

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.04.2018

CORAM:

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

W.P.No.10657 of 2018
and WMP No.12603 of 2018

M/s.MSKG Engineering Consultancy Services,
Partnership Firm Rep. by its Partner Mr.T.Mahendran,
No.42, Krishna Flats 59,
1st Avenue, 100 Feet Road,
Ashok Nagar,
Chennai - 600 083. Petitioner

vs.

State Bank of India,
Stressed Assets Management Branch,
"Red Cross Buildings", 32, Red Cross Road,
Egmore, Chennai - 600 008. Respondent

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorarified mandamus, calling for records pertaining to the letter dated 03.04.2018 issued by the respondent and quash the same with refund to forfeiture of 25% action sale price as illegal, arbitrary and unlawful and consequently direct the respondent to refund the entire sum of Rs.1.59 Crores deposited by the petitioner.

For Petitioner : Mr.K.N.Selvabharathi

ORDER

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

Order impugned is a letter dated 03.04.2018 of the respondent bank, with regard to forfeiture of sum of Rs.1.59 Crores, being the Earnest Money Deposit, already paid by the auction purchaser, pursuant to the e-auction held on 29.11.2017 and the same is extracted hereunder:

"We refer to the order dated 22.03.2018 of the Hon'ble High Court of Madras in Writ Petition No.6619/2018 directing the Bank to consider and pass appropriate order on your request seeking refund and your letter dated 31.03.2018, seeking refund of the sum

of Rs.1.59 crore deposited by you on various dates after participating in the captioned e-auction and confirmed as the successful bidder for the property auctioned at Rs.2.36 crore. Accordingly, we have carefully considered your representation dated 31.03.2018 and other relevant papers and the order of the Hon'ble High Court and observe as under:

1. You have participated in e-auction conducted on 29.11.2017 and remitted 25% of sale amount on the next day and we have also issued sale confirmation for Rs.2.36 crores and stipulated that balance amount should be remitted within 15 days from the date of auction date ie. on or before 13.12.2017 and on failure to remit the balance amount, the amount already remitted by you would be forfeited.

2. Further, you have requested for 45 days extension for making the payment vide your letter dated 12.12.2017. We have also confirmed to you vide our letter dated 15.12.2017 to remit the balance amount by 29.12.2017 as a special case, otherwise the amount already remitted by you will be forfeited.

3. Again on 22.12.2017 you have requested for extension of time for another one month from 29.12.2017. Vide our letter dated 03.01.2018, we have replied that extension of time as sought by you is permitted at your risk and that no further time would be permitted and if the the amount is not paid on or by 29.01.2018, the amount already paid by you Rs.0.59 crore, will be forfeited.

4. Again on 29.01.2018 you have remitted Rs.1.00 crore and sought for extension of time up to 28.02.2018 to make payment of the balance amount for Rs.0.77 Crore. Similarly we have replied vide our letter dated 31.01.2018 that the extension of time is permitted at your risk. Please note that no more extension of time will be permitted and if the balance amount is not paid on or before 26.02.2018, the amount already paid by you will be forfeited.

5. In your letter dated 23.02.2018, you have requested for extension of time for a further period of 15 days stating that the 90 days period prescribed under the rules is still available and again on 23.02.2018 you have sent a second letter seeking time up to 26.03.2018 for making the balance payment of Rs.0.77 Crore. We have categorically replied vide our mail dated 26.02.2018 that your request for extension of further time beyond 26.02.2018 is not acceptable, as the SARFAESI Norms does not provide for any further time beyond 90 days from the date of sale and therefore you are supposed to make arrangement immediately for payment of the balance amount.

6. Despite our specific reply to your letter dated 23.02.2018 demanding immediate payment of the amount to be remitted by you, you have merely sent a letter dated 26.02.2018, seeking for further extension of time up to 26.03.2018 and we have categorically informed you the last date for payment was 26.02.2018, since the 90 days' time period stipulated in the SARFAESI Act would end by then.

7. Again vide your mail dated 27.02.2018, you have sought another 15 days time for making payment and on the same day, we have sent a mail to you stating that we are unable to accede to your request for further extension of time upto 15.03.2018 and amount already remitted by you will be forfeited. Similarly, on 10.03.2018 we have received a mail seeking our concurrence for making payment of balance amount for which we have replied by citing our earlier letters.

8. From the above, it is very clear that we have been repeating our demand for payment of the balance amount before 26.02.2018 failing which the amount remitted would be forfeited as per SARFAESI Rules.

9. Hence, we regret to inform that the Bank is unable to accede to your request for refund of the entire amount of Rs.1.59 Crore remitted by you. However, on receipt of your request seeking refund of the balance amount of Rs.1.00 Crore after forfeiting 25% of the auction price of the property bid by you, we will be in a position to act on your request.

10. All the above have been conveyed to your good self personally also when you visited the branch.

11. The above developments are strictly based on SARFAESI rules and as a financial institution, we are bound by these rules and as an auction purchaser you are also bound by the same rules."

2. E-auction notice can be challenged under Section 17(1) of the SARFAESI Act, 2002, before the tribunal and 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.

..... "

3. Further, in a decision dated 27.11.2017, between Agarwal Tracom Pvt. Ltd. Vs. Punjab National Bank & Others, in Civil Appeal No.19847 of 2017 (arising out of SLP(C) No.33514 of 2016), the Hon'ble Supreme Court held that forfeiture can also be challenged before the tribunal and at Paragraph No.34, Hon'ble Supreme Court held as follows:

"34. In the light of foregoing discussion, we are of the considered opinion that the Writ Court as also the Appellate Court were justified in dismissing the appellant's writ petition on the ground of availability of alternative statutory remedy of filing an application under Section 17(1) of SARFAESI Act, before the concerned Tribunal to challenge the action of the PNB in forfeiting the appellant's deposit under Rule 9(5). We find no ground to interfere with the impugned judgment of the High Court."

4. In the light of the above decisions of the Hon'ble Supreme Court and the remedy under Section 17(1) of the SARFAESI

Act, 2002, we are not inclined to entertain the instant writ petition. Accordingly, writ petition is dismissed. No Costs. Consequently, the connected Writ Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS III)

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Sub Assistant Registrar

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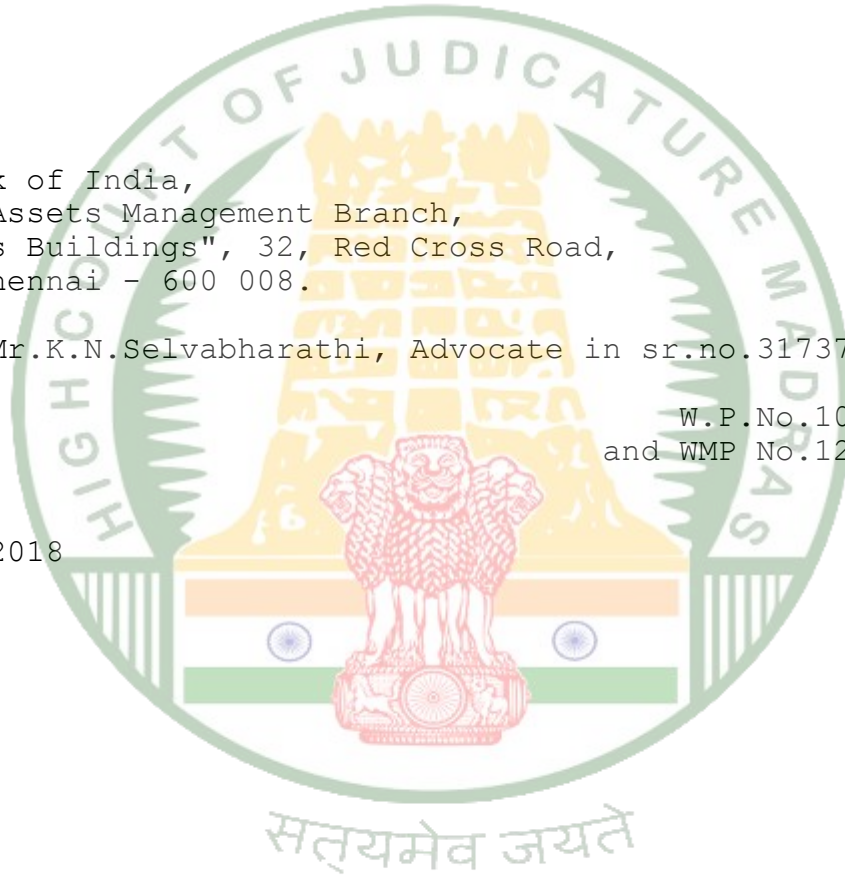
To

State Bank of India,
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Egmore, Chennai - 600 008.

+1cc to Mr.K.N.Selvabharathi, Advocate in sr.no.31737

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