

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.02.2018

CORAM:

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

W.P.No.4297 of 2018
and
WMP No.5284 of 2018

Mohan Babu

.... Petitioner

vs.

1. Kotak Mahindra Bank,
Rep. by Manager,
2nd Floor, Ceebros Center,
39, Montieth Road,
Egmore,
Chennai - 600 008.

2. Parthasarathy

3. Viswanathan Madhusudhan Respondents

Prayer: WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorari to quash the symbolic Possession Notice dated NIL (for immovable property) in Loan Account No.HF17281 at the 1st respondent order passed under the SARFAESI Act.

For Petitioner : Ms.V.Preetha

ORDER

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

Petitioner, tenant under Mr.Parthasarathy, 2nd respondent, has sought for a writ of certiorarified mandamus, to quash the symbolic possession notice dated 27.11.2017, issued under Section 13(4) of the SARFAESI Act, 2002.

2. Contending inter alia that the petitioner has also filed a suit against the bank in O.S.No.5819 of 2016, on the file of the XII Additional City Civil Court, in which bank has filed an interlocutory application to reject the plaint and further contending that subject property for which possession notice has been issued under Section 13(4) of the SARFAESI Act, 2002 has been leased out to another person and further

contending that impugned possession notice affects his right, instant writ petition has been filed for a writ of certiorarified mandamus as stated supra. Added further, Ms.V.Preetha, learned counsel for the petitioner further submitted that landlord is refusing to renew the lease and also return the advance amount of Rs.10 Lakhs paid. Learned counsel further contended that the petitioner is not aggrieved even if the property is brought for auction, but, prayed to include the petitioner's name in the auction notice. For the abovesaid reasons, learned counsel for the petitioner seeks for a writ.

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

4. Possession notice dated 27.11.2017, issued under Section 13(4) of the SARFAESI Act, 2002, and impugned in the instant writ petition is reproduced.

SYMBOLIC POSSESSION NOTICE
(For Immovable Property)

Ref: Loan Account No.HF17281

The undersigned, being the Authorized Officer of KOTAK MAHINDRA BANK LIMITED, a banking company within the meaning of the Banking Regulation Act, 1949 having it's Registered Office at 27BKC, C 27, G Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051 (hereinafter referred to as "the Bank/KMBL"), and branch office 1st Floor, Ceebros Centre, No.45, Montieth Road, Egmore, Chennai-600 008 appointed under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

Whereas, the undersigned being the authorised officer of the M/s.Kotak Mahindra Bank Limited under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and in exercise of powers conferred under Section 13(12) read with rule 3 of Security Interest (Enforcement) Rules, 2002 issued Demand Notice dated 1-09-2017 calling upon the Borrower & Co-Borrower, Mr.Parthasarathy Doraisamy having their address at Plot No.2, Flat NO.E-05, Mezzanine Floor, Plot No.2, Flat No.E-05, Mezzanine floor, Velachery, Chennai - 600 042, and 2A, Arunachala Apartments, No.24, M.G.Road, Shastri Nagar, Adyar, Chennai - 600 041 & Enterprise BIDI Solutions, GF51, TIDEL Park, EICOZ-IT/ITES, Civil Aerodrome Post, Coimbatore - 641 014, & No.140, GV Residency, Sowripalayam, Coimbatore-641 028 to repay the amount mentioned in this Notice being Rs.8,85,800.10p as on 31.08.2017 under Loan Account No.HF17281 with further interest at the contractual rate within 60 days from the date of receipt of the said notice.

The Borrower's having failed to discharge their liabilities in full, notice is hereby given to them in particular and public in general, that the under signed being the authorized officer has taken the SYMBOLIC POSSESSION of the property described herein below, under Section 13(4) of the said [Act] read with Rule 9 of the said rules on this Dated on 27.11.2017.

The borrower in particular and the public in general is hereby cautioned not to deal with the property and any dealing with the property will be subject to the charge of the M/s.Kotak Mahindra Bank Limited for the amount of Rs.8,85,800.10p as on 31.08.2017 under Loan Account No.HF17281 with further interest and other costs, charges and expenses.

SCHEDULE

DETAILS OF IMMOVABLE PROPERTY MORTGAGE TO THE BANK

All that piece and parcel of a Residential Flat being Flat No.E-5 in Mezzanine Floor admeasuring Built up/Plinth Area of 1065 Sqft situate at Plot No.2, Varadharajapuram D.D.T.P. Approved lay out No.25 of 1975 together with 569/2542 undivided share of the land in the total land measuring 2542 sq.ft comprised in S.No.240/3, No.137, Velachery Village, Mambalam-Guindy Taluk, Chennai Corporation Area and the land bounded on the

North By : 100 feet by-pass Road
South By : 20 feet Road
East By : Plot No.3
West By : Plot No.1

And lying within the Sub Registration District of Velachery and Registration District of South Chennai.

5. Perusal of the same shows that demand notice, under Section 13(12) dated 01.09.2017 of the SARFAESI Act, 2002, has been issued, to the borrower and co-borrower, demanding payment of Rs.8,85,800.10p, as on 31.08.2017 with further contractual interest, within sixty days from the date of receipt of the said notice. Thereafter, notice under Section 13(4) of the said Act read with rule 9 of the Security Interest (Enforcement) Rules, 2002 dated 27.11.2017, has been issued. Petitioner has contended that he has paid Rs.10 Lakhs to the owner of the property.

6. As per Section 17(4-A) of SARFAESI Act, 2002 any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purpose of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy, -

(a) has expired or stood determined;
or

(b) is contrary to Section 65 A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage;
or

(d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of Section 13 of the Act; and

(ii). the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act."

7. In the light of the recent amendment, by way of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 (44 of 2016), an effective and alternative remedy is provided to a person, who claims to be a tenant or has lease hold rights, on the secured asset and that if any application is filed, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties, in relation to such claim shall, for the purpose of enforcement of security interest, has jurisdiction to examine whether the lease or tenancy and other parameters, mentioned in Section 4 A of the Amended Act and to pass such orders, as deems fit, in accordance with the provisions of Securitisation and Reconstructions of Financial Assets and Enforcement of Security Interest Act, 2002, taking note of the amendment.

8. Repeatedly, the Hon'ble Supreme Court has held that when there is an efficacious and alternate remedy under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act or Securitisation And Reconstructions of Financial Assets Act, 2002, as the case may be, a writ petition 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 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:

"The petitioner has filed this writ petition praying for a Writ of Certiorari 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.

..... "

9. In the light of the above discussion and decisions, the instant writ petition cannot be maintained. Writ petition is dismissed. No costs. Consequently, the connected writ miscellaneous petition is closed.

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Sd/-
Assistant Registrar(CS-VII)

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Sub Assistant Registrar

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