IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.P.No.28520 of 2017
and
W.M.P. No.30661 of 2017

M/s.Chennai Guest House Pvt. Ltd.
represented by its Director and
Authorised Signatory
M/s.Geetha
Chennai Guest House Pvt. Ltd.,
Old No.32, New No.65/1
Wallajah Road
Triplicane
Chennai 600 005 ... Petitioner

Vs.

1. The Authorised Officer and
Assistant General Manager,
Indian Bank,
SIDCO Buildings
G.S.T. Road
Guindy, Chennai 600 032

2. AMB Infotech
Rep. by its Partner Mr.E.Alagarasan
Old No.32, New No.65/1
Wallajah Road
Triplicane
Chennai 600 002 ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus, to call for the records of the 1st respondent comprised in its Notice dated 19.10.2017 intending to conduct e-auction of the petitioner company's immovable property situated at Old No.50/51, (New No.32), Wallajah Road, Triplicane, Chennai 600 005 on 08.11.2017 to quash the sameand to consequently restrain the 1st respondent from in any way interfering with the peaceful possession and enjoyment of the petitioner company to carry on its business in its registered office situated at Old No.50/51 (New No.32), Wallajah Road, Triplicane, Chennai 600 005.

For Petitioner : Mr.M.N.S.Mohammed Habeeb Raja

ORDER

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

M/s.Chennai Guest House Pvt. Ltd. represented by its Director and Authorised Signatory Mrs.Geetha, has challenged the auction notice dated 19.10.2017, issued under Rule 6(2) and 8(6) of Security Interest Enforcment Rules, 2002. Impugned notice reads as here under:

INDIAN BANK
Guindy Branch
131, Sidco Building, GST. Road
Guindy, Chennai 600 032

NOTICE OF INTENDED SALE

Notice of intended sale under Rule 6(2) & 8(6) of the Security Interest (Enforcement Rules), 2002 under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

By Registered Post/Ack. Due

To Date : 19/10/2017

1.ABM Info Tech
Old No.32, New No.65/1 Wallajah Road
Triplicane
Chennai - 600 005

2.Mr.B.Azhagarasan (Partner)
Old No.32, New No.65/1 Wallajah Road
Triplicane
Chennai - 600 005

3.Mrs.A.Viji (Partner)
No.6, Parthasarathy Swamy Lane
Triplicane, Chennai - 600 005

4.Mr.S.Balan (Guarantor)
5.Mrs.Manimegalai (Guarantor)
6.Mrs.S.Geetha (Guarantor) all residing at
No.6, Parthasarathy Swamy Lane
Triplicane, Chennai - 600 005

7.M/s.Chennai Guest House P. Ltd.
(Guarantor & Mortgagor)
Old No.32, New No.65/1 Wallajah Road
Triplicane, Chennai - 600 005.

Sir/Madam,

Sub: Your Loan Account/OD with Indian Bank, Guindy Branch - A/c No.990650507 - Regarding.
****

M/s.ABM Info Tech, Partnership Firm had availed credit facilities from Indian Bank, Guindy Branch, the repayment of which are secured by mortgage/hypothecation of schedule mentioned properties hereinafter referred to as "the properties". M/s.ABM Infotech, a Partnership Firm represented by its partners Mr.B.Azhagarasan and Mrs.A.Viji had failed to pay the outstanding to the bank. Therefore a Demand Notice dated 09.10.2015 under Section 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short called as "The Act"), was issued by the Authorised Officer calling upon M/s.ABM Info Tech represented by its partners Mr.B.Azhagarasan and Mrs.A.Viji and Guarantors Mr.S.Balan, Mrs.Manimegalai, Mrs.Geetha and the guarantor and mortgagor M/s.Chennai Guest House Pvt. Ltd., to pay the amount due to the tune of Rs.1,41,82,802.12 (Rupees One crore forty one Lakhs eight two thousand and eight hundred and two and paise twelve only) (as on 30.09.2015) with further interest, cost and other charges and expenses thereon. M/s.ABM Info Tech represented by its partners Mr.B.Azhagarasan and Mrs.A.Viji and the guarantors failed to make payment despite Notice dated 09.10.2015.

M/s.ABM Info Tech represented by its partners Mr.B.Azhagarasan and Mrs.A.Viji failed to make payment despite Demand notice dated 09.10.2015 the Authorised Officer took possession of the schedule mentioned properties under Section 13/4 of the Act on 25.01.2016 after complying with all legal formalities.

As per Sec.13(4) of the Act, Bank is entitled to effect sale of the assets taken possession of and realise the proceeds towards outstanding balance. In accordance with the same, the undersigned/Authorised Officer intend selling the schedule mentioned securities in the following mode:

The sale proposed to be held is by way of public tender/auction adopting the e-auction mode.

As per Rule 6(2) and 8(6) of the Security Interest (Enforcement) Rules, 2002 framed under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, this being the sale notice for second time, 15 days notice of intended sale is required to be given and hence we are issuing this notice. The amount due as on 30/09/2017 is Rs.1,87,81,366/- (Rupees one crore eighty seven lakhs eighty one thousand and three hundred and sixty six only) with further interest, costs, other charges and expenses thereon.

Please take note that this is notice of 15 days and the schedule mentioned properties shall be sold under the Act by the undersigned any time after 15 days from serving of this notice.

The date of sale is fixed as 08/11/2017 at 11.00 p.m to 12.00 Noon which would be by e-auction mode.

The schedule mentioned properties, can be verified/inspected by the intending purchasers/bidders at their expense on 31/10/2017 between 11 a.m to 5.00 p.m. The related documents and up-to-date EC can be verified/inspected by the intending purchasers/bidders on 01/11/2017 between 10 a.m to 5 p.m at Indian Bank, Guindy Branch.

The Reserve price and Earnest Money Deposit (EMD) for the sale of the secured assets is fixed as mentioned in the schedule.

The Tender/bid Form with the terms and conditions can be had on-line from the website http://www.matexauctions.com and using the provision in the system/software, the same could be procured using the 'seal bid option' such that the activities could be done online.

The tender form and the terms and conditions would be available in the website from 23/10/2017 to 07/11/2017 4.00 p.m. The last date for submitting tenders/bids complying with all necessary terms along with EMD in the stipulated manner is 07/11/2017 by 5.00 p.m.

The tenders should be accompanied with EMD taken in RTGS/NEFT/Account Transfer and / or any other acceptable mode of money transfer without time lag, failing which the tender becomes disqualified.

The Nodal Bank account No./IFSC Code etc. for online money transfer is as under:

The Nodal bank account No. and Name	6120612786 e-auction EMD account, Chennai South
Name of the Bank/Branch and IFSC Code	Indian Bank, Ethiraj Salai Branch IDIB000C032

The sale shall be conferred on the person making highest offer/tender/bid subject to confirmation by Indian Bank, Secured Creditor. The undersigned/Authorised Officer reserves right to accept or reject the bid/tender without assigning any reason therefor.

Once the auction/e-auction is completed and sale is conferred on the person making the highest offer/tender/bid, the successful bidder will be intimated in person/by email, as the case may be, who has to remit 25% of the bid amount (less the EMD) immediately by RTGS/NEFT/Account transfer and/or any other acceptable mode of money transfer, failing which the EMD amount remitted will stand to be forfeited.

The balance sale price shall be paid within 15 days of confirmation of sale or extended time agreed upon in writing. If the balance amount is not remitted within the stipulated/agreed time, the amount of 25% remitted will also stand to be forfeited. The sale is subject to confirmation by the Bank, Secured Creditor.

The sale is made on "As is where is and as is what is" basis and no representations and warranties are given by the Bank relating to encumbrances, statutory liabilities etc.

If the e-auction fails owing to any technical snag etc. the same may be re-scheduled by issuing 7 days prior notice. This notice is without prejudice to any other remedy available to the Bank.

SCHEDULE

The specific details of the assets which are intended to be brought to sale are enumerated here under:

Mortgaged/Hypothecated asset (covered by Doc. Nos.612/1998 and 182/1999)	Reserve Price	EMD	Date and time of Auction sale	Prior Encumbrance
All that piece and parcel of land and building comprised in OS No.1018, RS No.3045/3 (part) as per present permanent land register, present field sub-Division No.3045/9, Block No.58, Land measuring an extent of 1045 sq.ft. (833 + 212 sq.ft.) situated at Old No.50/51, New Door No.32, Wallaja Road, Triplicane, Chennai - 600 005, Mylapore - Triplicane Taluk, Chennai District and within the limits of Chennai Corporation and bounded on the North by : Wallajah Road, South by : R.S. No.3044 (Temple property), East by : R.S. No.3042, West by : Property of B.Sundaramoorthy and others, situated within the Registration District of Chennai Central and Sub Registration District of Triplicane. Property owned by M/s.Chennai Guest House Pvt. Ltd.	Rs.175.00 Lakhs	Rs.17.50 Lakhs	08/11/17 at 11.00 a.m to 12 Noon	NIL

Last date and time for submission of bid through e-auction mode on 07/11/2017, 5.00 p.m

The bidders are advised to visit the website http://www.matexauctions.com of our e-auction service provider M/s.Matexnet P Ltd, Chennai-600 028 for auction bid form and detailed terms and conditions are annexed to the bid form. The helpline No to get assistance during the entire process is 044-43437474. Name of the contact person: Mr.Jagadish, Mobile 9380570551, e.mail bankauctions@matexnet.com

Place: Chennai Authorised officer/Asst Gen Manager
Date: 19/10/2017 Indian Bank"

2. Inviting the attention of this court to the sale deeds dated 03.07.1998 and 25.02.1999, learned counsel for the petitioner submitted that the subject property brought for auction, belongs to M/s.Chennai Guest House Pvt. Ltd., the writ petitioner herein, in which, Mrs.S.Geetha, is the Director and Authorised Signatory.

3. He further submitted that Mr.E.Alagarasan, respondent No.2, is one of the parters in M/s.AMB Infotech, Partnership firm, which had availed credit facility from Indian Bank and stated to have defaulted.

4. Further inviting the attention of this court to Section 185 of the Companies Act, 2013, Mr.M.N.S.Mohammed Habeeb Raja, learned counsel for the petitioner submitted that no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

5. According to the learned counsel for the petitioner, when Mr.E.Alagarasan, has, no right to mortgage the property of M/s.Chennai Guest House Pvt. Ltd., the writ petitioner herein, and when there is a statutory bar under Section 185 of the Companies Act, 2013, illegal acts said to have been committed both by Mr.E.Alagarasan, partner of M/s.AMB Infotech, Partnership Firm, and the bank, cannot be allowed to be legalised by recourse to SARFAESI action by bringing the said subject property for sale. Subject property mortgaged with the bank, as per Schedule 1 of the Sale Notice is extracted hereunder:

> "All that piece and parcel of land and building comprised in OS No.1018, RS No.3045/3 (part) as per present permanent land register, present field sub-Division No.3045/9, Block No.58, Land measuring an extent of 1045 sq.ft. (833 + 212 sq.ft.) situated at Old No.50/51, New Door No.32, Wallaja Road, Triplicane, Chennai - 600 005, Mylapore - Triplicane Taluk, Chennai District and within the limits of Chennai Corporation and bounded on the North by : Wallajah Road, South by : R.S. No.3044 (Temple property), East by : R.S. No.3042, West by : Property of B.Sundaramoorthy and others, situated within the Registration District of Chennai Central and Sub Registration District of

Triplicane. Property owned by M/s.Chennai Guest House Pvt. Ltd."

6. Inviting the attention of this court to Article 300-A of the Constitution of India and the decision in P.Magudeeswaran vs. The Authorised Officer, Lakshmi Vilas Bank Coimbatore Main Branch reported in 2017-2-Writ L.R. 476 to which, one of us (Hon'ble Mr.Justice S.Manikumar), is a party, learned counsel for the petitioner submitted that when there is violation of a constitutional right, by issuance of the sale notice, the same has been interfered with.

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

7. Reading of the impugned notice disclose that M/s.AMB Infotech, a Partnership firm, had availed credit facilities from Indian Bank, Guindy Branch, repayment of which is secured by mortgage/hypothecation of properties. M/s.AMB Infotech, represented by its partners Mr.E.Alagarasan and Mrs.A.Viji, had failed to discharge the loan, and therefore, a demand notice dated 09.10.2010 under Section 13(2) of the SARFAESI Act, 2002 is stated to have been issued calling upon M/s.AMB Infotech, represented by its partner Mr.E.Alagarasan and Mrs.A.Viji. Despite notice, amount has not been paid. Hence, bank has brought the property mortgaged, for auction.

8. Though several grounds have been raised assailing the impugned notice, on more than one occasion, the Hon'ble Supreme Court as well as this court, held that when there is an effective and alternative remedy, writ petition is not maintainable. Reference can be made to the following decisions.

8.1) The Hon'ble Supreme Court in United Bank of India v. Satyawati Tondon and others reported in (2010) BC 495 (SC) = 2010-5-L.W. 193, took a very strong view and at paragraph No.55 observed as follows:

> "55. 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 the 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."

8.2) 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)

Therefore, when there is an efficacious remedy available in law to the petitioner and the petitioner having stated in uncontraverted terms that he has invoked the SARFAESI Act by filing necessary appeal before the Debts Recovery Tribunal, the claim of the petitioner to seek for the very same relief in this writ petition cannot be entertained."

8.3) In Satyawati Tondon's case, the Hon'ble Apex Court also held at Paragraphs 16 to 18 and 27 to 29, 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."

8.4) 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:

"6. It is categorically brought out by the bank that pending the SARFAESI proceedings initiated by the bank, the petitioner, in order to deprive the right of the bank to recover the amount, has clandestinely transferred the secured assets in favour of her son and in that event, the bank has got every right to decline to extend the benefits of One time settlement scheme to the petitioner. Further, the possession notice sent to the petitioner way back in the year 2004, remains unchallenged by her till 2010 by approaching the competent Forum namely Debts Recovery Tribunal. 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. As regards the decision of this court in P.Magudeeswaran vs. The Authorised Officer, Lakshmi Vilas Bank Coimbatore Main Branch reported in 2017-2-Writ L.R. 476, in which, reference has been made to Article 300-A of the Constitution of India, we wish to state that judgment rendered on the facts and circumstances of this case, can be relied on, as a precedent, if only the subsequent case is proximate to the facts of the relied on case. In P.Magudeeswaran vs. The Authorised Officer, Lakshmi Vilas Bank Coimbatore Main Branch reported in 2017-2-Writ L.R. 476, we considered the statutory compliance of notice of sale on the borrower as mandated in Rule 9(1) of the Security Interest (Enforcement) Rules, 2002. At paragraph 38 of the judgment in Magudeeswaran's case, we held that on the facts and circumstances of this case, there is a violation of statute of constitutional right under Article 300-A and this court, moulded the relief sought for in the writ petition. Question as to whether M/s.AMB Infotech/respondent No.2 herein, has colluded with the bank, in mortgaging the property for availing loan to M/s.AMB Infotech, in which he is partner? - can always be raised before the Tribunal under Section 17(1) of the SARFAESI Act, 2002. Section 17(1) of the SARFAESI Act, reads thus.

10. Section 17 of the SARFAESI Act, 2002, deals with appeal and it reads as follows:

> "17. Right to appeal-(1) 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 authorized officer under this Chapter, may prefer an appeal to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken.
>
> Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal seventy-five per cent. Of the amount claimed in the notice referred to in sub-section (2) of section 13:
>
> Provided that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.
>
> (3) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 193 (51 of 1993) and rules made thereunder.

11. It is the contention of the learned counsel for the petitioner that the Tribunal has no jurisdiction to go into

the validity of the title on Mr.E.Alagarasan, respondent No.2, for mortgaging the property.

12. In the light of the above discussions, we are not inclined to entertain the writ petition on the grounds raised and it is open to the writ petitioner to challenge the auction notice, if so advised in the manner known to law. Registry is directed to return the original auction notice, dated 19.10.2017, after getting an attested copy from the learned counsel for the petitioner.

13. Accordingly, the writ petition is dismissed. However, there shall be no order as to cost. Consequently, the connected writ miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1. The Authorised Officer and
Assistant General Manager,
Indian Bank,
SIDCO Buildings
G.S.T. Road
Guindy, Chennai 600 032

2. The Section Officer,
ER Section,
High Court, Madras

+1cc to Mrs.S.R.Sumathy, Advocate Sr.No.79066/17
+1cc to Mr.M.N.S.Mohamed Habeeb Raja, Advocate SR.No.78767/17

W.P.No.28520 of 2017

BR(CO)
sm:24.11.2017