IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.03.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.5126 of 2018
and WMP No.6297 of 2018

R.Mohandas ... Petitioner

vs.

1. Vijaya Bank,
rep. by its General Manager,
Head Office,
No.41/2, M.G.Road,
Bangalore - 560 001.

2. The Branch Manager,
Vijaya Bank,
No.3/3, Rajaram Complex, Manivannan Road,
(Opp. New Bus Stand),
Salem - 636 004.

3. The Authorized Officer,
Vijaya Bank,
No.3/3, Rajaram Complex, Manivannan Road,
(Opp. New Bus Stand),
Salem - 636 004. ... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorari, calling for the records of the 3rd respondent pertaining to his sale notice dt. 31.1.2018 and quash the same and further forbear the respondents from invoking the provisions of SARFAESI Act with respect to the petitioners property situated at Plot Number 3, Kandhampaty Village, Suramangalam, Salem which has not been given as security for the cash credit loan.

For Petitioner : Mr.Sivavarthanan

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

Sale notice dated 31.01.2018, issued by Vijaya Bank and impugned in the instant writ petition is as follows:

"Sub: Sale of secured asset in favour of Vijaya Bank, Salem Branch

The undersigned acting as Authorized Officer of Vijaya Bank, has taken possession of the below mentioned immovable property on 12.09.2017 over which security is created by you for the loan availed by M/s.Pushpa Telecom in favour of the Vijaya Bank, Salem Branch. The possession notice was sent to you on 12.09.2017. Further in pursuance of powers conferred under Sec.13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and Rule 8(6) of the Security Interest (Enforcement) Rules, 2002, please take notice that the said property will be put for sale on 08.03.2018 at 10.30 AM - 11.30 AM (with unlimited auto extension of 3 minutes). The detailed sale notice is published in the newspaper as per the provisions of the Act is enclosed herewith and as such be appraised of full details of the sale.

Thus we demand from you the payment of all the dues as shown in our possession notice with further interest and expenses on or before the sale date. In the absence of the same the property will be sold on the date fixed for the sale.

Description of the Immovable Property

All the piece and parcel of land with building as per Resurvey S.No.4/8 located in Salem District, Salem West Rd; Suramangalam SRD, Salem Taluk, No.63, Kandhampaty Village, Plot No.3; having total extent of 1504 sq.ft. having its extent and boundaries as follows: East to West On the North 47 ft; On the South 47 ft; North to South On the East 32 ft; On the West 32 ft. Extent-1504 sq.ft. Boundaries: South of Plot no.2 Land; North of Plot no.4 land; East of Venkatachalam Property; West of 18 ft wide of Common Pathway. With all the pathway rights and easementary rights etc, as prescribed in the title deed."

2. Assailing the correctness of the sale notice dated 31.01.2018, Mr.M.Sivavarthanan, learned counsel for the petitioner submitted that property now brought for auction, was never shown as a security to the cash credit loan availed, but was shown as a security for the housing loan, in which, there was no default. He therefore submitted that when there was no security to the cash credit loan availed, impugned notice, should be set aside. Except the above, no other contention is made.

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

4. Impugned sale notice has been issued on 31.01.2018, fixing the tender-cum-auction on 08.03.2018. Writ petition has been filed on the eleventh hour i.e on 06.03.2018. 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) Issuance of sale certificate can be questioned before the tribunal. 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. ...."

5. In the light of the above decisions, without expressing any opinion on the merits of the abovesaid contentions, we are of the view that there is an alternative and effective remedy, and therefore, writ petition is not maintainable, and accordingly, writ petition is dismissed, granting liberty to the petitioner to approach the appellate forum. No costs. Consequently, the connected Writ Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

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To

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rep. by its General Manager,
Head Office,
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Vijaya Bank,
No.3/3, Rajaram Complex, Manivannan Road,
(Opp. New Bus Stand),
Salem - 636 004.

4.The Section Officer,
Current Section,
High Court, Madras-104.

+1 CC TO MR.K.S.Karthik Raja, Advocate SR. No.17239

W.P.No.5126 of 2018
and WMP No.6297 of 2018

GMR(CO)
RMP(26/03/2018)