

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.11.2017

CORAM:

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

W.P.No.29026 of 2017  
and WMP No.31267 of 2017

A.R.Babu ..... Petitioner

vs.

1. The General Manager,  
Lakshmi Vilas Bank Ltd.,  
Chennai Zonal Office,  
189,1st Floor, Aarthi Chambers,  
Anna Salai, Chennai - 600 006

2. The Assistant General Manager/  
Authorized Officer,  
Regional Office,  
Lakshmi Vilas Bank Ltd.,  
No.378, Mahatma Gandhi Road,  
Near Kaalvai Street Corner,  
Pondicherry - 605 001.

3. The Branch Manager,  
Lakshmi Vilas Bank Ltd.,  
Tindivanam Branch,  
No.20, R.S.Pillai Street,  
Tindivanam - 604 001,  
Villupuram District.

सत्यमेव जयते ..... 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 pertaining to the impugned auction sale notice of the 2nd respondent dated 5.10.2017 fixing auction sale on 14.11.2017 for property measuring 2178 sq.ft., bearing Plot No.51 in NGO Colony Street, situated in S.No.106/1A of Avarapakkam Village, Tindivanam Taluk and quash the same and consequently direct the respondents to allow the petitioner to settle the loan account by giving concession towards penal interest and sufficient time.

For Petitioner : Mr.G.Arul Murugan

ORDER

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

Auction sale notice dated 05.10.2017 of the subject property scheduled on 13.11.2017, mortgaged with Laxmi Vilas Bank, as security interest, is assailed on the grounds inter alia that even after possession notice dated 01.10.2015, sum of Rs.14.50 Lakhs, has been paid and that due to change of officer, bank in a hurried manner has issued the auction notice.

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

3. Notice under Section 13(2) of the SARFAESI Act, 2002, dated 28.05.2015 has been issued demanding a sum of Rs.40,63,711.27p, as on 30.04.2015, calling upon the borrower, M/s.Kanniyamman Traders, Villupuram District and guarantors, to pay the said sum, within 60 days from the date of notice, failing which, further action would be taken under the provisions of SARFAESI Act, 2002 in exercise of the rights conferred under Chapter III, for enforcement of security interest and recovery of liabilities. Schedule-I and schedule-II to the said notice, are the details of the secured assets intended to be enforced, which includes a house property. Thereafter, possession notice dated 01.10.2015 has been issued for recovery of the said amount.

4. Writ petitioner has filed S.A.No.442 of 2016, challenging the possession notice. On 26.10.2016, when the matter came up for hearing, after hearing both sides and perusal of documents vide order dated 26.10.2016, DRT-III, Chennai, in S.A.No.422 of 2016, has granted interim stay.

"....

Heard both sides and perused applicant's documents. Interim stay of all further proceedings pursuant to the impugned Possession Notice dated 01.10.2015 is granted subject to deposit of 10% of the outstanding amount (i.e., 10% of Rs.40,63,711.27p) by the applicant on or before 24.11.2015 with the respondent bank. In the event of non-compliance of the conditional order as stated above, interim stay shall stand vacated automatically and the respondent bank is at liberty to proceed further in accordance with law. Call on 26.11.2015 for reporting compliance and for filing counter and documents by the respondent bank."

5. Subsequently, when the matter came up for further hearing on 02.09.2016, taking note of the fact that a sum of Rs.14,50,000/- has already been deposited and the submission of the learned counsel for the writ petitioner that the latter is ready and willing to remit the balance amount due to the

bank and the submission of the learned counsel for the bank that penal interest would be reduced so as to enable the writ petitioner / appellant therein to settle the loan account and also of the submission of the learned counsel for the appellant that the latter is contemplating to settle the amount due to the bank, for which, disposal of the SA was required and taking note of the endorsement made in S.A.No.422 of 2015, vide order dated 02.09.2016, S.A.422 of 2015 has been disposed of, in terms of the settlement made by the learned counsel for the writ petitioner/appellant therein.

6. After nearly one year, bank has issued sale notice under Rule 8(5) and (6) of the Security Interest (Enforcement) Rules, 2002 stating that a sum of Rs.40,63,711.07p availed by the writ petitioner has not been discharged.

7. Petitioner has sought for a writ of certiorarified mandamus, calling for the records pertaining to the impugned auction sale notice of the 2nd respondent dated 5.10.2017 fixing auction sale on 14.11.2017 for property measuring 2178 sq.ft., bearing Plot No.51 in NGO Colony Street, situated in S.No.106/1A of Avarapakkam Village, Tindivanam Taluk and quash the same and consequently to direct the respondents to allow the petitioner to settle the loan account by giving concession towards penal interest and sufficient time.

8. According to the petitioner, though a sum of Rs.14.50 Lakhs has already been paid to the loan account, and taken note of by the tribunal in its order dated 02.09.2016, the bank in the impugned sale notice, without reference to the same, has stated that the outstanding amount is Rs.51,59,037.27p as on 30.09.2017, with interest and costs from 30.09.2077, payable to the bank.

9. Learned counsel for the petitioner further submitted that though, before the tribunal on 02.09.2016, bank had conceded for reduction of penal interest to enable the writ petitioner to settle the loan account, the same has not been done. It is also the submission of the learned counsel for the writ petitioner that one time proposal submitted has not been considered and for the abovesaid reasons impugned sale notice requires to be set aside.

10. Firstly, 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...."

iv) Even issuance of sale certificate can be questioned. 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. Though, the learned counsel for the petitioner submitted that one time proposal has already been made to the bank, there is no supporting material for the same.

12. Further upto 02.09.2016, the writ petitioner has paid a sum of Rs.14.50 Lakhs and thereafter, there is no payment. Issue as to whether, bank had deducted the payment of Rs.14.50 Lakhs already remitted, from the demand of Rs.40,63,711.27p and accordingly, issued the sale notice, can always be urged before the tribunal, competent to adjudicate facts.

13. In the light of the above discussion and decisions stated supra, when there is an effective and alternative remedy under the SARFAESI Act, 2002, we are not inclined to entertain the instant writ petition. Hence, the writ petition is dismissed. No costs. Consequently, the connected Writ Miscellaneous Petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The General Manager,  
Lakshmi Vilas Bank Ltd.,  
Chennai Zonal Office,  
189,1st Floor, Aarthi Chambers,  
Anna Salai, Chennai - 600 006

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Tindivanam - 604 001,  
Villupuram District.

+1cc to Mr.G.Arul Murugan, Advocate SR.No.81043

W.P.No.29026 of 2017  
and WMP No.31267 of 2017

sm:4.12.2017