

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25/7/2017

C O R A M

The Honourable Mr.JUSTICE S. MANIKUMAR

and

The Honourable Mrs.JUSTICE V. BHAVANI SUBBAROYAN

Writ Petition No.18866 of 2017

a n d

W.M.P.No.20385 of 2017

K. Ambikavathy

...

Petitioner

Vs

1. The Recovery Officer
Canara Bank
Guindy Branch
(Now ARMB)
Chennai.

2. Nila Sunraj

3. K.Jawad Hussain

...

Respondents

Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of mandamus to forbear the respondents, their men, people, their subordinates or any other persons, claiming through them from in any manner dispossessing the petitioner from the premises situated at Coimbatore District, Coimbatore Taluk, Peelamedu, Sowripalayam Village, comprised in No.4, Rajagopal Layout in S.No.345 and 346/1 measuring an extent of 2760 Sq.ft (6 cents 146 Sq.ft) along with the building thereon within the jurisdiction of SRO, Peelamedu and the registration District of Coimbatore, under due process of law.

For Petitioner

... Mr.P.Singaram

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O R D E R

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

Contending inter alia that the petitioner is a tenant, in respect of the subject property, stated to have been mortgaged and sold in auction, writ petitioner has sought for a mandamus, forbearing respondents, from in any manner, dispossessing the petitioner from the premises situated at Coimbatore District,

Coimbatore Taluk, Peelamedu, Sowripalayam Village, comprised in No.4, Rajagopal Layout in S.No.345 and 346/1 measuring an extent of 2760 Sq.ft (6 cents 146 Sq.ft) along with the building thereon, within the jurisdiction of SRO, Peelamedu and registration District of Coimbatore, under due process of law.

2. According to the petitioner, subject property has been settled in favour of her daughter/second respondent, by way of a registered sale deed, dated 18/12/2003, under Document No.2415 of 2003, on the file of the Sub-Registrar, Peelamedu. By virtue of an unregistered sale deed, dated 4/2/2004, executed by his daughter, she is in possession and hence has a right to seek for a mandamus.

3. If the petitioner is in possession of the subject property mortgaged with the Bank, as security asset, in the capacity of a tenant, then, as per Section 17 (4-A) of the SARFAESI Act, 2002, remedy lies before the forum.

4. Section 17 (4-A) of the SARFAESI Act, reads as follows:-

"(i). any person, in an application under sub-section 91), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy -

(a). has expired or stood determined;
or (b). is contrary to Section 65 A of the Transfer of Property Act, 1882 (4 of 1882); or

(c). is contrary to terms of mortgage;
or

(d). is created after the issuance of notice of default and demand by the Bank under sub-section (2) of Section 13 of the Act; and

(ii). the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act."

5. Repeatedly, Courts have 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, writ petition is not maintainable.

(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.

6. In the light of the decisions and discussion, we are of the view that the instant writ petition, is not maintainable and accordingly, the same is dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

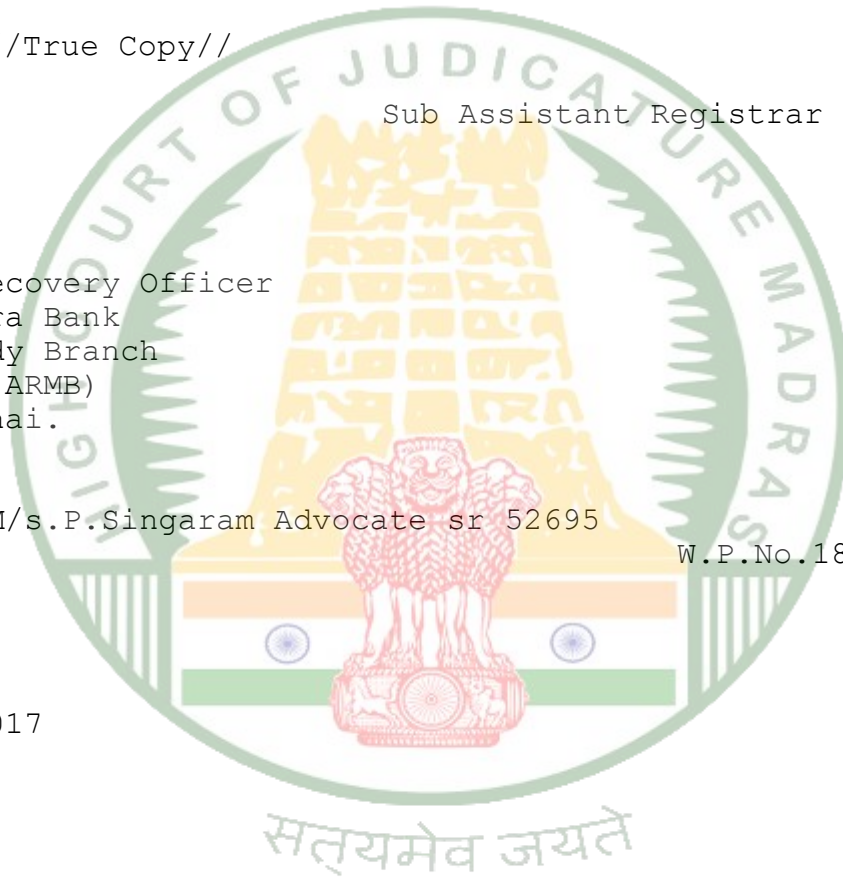
mvs
To

1. The Recovery Officer
Canara Bank
Guindy Branch
(Now ARMB)
Chennai.

+1 cc to M/s.P.Singaram Advocate sr 52695

W.P.No.18866 of 2017

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