

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 4/10/2017

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

Writ Petition No.25944 of 2017
and

WMP.No.27501 & 27502/17

1. Mr.P.Danaraj
2. Mr.P.Mohanraj
3. Mrs.M.Meenakshi ... Petitioners

Vs

1. M/s. Diamond Engineering (Chennai) Pvt Ltd
rep. By the Interim Resolution Professional
Mr.V.Magesh, No.39/19 Aspen Court, III Floor
6th Main Road, R.A.Puram
Chennai 600 028.
2. State Bank of India
rep. By its Chief Manager
Leather and International Branch
M.V.J.Towers
177/1 Poonamallee High Road
Kilpauk, Chennai 600 010.
3. State Bank of India
rep. By the Deputy General Manager
Stressed Assets Management Branch
Red Cross Buildings
No.32 Red Cross Road
Egmore, Chennai 600 008. ... Respondents

Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of certiorari to call for the records on the file of the third respondent relating to e-auction sale notice dated 29/8/2017 issued by the third respondent for sale of assets of the petitioners and to quash the same.

For respondent ... Ms.A.Celine

O R D E R

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

E-auction notice, dated 29/8/2017, is impugned by the guarantors, on the grounds inter alia that, on 6/6/2017, an order of moratorium has been issued, by the National Company

Law Tribunal, Division Bench, Chennai, at the instance of Shah Brothers Ispat Private Ltd., and therefore, State Bank of India, Chennai, has no authority, to issue the above said sale notice. On the above submission, attention of this Court was brought to the order of the National Company Law Tribunal.

2. Added further, Ms.A.Celine, learned counsel for the petitioners submitted that though State Bank of India, was not a party to the proceeding, as per the order of the National Company Law Tribunal, Division Bench, Chennai, Bank, had participated in the deliberations and in the above said circumstances, prayed to entertain the writ petition.

3. On the aspect as to whether SARFAESI proceedings can be initiated or continued when the National Company Law Tribunal, Division Bench, Chennai, has issued a moratorium, attention of this Court was brought to an order of Allahabad High Court, in the matter of Sanjeev Shriya Vs. State Bank of India and six others (Writ - C.No.30285 of 2017).

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

5. Admittedly, the petitioners stood as guarantors, to the loan availed by the first respondent. On account of default, State Bank of India, Chennai, has classified the account as Non-performing Account, and issued a notice, dated 21/12/2016, under Section 13 (2) of the SARFAESI Act, 2002 to the petitioners, to which a reply, dated 5/1/2017, has been sent. Thereafter, on 18/5/2017, Bank has issued possession notice, under Section 13 (4) of the SARFAESI Act, 2002. M/s. Shah Brothers Ispat Private Ltd., has instituted a proceeding, under Section 9 of the Insolvency and Bankruptcy Code 2016, r/w. Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against M/s.Diamond Engineering (Chennai) Private Ltd., on the file of the National Company Law Tribunal, Division Bench, Chennai. Applicant therein is stated to be an operational creditor. Writ petitioners are not parties to the above said proceeding.

6. Taking note of Section 14 of the Insolvency and Bankruptcy Code, on 6/6/2017, National Company Law Tribunal, Division Bench, Chennai, has passed the following orders:-

"a. The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any Court of law, Tribunal, arbitration panel or other authority;

(b). Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or

any legal right or beneficial interest therein;

(c). Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002)

6. The Registry is directed to inform the Insolvency Resolution Professional to take charge of the entity and make compliance with this order as per the provisions of I & B Code, 2016.

7. Accordingly, the application is admitted. The Registry is directed to communicate this order to the operational creditor and the corporate debtor."

7. Repeatedly, the Hon'ble Supreme Court, as well as this Court held that correctness and validity of sale notice can be assailed before the Tribunal. Reference can be made to 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

(ii) In Union Bank of India v. Satyawati Tondon, reported in 2010 (5) LW 193 (SC), the Hon'ble Apex Court has 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:

... 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.

8. Though Ms.A.Celine, learned counsel for the petitioner contended that moratorium order, dated 6/6/2017, passed by the National Company Law Tribunal, Division Bench, Chennai, would bind State Bank of India/respondents 2 and 3 herein, on the grounds inter alia that they had participated in the deliberations, at this juncture, we are not inclined to delve into the said aspect, record any finding, and it is always open to the petitioners, to urge the same before the forum.

9. In Sanjeev Shriya's case, relied on by the learned counsel for the petitioners, the Tribunal therein has failed to take note of para 3 of the Insolvency and Bankruptcy Code 2016, r/w. Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and passed an order, which culminated into a challenge before the High Court. Facts of the reported case, disclose that being aggrieved by the order of the Tribunal, High Court has been approached. Such a situation has not arisen here.

10. In the light of the above discussion and decisions, writ petition is dismissed giving liberty to the petitioner to challenge the sale notice, in the manner known to law. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

mvs

To

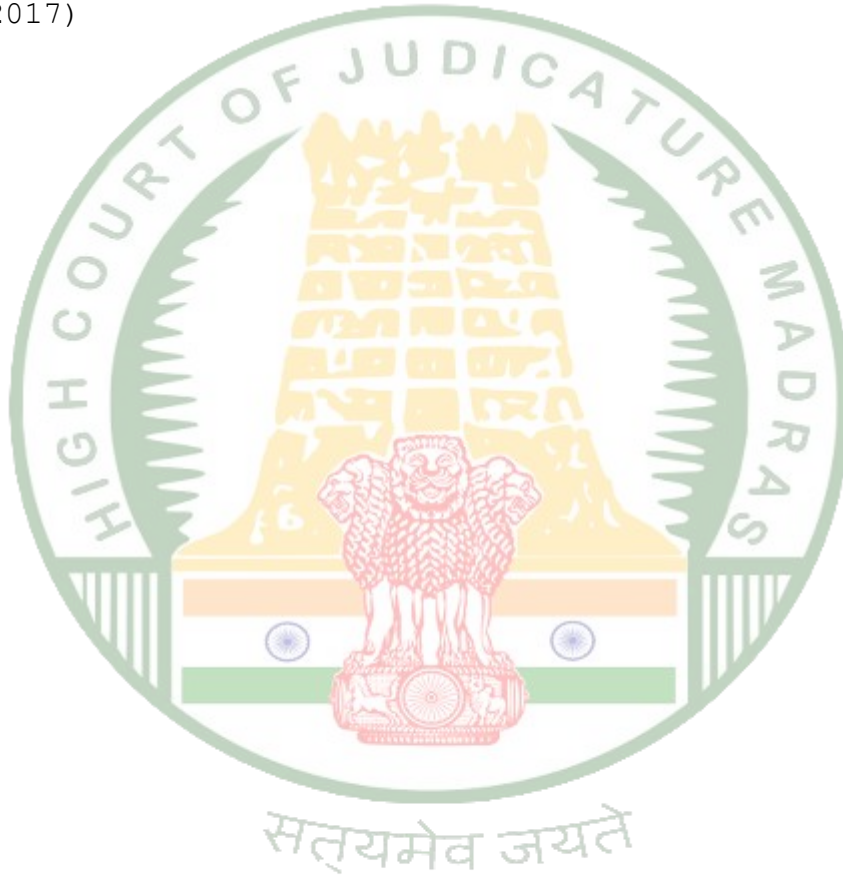
1. The Chief Manager
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2. The Deputy General Manager
State Bank of India
Stressed Assets Management Branch
Red Cross Buildings
No.32 Red Cross Road
Egmore, Chennai 600 008.

+1cc to Mr.R.Saravanan, Advocate, S.R.No.71604

W.P.No.25944 of 2017

SKV(CO)
GN(09/11/2017)



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