

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 28/2/2018
C O R A M
THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Petition No.4441 of 2018

K.Venkatesan

... Petitioner

vs

1. M/s. Axis Bank Limited
rep. By its Authorised Officer
K. Thiagarajan
Chennai.
2. The Chief Metropolitan Magistrate
Allikulam
Chennai 600 003.
3. P. Sathya Soul Raj
4. K. Kanagaraj

... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of certiorarified mandamus to call for the records in respect of the impugned order passed by the second respondent in CrI.M.P.No.4328 of 2017, dated 18/1/2018 and quash the same and consequently forbear the first respondent, their men, agents from interfering with the physical possession of the petitioner and from in any manner evicting the petitioner from the piece and parcel of the land and building bearing Flat No.S 3 Second Floor situated at Plot No.2 part and 3 part, Block 7, Bhattachariar Street, Virugambakkam, Chennai 600 092 comprised in Old S.Nos.121/1, 121/3 and 122/1 part of the extent of 364 sq.ft as per survey present Block No.7, T.S.No.25/3 part of Virugambakkam Village, Mambalam - Guindy Taluk, within the limits of Corporation of Chennai except following due process of law.

For Petitioner ... Mr.P.Sam Japa Singh

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O R D E R

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

Order made in CrI.M.P.No.4328 of 2017, dated 18/1/2018, on the file of the Chief Metropolitan Magistrate, Allikulam, Chennai, directing appointment of an Advocate Commissioner, to take possession of the subject property, mortgaged with the Bank, with the assistance of the Station House Officer, R.5 Virugambakkam Police Station, Chennai and handover the same to M/s. Axis Bank Limited, Chennai, first respondent herein, is challenged by the petitioner.

2. According to him, he is a tenant of the third respondent. He has been paying monthly rent periodically. He is not aware of any loan transaction between the Bank and the borrower. On 21/2/2018, an Advocate Commissioner, came to the house, in which he is a lessee and served a copy of an order, made in CrI.M.P.No.4328 of 2017, dated 18/1/2018, passed by the learned Chief Metropolitan Magistrate, Chennai and only thereafter, he came to know about the banking transactions.

3. Inviting the attention of this Court to the possession notice, dated 2/8/2016, Mr.P.Ram Japa Singh, learned counsel for the petitioner submitted that the said notice was challenged by the borrower, Mr.P.Sathya Soul Raj, Kanyakumari District, represented by his Power of Attorney, in S.A.No.101 of 2016, on the file of the Debts Recovery Tribunal - 2, Chennai and taking note of the memo, dated 21st December 2016, filed by Axis Bank Limited, respondent therein, possession notice was withdrawn. Accordingly, S.A., challenging possession notice, was allowed.

4. Inasmuch as S.A.No.1 of 2016 has been allowed, learned counsel for the petitioner submitted that suppressing the above, Bank has filed CrI.M.P.No.4328 of 2017, under Section 14 of the SARFAESI Act, 2002, for taking actual physical possession, which according to him is erroneous.

5. Placing reliance on the decision of the Hon'ble Supreme Court, in Harshad Govardhan Sondagar Vs. International Assests Reconstruction Co. Ltd., & Ors, reported in {2014 (5) CTC - 546}, and another decision of this Court in Nantu Maity Vs. Allahabad Bank and three others, {2015 (5) CTC - 773}, learned counsel for the petitioner submitted that when there is a lessee in the subject property, the tenant is entitled to be heard in the application filed under Section 14 of the SARFAESI Act. According to him, Bank has not impleaded the tenant in the application filed before the learned Chief Metropolitan Magistrate, Chennai, and therefore, there is a violation of principles of natural justice, warranting interference with the

impugned order.

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

7. Contention that the petitioner is a tenant under P.Sathya Soulraj, respondent No.3, is a matter of evidence. As per Section 13 (4) of the SARFAESI Act, 2002,

(4) In case the borrower fails to discharge his 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:-

(a) 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;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

8. As per Section 14 of the SARFAESI Act, 2002,

14."Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset:

(1) Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him--

(a) take possession of such asset and documents relating thereto; and

(b) forward such assets and documents to the secured creditor.

[Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that-

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding

payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officers is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets [within a period of thirty days from the date of application]:

[Provided further that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such also period but not exceeding in aggregate sixty days.]

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.]

[(1-A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him,-

(i) to take possession of such assets and documents relating thereto; and

(ii) to forward such assets and documents to the secured creditor.]

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such

steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority."

9. Decision in Harshad Govardhan Sondagar Vs. International Assets Reconstruction Co. Ltd & Ors, {2014 (5) CTC 546}, at paragraph No.28, the Hon'ble Supreme Court has been rendered, prior to the introduction of Section (4-A) to 17 of the SARFAESI Act, 2002, and the same would not render any assistance to the case of the petitioner.

10. Following the above said decision in Nantu Maity Vs. Allahabad Bank, Mugappair Branch and three others, reported in {2015 (5) CTC 73}, at paragraph No.8, a Hon'ble Division Bench of this Court, held as follows:-

8. In that view of the matter, without going into the factual disputes and also merits of the case, we are of the considered opinion that since the Petitioner was not a party to the proceedings under Section 14 of the SARFAESI Act before the CMM, the impugned Order deserves to be set aside. Accordingly, the impugned Order dated 9.2.2015 is set aside and the matter is remitted back to the CMM to pass Orders in accordance with the law laid down by the Supreme Court in Harshan Govardhan sondagar v. International Assets Reconstruction Company Ltd. and other, 2014 (5) CTC 546 (SC), and also any other law relevant in the case, after giving an opportunity of hearing to all the parties concerned. The CMM is further directed to consider the matter and pass Final Orders under Section 14 of the SARFAESI Act within a period of two months from the date of filing of a certified copy of this Order, by either party."

11. Both the above said judgments have been rendered, when there was no provision, in SARFAESI Act, 2002, protecting the interest of the lessee. Though the learned counsel for the petitioner contended that the fact of withdrawal of possession notice, dated 2/8/2016, and consequently, when S.A has been allowed on 21/12/2016, suppressing the above, Bank has filed CrI.M.P.No.4328 of 2017, dated 18/1/2018, on the file of the Chief Metropolitan Magistrate, Allikulam, Chennai, for taking actual physical possession and that therefore, order made therein requires interference, this Court is not inclined to

accept the said contentions, for the reason that symbolic possession taken, under Section 13 (4) of the SARFAESI Act, 2002 is different from taking actual physical possession, under Section 14 of the SARFAESI Act, 2002, for which assistance is sought for, either from the learned Chief Metropolitan Magistrate, or the District Magistrate, as the case may be, within whose jurisdiction, any such secured asset or other documents relating thereto may be situated or found. There could be a proceeding for symbolic possession and thereafter, Bank can sell the property or transfer, by way of lease, assign the loan account or resort to Section 14 of the SARFAESI Act, 2002, for taking actual physical possession.

12. On receipt of an affidavit from the Authorised Officer, the District Magistrate or the learned Chief Metropolitan Magistrate, as the case may be, after satisfying with the contents of the affidavit, pass suitable orders for the purpose of taking possession of the secured assets within a period of thirty days from the date of application.

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets [within a period of thirty days from the date of application]:

[Provided further that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such also period but not exceeding in aggregate sixty days.]

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.]

13. Seeking assistance from the District Collector-cum-District Magistrate or the learned Chief Metropolitan Magistrate, as the case may be, is an independent action, for which purpose, it cannot be contended that possession notice under Section 13 (4) should have been issued and that the same should be in force. In the light of the above discussion, we are not inclined to accept the case of the petitioner that no proceeding can be initiated under Section 14 of the SARFAESI Act, 2002, when possession notice is withdrawn.

14. As per Section 17 (1),

"Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this Chapter (may make an application along with such fee, as may be prescribed) to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower]."

15. Section 4 (A) to Section 17 has been inserted by Act 44/2016, with effect from 1/9/2016. Section 17 (4-A) reads thus:-

Where-

(i) any person, in an application under sub-section (1), claim 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.]

16. By virtue of the insertion by Act 44/16, to Section 17 of SARFAESI Act, 2002, petitioner who claims to be a tenant, can always make an application, under Section 17 (4-A) of the Act, challenging the correctness of the order, in Crl.M.P.No.4328 of 2017, dated 18/1/2018, on the file of the learned Chief Metropolitan Magistrate, Chennai. For the purpose of Enforcement of Security Interest, the Tribunal would examine the facts of the case. Contention of the petitioner that he ought to have been impleaded in the application filed, under Section 14 of the SARFAESI Act, 2002, and in the absence of the same, there was a violation of principles of natural justice, can also be raised before the Tribunal, if any application under Section 17 (4-A) of the SARFAESI Act, 2002 is made.

17. 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) "

18. 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."

19. 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...."

20. In the light of the above discussion and decisions considered, we are not inclined to entertain the writ petition. Accordingly, the same is dismissed. Petitioner is at liberty to approach the Tribunal, under Section 17 (4-A) of the SARFAESI Act, 2002, if so desire. No costs. Consequently, the connected Writ Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

mvs

To

1. The Chief Metropolitan Magistrate
Allikulam
Chennai 600 003.

+1 cc to Mr.P.Sam Japa Singh Advocate sr 15116

W.P.No.4441 of 2018

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