IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19/2/2018

C O R A M

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

Writ Petition No.34222 of 2017

1. B.G.Babu

2. K. Surekha ...Petitioners

Vs

1. State Bank of India
rep. by its Authorised Officer
PBB Besant Nagar
E 159 Annai Velankanni Church Road
7th Avenue, Besant Nagar
Chennai 600 090.

2. The Authorised Officer
State Bank of India
Retail Assets Central Processing Centre
No.4/952 & 4.952 A
Rajeev Gandhi Salai
Old Mahabalipuram Road
Perungudi
Kandanchavadi
Chennai 600 096.

3. M/s. Alliance Projects
rep. by its Authorised Signatory
Mr.Ravindranath Singh
Chennai 600 018. ...Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of certiorarified mandamus to call for the records of the impugned sale notice dated 8/11/2017 issued by the second respondent Bank and quash the same and consequently direct the first respondent bank to regularise the loan account of the petitioner in HTL Loan A/c. No.32458918716 upon payment of the irregular amount as on date along with the consequent interest by the petitioners.

For Petitioners ... Mr.Naveen Kumar Murthi

For respondents ... Mr.ML.Ganesh
for R.R.1 and 2.

O R D E R
(Order of the Court was made by S.MANIKUMAR, J)

Impugned sale notice dated 8/11/207, challenged in the instant writ petition is as follows:-

> "Whereas, the Authorised Officer had taken possession of the below mentioned properties on 16/8/2017, as per Section 13 (4) of the SARFAESI Act, 2002 (hereinafter called the Act) which has been offered as security by you towards your/borrower's liabilities amounting to Rs.41,51,220/- as on 15/8/2017 and further interest from 16/8/2017 together with incidental expenses, cost, charges, etc.
>
> Whereas you have failed to satisfy your/borrower's liabilities to the Bank even after receipt of notice under Section 13 (2) and Section 13 (4) of the Act. Therefore, the Bank in exercise of its rights granted the Act and Rules, issues this notice under Rule 8 (6) (immovable) of the Security Interest (Enforcement) Rules, 2002, calling upon you to discharge in full liabilities amounting to Rs.42,65,807/- as on 7/11/2017 and further interest from 8/11/2017 together with incidental expenses, cost, charges, etc., within 30 days from the date of this notice, failing with the bank shall proceed under the act with the sale of the secured properties to realise the above stated outstandings, with interest and costs.
>
> SCHEDULE OF IMMOVABLE PROPERTEIS
> Schedule of Property
> Schedule "A"
>
> Item No.1
> All that piece and parcel of the land with building situated in "Orchid Springss" comprised in S.Nos.514A/1, 514A/2, 537 A, 538, 538/1, 541, 542, 545, 546, 561,589, 590, 591, 592/1, 2, 3, 594/2 of Korattur Vilalge, Ambattur Taluk, situate within Sub-Registration District of Villivakkam and Registration District of Central Chennai, measuring 13 acres 89 cents, patta No.7879 (RPT No.9404/06-07, T.K.8A/1873/1415, RPT No.181, 182/06-07 & RPT

No.444/445/06-07).

Item No.2

All that piece and parcel of land with building situated in "Orchid Springss" bearing Plot Nos.1, 2 and 3 comprised in S.No.536/B measuring 10,072 sq.ft (22 cents), Sy.No.539 measuring 05 cents and Sy No.540 measuring 1 acre 30 cents of Korattur Village, Ambattur Taluk, situate within sub-registration District of Villivakkam and Registration District of Central Chennai, totally, measuring 1 Acre 57 cents, patta Nos.1076 &903.
The total land area of item Nos.1 and 2 measures 62,563.81 sq.meters.

Boundaries

North By	:	vacant land
South by	:	vacant land
East by	:	water canal road
West by	:	Lake

Schedule "B" property

All that piece and parcel of the land with building situated on water canal road in S.Nos.514A/1, 514A/2, 537/A, 538, 538/1, 541, 542, 545, 546, 561, 589, 590, 591, 592/1, 2, 3, 594/2, Plot Nos.1, 2 and 3 comprised in S.No.536/B measuring 10,072 dq.ft (22 cents), Sy.No.539 measuring 05 cents and Sy.No.540 of Korattur village, Ambattur Taluk, situate within Sub-Registration District of Villivakkam and Registration District of Central Chennai in all measuring 52727.23 sq.meters.

Schedule "C" Property

Flat No.610, Block Opal, Floor No.6, Door No.54, Alliance Orchid Springs, Water Canal Road, Santhosh Nagar Phase – I, Korattur, Chennai 600 080 having 195.51 sq.ft., of undivided right, title and interest in Schedule "B" property.

Date & time of auction	15/12/2017, Friday, between 12.00 p.m to 01.00 p.m.*
	* with auto time extension of five minutes each till sale is completed

Reserve Price	Minimum Star price: Rs.50,00,000/-
Earnest Money Deposit (EMD)	Rs.5,00,000/-
EMD Remittance	EMD Remittance:Submission of EMD through "Demand Draft" in favour of State Bank of India
Bid Multiplier (for all properties)	Rs.10,000/- and above
Inspection of properties	22/11/2017 from 11.00 a.m to 3.00 p.m
Submission of online bid application with EMD	15/11/2017 from 11.00 a.m onwards
Last date of submission of online bid application with EMD	13/12/2017 upto 4.00 p.m

2. Grounds of challenge are as follows:-

(i). As per the tripartite agreement, the third respondent is liable to repay the entire consideration received. The third respondent has failed to complete the project on time.

(ii). The second respondent has not taken into account the crucial factor that the said flat has not yet been delivered to the petitioners and the present action of the respondent bank would amount to making the petitioner pay for the purchase of the said flat and also to take over the said flat, to sell the same to some third party after extracting the entire amount from the petitioner.

(iii). The impugned notice is liable to be quashed for the reason that the respondents are acting entirely behind the back of the petitioners and even after receiving the information about the action taken by the second respondent bank, the third respondent has not brought any information to the notice of the petitioners.

(iv). The second respondent Bank has failed to comply with the procedure mandated under Rule 3 of the Security Interest (Enforcement) Rules, 2002, for serving the notices issued under Section 13 of the SARFAESI Act. The second respondent is trying to act behind the back of the petitioners, so as to defeat the rights of the petitioners.

3. Material on record shows that the supporting affidavit to the instant writ petition has been sworn on 28/12/2017.

Record of proceeding shows that on 29/12/2017, a Hon'ble Division Bench of this Court, while ordering notice to the respondents through Court and privately returnable on 22/1/2018, has granted interim stay of the impugned order, subject to the condition that the writ petitioners, paid a sum of Rs.10 lakhs to the authorised officer, State Bank of India, Retail Asset Central Processing Centre, Kandanchavadi, Chennai, second respondent, within a period of one week, from the date of receipt of a copy of the order made in W.P.No.34222 of 2017 and M.P.Nos.38102 to 38105 of 2017.

4. On this day, when the matter came up for further hearing, Mr.Naveen Kumar Murthi, learned counsel for the petitioner, submitted that the order of interim stay has been complied with and reiterating the grounds stated supra, prayed to set aside the sale notice.

5. Authorised Officer and Chief Manager of State Bank of India, Chennai, in his counter affidavit has opposed the maintainability of the writ petition, on the grounds of availability of alternate remedy. That apart, the authorised officer and Chief Manager of State Bank of India, has submitted that on 30/4/2017, Bank has classified the account as Non-performing Asset, demand notice under Section 13 (2) of the SARFAESI Act was issued on 20/5/2017 and published on 15/6/2017, Possession notice under Section 13 (4) of the SARFAESI Act, 2002 was issued on 16/8/2017 and published on 22/8/2017. Sale notice was issued on 8/11/2017 and sale conducted on the same day. Confirmation of sale was done, but sale certificate was not issued.

6. Attention of this Court was also invited to the sale confirmation letter, dated 15/12/2017, issued in favour of H.Shabid Ali. Confirmation letter is extracted hereunder:-

SALE CONFIRMATION LETTER

> "Whereas
> The undersigned being the Authorised Officer of the State bank of India has in consideration of the payment of Rs.50,10,000/- sold on behalf of the State Bank of India in favour of Shri.H.Shabith Ali, No.22, Janaki Ammal Layout, Erode 638 003, the following house property secured in favour of State Bank of India by Shri B.G.Babu, Amrutha Flats, AJ-135, 3rd Cross, 10th main road, Shanthi Colony, Anna Nagar, Chennai 600 040, towards the financial facility i.e., term loan for purchase of house offered by State Bank of India. The undersigned acknowledges the receipt of Rs.12,53,000/-

being the 25% of the sale price in the e-auction conducted on 15/12/2017. The balance 75% i.e., Rs.37,57,000/- is to be paid on or before 30/12/2017."

7. Going through the supporting affidavit, dated 28th September 2017, and the order passed by this Court, on 29/12/2017, when we posed a question as to whether the writ petitioners, in their supporting affidavit have brought to the notice of this Court that the sale had already been effected on 15/12/2017, as per the sale notice, dated 8/11/2017, learned counsel for the petitioners submitted that at page Nos.7 and 8 of the supporting affidavit, writ petitioners have contended that the sale might have taken place on 15/12/2017 and that there was likelihood of the flat belonging to the petitioners been sold to a third party at a throw away price.

8. The above contention in our view, does not disclose full and proper disclosure of the facts and the supporting affidavit. A Hon'ble Division Bench of this Court which considered the writ petitioners on 29/12/2017 has not been appraised of the facts, as stood, on 28/12/2017. Writ petitioners, owners of the property brought for auction, have made submissions on assumptions that there was a likelihood of the flat being sold to a third party, at a throw away price. In our view, writ petitioners have not approached this Court with clean hands.

9. (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...."

iv) Even issuance of sale certificate can be questioned. In Simon's Foot Wear Pvt. Ltd. v. Indian Bank, reported in (2015) 2 MLJ 166, a Hon'ble Division Bench of this Court held as follows:

"9.As against the confirmation of sale and issuance of the sale certificate, the writ petitioners did have their remedy of filing an appeal under Section 18 of the SARFAESI Act before the Debts Recovery Appellate Tribunal. The appeal remedy is an effective and efficacious remedy. When such an effective and efficacious remedy is available, this court will decline exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. ....

10.So far as the challenge made to the order dated 24.06.2013 is concerned, since an appeal remedy is available the writ petitioners ought to have exhausted the appeal remedy before approaching this Court with this writ petition. ...."

10. Though the learned counsel for the petitioner submitted that conditional order of deposit of Rs.10,00,000/-, has been complied with and that therefore, some directions be issued to the Bank, having regard to the fact that there are no compelling circumstances, requiring entertainment of this instant writ petition, against the sale notice and in the light of the decisions of the Hon'ble Supreme Court as well as this Court holding that there is an alternative and effective remedy of an application, under SARFAESI Act, 2002, this Court is not

inclined to grant any interim protective order, in this writ petition.

11. Confirmation of sale is integral to sale. It is always open to the petitioners, to challenge the confirmation of sale or the issuance of sale certificate in the manner known to law. Thus, dismissing the instant writ petition, for the reasons stated supra, we leave the issues of challenge open to the petitioners, if they so desire to pursue further. No costs. Consequently, the connected Miscellaneous Petitions are closed.

s/d-
Assistant Registrar(CS-V)

True Copy

Sub-Assistant Registrar

mvs.

To
1. The Authorised Officer
State Bank of India
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E 159 Annai Velankanni Church Road
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+1 CC to Mr.M.L. Ganesh, Advocate sr 12453.
+1 CC to Mr.Naveen Kumar, Advocate sr 12819.

W.P.No.34222 of 2017

SP(09/03/2018)