

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 4/7/2017

C O R A M

The Honourable Mr.JUSTICE S. MANIKUMAR  
and  
The Honourable Ms.JUSTICE V. BHAVANI SUBBAROYAN

W.P.No.16665 of 2017  
and  
W.M.P.Nos.18033 and 18034 of 2017

M/s.MCM Pharmaceuticals  
Rep. By its Prop.K.Vijaya Baskar,  
Old.No.15/1, New No.27/1,  
Nehruji Street,  
Near Court, First Floor,  
Shop No.2, Walajapet,  
Vellore District - 632 513. .... Petitioner

vs.

1. State Bank of India,  
RASMECCC & SARC Branch,  
No.97, 7<sup>th</sup> East Main Road,  
Gandhi Nagar,  
Vellore - 632 006.

2. K.Murugan

.... Respondents

Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of Declaration, declaring the sale conducted on 10.05.2016 pertaining to immovable property Item No.2 in the E-auction sale situated at Land & RCC Roofed Residential Building comprised in Old Survey No.344A/2 (Part) New T.S.No.152, Door No.13/1, Velumudali Street, Ranipet Town, Walaja Taluk, Vellore District, total land extent of 586.50 sq.ft. Purchased by the 2<sup>nd</sup> respondent in pursuant to the E-auction Sale Notice dated 28.03.2017 issued by the 1<sup>st</sup> respondent and declare the sale as null and void.

For Petitioner : Mr.V.R.Kamalanathan

O R D E R

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

Borrower, who has availed loan of Rs.20,00,000/-, from State Bank of India, Vellore, has failed to honour the same. The Bank issued a Demand Notice, on 10/5/2016, under Section 13(2) of the SARFAESI Act, 2002 to the writ petitioner and guarantors, demanding a sum of Rs.21,40,002/- (Rupees Twenty One Lakhs Forty Thousand and Two Only), up to 10/5/2016. Thereafter, on 13/7/2016, possession notice, under Section 13(4) of the SARFAESI Act, 2002, has also been issued.

2. E-auction Sale Notice, dated 28/3/2017 has been issued, fixing e-auction sale, on 10/5/2017, bringing the properties under mortgage for sale. Auction has been conducted, on 10/5/2017 and item No.2 immovable property viz., land and building in old S.No.344/A2/part, New T.S.No.152, Door No.13/1, Velumudali Street, Ranipet Town, Walaja Taluk, Vellore District, has been sold. Second respondent herein, is the auction purchaser. To declare demand notice under Section 13 (2) of the SARFAESI Act, 2002 and to quash the sale notice, dated 28/3/2017, borrower has filed the instant writ petition, for a declaration.

3. Supporting the prayer sought for, Mr.V.R.Kamalanathan, learned counsel for the petitioner submitted that as per Rule 8 (6) of the Security Interest Rules (Enforcement) Rules, 2002, e-auction sale notice has to be published, in two leading newspapers, in vernacular language, having sufficient circulation in the locality and one in English. He also contended that Rule 8 (7) of the SARFAESI Act, 2002, sale notice dated 28/3/2017, ought to have been affixed, in a conspicuous place of the property sought to be sold. Urging the above said grounds, and placing reliance on the decision reported in AIR 2012 Madras 21, Mr.V.R.Kamalanathan, learned counsel for the petitioner, prayed for interference.

4. Heard, Mr.V.R.Kamalanathan, learned counsel for the writ petitioner and perused the materials available on record.

5. Section 13 (2) of the SARFAESI Act, 2002, reads as follows:-

"Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor

as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4):

Provided that

(i). the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii). In the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this Section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee."

6. Notice under Section 13(2) is only a demand made by the Bank, Hon'ble Supreme Court in *Mardia Chemicals v. Union of India* reported in AIR 2004 SC 2371 : 2004(4) SCC 311 held that notice under Section 13(2) would not give rise to a cause to challenge. However, as per Section 13(3A) of the SARFAESI Act, 2002, 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 17A.

7. No materials have been enclosed in the typed set of papers, indicating that the writ petitioner has sent any reply, under Section 13 (2) of SARFAESI Act, 2002. Possession Notice, dated 13/7/2016 has not been challenged.

8. Vide letter, dated 11/5/2017, State Bank of India, Vellore/first respondent has informed the petitioner as hereunder:-

"With reference to the above, we have to advise that you had availed an SME Cash Credit loan of Rs.20.00 lacs on 3/5/2011. You have not serviced the interest for the above said account and it has become NA on 29/4/2016.

2.Despite of our repeated reminders/notices you did not regularize the account. So, the recovery proceeding under SARFAESI Act was initiated. Demand Notice under SARFAESI Act 13 (2) was issued on 10/5/2016. The Symbolic Possession Notice under SARFAESI Act 13 (4) was issued on 13/7/2016. The same was published in the leading newspapers on 15/7/2016. Even then you did not regularize the account.

3.The Zonal Credit Committee has approved the Reserve price proposal for Rs.27.99 laccs (13.71 lacs + 14.28 lacs - 15% discount of market value).

4. We have sent the Sale Notice to you and the guarantors on 28/3/2017. The same was published in "The Hindu" on 28/3/2017 and the properties were brought for sale for an amount of Rs.27.99 lacs through e-auction. One of the properties (Residential building @ S.No.344A/2 P, T.S.No.152, Door No.13/1 Velumudali Street, Ranipet, total extent of Rs.586.50 sq.ft was auctioned on 10/5/2017 to the successful bidder Shri K.Murugan for Rs.14.53 lacs."

9. Though Mr.V.R.Kamalanathan, learned counsel for the petitioner drew the attention of this Court to paragraph No.18 of the judgment in Tamilnadu Industrial Investment Corporation Vs. Millenium Business Solutions Private Limited, reported in 2005 (1) L.W - 58 = 2004 (5) CTC 689, has deprecated the practice of High Courts, entertaining writ petitions, when there is an effective and alternative remedy provided under SARFAESI Act, 2002.

10. Repeatedly, the Hon'ble Supreme Court has held that when there is an efficacious and alternate remedy under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act or Securitisation And Reconstructions of Financial Assets Act, 2002, as the case may be, a writ petition is not maintainable. 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 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:

"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.

7. In this connection, we are fortified by the decision of the Honourable Supreme Court reported in ( United Bank of India v. Satyawati Tondon and others ) III (2010) BC 495 (SC) = 2010-5-L.W. 193, wherein in para Nos. 17 and 18, it was held thus:-

"17. ...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 redressal 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 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.

iv) In Simon's Foot Wear Pvt. Ltd. v. Indian Bank, reported in (2015) 2 MLJ 166, a Hon'ble Division Bench of this court held as follows:

"9.As against the confirmation of sale and issuance of the sale certificate, the writ petitioners did have their remedy of filing an appeal under Section 18 of the SARFAESI Act before the Debts Recovery Appellate Tribunal. The appeal remedy is an effective and efficacious remedy. When such an effective and efficacious remedy is available, this court will decline exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. ....

10.So far as the challenge made to the order dated 24.06.2013 is concerned, since an appeal remedy is available the writ petitioners ought to have exhausted the appeal remedy before approaching this Court with this writ petition. ...."

11. Grounds urged before us can always be raised and before the Tribunal. In the light of the above decisions and discussion, we are not inclined to entertain the writ petition and issue a declaration as sought for.

12. In the result, this Writ Petition is dismissed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-  
सत्यमेव जयते

Assistant Registrar(CS VIII)

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Sub Assistant Registrar

mvs.

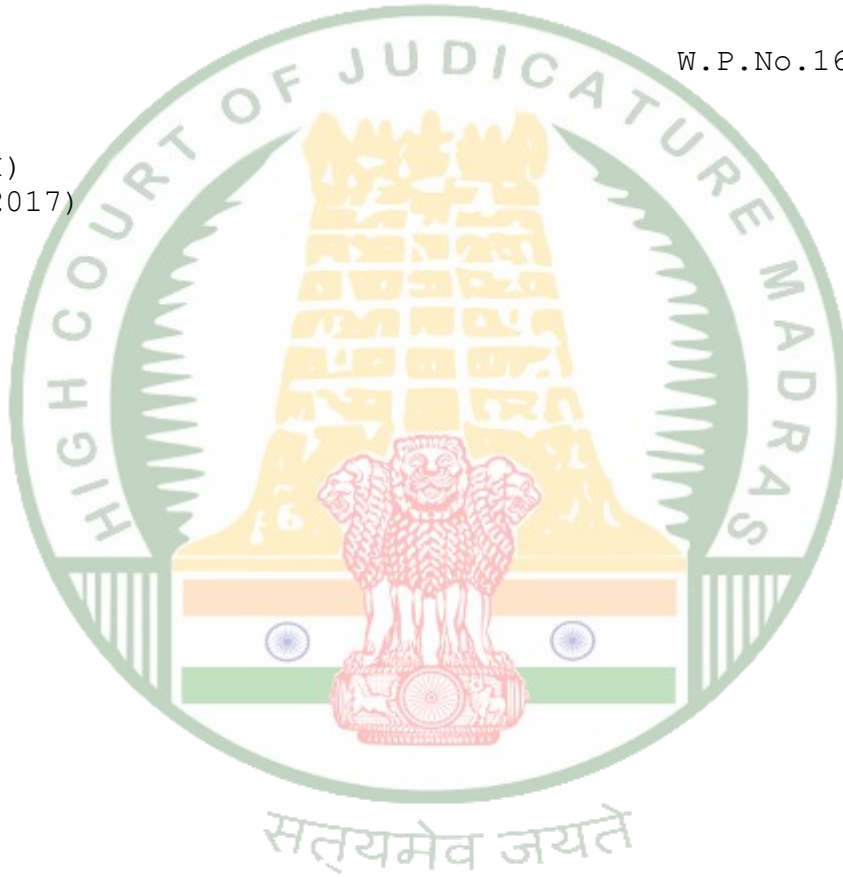
To

1. State Bank of India,  
RASMECCC & SARC Branch,  
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Vellore - 632 006.

+1cc to M/s.V.R.Kamalanathan, Advocate, S.R.No.46250

W.P.No.16665 of 2017

AR(CS VIII)  
CU(03/08/2017)



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