IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 2/8/2017

C O R A M

The Honourable Mr.JUSTICE S.MANIKUMAR
and
The Honourable Mrs.JUSTICE V.BHAVANI SUBBAROYAN

Writ Petition No.19760 of 2017

P.S.Suresh Kumar ... Petitioner

Vs

The Branch Manager
Indian Bank
Ambur
Vellore District. ... Respondent

Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of mandamus to direct the respondent not to auction the petitioner's properties while the investigation is pending in Crime No.623 of 2011, dated 29/9/2011, on the file of Ambur Police Station against officials of the respondent Bank, in connection with the petitioner's loan account.

For Petitioner : Mr.C.S.Vijayakumar

O R D E R

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

Writ petitioner, has borrowed a sum of Rs.19 lakhs, from Indian Bank/sole respondent, by mortgaging the property, at Plot No.82, Jai Nagar, Cheetiyapanur Village, Vaniyambadi, measuring 1744 Sq.ft of land, with construction in the ground floor, first and second floors, Alangayam Union, Vaniyambadi Taluk, Kalandira Village, Madura. Petitioner has contended that he has repaid a sum of Rs.2,33,000/-, towards the principal amount. He has also contended that on 16/6/2010, a sum of Rs.65,100/-, has been paid. However, without serving notice, Bank has attached the property, for Rs.23.40 lakhs. According to the petitioner, though value of the property is Rs.98 lakhs, Bank has attached the property for Rs.23.40 lakhs only.

2. Writ petitioner has further contended that he has given a complaint against the Bank officials, viz., Mr.Karuppiah and

Mr.Manoharan, on the file of Ambur Town Police Station. As no action was taken, writ petitioner was constrained, to file Crl.O.P.No.28833 of 2010. Pursuant, to an order made in Crl.O.P.No.28833 of 2010, dated 29/9/2011, a criminal case has been registered, under Sections 327, 383, 384, 417, 420, 425, 427 and 506 (i) of the Indian Penal Code, in Crime No.623 of 2011, dated 29/9/2011, on the file of Ambur Town Police Station and that investigation, is pending.

3. Writ petitioner has further contended that he has filed I.A.No.499 of 2016 in D.R.C.No.208 of 2012, for stay of all proceeding of the respondent Bank, pending investigation against the Bank officials, in Crime No.623 of 2011, dated 29/9/2011. The said I.A has been dismissed, on 5/4/2017. The petitioner has further contended that Bank has issued a sale proclamation through the Recovery Officer, in D.R.C.No.208 of 2012, dated 7/6/2017, fixing the e-auction, on 3/8/2017.

4. In the above said circumstances, petitioner has sought for a writ of mandamus, directing the Bank not to auction the properties, while investigation is pending, in Crime No.623 of 2011, dated 29/9/2011, on the file of Ambur Police Station.

5. Supporting the prayer sought for, Mr.C.S.Vijayakumar, learned counsel for the petitioner made submissions.

6. Material on record discloses that for the default, Bank has instituted O.A.No.95 of 2012, on the file of the Debts Recovery Tribunal - III, Chennai. On 27/9/2012, an ex parte final order has been passed. On 12/12/2012, Debts Recovery Certificate has been issued, followed by the issuance of Demand Notice, dated 31/12/2012. Demand Notice is stated to have been served on the defendants. Mortgaged property has been attached, on 22/2/2016.

7. When the matter stood thus, writ petitioner has filed I.A.No.499 of 2016, in D.R.C.No.208 of 2012, on the file of the Debts Recovery Tribunal - III, Chennai, to stay all further proceedings, on the grounds inter lia that this Court, vide order, dated 13/12/2012, in Crl.O.P.No.28833 of 2010, has observed that on completion of the enquiry, if cognizable offence is made out, necessary proceedings can be initiated.

8. Adverting to the prayer sought for, vide order dated 5/4/2017, in I.A.No.499 of 2016, in D.R.C.No.208 of 2012, Debts Recovery Tribunal - III, Chennai, has passed the following order.

> "5. In view of the above facts and taking into consideration the available

materials filed by the rival parties, the following order is passed:-

a. The prayer of the petitioner for stay of further proceedings is not granted.

b. The submissions of the petitioner regarding the criminal proceedings is out of the purview of the undersigned.

c. The respondent Bank has every right to recover their outstanding dues.

d. There is no genuineness on the part of the defendants to prove that they are interested in settling the loan account.

e. The defendants have every right to redeem their property even at this stage by remitting the entire dues to the respondent Bank.

f. The application lacks merit.

6. Accordingly, the IA is dismissed as devoid of merits."

9. Material on record discloses that vide proceedings, in D.R.C.No.208 of 2012, dated 7/6/2017, the Recovery Officer, Debts Recovery Tribunal - III, Chennai, has issued the sale proclamation, under Rules 38, 52 (2) of second schedule to the Income Tax Act, 1961, r/w. The Recovery of Debts Due to the Banks and Financial Institution Act, 1993, fixing the e-auction, on 3/8/2017.

10. From the facts stated supra, it could be deduced that when the writ petitioner filed I.A.No.499 of 2016 in D.R.C.No.208/2012, before the Debts Recovery Tribunal - III,Chennai, seeking stay of all proceedings, vide order, dated 5/4/2017, the Tribunal has dismissed the said application. No appeal has been filed against the said order. Proclamation of sale or sale notice in D.R.C.No.208 of 2012, dated 7/6/2017, issued by the Recovery Officer, Debts Recovery Tribunal - III, Chennai, can also be questioned before the Tribunal. Contention of the writ petitioner that Bank has to be injuncted by issuance of a writ of mandamus till the completion of investigation, in Crime No.623 of 2011, dated 29/9/2011, on the file of Ambur Police Station, can always be urged before the forum.

11. Contention of the writ petitioner that there is no efficacious remedy, except to approach this Hon'ble Court, under Article 226 of the Constitution of India, cannot be accepted, for the reason that time and again, the Hon'ble Supreme Court as well this Court, held that forums constituted under the SARFAESI Act, 2002 or the Recovery of Debts Due to Banks Act, 1993,

providing an effective and alternative remedy to the person aggrieved.

12. 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 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:

"... 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. 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. In the light of the above discussion and decisions, writ petition is dismissed, giving liberty to the petitioner to challenge the sale notice in the manner known to law. No costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

mvs

To

The Branch Manager
Indian Bank
Ambur
Vellore District.

W.P.No.19760 of 2017

LRS(CO)
CA(28/08/2017)