

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.07.2017

CORAM:

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

W.P.No.17078 of 2017
and
WMP No.18557 of 2017

1. Mr.B.Gangadharan
2. Mrs.Sumathy ... Petitioners

vs.

- 1.State Bank of India,
Siruthozil (Chennai) Branch,
Old No.320, New No.2,
Valluvar Kottam High Road,
Nungambakkam, Chennai - 34.
- 2.Debt Recovery Tribunal I,
6th Floor, Dewa Towers,
No.770-A, Anna Salai,
Chennai - 600 002.
- 3.M/s.Neon Mines Private Limited,
Flat No.F1, Asian Flats,
Old No.17A, New No.12,
Parthasarathypuram,
T.Nagar, Chennai - 600 017.
- 4.S.K.Hussain,
Director,
M/s.Neon Mines Private Limited,
Flat No.F1, Asian Flats,
Old No.17A, New No.12,
Parthasarathypuram,
T.Nagar, Chennai - 600 017.
- 5.Mr.Shrivatsan Iyengar
Director,
M/s.Neon Mines Private Limited,
Flat No.F1, Asian Flats,
Old No.17A, New No.12,
Parthasarathypuram,
T.Nagar, Chennai - 600 017.

6. Mrs.Masthan Bebe
Director,
M/s.Neon Mines Private Limited,
Flat No.F1, Asian Flats,
Old No.17A, New No.12,
Parthasarathypuram,
T.Nagar, Chennai - 600 017.

7. Mr.S.K.Himamuvalli,
S/o.S.K.Hussain,
Director,
M/s.Neon Mines Private Limited,
Flat No.4, Seethamma Apartments,
No.3, Zockariah Colony, First Street,
Choolaimedu, Chennai - 600 094.

8. M/s.Neon Mines Private Limited,
Rep. by its Board of Directors,
Flat No.F1, Asian Flats,
Old No.17A, New No.12,
Parthasarathypuram,
T.Nagar, Chennai - 600 017.

... Respondents

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 passed by the 2nd respondent Debt Recovery Tribunal I, dated 22nd June 2016 in O.A.No.35 of 2011, quash the same.

For Petitioners : Mr.Zaffarullah Khan

ORDER

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

Bank has sanctioned credit facilities to the 1st respondent on 26.04.2005 to the tune of Rs.100 Lakhs, subject to the terms and conditions stipulated in the sanction order dated 26.04.2005. To secure repayment of the said credit facilities, respondents 1 to 6 have offered primary and collateral security by creating hypothecation and equilateral mortgage.

2. Bank has instituted SARFAESI proceedings in O.A.No.35 of 2011 for recovery of Rs.84,60,657.59p against respondents 1 to 6. In the said OA, writ petitioners have been arrayed as Respondents 7 and 8. Respondents 1 to 6 remained exparte. After considering the material on record, the Debts Recovery Tribunal-I, Chennai, vide order dated 22.06.2016 in OA.No.35 of 2011, ordered as hereunder

11. IN THE RESULT:

a) The applicant bank is entitled for a Recovery Certificate against the Defendants 1 to 8, jointly and severally, for a total sum of Rs.84,60,657.59p (Rupees Eighty Four Lakhs Sixty Thousand Six Hundred Fifty Seven and paise Fifty Nine Only), ie.;

i) a sum of Rs.80,82,252.68p towards the Cash Credit Facility together with interest thereon at the rate of 1.50% per annum with monthly rests.

ii) a sum of Rs.1,80,433.64p towards the Term Loan Facility I together with interest thereon at the rate of 13.75% per annum with monthly rests.

iii) a sum of Rs.1,97,971.27p towards the Term Loan Facility II together with interest thereon at the rate of 13.75% per annum with monthly rests.

from the date of application till the date of payment in full, along with costs.

b) It is further ordered that in case of default of payment by the Defendants, the Applicant-Bank is at liberty to sell the schedule mentioned properties, if any, available and appropriate the sale proceeds towards the decretal dues, and,

c) If the sale proceeds are not found sufficient to cover the amount due and payable to the Applicant-Bank, the Defendants are personally liable for all such amounts due.

d) It is further ordered that any amount remitted or realized if any during the course of the proceedings, shall be given due credit to the loan account of the Defendants.

12. Recovery Certificate be prepared asper the directions given above of this judgment and issued accordingly. A copy of the order be communicated to the parties concerned, immediately.

13. It is further ordered that 15 days time is granted to the applicant bank to file costs memo from the date of receipt of this order."

3. Being aggrieved by the same, respondents 7 and 8 in O.A.No.35 of 2011 has filed the instant writ petition to call for the records of the Debts Recovery Tribunal-I, Chennai, dated 22.06.2016 in OA.No.35 of 2011, contending inter alia that when the entire averments pertain to the loan borrowed by the 1st respondent therein, and the guarantors, and when the relief sought for was only against them, the tribunal has erroneously mulcted liability on the purchaser of the property. Added further, Mr.Zaffarullah Khan, learned counsel for the writ petitioners submitted that when there is no liability on the part of the writ petitioners, to repay the amount borrowed,

filing an appeal against the order made in O.A.No.35 of 2011 dated 22.06.2016, would burden the writ petitioners/purchaser, with further liability of payment of deposit, in terms of Section 21 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993.

4. Heard Mr.Zaffarullah Khan, learned counsel for the writ petitioners and perused the materials available on record.

5. Before the tribunal, respondents 7 and 8/writ petitioners have been represented through a counsel. They have filed reply statement, but failed to file a counter proof affidavit, though sufficient opportunities were given to them. Thereafter, interim orders have been passed restraining respondents 7 and 8 therein/writ petitioners from dealing with the schedule property, in O.A.No.35 of 2011 on the file of Debts Recovery Tribunal-I, Chennai, in any manner until further orders from the tribunal, writ petitioners/respondents 7 and 8 therein have not chosen to challenge the same.

6. Order in O.A.No.35 of 2011 has been made on 22.06.2016. Section 20 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, reads as follows:

20. Appeal to the Appellate Tribunal.—(1) Save as provided in subsection (2), any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter.

(2) No appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made, or deemed to have been made, by the Tribunal is received by him and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Tribunal.

(6) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal."

7. Statutory period for preferring an appeal before the appellate tribunal is 45 days from the date on which a copy of the order is made, or deemed to have been made by the tribunal is received by any person aggrieved by the same.

8. In the case on hand, writ petition has been filed after the statutory period. Secondly, as per Section 21 of the said Act, where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy-five per cent of the amount of debt so due from him as determined by the Tribunal under section 19: Provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

9. Statute contemplates an appeal, to the appellate forum, within a specific period and as per Section 21 of the Act, a pre deposit. Inability to deposit 50% of the amount of debt, cannot be a ground to maintain a writ petition, as against an order made by the Debts Recovery Tribunal, against which a statutory remedy is provided.

10. Though Mr. Zaffarullah Khan, learned counsel for the petitioners submitted that the onerous condition in Section 21 of the Act mulcts the writ petitioners to pay the statutory deposit, as per the proviso to Section 21 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, appellate tribunal may for reasons to be recorded in writing, waive or reduce the amount to be deposited under Section 21 of the Act.

11. Power is conferred on the appellate tribunal, to waive or reduce the amount, to be deposited. In such a view of the matter, it cannot be contended that the writ petitioners, have no other alternative and efficacious remedy, to challenge the order of the tribunal. On the aspect of alternative and efficacious remedy, decisions rendered by this Court and the Hon'ble Apex Court, which we are bound to follow, require consideration, as to whether the writ petitioners, be allowed to

file a writ petition under Article 226 of the Constitution of India, instead of invoking the alternative remedy, provided under 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.

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, (underlining added).

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.

13. The present case is identical in nature and it is covered by the judgment of the Supreme Court mentioned supra. In this case, the petitioner has violated the condition of mortgage by transferring

the secured asset in favour of her son and therefore, as per clause 1.7 of the OTS Scheme offered by the bank, the petitioner has to be excluded from extending the benefits of the scheme which was rightly done by the bank. In any event, without exhausting the alternative remedy, the relief sought for by the petitioner by invoking the discretionary remedy under Article 226 of The Constitution of India cannot be granted."

12. In the light of the above decisions and discussion, this Court is not inclined to entertain the writ petition. Accordingly, the writ petition is dismissed. No costs. Consequently, the connected Writ Miscellaneous Petition is closed.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

ars

To

The Debt Recovery Tribunal -I
No. 770-A Anna Slai, Chennai-2.

+1cc to M/S. Zaffarullah Khan, Advocate Sr. 49756

W.P.No.17078 of 2017
and WMP No.18557 of 2017

AR(IV)
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