IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.10.2017

CORAM:

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

W.P.No.26827 of 2017
and
WMP No.28544 of 2017

North East Builders,
Rep. by its Proprietor,
K.Selvaraj Gandhi Nagar Post,
Tiruppur. ... Petitioner

vs.

1. The District Magistrate and
District Collector,
Tiruppur, Tiruppur District.

2. The Authorised Officer,
State Bank of India
SME Branch,
Uthukuli Road, Tiruppur. ... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorarified Mandamus, calling for the records of order dated 28.03.2017 vide proceedings in Reg.No.4723/2017/C3, on the file of the 1st respondent and quash the same and forbearing the respondents from interfering with the peaceful possession of petitioner property comprised in S.No.519 situated at site No.3, Velampalayam Village, Tiruppur District.

For Petitioner : Mr.K.Myilsamy

ORDER

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

Proceedings dated 28.03.2017, impugned in the instant writ petition is an order passed by the District Magistrate and District Collector, Tiruppur, under Section 14 of the SARFAESI Act, 2002 and the same is extracted hereunder.

PROCEEDINGS OF THE DISTRICT MAGISTRATE AND DISTRICT COLLECTOR, TIRUPPUR DISTRICT
PRESENT: TMT.S.JAYANDHI, I.A.S.,

Ref.No.4723/2017/C3 Dated 28.03.2017

Sub: Secruitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Tiruppur District - M/s.State Bank of India, SME Branch, Uthukuli Road, Tiruppur - Sanction of loan to M/s.North East Builders represented by Thiru.K.Selvaraj, S/o.Kuppusamy - Defaulted in repayment of loan - Non-settlement of Rs.33,63,345/- Action U/s.14 (1) of SARFAESI Act - Orders issued - Reg.

Ref: 1. Affidavit filed by the Authorized Officer M/s.State Bank of India, SME Branch, Uthukuli Road, Tiruppur dated 13.02.2017.
2. Connected Records.

Order:

The Authorized Officer / Chief Manager of M/s.State Bank of India, SME Branch, Uthukuli Road, Tiruppur has submitted a petition U/s.14(1) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 praying for suitable orders /directions to any Sub-Ordinate Officers, to take possession of the property mentioned in schedule the secured assets belonging to M/s.North East Builders represented by proprietor Thiru.K.Selvaraj, S/o.Kuppusamy, Raj Bhavan, No.3, Kannaki Nagar (Behind) Govt Arts College, Gandhi Nagar, Tiruppur North Taluk, Tiruppur District to hand over the same to the petitioner Bank, as per the provisions of the Sec 14 (1-a) of the said Act, 2002 in order to realise the defaulted loan Rs.33,63,345/- from the borrower.

Schedule of Property

Property in Tiruppur Registration District, Tiruppur Joint 2 Sub Registration District, Tiruppur Taluk, Tiruppur Town, 1st ward Anappalayam area, 15, Velampalayam Village, S.F.No.519, p.ac.10.87 in this layout was formed and in the site No.3 situated within the following boundaries.

South by one part on site No.2
North by 60 feet wide East West road
East by No.4 of Shanmugavadivu
West by 22 feet wide South North road

In this in the middle, Northern side East West 37 ft, Southern side East West 38 ft, Eastern side South North 64 ft, Western side South North 67½ ft, thus totally to an extent of 2466 sq.ft of house site along with mamool pathway and other appurtenances and attachments thereon. T.S.Ward "A".

2. Hence, as per the powers mentioned under Section 14 1(a) of SARFAESI Act, 2002, I hereby authorize the Sub Collector, Tiruppur to take possession of the properties as mentioned in the schedule of properties above and to hand over the assets to the Authorized Officer, M/s.State Bank of India, SME Branch, Uthukuli Road, Tiruppur under proper acknowledgment in accordance with law in force.

Encl.: Petition of Authorized Officer.

Sd/-S.Jayandhi,
District Magistrate and
District Collector,
Tiruppur.

To
The Sub Collector, Tiruppur.
(for necessary action and report compliance)
Copy to

1. The Authorized Officer, M/s.State Bank of India, SME Branch, Uthukuli Road, Tiruppur - 641 601.
2. The Commissioner of Police, Tiruppur City.
3. The Tahsildar, Tiruppur North Taluk.
4. M/s.North East Builders, Raj Bhavan, No.3, Kannaki Nagar (Behind) Govt. Arts College, Gandi Nagar, Tiruppur - 641 603.
5. Thiru.K.Selvaraj, S/o.Kuppusamy, Raj Bhavan, No.3, Kannaki Nagar (Behind) Govt Arts College, Gandhi Nagar, Tiruppur - 641 603.
6. Copy to 'C3' file.

/True Copy / By Order/
For District Magistrate and
District Collector.

2. Admittedly, petitioner is a borrower, who had mortgaged his house as a collateral security for the loan availed from State Bank of India, SME Branch, Tiruppur, 2nd respondent. After issuance of the demand notice under Section 13[2] of the SARFAESI Act, application under section 14[1] of the said Act has been filed seeking assistance for taking possession.

3. Though Mr. K.Myilsamy, learned counsel for the petitioner submitted that instalments have been paid periodically and that bank has not classified the loan account as NPA, we are not inclined to delve into the said contentions, for the reason that seeking assistance for taking possession under Section 14 of the SARFAESI Act, 2002, is in aid of taking recourse under Section 13[4] of the SARFAESI Act, 2002, which is as follows:

> (4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse 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.

4. As per Section 17 (1) of the SARFAESI Act, 2002, any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken: PROVIDED that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

5. Courts have consistently held that when there is an effective and alternative remedy, writ 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 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.

....

6. In the light of the above discussion and decisions, we are not inclined to entertain the writ petition. Accordingly, the writ petition is dismissed. No costs. Though the learned

counsel for the petitioner insisted for an interim protection, we are of the view that once the writ is not maintainable, no interim order can be granted and hence, the connected Writ Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

ars
To
1. The District Magistrate and
District Collector,
Tiruppur, Tiruppur District.

2. The Authorised Officer,
State Bank of India
SME Branch,
Uthukuli Road, Tiruppur.

+ 1 cc to Mr. K. Myilsamy, Advocate SR.74013

W.P.No.26827 of 2017
and
WMP No.28544 of 2017

MSM(CO)
EU 21/11/2017)