IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.02.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE M.GOVINDARAJ

Writ Petition No.30410 of 2016
and
W.M.P.Nos.26359 and 26360 of 2016

G.Raja @ Rajapart .... Petitioner

vs.

1. The Authorised Officer
   Indian Overseas Bank
   Mettur Branch (0156)
   Salem Region, Salem District

2. The Branch Manager
   Indian Overseas Bank
   Ram Nagar, Mettur,
   Salem District .... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, for a writ of certiorari, calling for the entire records relating to the impugned possession notice dated 03.08.2016 issued by the 1st respondent and quash the same.

For Petitioner : Mr.C.Prakasam
For Respondents : Mr.F.B.Benjamin George

ORDER

(delivered by S.MANIKUMAR, J)

Borrower, who has availed loan, by pledging his properties situate at S.No.332/2, Singeripatti Village, Kolathur, Mettur Taluk, Salem District, to an extent of 2.68 acres, with a building constructed to an extent of 600 sq.ft. ground fllor and AC roof constructed to an extent of 300 sq.ft., has committed default in repayment.

2. Indian Overseas Bank, Salem District, has issued a demand notice under Section 13(2) r/w Rule 8 of the Security Interest (Enforcement) Rules, 2002, dated 28.12.2015 calling upon the writ petitioners/borrowers to repay Rs.7,88,908/- with interest, within 60 days from the date of receipt of the said notice.

3. As payment has not been made, Indian Overseas Bank, Salem Region, Salem District, has issued a notice under Section 13(4) of the SARFAESI Act, dated 27.07.2016 and another notice dated 03.08.2016, terming it as Possession Notice. Being aggrieved by the same, borrower, has filed the instant writ petition to quash the same contending inter alia that the subject property mortgaged, is an agricultural property and that the respondent bank, cannot invoke SARFAESI Act, 2002, to take possession of the land with a cow shed.

4. Record of proceedings shows that, on 01.09.2016, while ordering notice, a Hon'ble Division Bench of this court, has granted interim stay of further proceedings till the next date of hearing. Though respondents 1 and 2 have entered appearance, so far, no counter affidavit has been filed. However inviting the attention of this court to the description of the immovable property in the notice dated 03.08.2016, Mr.F.B.Benjamin George, learned counsel for the respondent-bank, submitted that there is a building constructed to an extent of 600 sq.ft. ground floor and A/c roof measuring 300 sq.ft. and refuted the contention of the learned counsel for the writ petitioner, the subject property is an agricultural property.

5. He further submitted that when there is an effective and alternative remedy available to the writ petitioner under Section 17 of the SARFAESI Act, writ petition is not maintainable. It is also his contention that when the very nature of the property is disputed, Debts Recovery Tribunal, would be the competent forum to adjudge the same, on evidence.

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

6. Description of the property, as per the impugned possession notice dated 03.08.216 is as follows:

> "All that piece and parcel of land measuring of 5.98 acres land in S.No.309/2A, 332/2, Singiripatti village, Kolathur, Mettur Tk, standing in the name of Mr.Raja @ Rajapart S/o C.Ganesan (1) Mr.C.Ganesan S/o Chinnapaiyan (2) Mr.G.Mayilsamy S/o.Ganesan (3) Mr.Sangeethan S/o.Ganesan (reported deceased) (4). In that building constructed to the extent of 600 sq.ft.

ground fllor and AC roof constructed 300 sq.ft."

7. Whether the building constructed to an extent of 600 sq.ft. and A/c roof measuring 300 sq.ft. is a cow shed or a dwelling house? and whether the entire extent of land of 2.68 acres mortgaged with the respondent bank is an agricultural land or not? On the above, there is dispute and rival contentions are made. It is well settled law, when facts are disputed, the same have to be adjudged before the appropriate forum. Remedy under Article 226 of the Constitution of India is extraordinary. Tribunal is empowered to adjudge the issue on appreciation of evidence.

8. The issue as to whether the secured property is an agricultural property or not, is a question of fact and Writ Court could not delve into the said aspect and record a finding, solely on the basis of averments. Reference can be made to few decisions:-

(a) In the decision reported in (2003) 4 SCC 317 (Rourkela Shramik Sangh v. Steel Authority of India Ltd. and Anr.) it is held that the disputed questions of fact could not be entertained in the writ proceedings. At paragraph 19, the Hon'ble Supreme Court held as follows:

> "19. The question as to whether the workmen concerned had been continuously working for a period of ten years so as to enable them to derive benefit of the judgment of this Court in R.K. Panda case (1994) 5 SCC 304 was essentially a question of fact...."

In paragraph 22, the Honourable Supreme Court further held as follows:

> "22. ...a disputed question of fact normally would not be entertained in a writ proceeding. This aspect of the matter has also been considered by a Constitution Bench of this Court in Steel Authority of India Ltd. v. National Union Waterfront Workers (2001) 7 SCC 1...."

(b) In (2006) 9 SCC 256 (Himmat Singh v. State of Haryana and Ors.), the Honourable Supreme Court held that

> 'the statement of the appellant or the 5th respondent was correct or not could not ordinarily be tested in writ proceedings and it is well known that in writ petition ordinarily such a disputed question of fact could not be entertained'.

(c) In yet another decision reported in (2007) 7 MLJ 687 (Food Corporation of India v. Harmesh Chand), the Supreme Court held as follows:

> "Since the facts were seriously disputed by the appellant and no factual finding could be recorded without consideration of evidence adduced by the parties, it was not an appropriate case in which the High Court ought to have exercised its writ jurisdiction. The parties could have approached a civil court of competent jurisdiction to adjudicate the matter."

9. Further, except the averments made in the supporting affidavit that the subject property mortgaged, is an agricultural property, no supporting document has been filed.

10. Receipt of Section 13(4) notice dated 27.07.2016 and 03.08.2016 has not been disputed, and as per sub section 1 of Section 17, any person (including borrower), aggrieved by any of the measures referred in sub section (4) of Section 13 taken by the secured creditor or its authorised officer, can make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter, within 45 days from the date, on which such measure had been made. Writ petitioners have not challenged Section 13(4) possession notice. As per Section 13(4)(a) of the Act, in case the borrower fails to discharge its liability in full within the period specified in sub section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely, take possession of the secured assets of the borrower including the right to transfer by way of lease assignment or sale for realising the secured asset. Writ of certiorari cannot be issued to have the effect of setting at naught actions taken under the provisions of the statute when an alternate remedy is provided. Contention of the petitioners that remedy under SARFAESI Act, 2002 is too dilatory and difficult to get quick relief and the remedy is not efficacious, forcing the petitioners to file a writ petition before this court, cannot be accepted.

11. Having regard to the practice of the High Courts in entertaining writ petitions against SARFAESI action, ignoring the statutory remedies, 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."

12. 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."

13. 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.
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> 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."

14. 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.

7. In this connection, we are fortified by the decision of the Honourable Supreme Court reported in (United Bank of India v. Satyawati Tondon and others) III (2010) BC 495 (SC) = 2010-5-L.W. 193, wherein in para Nos. 17 and 18, it was held thus:—

> "17. …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 t he 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 redressal 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 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, (underlining added).

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. 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."

15. In the light of the above, decisions and discussion, we are not inclined to entertain the writ petition.

16. Accordingly, writ petition is dismissed. However, there shall be no order as to cost. Consequently, the connected writ miscellaneous petitions are also dismissed. Petitioner/borrower is at liberty to work out his remedy in the manner known to law.

s/d-
Assistant Registrar(CCC)

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Sub-Assistant Registrar

+1 CC to F.B. Benjamin George, sr 8770
+1 CC to C. Prakasam, sr 8381

W.P.No.30410 of 2016

NR(CO)
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