

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.08.2018

CORAM :

THE HON'BLE MRS.V.K.TAHILRAMANI, CHIEF JUSTICE

AND

The HON'BLE MR.JUSTICE M.DURAIWAMY

W.P. No.21252 of 2018 and
W.M.P.Nos.24921 & 24922 of 2018

S.Balasubramaniam

... Petitioner

v.

1.The Authorized Officer
Karur Vysya Bank Limited
Asset Recovery Branch
R.S.No.170/9, Mattuthavani - Melur Road
Near Mattuthavani Bus Stand
Mattuthavani
Madurai - 625 107

2.The Branch Manager
Karur Vysya Bank Limited
No.269, Big Bazaar Street
Dharapuram
Tiruppur District

3. The Reserve Bank of India
Rajaji Salai
Chennai - 1.

(R3 not necessary party,
hence given up)

... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issue of Writ of Certiorari, calling for the entire records relating to the impugned order passed by the 1st respondent in his proceedings No.Nil, dated 24.07.2018 and quash the same.

For Petitioner : Mr.C.Prakasam

O R D E R

(Order of the Court made by M.DURAIWAMY,J.)

Heard Mr.C.Prakasam, learned counsel appearing for the

petitioner.

2. The petitioner, who is the borrower, has filed the above Writ Petition to issue a Writ of Certiorari to call for the records relating to the impugned order passed by the 1st respondent, dated 24.07.2018 and to quash the same.

3.1 It is the case of the petitioner that he borrowed a sum of Rs.2,00,00,000/- (Rupees two crores only) from the 2nd respondent Bank and mortgaged his property with them. Since the petitioner committed default in re-paying the loan amount, the respondent Bank initiated proceedings under the SARFAESI Act by issuing a notice under section 13(2). Subsequently, the respondent Bank had also taken symbolic possession of the properties mortgaged with them. The 1st respondent bank brought the mortgaged property for auction and issued a sale notice dated 26.06.2018.

3.2 The petitioner approached the Debts Recovery Tribunal, Coimbatore and filed a petition in S.A.No.225 of 2018 and obtained interim order in the said appeal on condition that the petitioner should deposit a sum of Rs.88,00,000/- (Rupees eighty eight lakhs only) in two installments. The conditional order passed by the Debts Recovery Tribunal, Coimbatore was not complied with by the petitioner. The property could not be auctioned on 26.06.2018 for want of bidders. Hence, the Debts Recovery Tribunal, Coimbatore dismissed the Securitisation Appeal as infructuous on 01.08.2018. Thereafter, the 1st respondent issued another sale notice dated 24.07.2018 fixing the date of auction as 23.08.2018. In the said notice, the 1st respondent has mentioned that a sum of Rs.2,65,00,000/- (Rupees two crores and sixty five lakhs only) is due and payable by the petitioner.

4. Though the petitioner has stated that he was approaching the bank for one time settlement, he has not produced any evidence to establish the said contention. When the petitioner has approached the Debts Recovery Tribunal challenging the auction sale notice dated 26.06.2018 issued on the earlier occasion, the petitioner should not have filed the Writ Petition under Article 226 of the Constitution, challenging the sale notice dated 24.07.2018, without exhausting the alternative remedy.

5.1 The Hon'ble Supreme Court of India, in the judgment reported in (2018) 3 Supreme Court Cases 85 [Authorized Officer, State Bank of Travancore and another Vs. Mathew K.C.], has held as follows:

" 10. In Satyawati Tandon [United Bank of India Vs. Satyawati Tandon, (2010) 8 SCC 110 : (2010) 3 SCC (Civ) 260], the High Court had restrained [Satyawati Tandon Vs. State of U.P., 2009 SCC Online All 2608] further proceedings under Section 13(4) of the Act. Upon a detailed consideration of

the statutory scheme under the SARFAESI Act, the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of

the alternate statutory remedy available holding:-

"43. 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 a 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, the 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.

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55. 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 the 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."

11. In Union Bank of India and another Vs. Panchanan Subudhi, (2010) 15 SCC 552: (2013) 2 SCC (Civ) 221, further proceedings under Section 13(4) were stayed in the writ jurisdiction subject to deposit of

Rs.10,00,000/- leading this Court to observe as follows :

"7. In our view, the approach adopted by the High Court was clearly erroneous. When the respondent failed to abide by the terms of one-time settlement, there was no justification for the High Court to entertain the writ petition and that too by ignoring the fact that a statutory alternative remedy was available to the respondent under Section 17 of the Act."

12.The same view was reiterated in Kanaiyalal Lalchand Sachdev vs. State of Maharashtra, (2011) 2 SCC 782 : (2011) 1 SCC (Civ) 570, observing:

"23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See Sadhana Lodh v. National Insurance Co. Ltd., (2003) 3 SCC 524 : 2003 SCC (Cri) 762; Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675 and SBI v. Allied Chemical Laboratories, (2006) 9 SCC 252)"

13.In Ikbali, Sri Siddeshwara Coop. Bank Ltd., Vs. Ikbali, (2013) 10 SCC 83 : (2013 4 SCC (Civ) 638, it was observed that the action of the Bank under Section 13(4) of the 'SARFAESI Act' available to challenge by the aggrieved under Section 17 was an efficacious remedy and the institution directly under Article 226 was not sustainable, relying upon Satyawati Tandon (United Bank of India Vs. Satyawati Tandon, (2010) 8 SCC 110 : (2010) 3 SCC (Civ) 260), observing: (Ikbali, Sri Siddeshwara Coop. Bank Ltd., Vs. Ikbali, (2013) 10 SCC 83 : (2013 4 SCC (Civ) 638, pp.94-95, paras 27-28)

"27.No doubt an alternative remedy is not an absolute bar to the exercise of extraordinary jurisdiction under Article 226 but by now it is well settled that where a statute provides efficacious and adequate remedy, the High Court will do well in not entertaining a petition under Article 226. On misplaced considerations, statutory procedures cannot be allowed to be circumvented.

28. ... In our view, there was no justification whatsoever for the learned Single Judge to allow the borrower to bypass the efficacious remedy provided to him under Section 17 and invoke the extraordinary jurisdiction in his favour when he had disentitled himself for such relief by his conduct. The Single Judge was clearly in error in invoking his extraordinary jurisdiction under Article 226 in light of the peculiar facts indicated above. The Division Bench also erred in affirming the erroneous order of the Single Judge."

14.A similar view was taken in Punjab National Bank vs. Imperial Gift House, (2013) 14 SCC 622, observing:-

"3. Upon receipt of notice, the respondents filed representation under Section 13(3-A) of the Act, which was rejected. Thereafter, before any further action could be taken under Section 13(4) of the Act by the Bank, the writ petition was filed before the High Court.

4. In our view, the High Court was not justified in entertaining the writ petition against the notice issued under Section 13(2) of the Act and quashing the proceedings initiated by the Bank."

15. It is the solemn duty of the Court to apply the correct law without waiting for an objection to be raised by a party, especially when the law stands well settled. Any departure, if permissible, has to be for reasons discussed, of the case falling under a defined exception, duly discussed after noticing the relevant law. In financial matters grant of ex parte interim orders can have a deleterious effect and it is not sufficient to say that the aggrieved has the remedy to move for vacating the interim order. Loans by financial institutions are granted from public money generated at the tax payers expense. Such loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same. The caution required, as expressed in United Bank of India Vs. Satyawati Tondon, (2010) 8 SCC 110 : (2010) 3 SCC (Civ) 260, has also not been kept in mind before passing the impugned interim order:-

"46. 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 (sic will) 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 Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1 and Harbanslal Sahnia v. Indian Oil Corpn. Ltd., (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order."

5.2. In the judgment reported in (2018) 1 Supreme Court Cases 626 [Agarwal Tracom Private Limited Vs. Punjab National Bank and others] the Apex Court held as follows:

"27. The reason is that Section 17(2) empowers the Tribunal to examine all the issues arising out of the measures taken under Section 13(4) including the measures taken by the secured creditor under Rules 8 and 9 for disposal of the secured assets of the borrower. The expression "provisions of this Act and the Rules made thereunder" occurring in sub-sections (2), (3), (4) and (7) of Section 17 clearly suggests that it includes the action taken under Section 13(4) as also includes therein the action taken under Rules 8 and 9 which deal with the completion of sale of the secured assets. In other words, the measures taken under Section 13 (4) would not be completed unless the entire procedure laid down in Rules 8 and 9 for sale of secured assets is fully complied with by the secured creditor. It is for this reason, the Tribunal has been empowered by Section 17(2), (3) and (4) to examine all the steps taken by the secured creditor with a view to find out as to whether the sale of secured assets was made in conformity with the requirements contained in

Section 13(4) read with the Rules or not?

28. We also notice that Rule 9(5) confers express power on the secured creditor to forfeit the deposit made by the auction purchaser in case the auction purchaser commits any default in paying installment of sale money to the secured creditor. Such action taken by the secured creditor is, in our opinion, a part of the measures specified in Section 13(4) and, therefore, it is regarded as a measure taken under Section 13(4) read with Rule 9(5). In our view, the measures taken under Section 13(4) commence with any of the action taken in clauses (a) to (d) and end with measures specified in Rule 9.

29. In our view, therefore, the expression "any of the measures referred to in Section 13(4) taken by secured creditor or his authorized officer" in Section 17(1) would include all actions taken by the secured creditor under the Rules which relate to the measures specified in Section 13(4).

...

32. In *United Bank of India vs. Satyawati Tondon & Ors.*, (2010) 8 SCC 110, this Court had the occasion to examine in detail the provisions of the SARFAESI Act and the question regarding invocation of the extraordinary power under Article 226/227 in challenging the actions taken under the SARFAESI Act. Their Lordships gave a note of caution while dealing with the writ filed to challenge the actions taken under the SARFAESI Act and made following pertinent observations which, in our view, squarely apply to the case on hand:

"42. There is another reason why the impugned order should be set aside. If Respondent 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 the 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.

43. 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 a 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, the 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.

44. 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.

45. 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 redressal of his grievance."

6. From the above referred judgments, it is clear that the petitioner should challenge the impugned sale notice only before the Debts Recovery Tribunal and not under Article 226 of the Constitution.

7. The ratio laid down by the Hon'ble Apex Court squarely applies to the present case. The petitioner has not made out a case for interference.

8. In these circumstances, the Writ Petition is devoid of merits and the same is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

Rj

+1cc to Mr.C.Prakasam, Advocate SR.NO.57585

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