

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27/4/2018

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Petition No.10941 of 2018

S. Dhandapani ... Petitioner

Vs

1. HDB Financial Services Ltd
rep. By Authorised Officer
Srivari Complex
52/1A Meenakshi Sundaram Street
Thirunagar Colony
Erode 638 001.

2. M/s. Amarjothi Corporation
rep. By its Proprietrix
Mrs.P.D.Thenmozhi
No.12/29 Theppakulam Street
Erode 638 001 (given up).

3. The District Collector
Erode District.

... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of certiorarified mandamus, seeking to call for the records of the first respondent with respect to the order No.29202/2017/D2 dated 31/3/2018 signed on 9/4/2018 passed by the third respondent and quash the same as not entitled to under the SARFAESI Act and consequently, issue a mandamus of permanent injunction restraining the first respondent from invoking the provisions of the SARFAESI Act to execute a money decree obtained by it on 4/10/2016.

For petitioner ... Ms.Ananda Gomathy

For respondents ... Mr.V.Prabhu
Government Advocate
for R.3.

O R D E R

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

Proceedings, dated 31/3/2018, of the District Collector-cum-District Magistrate, Erode, directing Tahsildar, Erode, to take physical possession of the subject property, with the assistance of Police, is impugned in this writ petition, by the borrower, on the grounds inter alia that

(i). First respondent having obtained only a simple money decree, without any prayer made against the mortgaged property and no prayer being allowed to enforce the mortgage cannot invoke the provisions of the SARFAESI Act by issuing a demand notice based on the decree obtained.

(ii). The creditor has given up his claim on the mortgaged property by not seeking nay prayer against the mortgaged asset and therefore, is deprived to be clothed with the power of a secured creditor as the security has been given up by the creditor himself in the process of obtaining a money decree alone.

(iii). Where there exists no secured asset or any relief to enforce the secured asset, then the right to invoke the action under SARFAESI extinguishes and no provisions of the Act can be invoked including the one under Section 14 of the Act.

2. Material on record discloses that I.A.No.1287 of 2017 in S.A.No.251 of 2017 has been filed, under Section 19 (25) of the RDDB FI Act, for a temporary injunction restraining the respondent financial institution, from initiating action, under the provisions of the SARFAESI Act, 2002, based on the possession notices, dated 23/5/2017 and 27/5/2017 also to restrain the respondent Company, from taking actual possession of the properties described in the notice or by putting the same for sale.

3. After hearing the learned counsel for the parties, Debts Recovery Tribunal - 2, Madurai, vide order, dated 12th April 2018, ordered as hereunder:

"Admittedly, the first applicant concern, which is represented by the third applicant availed a loan of Rs.1.40 crores from the respondent FI and that third applicant stood as guarantor for the said loan facility. Even though the petitioners have not specifically stated in their affidavit as to whether they were regularly paying the outstanding loan dues. The respondent FI has clearly stated in the counter statement that since the petitioners failed to pay the

outstanding loan dues, arbitrary proceedings and SARFAESI proceedings were initiated against them. Therefore, the account of the petitioners came to be classified as Non-performing Asset. There is no dispute with regard to the passing of an ex-parte award by the Arbitrator in Ar.O.P.No.91 of 2016. The averment raised by the side of the petitioners is that since the respondent FI has obtained an arbitration award its right to initiate SARFAESI proceedings in respect of petition schedule mentioned property is deemed to have been waived. As per the provision of Sec.27 of the SARFAESI Act, 2002, the respondent FI can proceed against the petitioners under the SARFAESI Act notwithstanding the fact that it has already proceeded against the petitioners under the Arbitration Act for obtaining an award. Therefore, the above averment raised by the petitioners does not hold good. With regard to other averments of the petitioners, in respect of the alleged issuance of the demand notice, and possession notice are concerned, the respondent FI has satisfactorily and convincingly stated in its counter statement that the provision of Rule 8 (1) of the Security Interest (Enforcement) Rules 2002 has not been violated. A perusal of the available records shows that there are no prima facie violations in respect of issuance of the demand notice dated 10/11/2016 and the possession notice dated 23/5/2017 and that therefore, there are no valid reasons to grant temporary injunction as prayed for by the petitioners. Therefore, the petition stands dismissed."

4. Order in I.A.No.1287 of 2017 in S.A.No.251 of 2017, dated 12/4/2018, falling within the jurisdiction of Madurai Bench of Madras High Court, has not been challenged. Order, dated 31/3/2018 of the District Collector-cum-District Magistrate, Erode, can be challenged under Section 17 (1) of the SARFAESI Act, 2002. While that be so, certiorarified mandamus, to quash the above said order, dated 31/3/2018, to restrain the first respondent from invoking the provisions of SARFAESI Act, to execute the money decree obtained on 4/10/2016, are not entertained. Order, dated 3/3/2018, is appealable. Mandamus cannot be issued to set aside an order, which is appealable to the higher forum.

5. In view of the above, instant writ petition is dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar (CO)

//True Copy//

Sub Assistant Registrar

mvs.

To

1. The Authorised Officer
HDB Financial Services Ltd
Srivari Complex
52/1A Meenakshi Sundaram Street
Thirunagar Colony
Erode 638 001.
2. The District Collector
Erode District.

COPY TO

THE PRESIDING OFFICER,
DEBT RECOVERY TRIBUNAL, MADURAI.

+1cc to M/S.ANANDA GOMATHY, Advocate, S.R.No.32354
+1cc to the Government Pleader, S.R.No. 32728

W.P.No.10941 of 2018

CP (CO)
TR(18/05/2018)

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