IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.07.2018

CORAM

THE HON'BLE MR.JUSTICE S.MANI KUMAR
&
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.3755 of 2018
and
W.M.P.No.4584 of 2018

Mr.S.Ashok ... Petitioner

Vs.

1. M/s.State Bank of India
SME Siruthozhi Branch Chennai,
KRM Tower, 5th floor,
No.1, Harrington Road, Chetpet,
Chennai - 600 031.

2. M/s.MPL Cars Private Limited
Old No.11, New No.25, Bagavantham Street,
T.Nagar, Chennai - 600 017.

3. S.Ravindranathan

4. Madhavilata

5. S.Gauthama Shankar

6. M/s.MPL Parts & Services Private Ltd
Old No.11, New No.25, Bagavantham Street,
T.Nagar, Chennai - 600 017.

7. The Registrar
Debts Recovery Appellate Tribunal
Chennai

(Deleted as per the order of this
Court dated 06.03.2018 made in
W.P.No.3755 of 2018) ... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records in R.A.(S.A).No.95 of 2017 on the file of the 7th respondent leading to the impugned order dated 13.02.2018 and quash the same.

For Petitioner : Vignesh Venkat for Mr.P.J.Rishiksh

For Respondents: Mr.M.L.Ganesh
For R1

R2 to R6 - Given Up

R7 - Deleted vide Court Order
dated 06.03.2018

O R D E R

This Writ Petition has been filed to call for the records of the 7th respondent relating to the order made in R.A.(S.A). No.95 of 2017 dated 13.02.2018 and to quash the same.

2. Interim application was also filed to grant an order of Interim stay of the impugned order dated 13.02.2018 passed in R.A.(S.A).No.95 of 2017 on the file of the Debt Recovery Appellate Tribunal, Chennai.

3. The brief facts of the case as per the petitioner's affidavit are that the State Bank of India, the first respondent herein, had initially sanctioned a sum of Rs.35 Crores under an "eDFS facility (Inventory funding facility) to the second respondent company on 25.01.2012. The said loan was sanctioned against the stock inventory of the second respondent company and no collateral security was taken by the bank for the said sanction. The initial borrowers/guarantors were respondents 3, 5 and the 6th respondent which is the parent company of the second respondent company.

4. The petitioner submits that he has never stood as a guarantor in his personal capacity and all the documents such as renewal letters, etc, had been executed only in the fiduciary capacity, as a director of the company while holding 4.62% share in the 6th respondent parent company. Thereafter, the petitioner was made as a director in the second respondent company, however, he resigned from the position of director, as early as on 20.01.2016, which the petitioner states that he had communicated to the bank vide letter dated 16.06.2016 on the very same day of resigning from the position of Director.

5. The petitioner seems to have transferred his shares by way of gift in favour of the third respondent on 20.01.2016 and as on date, the shareholding pattern of the parent sixth respondent company of which the second respondent is a 100% wholly owned subsidiary which is as follows:

(i) 3rd Respondent - 69.04%

(ii) 4th Respondent - 28.22%
(iii) 5th Respondent 2.74%

6. The petitioner further submits that the second respondent company was initially doing well being one of the primary dealers for FORD Cars. However, due to unforeseen market conditions and other related recession conditions, the company's stock position eroded and eventually, the entire business had come to a standstill. While that being the position, the respondents 2 to 6 negotiated with the first respondent bank for restructuring the loan facility and made an effort to revive the said business, to which, the first respondent bank had suggested a proposal to convert the eDFS facility to a "Working capital term loan (WCTL), to tide over the crisis of the said company. Since the first respondent bank had sought a collateral security from the second respondent company for the said conversion and since the company could not arrange the same, it seems that the third respondent requested the petitioner to provide his residential apartment located at Alwarpet as security for the proposed conversion of eDFS facility to "Working capital term loan (WCTL). Since the third respondent is the own brother of the petitioner, in order to help him for the said conversion, the petitioner had accepted to give his residential apartment located at Alwarpet as security and the same was confirmed by the first respondent bank by its email dated 31.03.2016.

7. It is further submitted by the petitioner that on 07.05.2016, the first respondent bank officials came to his residence along with representatives of the second respondent company and took signatures in lot of papers including blank papers, to which the petitioner has raised concerns. However, the officials of the first respondent bank stated that the same were just formalities and later, the petitioner was also made to give the original title deeds of his apartment to register MOD before the Sub-Registrar, Mylapore. Believing the words of the bank, the petitioner has signed on all the documents and gave the original title deeds and registered the MOD on 19.05.2016.

8. The petitioner further submitted that to his shock and surprise, he was issued a notice dated 06.09.2016 under Section 13(2) of the SARFAESI Act, stating that the account of the second respondent company had been declared as NPA and his property was being proceeded with. Only after the said notice, the petitioner came to know that the first respondent bank had lured and misled him to give his residential apartment as collateral for the existing eDFS facility of the second respondent company, instead of converting the same into Working capital term loan facility.

9. The petitioner also stated that the first respondent

bank, in collusion with the respondents 2 to 6, had wrongfully induced the petitioner and obtained his residential apartment as security by complete misrepresentation, breach of trust and false statements. Further, the petitioner stated that he was also shocked to know that the third respondent, who is none other than his own brother, had been siphoning off funds from the second respondent company by various means and methods. Since the petitioner had already quit the company and transferred his shares by way of gift to the third respondent, he has nothing to do with any of the respondents herein and the first respondent should not proceed against the petitioner's residential apartment under the SARFAESI Act.

10. Furthermore, the petitioner submits that 13(2) notice was issued on 16.09.2016, to which, the petitioner had made a detailed reply under Section 13(3) on 13.10.2016 requesting the first respondent bank to drop the SARFAESI proceedings initiated against him. However, the bank gave an evasive reply and rejected the petitioner's request by letter dated 18.10.2016. Subsequently, the first respondent bank, all of a sudden issued a letter to the second respondent company on 03.11.2016 (this letter was not sent to the petitioner by the bank) accorded a conditional sanction for conversion of the eDFS facility with unacceptable conditions as follows:

S.No	Facility	Sum
1	WCTL - I (Working Capital Term Loan)	22 Crores
2	WCTL - II (Working Capital Term Loan)	2.15 Crores
3	FITL (Funded Interest Term Loan)	2.70 Crores
	Total	26.85 Crores
• Payment of 3 Crores immediately upon acceptance of the letter along with up to date interest from 01.10.2016 • Payment of 1.85 Crores by within 60 days from the date of documentation		

11. Moreover, the petitioner submitted that the legality of Section 13(2) notice was challenged by him before the Debt Recovery Tribunal - II (hereinafter referred to as DRT-II) Chennai, in S.A.No.126 of 2016 and DRT-II allowed the application filed by the petitioner on the ground that the first respondent bank failed to establish the scheduled property which was given as collateral security for the loan availed by the second respondent company herein. Further, it was held that the property given by the petitioner, was only for the purpose of converting the eDFS facility into WCTL facility, but the first respondent bank had neither sanctioned WCTL nor converted the

eDFS into WCTL and therefore, the said application was allowed by the DRT-II.

12. Aggrieved by the said order, the first respondent bank filed an appeal in R.A.(S.A).No.95 of 2017 before the Debt Recovery Appellate Tribunal (hereinafter referred to as DRAT) and the DRAT, by its order dated 13.02.2018, has reversed the order of DRT-II.

13. Challenging the order dated 13.02.2018, the petitioner herein has filed the present Writ Petition on the ground that the DRAT has failed to see the order passed by the DRT-II, Chennai, that residential apartment of the petitioner, was given only for the purpose of converting the eDFS loan into WCTL loan and hence, the same will not stand as a collateral security for the loan availed by the second respondent company. As the petitioner is neither a share holder nor a director of the company, his property cannot be proceeded against under SARFAESI Act. As the conversion of eDFS loan into WCTL loan has not taken place by the first respondent bank, the petitioner has raised various grounds in this regard in his affidavit. However, the above ground has been predominantly repeated in all the grounds, in different cause and usage.

14. The first respondent bank has filed a detailed counter stating that the petitioner and the respondents 2 to 6 are due and liable to pay an outstanding loan amount of Rs.28,16,67,146.25 as on 10.01.2017, towards Cash Credit Inventory funding under eDFS Account No.32182823075 (Chennai) and Cash Credit eDFS Account No.32191510980 (Pondi) to the first respondent bank. The first respondent bank in its counter further states that the second respondent is a Private Limited Company, represented by its Directors, who are the petitioner and respondents 3 to 5 herein. The sixth respondent had offered corporate guarantee and the petitioner, respondents 3 to 5 offered their personal guarantee in order to secure the repayment of loan liability of the second respondent herein. The petitioner had offered his property of residential apartment as collateral security by executing MOD on 19.05.2016, which was duly registered as Document No.1655 of 2016 at Sub Registrar Office, Mylapore.

15. The first respondent bank further submits that the second respondent had originally availed the credit facility to an extent of 35 Crores on 25.01.2012, which was subsequently enhanced to 42 Crores on 05.12.2012 and thereafter, reduced to 35 Crores on 05.12.2013. Furthermore, on 28.04.2015, the said credit facility was reduced to 25 Crores and subsequently enhanced to 30 Crores on 30.09.2015. Thereafter, it was further reduced to 25 Crores on 07.05.2016. Accordingly, the petitioner

and respondents 2 to 6 herein had executed the loan security documents on 25.01.2012, 05.12.2012, 05.12.2013 28.04.2015, 30.09.2015, 07.05.2016 and 09.05.2016 in favour of the first respondent bank.

16. Moreover, the first respondent bank submitted that since the second respondent company had failed to adhere to the terms and conditions of the sanction letter and loan security documents, the bank had not restructured the existing credit facilities and had no other option other than to declare the second respondent account as NPA on 01.09.2016 in the books of the first respondent bank and demand notice under Section 13(2) of the SARFAESI Act was also sent to the petitioner and the respondents 2 to 6 herein. Further, it was submitted by the first respondent that since the petitioner and respondents 2 to 6 have failed to repay the loan amount within 60 days, thereof, the first respondent bank issued possession notice under Section 13(4) of the SARFAEST Act on 23.11.2006 and accordingly, taken the symbolic possession of the secured property. Besides this, the petitioner and respondent 2 to 6 have transferred their business operation at Teynampet showroom in favour of M/s.Eureka Automobiles Private Ltd and not routed the sale proceeds to the loan account with an oblique motive. In fact, the other showroom located in OMR and service centres located at Alwarpet, OMR and Vadapalani have also been transferred to the said Eureka Automobiles Private Ltd. Thereafter, the first respondent bank sent communication to M/s.Eureka Automobiles Private Ltd stating that the second respondent company is having inventory funding liabilities with the bank and for which, the second respondent vide letter dated 22.08.2016, had confirmed the taking over of showroom located at Teynampet and OMR, and also the service centres, located at Alwarpet, OMR and Vadapalani.

17. It is further submitted in the counter affidavit of the first respondent that even though the said showrooms and service centres were hypothecated to the bank, the second respondent company, without informing and obtaining prior permission from the bank, had transferred its business interest in favour of M/s.Eureka Automobiles Private Ltd, in utter violation of terms and conditions of the sanctioned letter and loan security documents, in the result, no security was available to the bank, except the property which was offered by the petitioner herein. In addition to that, the first respondent bank submits that after the notice under Section 13(2) was issued to the petitioner, there had been a negotiation for conversion of eDFS facility into WCTL facility for wrapping the business operations subject to the condition that the second respondent shall pay a sum of Rs.3 Crores immediately and further sum of Rs.1.85 Crores within 60 days from the documentation of the loan security documents. The said terms and conditions were accepted by the

petitioner and respondents 2 to 6 herein and only then, the petitioner deposited his title deeds of the residential apartment as a collateral security.

18. The first respondent bank also submits that the petitioner and respondents 3 to 6 had executed the Deed of Guarantee from time to time for each sanction and thereby, personally guaranteeing jointly and severally to the amount due to the bank and finally, the petitioner and respondents 3 to 6 executed the same to the extent of Rs.25 Crores and further they had agreed that their guarantee to the said limit shall be a continuing guarantee until a notice in writing that the same is discharged as given by the bank to them.

19. Under these circumstances, the respondent bank pleads that the petitioner, accepted the aforesaid conditions for conversion of eDFS facility into WCTL facility, but, had not complied with the conditions for the same and the bank had no other collateral security other than the petitioner's residential apartment and hence, they were forced to issue a notice under Section 13(2) of the SARFAESI Act, that too, when the bank had come to understand that the second respondent had entirely transferred its stocks to M/s.Eureka Automobiles Private Ltd, as such huge amount of loan was sanctioned only based on the running stocks of the second respondent company. Therefore, the first respondent bank pleads to sustain the order of the DRAT on the basis that DRT-II has grossly misunderstood and misconstrued the entire agreement, while allowing the application filed by the petitioner challenging the possession notice as well as 13(2) notice under a wrong pretext which has been later found by DRAT.

20. Heard the learned counsel for the petitioner and learned counsel for the respondents, and perused the materials available on record.

21. The facts and position as pleaded by the learned counsel, it is the view of this Court that when there is a default or even to secure loan either for his business or for housing loan facilities, the bank admittedly press them to undergo several process for securing collateral equivalent to the loan disbursed by them. Even in cases of educational loans, despite there being several guidelines conferred by the Reserve Bank of India and several Judgments have been rendered by the Honorable Supreme Court of India, as well as the High Court not to insist upon collateral, still we see several Writ petitions filed by the students community challenging the orders of the bank, asking for collateral security, for such disbursement of the said loan. When that being the situation, it is surprising to note that the first respondent bank has sanctioned the loan

for more than a sum Rs.35 Crores, only based on the running stocks maintained by the second respondent company, which was later siphoned off by the second respondent company into another company without the knowledge of the first respondent bank. Now the bank has proceeded against the petitioner's residential property which has been taken, as the one and only collateral, which is nothing but a peanut, as against the value of the debt due by the second respondent company to the bank.

22. On perusal of the records filed by the learned counsel for the petitioner and type set of papers, it can be seen that the petitioner, as well as the respondents 3, 4 and 5, are the brothers and who directly or indirectly had control over the second respondent and the sixth respondent company. The second respondent had availed the eDFS facility, as early as 25.01.2012 to an extent of 35 Crores and the bank has sanctioned the said loan, only based on the stocks and receivables of the second respondent company and no collateral security has been taken by the first respondent bank. This eDFS facility was subsequently enhanced or reduced periodically, to which, the petitioner and respondents 2 to 6 either stood as a guarantor or a corporate guarantee. It is seen that the petitioner has not objected to the document, which is the guarantee agreement dated 28.04.2015, and was duly signed by the petitioner, as well as the respondents 2 to 6, periodically, which states that the petitioner, namely S.Ashok as one of the directors.

23. It could be seen from the guarantee agreement dated 30.09.2015 received by the bank dated 21.03.2016 that the petitioner has resigned as a director from M/s.MPL Cars Private Limited with effect from 20.01.2016, but there was no material to prove the same. The petitioner as well as the directors have stood as a guarantors for the said eDFS facility availed from the first respondent bank. The clause 12 of the said guarantee agreement states as follows:

> "This Guarantee is independent and distinct from any security that the Bank has taken or may take in any manner whatsoever and the liability of the Guarantors shall be in addition to such security and the loss impairment failure realisation or release of or parting with any such security shall not diminish, extinguish or affect the liability of the Guarantors hereunder and the Bank shall have fullest liberty to call upon the Guarantors to pay the principal sum together with interest, costs, charges, expenses and all other monies payable under all or any of the said facilities without requiring the Bank to realise from the borrowers."

24. It is clear from the above clause that guarantee is

independent and distinct from any security that the bank has taken for realization of account of non repayment of the liability. Only on 12.03.2016, the petitioner has sent a letter to the bank informing that he has resigned from the position of director with effect from 20.01.2016 along with the copy of the Form 'DIR-12' filed with Registrar of Companies which is not to be seen here in the record.

25. It could be seen from the documents that only with an intention to convert the eDFS facility into WCTL facility, so as to restructure the loan facility availed by the second respondent, the first respondent bank, by its order dated 07.05.2016 to the second respondent, enumerated the proposed sanction condition for the conversion of eDFS facility into WCTL facility, to which, the petitioner as well as the respondents 2 to 6 have categorically signed and accepted each and every condition of the first respondent bank. Apart from that, the petitioner had deposited the title deeds of his residential apartment, at Plot No.4 part & Plot No.5, New Door No.18, Old Door No.24, Flat No.1, Third floor, in the complex of "TVH Akhiraa" together with 2 nos of covered car parking spaces, Bawa Road, Alwarpet, Chennai - 600018 with an undivided share of 1470 sq.ft belonging to the petitioner. Thus, the agreement of Letter of Arrangement was signed by the petitioner and the respondents 2 to 6 herein. Afterwards, on 19.05.2016, the Memorandum of Title Deed was also executed in favour of the first respondent bank by the petitioner, which was registered as Document No.1655 of 2016 before the Sub-Registrar, Alwarpet. As against the overdraft cum credit limit, loan was not exceeded beyond Rs.25,000/-. Meanwhile, the first respondent bank has intimated the second respondent by its letter dated 08.08.2016, that the account has become inactive since November 2015 due to non-payment of overdue invoices from August 2015. When the negotiation was going on between the petitioner and the respondent bank for restructuring the loan facility from eDFS to WCTL, the second respondent company informed the first respondent bank that they have closed the operations at Teynampet, Alwarpet, Vadapalani and OMR, and currently operating 3S facility and the Body Shop at Pallikaranai, to which, the bank had replied on 16.08.2016 informing that they are having inventory funding liabilities to the tune of Rs.27 Crores and requested them to pay interest on Rs.2.37 Crores, and one time payment of Rs.1.68 Crores immediately, so that they can process the restructuring proposal along with the offer of additional collateral security. Notwithstanding the above letter informing the second respondent company that they could not transfer any such stocks which stood as a collateral for the initial sanction of eDFS facility, the second respondent had siphoned off the stock to M/s.Eureka Automobiles Private Limited and only thereafter, the bank has initiated proceedings by issuing 13(2)

notice and directed the petitioner as well as the respondents 2 to 6 to pay a sum of Rs.26,59,17,116 as on 02.09.2016 with further interest and incidental expenses within a period of 60 days. Thereafter, notice under Section 13(4) was also issued by the first respondent bank which was later on challenged by the petitioner before the DRT-II.

26. On perusal of the order of the DRT - II, it could be seen that the DRT-II had miserably failed to consider the documents filed by the respondent bank, the guaranteed agreement and clause 12 in the said agreement, wherein, it could be seen that the petitioner herein has only stood as a guarantor and not as a personal guarantee to the loan facility availed by the second respondent company. The DRT-II has also come to the conclusion that the collateral security offered by the petitioner was not towards the loan facility availed by the second respondent company but only for the process of converting the loan facility under eDFS to WCTL facility.

27. On perusal of the records, it could be seen that the wrong order passed by the DRT-II, Chennai, had been rightly set aside by the DRAT, Chennai. Moreover, only before the Appellate Tribunal it came to light that the petitioner herein while executing the Memorandum of Title Deeds in favour of the first respondent bank, had parallely executed a settlement deed in favour of his wife and thereafter, she has initiated Civil proceedings before the City Civil Court, Chennai, to circumvent the proceedings initiated by the bank under the SARFAESI Act.

28. On perusal of the entire material on record, the attitude of the petitioner in executing MODTD regarding the residential apartment which has been given as a collateral security to the bank and thereafter, transferring the said property in favour of the petitioner's wife by way of settlement deed, is nothing but an intention to protract the proceedings and there is no intention to pay the same.

29. The petitioner has not approached this Court with clean hands and apart from this, on perusal of the Letter of Arrangement issued by the first respondent bank, it reveals that the properties mentioned in Annexure A, i.e. Primary security and Collateral Security including the immovable properties of the petitioner, were given as security to the first respondent bank for the loan availed by the second respondent company and which was duly signed by them by accepting the other terms and conditions of the first respondent bank. As per Annexure A, the following are the properties given as security to the bank:

Limit (Rs in Lacs)	Primary Security	Collateral Security	
		Immovable Property	Third Party Guarantee
Fund Based: a) CC Inventory funding under eDFS Rs.2500 Lacs Total FB Rs.2500 Lacs Non-Fund Based: LC CEL Total NFB: NIL	100% Hypothecation of stocks financed and receivables NIL	Residential flat at Plot No.4 part & Plot No.5, New door No.18, Old door No.24, Flat No.1, Third floor, in the complex called "TVK Akhiraa" together with 2 nos of covered car parking spaces, Bawa Road, Alwarpet, Chennai - 18, residential space measuring UDS of 1470 sq.ft belonging to Mr.S.Ashok NIL	Shri/Smt 1. S.Ravindranathan 2. Madhavi Lata 3. S.Ashok 4. S.Gouthama Shankar 5. Corporate Guarantee of M/s. MPL Parts & Services Pvt Ltd.

30. In view of the above, we do not find any infirmity in the order passed by DRAT, Chennai, who had set aside the wrong order passed by the DRT-II, Chennai. Further, the reasons given by the DRAT is sufficient to set aside the wrong order passed by the DRT-II, Chennai. As said earlier, the collateral security sought to be proceeded against under SARFAESI Act is only a peanut when compared to the loan amount sanctioned and subsequently extended by the bank based only on stock which the second respondent company has siphoned off to another company.

31. It is needless to say about the attitude of the petitioner, that while executing the property as a collateral to

the bank for conversion of eDFS facility to an extent of 25 Crores, when the second respondent was due and payable, an outstanding amount of Rs.28,16,67,146.25 as on 10.01.2017, the petitioner intentionally to defraud, had transferred his property of residential apartment which has been given as collateral to the bank, in favour of his wife to protract the SARFAESI proceedings initiated against him. It could be seen that the petitioner wife has also approached the City Civil Court which has been suppressed by the petitioner in the earlier proceedings.

32. Under these circumstances, this Court is of the view that the petitioner has approached this Court with an unclean hands and the action of the petitioner has to be condemned for his non-payment of the money which has been availed as a loan from the first respondent bank. Hence, this Court of the firm view that the petitioner should be imposed with the cost of Rs.10,000/- which the petitioner shall deposit into the account of Director Social Defence, Kelleys, Chennai - 10 within a period of two weeks from the date of receipt of a copy of this order. Accordingly, this Writ Petition is dismissed. Costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

raja

To

1. The State Bank of India
SME Siruthozhi Branch Chennai,
KRM Tower, 5th floor,
No.1, Harrington Road, Chetpet,
Chennai - 600 031.

2. The MPL Cars Private Limited
Old No.11, New No.25, Bagavantham Street,
T.Nagar, Chennai - 600 017.

3. The MPL Parts & Services Private Ltd
Old No.11, New No.25, Bagavantham Street,
T.Nagar, Chennai - 600 017.

4. The Director of Social Defence,
   Kellys, Chennai 10.

W.P.No.3755 of 2018
and WMP.No.4584 of 2018

KJI(CO)
GN(01/10/2018)