

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.09.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.21640 of 2016

and WMP Nos.18484 & 18485 of 2016

R.B.Jayakumar

... Petitioner

vs.

1. Magma Fin Corp Limited,
Rep. by its Authorized Officer,
Old NO.103, New No.17-19,
7th Floor, Nelson Manickam Road,
Aminjikarai, Chennai - 600 029.

2. Magma Housing Finance,
Rep. by its Authorized Signatory,
No.8, Sant Nagar,
East of Kailash,
New Delhi - 110 065.

3. N.Sonaimuthu

4. S.Selvi

... 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 in impugned possession notice dated 25.05.2016, affixed on 27.05.2016 on the file of the 2nd respondent herein with respect to the property Plot Nos.58 & 59, D.1, Pemmasani Enclave, Sri Balaji Nagar, Padikuppam, Padi Village, Anna Nagar West Extension, Chennai 600 101 and quash the same and direct the respondents 1 and 2 herein to release the property in question from the loan liability accepting the payment of amount proportionate to the property under petitioner's occupation namely premises bearing Plot No.58 & 59, D-1, Pemmasani Enclave, Sri Balaji Nagar, Padikuppam, Padi Village, Anna Nagar West Extension, Chennai - 600 101, namely an extent of 1221 sq.feet of undivided share with 2188 sq.feet of built up area out of 6300 sq.feet of the property comprised in Survey Nos.226 Part, 1A2 and 1A4 in Padikuppam, Padi Village.

For Petitioner : Mr.S.Sadasharam

For Respondents : Mr.S.Tamizharasan (for R1 & R2)
for M/s.Srinivasan Raghavan Asso.

ORDER

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

Possession notice dated 25.05.2016, impugned in this writ petition, is extracted hereunder:

POSSESSION NOTICE

(For Immovable Property)

Whereas, the undersigned being the authorised officer of the Magma Housing Finance under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) and in exercise of powers conferred under Section 13(12) read with rule 9 of the Security Interest (Enforcement) Rules, 2002 issued demand notice dated 08/02/2016 calling upon below named Borrowers / co-Borrowers N.Sonaimuth (Borrower), S.Selvi (Borrowers / Co-Borrowers) to repay the amount mentioned in the notice being Rs.67,61,341/- (Rs. Sixty Seven Lakh Sixty One Thousand Three Hundred Fourty One Only) payable as on 1-Feb-16 alongwith future interest @ 13.85% per annum within 60 days from the date of receipt of the said notice.

The borrower having failed to repay the amount, notice is hereby given to the borrower and the public in general that the undersigned has taken possession of the property described herein below in exercise of powers conferred on him / her under Section 13(4) of the said Act read with Rule 9 of the said rule on this 31st day of March of the year 2016.

The borrower in particular and the public in general is hereby cautioned not to deal with the property and any dealings with the property will be subject to the charge of the Magma Housing Finance for an amount Rs.67,61,341/- and interest thereon.

Description of the Immovable Property.

1. All that piece and parcel of land bearing No.59, measuring 2400 sq.ft., comprised in S.No.226, Part, Patta No.1289 as per Patta Survey No.226/1A2, situated in Sri Balaji Nagar, Padikuppam, Padi Village, Anna Nagar West Extn., Chennai, Ambattur Taluk, Thrivallur District Measuring on the North 40 feet, South 40 feet, East 60 feet and West 60 feet and

bounded on the
North : Plot No.55,
South: 24 feet road,
East: Plot No.58
West: Plot No.60

and

2. All that piece and parcel of land bearing No.58, measuring 1 ground and 1500 sq.ft., comprised in S.No.226, Part, Patta No.1291 as per Patta Survey No.226/1A4, situated in Sri Balaji Nagar, Padikuppam, Padi Village, Anna Nagar West Extn., Chennai, Ambattur Taluk, Thrivallur District Measuring on the North 80 feet, South 50 feet, East 68 feet and West 60 feet and bounded on the
North : Plot No.56 & 57,
South: 24 feet road,
East: Anna Nagar, Padi Kuppam Existing Road,
West: Plot No.59

Item No.1 and 2 measuring total extent of 6300 sq.ft., within the Sub-Registration District of Villivakkam and Registration District of Central Chennai.

2. 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.

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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.

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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."

3. Though, Mr.S.Sadasharam, learned counsel for the

petitioner submitted that 50% of the amount due and payable by the petitioner would be paid within a reasonable time, it is always open to the petitioner to work out his remedy with the bank. In the light of the decisions stated supra, the writ petition is not maintainable. It is open to the petitioner to seek for appropriate remedy before the tribunal, if so advised. Instant Writ Petition is dismissed. No Costs. Consequently, the connected Writ Miscellaneous Petitions are closed.

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Sd/-

Asst.Registrar

/true copy/

Sub Asst. Registrar

+1cc to Mr.S.Sadasharam, Advocate Sr.68233

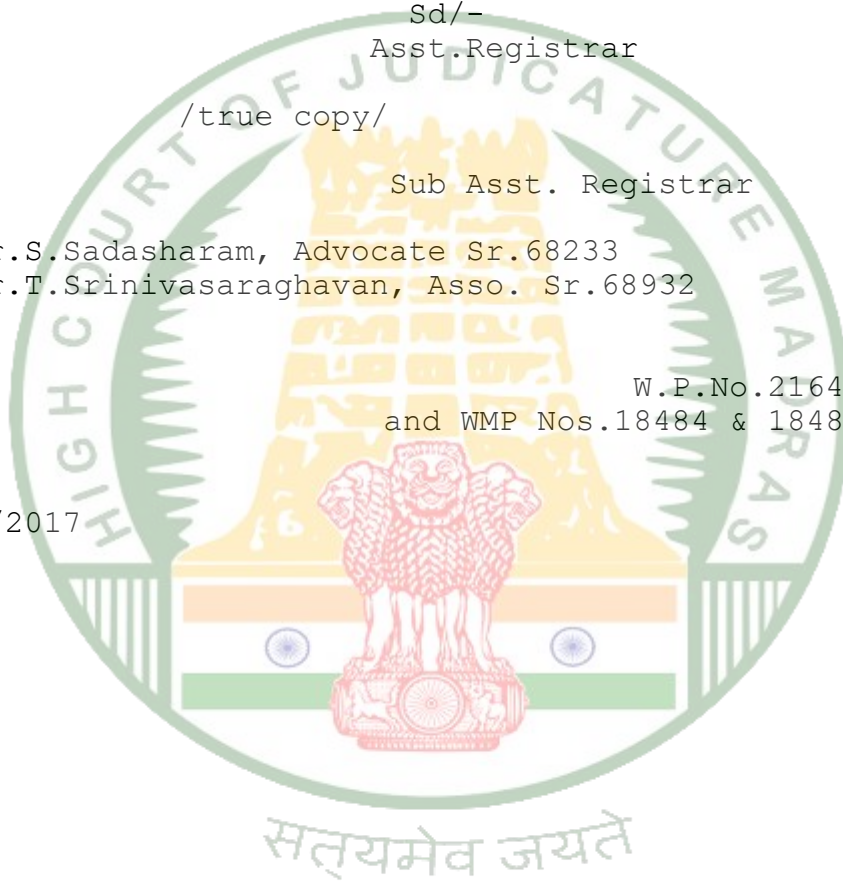
+1cc to Mr.T.Srinivasaraghavan, Asso. Sr.68932

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KGK(CO)

rvr 13/10/2017



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