

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.03.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.5386 of 2018

and

WMP Nos.6617 & 6618 of 2018

P.Sashikumar

... Petitioner

vs.

1. Authorised Officer,
State Bank of India,
Red Cross Building, II Floor,
Stressed Assets Recovery Branch,
No.32, Montieth Road, Egmore,
Chennai - 600 008.

2. R.Bhaskar

3. Assistant General Manager,
Specialized Agri Commercial Branch,
Sreeman Srinivasan Raod,
Alwarpet,
Chennai - 600 018.

4. Vamsi Krishna
rep. Sri Sai Loukhya Pvt. Ltd.,
Last known address at
No.14, Ramakrishna Street, T.Nagar,
Chennai - 600 017.

5. Commissioner of Police,
Greater Chennai,
EVK Sampath Road,
Vepery, Chennai - 600 007.

6. Mr.Mohan,
Inspector of Police,
CCB, O/o.Commissioner of Police,
EVK Sampath Road,
Vepery, Chennai - 600 007.

7. Chief Metropolitan Magistrate,
Allikulam,
Chennai - 600 003.

... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorari, to call for the records in the impugned order dated 19.1.2018 made in Crl.M.P.No.3696 of 2017 on the file of the 7th respondent and quash the same.

For Petitioner : Mr.N.S.Nandakumar

For Respondents : Mr.M.Elumalai (for R5 & R6)
Government Advocate.

For Respondent-7 : Court

ORDER

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

Challenge in this writ petition is to an order dated 19.01.2018 made in Crl.M.P.No.3696 of 2017 by which the learned Chief Metropolitan Magistrate, Chennai, appointed an Advocate Commissioner, to take physical possession of the property and to hand over the same to State Bank of India, Stressed Assets Recovery Branch, Chennai.

2. Short facts leading to the writ petition are that 4th respondent, is a friend of the writ petitioner. Writ petitioner and his mother offered their house property as collateral security for export loan. Loan was closed on 16.08.2013 by the 4th respondent by depositing a sum of Rs.67 Lakhs and leaving surplus credit balance of Rs.31,60,927/-.

3. Subsequently, on 19.01.2015 4th respondent seemed to have applied for a fresh loan. He had produced agreement of loan-cum-hypothecation, Guarantee Agreement and Letter of Arrangement, all dated 02.02.2015. Writ petitioner and his mother were not aware of the subsequent loan nor they were parties to the sanction of loan. They have not offered their property as collateral security for a subsequent loan. Signatures in the abovesaid documents are forged.

4. State Bank of India, Stressed Asset Recovery Branch, Chennai has filed OA No.196 of 2017 on the file of Debts Recovery Tribunal-I, Chennai, for recovery. Petitioner has filed I.A. in Diary Nos.1069 to 1071 of 2018 on 20.02.2018 in OA.No.196 of 2017 for declaring the loan as discharged and for other reliefs. Said O.A.No.196 of 2017 is stated to be pending.

5. On 29.07.2017, bank issued e-auction sale notice. Challenging the same, S.A.No.172 of 2017, has been filed on the file of Debts Recovery Tribunal-II, Chennai. SA No.172 of 2017 has been dismissed on 26.12.2017. Further e-auction sale notice dated 15.02.2018 has been issued.

6. Being aggrieved by dismissal of S.A.No.172 of 2017, petitioner has filed AIR No.81 of 2018, before the Debts Recovery Appellate Tribunal, Chennai. Before the Appellate Forum, I.A.No.190 of 2017, has been filed for condonation of delay. Another I.A. has also been filed for waiver.

7. According to the petitioner, suppressing the fact of discharge of the earlier loan, obtained in the year 2012 and surplus amount in the account of the borrower, bank has filed Crl.M.P.No.3696 of 2017, seeking assistance for taking possession of property mortgaged as a collateral security for the first loan availed. When bank has committed fraud and forgery, petitioner has filed a complaint dated 03.02.2018 to the Commissioner of Police. As no action was taken, petitioner was constrained to file Crl.OP.No.3703 of 2018, to register the FIR, and direction was issued by this Court in Crl.M.P.No.3703 of 2018, dated 08.02.2018 to the Station House Officer, 2nd respondent therein.

8. On the above facts, Mr.N.S.Nandakumar, learned counsel for the petitioner submitted that though, the order of the learned Chief Metropolitan Magistrate, in Crl.M.P.No.3696 of 2017 dated 19.01.2018 can be challenged before the Debts Recovery Tribunal, Chennai, by way of an application under Section 17 of the SARFAESI Act, 2002, considering the above facts as to how the bank, by suppressing the above details has filed an application under Section 14 of the SARFAESI Act and obtained an order for taking physical possession with the assistance of the Station House Officer, D3-Ice House Police Station, against whom, directions have been issued by this Court in Crl.OP.No.3703 of 2018 dated 08.02.2018, writ petition be entertained under Article 226 of Constitution of India. He further submitted that there are nine tenants in occupation. According to him, bank cannot attorn the tenancy.

9. In support of the contention that a writ petition against an order made under Section 14 of the SARFAESI Act, 2002, is maintainable, learned counsel for the petitioner placed reliance on the decision of the Hon'ble Division Bench of this Court in Veena Textiles Limited, Vs. The Authorised Officer, IFCI Ltd., reported in 2014 (5) CTC 209 and another order in V.Vishwanathan & Others Vs. The District Collector cum District Magistrate, Coimbatore District & others, reported in 2015-2-LW-426.

10. Learned counsel for the petitioner further submitted that when investigation is pending on the file of the Station House Officer, Vepery, Chennai, order made in Crl.M.P.No.3696 of 2017, dated 19.01.2018 of the learned Chief Metropolitan Magistrate, Chennai, requires to be interfered with. Supporting the submission of forgery and non execution of the abovesaid documents, either by the petitioner or his mother, attention of this Court was also invited to the documents, where neither the petitioner nor his mother had signed for the

second loan availed, in contrast to the signatures of all the three i.e. bankers, borrowers and the guarantors, for the first loan availed.

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

12. Petitioner is aware of the fact that an order made under Section 14 of the SARFAESI Act, can be challenged under Section 17 of the said Act. But on the facts stated supra contended that remedy under Section 17 of the Act is not efficacious.

13. On the aspect as to whether a writ petition can be entertained when there is an effective and alternative remedy, provided therefor, under the Act, 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.

..... "

14. Material facts, submitted by the learned counsel for the petitioner, require evidence and the same have to be proved. As regards forgery and fraud, the same is stated to be under investigation. Issue as to whether bank has suppressed the discharge of the first loan and bank has brought the subject property for auction, when no agreements were executed by the writ petitioner and his mother, are also the matter of evidence. Tribunal is vested with power to take evidence. It cannot be contended that there is no effective and alternative remedy to substantiate the facts pleaded before this Court. Both the decisions relied on by the learned counsel for the petitioner, were decided when there was no protection to a tenant under SARFAESI Act, 2002.

15. Taking note of the decision of the Hon'ble supreme Court, in Harshad Govardhan Sondangar Vs. International Assets Reconstruction Company Limited, reported in 2014 (6) SCC 1, legislature has brought an amendment by way of insertion of Section 4-A to Section 17 of the SARFAESI Act, 2002.

16. Though, Mr.N.S.Nanda Kumar, learned counsel for the petitioner contended that there are nine tenants in the premises and that for no fault, they would be forcibly evicted, if the impugned order made in Crl.M.P.No.3696 of 2017 dated 19.01.2018 is not interfered with, we are not inclined to subscribe to the said contention, for the reason that Section 17(4-A) enables, even the tenant to approach the tribunal under Section 17 of the SARFAESI Act.

17. In the light of the above discussion and decisions, we are of the view that no extraordinary circumstances exists for deviating from the procedure of filing an application under Section 17 of SARFAESI Act, 2002 and hence, while dismissing the instant writ petition, we grant liberty to the writ petitioner to approach the tribunal, if so advised. No costs. Consequently, the connected writ miscellaneous petitions are closed.

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Sd/-

Assistant Registrar (CS-VII)

/TRUE COPY/

Sub-Assistant Registrar

To

1. The Commissioner of Police,
Greater Chennai,
EVK Sampath Road,
Vepety, Chennai - 600 007.

2. The Chief Metropolitan Magistrate,
Allikulam, Chennai - 600 003.

+1CC to MR.N.S.NANDAKUMAR Advocate SR.NO.18212

+1CC to the Govt Pleader, High Court, Madras SR.NO.18434

W.P.No.5386 of 2018

and

WMP Nos.6617 & 6618 of 2018

EV[CO]

MK:26/03/2018

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