

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.02.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

Writ Petition No.31169 of 2016
and

W.M.P.No.27018 of 2016

S.Selvakumar

.... Petitioner

vs.

1.M/s.Indian Overseas Bank
Rep by Authorised Officer
Regional Office, IOB Towers
12/1, APT Road
Erode - 3

2.M/s.Indian Overseas Bank
Rep by the Chief Manager
Kottai Branch
9A, Thillai Nagar
Erode - 4

.... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, for a writ of certiorari, calling for the records of the first respondent in and by his proceedings in No.RO/LAW/67/2016-17 Dt.10.08.2016 and quash the same.

For Petitioner : Mr.V.S.Kesavan

For Respondents : Mr.F.B.Benjamin George

ORDER
(Made by S.MANIKUMAR, J)

Borrower, who has availed loan, by pledging his properties situate at various survey numbers in Erode Registration District, Perundurai Sub-Registration District, Erode District & Taluk, measuring an extent of 2.67.0 hectares, 2125 sq.ft. and 1863 3/4 sq.ft., has committed default in repayment.

2. Indian Overseas Bank, Regional Office, Erode, has issued a demand notice under Section 13(2) r/w Rule 3 of the Security Interest (Enforcement) Rules, 2002, dated 30.05.2016 calling upon the writ petitioner/borrower to repay Rs.21,16,098/- with interest, within 60 days from the date of receipt of the said notice.

3. As payment has not been made, Indian Overseas Bank, Regional Office, Erode District, has issued Possession Notice under Section 13(4) of the SARFAESI Act, dated 10.08.2016. Being aggrieved by the same, borrower, has filed the instant writ petition to quash the same.

4. Record of proceedings shows that on 07.09.2016, we passed the following order:

" Heard Mr.V.S.Kesavan, learned counsel for the petitioner.

2. Perused the materials available on record.

3. There shall be an order of interim stay of the operation of the possession notice, dated 10.08.2016, on condition that the writ petitioner pays 50% of the outstanding amount of Rs.21,16,098/- (Rupees twenty one lakhs sixteen thousand and ninety eight only), within eight weeks, from the date of receipt of this order. First of the installment of Rs.5,00,000/- (Rupees Five Lakhs only), should be paid, within four weeks from today and the second installment is permitted to be paid within the further period of four weeks, from the date of the first installment. It is made clear that if any one of the conditions ordered above, is not complied with, interim order granted by this court, would stand automatically vacated, without any further reference to this court.

Notice. Private Notice is also permitted."

5. Contending inter alia that the conditional order could not be complied with in time, a petition has been filed for extension of time. Even within the extended time prayed for, condition has not been complied with.

6. Mr.F.B.Benjamin George, learned counsel for the respondent bank submitted that when there is an effective and alternative remedy available to the writ petitioner under Section 17 of the SARFAESI Act, 2002, and therefore, writ petition is not maintainable.

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

7. Receipt of Section 13(4) notice dated 10.08.2016 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 petitioner 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.

8. 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."

9. 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."

10. 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.

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."

11. 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 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 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.

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

13. Accordingly, writ petition is dismissed. However, there shall be no order as to cost. Consequently, the connected writ miscellaneous petition is also dismissed.

Registry is directed to return the original possession notice dated 10.08.2016 filed along with this writ petition, after obtaining an attested copy of it from the learned counsel for the petitioner.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

asr

To

1.The Authorised Officer
Indian Overseas Bank
Regional Office, IOB Towers
12/1, APT Road
Erode - 3

2.The Chief Manager
Indian Overseas Bank
Kottai Branch
9A, Thillai Nagar
Erode - 4

+ 1 cc to Mr.F.B. Benjamin George, Advocate Sr.10904
+ 1 cc to Mr.Kesavan, Advocate Sr.10893

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and
W.M.P.No.27018 of 2016

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