribunal-II, Chennai, in S.A.No.57 of 2015 and after considering the rival submissions and taking note of the tripartite agreement dated 03.01.2014, vide order in S.A.No.57 of 2015 dated 16.06.2015, the Debts Recovery Tribunal-II allowed the appeal, as hereunder.

"10. On seeing the Tripartite Agreement dated 03.01.2014, the said Rakesh Jain agreed to purchase the property for Rs.5 Crores but he has not complied with the conditions and therefore the agreement was terminated by respondent on 23.06.2014. Thereafter, the respondent bank issued Sale Notice. In e-auction sale, the same Rakesh Jain was the bidder and bid the secured asset for Rs.3.51 Crore. When the said Rakesh Jain agreed to purchase the property for Rs.5 crores, after the termination of agreement, he bid for Rs.3.51 Crores for the same property in the e-auction. It is not proper and is against the principles of natural justice. The said Rakesh Jain should not be allowed to participate in the bid below Rs.5 Crore by the respondent. But the respondent allowed for Rs.3.51 crores. It seems to be something wrong in the e-auction sale and for this reason only, the SA is to be allowed. The other grounds raised by the applicant are not acceptable.

11. In the result, the SA is allowed. No order as to costs."

2. Subsequently, the bank brought the property for auction, by sale cum e-auction notice dated 17.03.2017, which was once again challenged in another application under Section 17(1) of the Act, 2002 in 2017, on the file of the Debts Recovery Tribunal-II, Chennai. This time, after considering the submissions of the parties, Debts Recovery Tribunal-II, Chennai, vide order dated 11.07.2017 at paragraph Nos.8 & 9, ordered, as hereunder

"8. Though the sale was not taken place on the E-auction date, the respondent has to prove that the reserve price was fixed as per the valuation report. But, the respondent bank failed to file the valuation report and failed to explain how they fixed the reserve price for the Schedule mentioned property for the impugned sale notice. Further, the respondent failed to prove that the sale notice was served to the applicant. Hence, I find there is violation of the Rules in Sale-cum-E-auction notice dt.17.3.2017 issued by the respondent and the SA has merit to be allowed.

9. If there is any confusion or doubt arises to this Tribunal to decide the case, the case laws are very much essential to take decision. But, in the present case, the facts and laws are very clear. There is no doubt and confusion in the facts and law. The counsel for applicant referred too may case-laws. But they are not discussed in this order since the facts and law are very clear in the present case."

3. Now for the third time, bank has issued e-auction notice dated 22.08.2017, bringing the properties for auction on 15.09.2017. Said notice is impugned on the grounds inter alia that the bank has arbitrarily reduced the upset price of the property, to Rs.4 Crores without following the procedure and valuation report.

4. Added further, Mr.A.Palaniappan, learned counsel for the petitioner submitted that while setting aside the sale cum e-auction dated 17.03.2017, the Debts Recovery Tribunal-II, Chennai in order dated 11.07.2017, has clearly observed that bank has not filed a valuation report.

5. Contention has also been made that the Debts Recovery Tribunal-II, Chennai, has categorically observed that valuation has not been done as per the procedure. In such circumstances, Bank has failed to explain as to how reserve price has been reduced, within a period of not less than two months and therefore the impugned 3rd auction notice dated 22.08.2017, is liable to be set aside.

6. Heard Mr.A.Palaniappan, learned counsel for the petitioner and perused the materials available on record.

7. Section 13 (4) of the SARFAESI Act, 2002, enables the secured creditor to take recourse to 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.

8. True that the earlier e-auction notices dated 27.01.2015 and 20.06.2017, respectively, have been set aside by Debts Recovery Tribunal-II, Chennai, vide orders dated 16.06.2015 and 11.07.2017 respectively, for the reasons stated supra.

9. Merely because the earlier sale notices have been set aside on the grounds extracted supra, that does not prevent the bank from taking a recourse to any measure under Section 13(4) of the SARFAESI Act, 2002, in the case on hand, by bringing the secured assets for auction. Upset price has been reduced to Rs.4 Crores. That appears to have been done, after the earlier e-auction notice dated 20.06.2017, has been set aside. Here again, if the bank has erroneously reduced the upset price or not taken into consideration the valuation report as contended by the learned counsel for the petitioner that itself would not give a cause of action to maintain a writ petition, under Article 226 of the Constitution of India. Material on record further discloses that as per the version of the bank, as on today, the petitioner has to pay a sum of Rs.6,26,55,869/-.

10. Time and again, Hon'ble Supreme Court, as well as this Court, have held that when there is an effective and alternative remedy provided under the statute, writ petition should not ordinarily be entertained. Reference can be made to few 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.

.....

9. In the light of the above decision of the Honourable Supreme Court, the writ petition filed by the petitioner seeking to set aside the possession notice issued to her long back is legally not sustainable. We are of the considered view that this petition has been filed only to drag on the proceedings and to evade repayment of the loan. That be so, the petitioner has no legal right to compel the bank to accept the one time settlement offer made by her."

11. In Satyawati Tondon's case, the Hon'ble Supreme Court held that the tribunals constituted under the SARFAESI Act, 2002, is competent to decide all questions of law and fact. Grounds raised before us, in the instant writ petition, can always be urged before the tribunal. Hence, the writ petition is dismissed, as not maintainable. No Costs. Consequently, the connected Writ Miscellaneous Petitions are closed.

12. Though Mr.A.Palaniappan, learned counsel for the petitioner submitted that rate of interest is high, this Court is not inclined to address the said issue in this writ petition, which is dismissed on the grounds of maintainability.

s/d-
Assistant Registrar(CS-III)

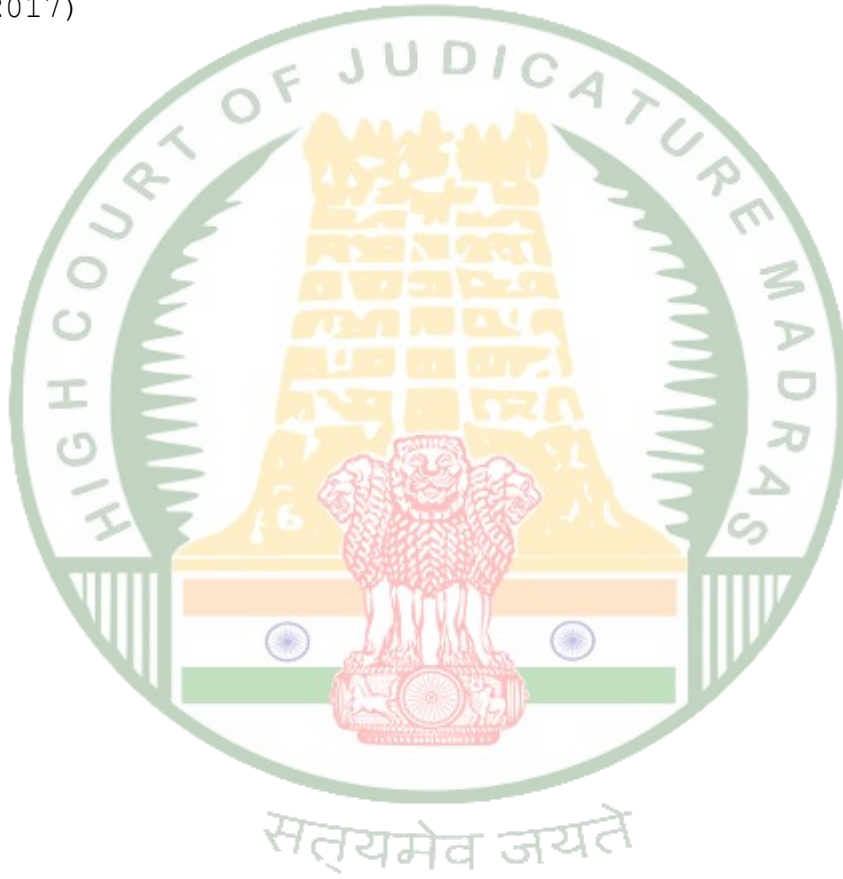
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Sub-Assistant Registrar

+1 CC to Ms. A. Palaniappan, Advocate sr 67686.

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