

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.04.2018

CORAM:

THE HONOURABLE MS.JUSTICE INDIRA BANERJEE, CHIEF JUSTICE
and
THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.P.No.33958 of 2017
and W.M.P.No.37680 of 2017

M/s.Sree Shanthosh Steels Pvt. Ltd.,
Represented by its Director,
Mr.P.K.P.Narayana Murthy
No.132/71, Rasappa Street,
Chennai - 600 003. Petitioner

Vs.

1.State Bank of India,
Represented by its Asst. General Manager &
Authorised Officer,
SAMB, Red Cross Building,
Montieth Road,
Egmore,
Chennai - 600 008.

2.Reserve Bank of India,
6, Sansad Marg, New Delhi,
Delhi - 110 001. Respondents

Prayer: Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Declaration, declaring that the measure initiated by the 1st respondent under Section 13 (4) of the SARFAESI Act, against the petitioners, guarantors and secured assets and other consequential measures is premature in view of clear 60 days notice is not fulfilled from the date of issuance of demand notice on 21.9.2016 and the date of issuance of possession notice dated 22.11.2016 as the same is covering only 57 days. Hence the measures initiated under 13(4) of the SARFEASI Act is excessive of jurisdiction and in violation of the provisions of the SARFEASI Act and liable to declare as null and void.

For Petitioner : Mr.M.A.Rajendra

For R1 : M/s.M.L.Ganesh & S.Arun Kumar

ORDER

ABDUL QUDDHOSE, J.,

Time and again, the Hon'ble Supreme Court has been issuing directions that, when there is an alternative statutory remedy available to the borrower under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred as the 'SARFAESI Act'), the High Courts should not entertain writ petitions filed under Article 226 of the Constitution of India. The exceptions to this normal rule have also been well defined, as observed by the Hon'ble Supreme Court in CIT v. Chhabil Dass Agarwal, reported in (2014) 1 SCC 603, and it reads as under:-

"15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case [AIR 1964 SC 1419], Titaghur Paper Mills case [Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 : 1983 SCC (Tax) 131] and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

2. But despite the repeated directions of the Hon'ble Supreme Court, some of the borrowers continue to knock at the doors of this Court under Article 226 of the Constitution of India, without exhausting the remedies available to them under the SARFAESI Act before the Debts Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be. The instant writ petition filed by a borrower is one such case.

3. The instant writ petition has been filed for issuing a Writ of Declaration, to declare that the measures initiated by the first respondent Bank under Section 13(4) of the SARFAESI Act, against the petitioners, guarantors and secured assets and

other consequential measures is premature, for non-fulfillment of 60 clear day notice, between the date of issuance of demand notice under Section 13(2) and the date of issuance of possession notice under Section 13(4) of the SARFAESI Act. Hence, the measures initiated under 13(4) of the SARFAESI Act is excessive of jurisdiction and in violation of the provisions of the SARFAESI Act and is liable to be declared as null and void.

4. Admittedly, the petitioners are defaulters with the first respondent Bank. The first respondent Bank has also initiated SARFAESI proceedings against the petitioner. Even according to the petitioner, credit facilities to the tune of Rs.36,00,00,000/- (Rupees Thirty Six crores) was availed by the petitioner for its Iron and Steel trading business. The account of the petitioner was also classified as a non-performing asset on 29.12.2013. The first respondent Bank has also taken possession of some of the secured assets belonging to the petitioner under Section 13(4) of SARFAESI Act. The first respondent Bank has also sold some of the properties under Section 13(4) of SARFAESI Act. The sale certificates have also been issued in favour of the auction purchasers. The sale certificates for the properties sold were issued on 11.04.2017, 18.04.2017, 16.08.2017 and 21.08.2017.

5. The petitioner had earlier filed an application under Section 17 of the SARFAESI Act in S.A.No.10 of 2017 before the Debts Recovery Tribunal-2, Chennai challenging a possession notice issued by the first respondent Bank under Section 13(4) of the SARFAESI Act. It was withdrawn by the petitioner on 27.02.2017. Similarly, another application under Section 17 of the SARFAESI Act in S.A.No.26 of 2017 was also filed by the petitioner, challenging the earlier sale notice, which was also dismissed as infructuous by the Debts Recovery Tribunal on 27.04.2017.

6. The petitioner filed another application S.A.No.98 of 2017 under Section 17 of the SARFAESI Act challenging another sale notice dated 15.04.2017. By order dated 18.09.2017 in S.A.No.98 of 2017, the Debts Recovery Tribunal-2, Chennai dismissed the application filed by the petitioner. Even though there is a remedy of Appeal before the Debt Recovery Appellate Tribunal, under Section 18 of the SARFAESI Act, no Appeal has been filed by the petitioner. Instead of approaching the Debts Recovery Tribunal or the Debts Recovery Appellate Tribunal as the case may be, the petitioner has been parallelly approaching

this Court under Article 226 of the Constitution of India, which practice of a borrower has been clearly deprecated by the Hon'ble Supreme Court in a number of decisions.

7. Before filing of the instant Writ Petition, the petitioner had filed two other Writ Petitions W.P.Nos.9811 and 9812 of 2017 before this Court under Article 226 of the Constitution of India. W.P.No.9811 of 2017 was filed for the issuance of Writ of Mandamus, directing the respondent Bank to permit the petitioners to settle their NPA account, by sale of some of the secured properties, by private treaty, as set out in the letter dated 03.01.2017, within a period of three months from the date the Government of Tamil Nadu brings in a scheme, regarding the use of agricultural lands for non-agricultural purposes and not to bring the secured assets for e-auction sale till the sale by private treaty is concluded and enable the petitioner firm to submit a proposal to the respondent Bank for restructuring of the account, in terms of guidelines of the Reserve Bank of India.

8.W.P.No.9812 of 2017 was filed for the issuance of Writ of Mandamus, directing the respondent/ Debts Recovery Tribunal-2, to entertain the objections of the petitioner against subsequent sale notices issued by the second respondent Bank for adjudicating in a pending Securitisation Application, under Section 17(1) of the Securitisation Act, 2002, by declaring that all the measures taken under Section 13(4) of the SARFAESI Act, are under scrutiny by the Tribunal, in the Application filed under Section 17(1) of the SARFAESI Act.

9.Both the writ petitions were dismissed by a common order dated 21.09.2017 passed by a co-ordinate Division Bench of this Court. Despite the dismissal of both the writ petitions, the petitioner has once again filed the instant petition in the guise of a different prayer, though the relief if granted by this Court will amount to the same relief of stalling the SARFAESI proceedings which was sought for by the petitioner in the earlier writ petitions W.P.Nos.9811 and 9812 of 2017.

10.The learned counsel for the petitioner submits that the relief sought for in this instant writ petition is totally different from what was sought for in the earlier writ petitions W.P.Nos.9811 & 9812 of 2017 which were dismissed by this Court by a Co-ordinate Division Bench of this Court by order dated 21.09.2017.

11.According to the learned counsel for the petitioner, the

account of the petitioner was declared as a non-performing asset by the first respondent Bank on 29.12.2013. Even though the account was declared as a non-performing asset on 29.12.2013, the petitioner was allowed to operate the bank account and in some cases, credit facilities were also enhanced/renewed by the first respondent Bank. He drew the attention of this Court to Section 2(o) of the SARFAESI Act, which defines 'Non-performing asset'. Section 2(o) of the SARFAESI Act reads as under:

"2.Definitions.

- (1) In this Act, unless the context otherwise requires,-
(o) "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, 3[doubtful or loss asset, --
(a) in case such bank or financial institution is administered or regulated by an authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;
(b) in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank;]

12. The learned counsel submitted that having allowed the petitioner to operate the account even after 29.12.2013, the bank account maintained by the petitioner cannot be treated as a non-performing asset any more. Unless and until the first respondent Bank declares afresh, the petitioner's bank account as a non-performing asset, no proceeding can be initiated by the first respondent Bank under the SARFAESI Act. Therefore, according to the petitioner, the proceedings initiated by the first respondent bank under the SARFAESI Act, against the petitioner has to be declared as null and void by this Court.

13. The learned counsel further submitted that under Section 13(2) of the SARFAESI Act, notice will have to be issued to the petitioner giving 60 clear days for payment of the demanded amount. According to the learned counsel for the petitioner, in the case on hand, the first respondent Bank has given only 57 days to the petitioner to comply with the demand or send a reply to the Section 13(2) notice. The learned counsel for the petitioner submitted that a notice of demand under Section 13(2) of the SARFAESI Act was sent only on 24.09.2016 and not on 21.09.2016, since the notice was dispatched by the first respondent Bank on 22.09.2016 and received by the petitioner only on 24.09.2016. The learned counsel submitted that even though 60-day period expires only on 24.11.2016, the first respondent Bank hastily without waiting for the expiry of 60-day period, issued the possession notice on 22.11.2016 under Section

13(4) of the SARFAESI Act, which according to the learned counsel of the petitioner violates the mandatory requirements under the SARFAESI Act.

14. The learned counsel further submitted that some of the properties which are brought for sale under the SARFAESI Act by the first respondent Bank are agricultural properties and therefore, the provisions of the SARFAESI Act will not apply, as per the exemption granted under Section 31 (i) of the SARFAESI Act. The learned counsel further submitted that as per the latest gazette notification dated 16.08.2016, the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 was amended. As per the amended provisions, before initiating any measures under the SARFAESI Act, the security interest ought to have been registered with the Central Registry, which is mandatory as per Section 26(d) of the SARFAESI Act.

15. The learned counsel for the petitioner relied upon the following authorities in support of his submissions.

- (i) M/s Deepak Apparels Pvt., Ltd., Vs., City Union Bank Ltd., - passed by the High Court of Karnataka in W.P.No.28182 of 2013 (GD-DRT)- constitution bench - jurisdiction and maintainability of "Writ".
- (ii) M/s Ameer Trading Corporation Ltd., Vs., Shapoorji Dta Processing Ltd., - Hon'ble Supreme Court of India - Case No. Appeal (Civil) 9130 of 2003 Special Leave Petition (civil) 135858 of 2003.
- (iii) P.Kumaran Vs. The Debt Recovery Appellate - 12.07.2011 - High Court of Judicature at Madras - W.P.no.20225 of 2009 - Coram - Hon'ble Justice D.Murugesan and Hon'ble Justice K.k.Sasidharan.
- (iv) Andhra High Court - Smt.R.Vimala Vs., State Bank of India - 22.08.2016 - W.P.No.7802 of 2016 - Hon'ble Justice Sanjay Kumar and Hon'ble Dr.Justice B.Siva Sankar Rao.
- (v) Madras High Court - Hemaltha Ranganathan Vs., the Authorised Officer - 13.08.2012 - W.P.No.13091 of 2012 and M.P.Nos.1 & 2 of 2012 Justice D.Murugesan and Hon'ble Justice Mr.K.K.Sasidharan.
- (vi) High Court of New Delhi - LPA No.1198 of 2007, LPA No.1199 of 2007 and LPA No.1200 of 2007 dated 1.11.2007, Kamal Gupta Vs., Bank of India - Hon'ble Chief Justice Sanjiv Khanna.

16. Per contra, the learned counsel for the first respondent Bank who took notice for the first respondent Bank in the open Court, submitted that the Writ Petition filed by the petitioner is not maintainable in view of the alternative and efficacious statutory remedy available to the petitioner under the SARFAESI Act. The first respondent Bank has also filed their counter

affidavit before this Court enumerating the various proceedings initiated by them under the SARFAESI Act to recover the outstanding loan amount of Rs.30,64,35,111.30/- which was due from the petitioner as on 03.01.2018.

17. From the contents of the counter affidavit, it is evidently clear that, instead of exhausting the alternative remedy available under the SARFAESI Act, the petitioner has filed the instant Writ Petition, which on the face of it is not maintainable before this Court under Article 226 of the Constitution of India. The learned counsel for the first respondent Bank referred to the latest decision of the Hon'ble Supreme Court dated 30.01.2018 in the case of State Bank of Travancore and another vs., K.C.Mathew in Civil Appeal No.1281 of 2018 and submitted that the said decision is squarely applicable to the instant case, since the petitioner has approached this Court under Article 226 of the Constitution of India, without exhausting the alternative remedy available to them under the SARFAESI Act.

18. After hearing the rival submissions and after perusing the contents of the affidavits and documents filed by both the parties, as observed by us in the opening paragraph of the judgment, we are of the considered view that the Writ Petition filed by the petitioner seeking the relief sought for in the Writ Petition is not maintainable under Article 226 of the Constitution of India, for the following reasons:-

(a) The SARFAESI Act is a Special Code by itself provided for the expeditious recovery of dues, arising out of loan granted by financial institutions.

(b) The remedy of Appeal to the aggrieved borrower is available under Section 17 before the Debts Recovery Tribunal followed by a further right to Appeal before the Appellate Tribunal, under Section 18.

(c) The Hon'ble Supreme Court in its latest decision dated 30.01.2018, in Civil Appeal No.1281 of 2018 in the case of State Bank of Travancore and another versus K.C.Mathew cited supra, following the earlier decisions of the Hon'ble Supreme Court in the case of (a) United Bank of India vs. Satyawati Tandon and others, 2010 (8) SCC 110 (b) General Manager, Sri Siddeshwara Cooperative Bank Limited and another vs., Ikbali and others, 2013 (10) SCC 83, has held that the writ petition under Article 226 of the Constitution of India should not be entertained, if alternative statutory remedy is available except in the cases falling within the well defined exceptions as observed

in CIT v. Chhabil Dass Agarwal, reported in (2014) 1 SCC 603, cited supra.

(ci)

(d) The Hon'ble Supreme Court in its latest decision has also extracted the observations made by the Hon'ble Supreme Court in the case of United Bank of India vs. Satyawati Tandon and others, 2010 (8) SCC 110 and the same is reproduced below:-

" 11. In Satyawati Tandon (supra), the High Court had restrained 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.

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."

19. The petitioner has also not established that the Debts Recovery Tribunal has not acted in accordance with Law, or in defiance of the fundamental principles of judicial procedure or have resorted to invoke the provisions which are repealed or, an order has been passed in total violation of the principles of natural justice. The grievances of the petitioner does not fall within any of the well defined exceptions for filing a Writ Petition without exhausting the alternative remedy.

20. The authorities cited by the learned counsel for the petitioner are not applicable, since the facts leading to the passing of those decisions are entirely different from the facts of the instant case. Further, the case of the petitioner does not come within any of the well defined exceptions, enumerated supra, for approaching this Court under Article 226 of the Constitution of India, without exhausting the alternative remedy before the Debt Recovery Tribunal. There is no bar for the petitioner to raise the same grounds which are raised in this Writ Petition before the Debts Recovery Tribunal or the Debts Recovery Appellate Tribunal, as the case may be. Instead of approaching the Debts Recovery Tribunal or the Debts Recovery Appellate Tribunal, the petitioner has wrongly approached this Court by filing the instant Writ Petition, under Article 226 of the Constitution of India.

21. We, therefore, find no merit in the Writ Petition. Accordingly, the Writ Petition shall stand dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-IX)

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Sub Assistant Registrar

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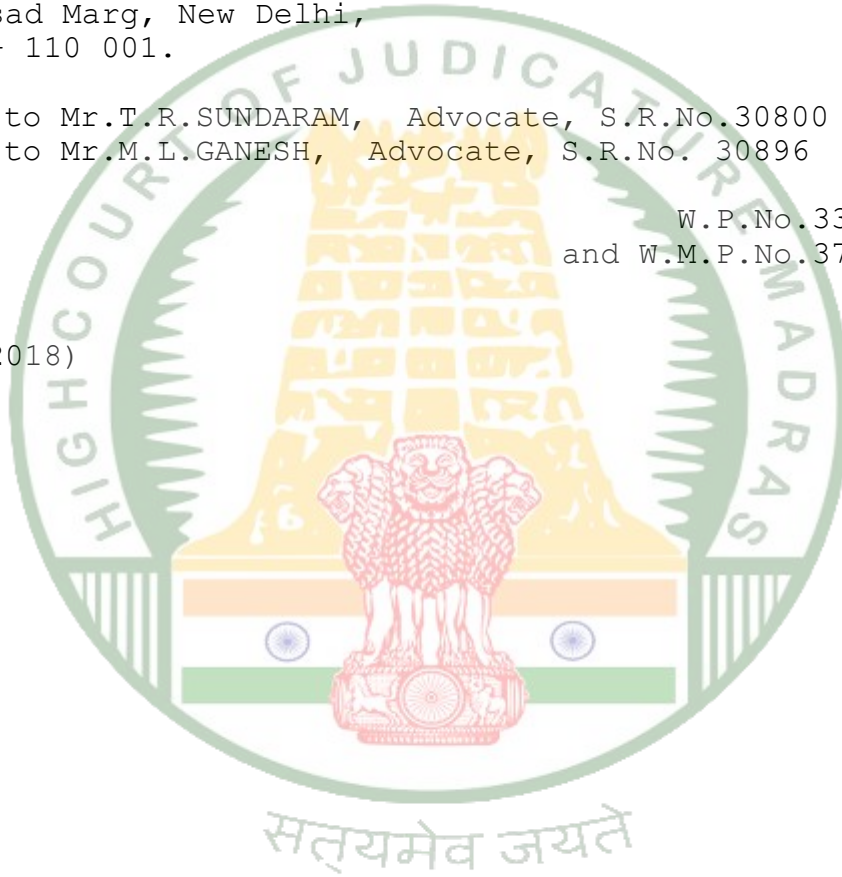
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