

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.01.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.122 of 2018
and WMP No.172 of 2018

Mrs.M.Mahalakshmi ... Petitioner

vs.

1. The Authorized Officer,
Tamilnadu Mercantile Bank,
Bengaluru Region (For Krishnagiri Branch),
D.No.190, Old Bangalore Road,
Krishnagiri - 635 001.

2. Reserve Bank of India, rep by its Secretary,
16th Floor, Central Office Buildings,
Shahid Bhagat Singh Marg,
Mumbai - 400 001. ... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Mandamus, directing the 1st respondent bank to recall the proceedings initiated under the provisions of the SARFAESI Act, 2002 and further directing the 1st Respondent Bank to render financial assistance to the petitioner in accordance with law and more particularly in compliance of the guidelines issued by the 2nd respondent Reserve Bank of India.

For Petitioner : Mr.Krishnan
for Mr.T.Sundaranathan

ORDER

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

According to Tamilnadu Mercantile Bank, Krishnagiri, the borrower, who has availed a term loan of Rs.18.21 Lakhs for purchasing machineries and another term loan for an amount of Rs.20.19 Lakhs, for construction of factory and buildings, has defaulted. Hence, on 31.03.2016, the bank has declared the loan

account, as non-performing asset. Bank has also instituted Original Application for recovery. Bank has issued notice dated 02.05.2016 under Section 13(2) of the SARFAESI Act, 2002, demanding a sum of Rs.17,02,257/- & Rs.19,91,757/- with future interest at 18.15.%(or) BRR Plus 2% P.I. to be paid, within sixty days from the date of 13(2) notice, failing which, the bank would take possession of secured asset and sell the same, appropriate the deposit to the abovesaid dues. Property hypothecated and offered as security by way of equitable mortgage, as per the demand notice dated 02.05.2016 issued under the SARFAESI Act, 2002, are as follows

Details of Security:

Hypothecation: 1. Ice Cream freezer, fruit & nut feeder with spares.

2. Batch pasteurizer, plate chiller, mix transfer pump, SS pipes & fittings, glycol solution chilling plant, LPG geyser, two compartment flavour Tank, ripple machine, hot/chilled water piping, pipe insulation, cooling tower pump and piping, electrical panel, cabling, compressor & Spares.

Equitable Mortgage: Land to the extent of 10 cents in S.No.71/2 and the factory building constructed thereat to the extent of 2475 sq.ft. and Toilet Block at Sundakuppam Village, Near KRP Dam x Road, Krishnagiri to Dharmapuri NH-7 Road, Krishnagiri District standing in the name of Mrs.M.Mahalakshmi.

2. Material on record discloses that thereafter, Appanraj Ice Cream has sent a letter dated 12.12.2017 to the Bank Manager, T.M.B.Limited, Krishnagiri. Thereafter, bank has issued a sale notice dated 18.11.2017 under Rules 8(6) & 9(1) of the Security Interest (Enforcement) Rules, 2002, for bringing the secured asset, viz., property mortgaged, for auction on 05.01.2018. Without challenging the said auction notice dated 18.11.2017, in the manner known to law, proprietrix of Appanraj Ice Cream, the borrower, has filed instant writ petition for a direction to the Authorised Officer, Tamilnadu Mercantile Bank, Krishnagiri, the 1st respondent herein, to recall the proceedings initiated under the provisions of SARFAESI Act, 2002 and prayed for a further direction to the 1st respondent bank to render financial assistance to the petitioner in accordance with law and more particularly, in compliance with the guidelines issued by the Reserve Bank of India, 2nd respondent.

3. Supporting the prayer sought for, Mr.Krishnan, learned counsel for the petitioner, submitted that payments made towards, discharging the loan, has not been taken note of, by Tamilnadu Mercantile Bank. As per the guidelines of Reserve Bank of India, there should be a continuous default for 90 days

and then only, the loan account can be classified as non performing asset. Inviting the attention of this Court to a decision of the Hon'ble Supreme Court in Anitha Kushwaha & Others Vs. Pushap Sudan & Others, reported in (2016) 8 SCC 509, Mr.Krishnan, learned counsel for the petitioner further submitted that there is an infringement of fundamental right, under Article 21 of the Constitution of India and that when sale notice has not been served on the writ petitioner, the whole proceedings are vitiated. He further submitted that when there is violation of principles of natural justice, writ petition can be entertained. Finally, considering the fact that auction is fixed today, learned counsel for the petitioner, offered to pay Rs.10 Lakhs towards the debt amount.

4. Heard Mr.Krishnan, learned counsel for the petitioner and perused the materials available on record.

5. Firstly, sale notice dated 18.11.2017 issued under Rules 8(6) & 9(1) of the Security Interest (Enforcement) Rules, 2002, can always be challenged by the borrower or any person aggrieved under Section 17 of the SARFAESI Act, 2002. Section 17 of SARFAESI Act, 2002, is extracted hereunder.

17. (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken: PROVIDED that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation : For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-

section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

PROVIDED that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and

Financial Institutions Act, 1993 and the rules made thereunder.

6. Though, Mr.Krishnan, learned counsel for the petitioner laid stress on the principles of natural justice and hence, prayed that the writ petition be entertained, instead of driving the petitioner to seek for alternate remedy, we are not inclined to accept the said contention for the reason that allegations of violations of principles of natural justice, can always be gone into by the tribunal. Further, it is always open to the petitioner to raise all tenable grounds before the forum.

(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.

..... "

7. In the light of the above discussion and decisions, we are not inclined to entertain the writ petition. Petitioner is at liberty to approach the tribunal, if so advised. Sale notice cannot be challenged collaterally in this writ petition, filed for a mandamus. Hence, the writ petition is dismissed. No costs. Consequently, the connected Writ Miscellaneous Petition is closed.

Sd/-
Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

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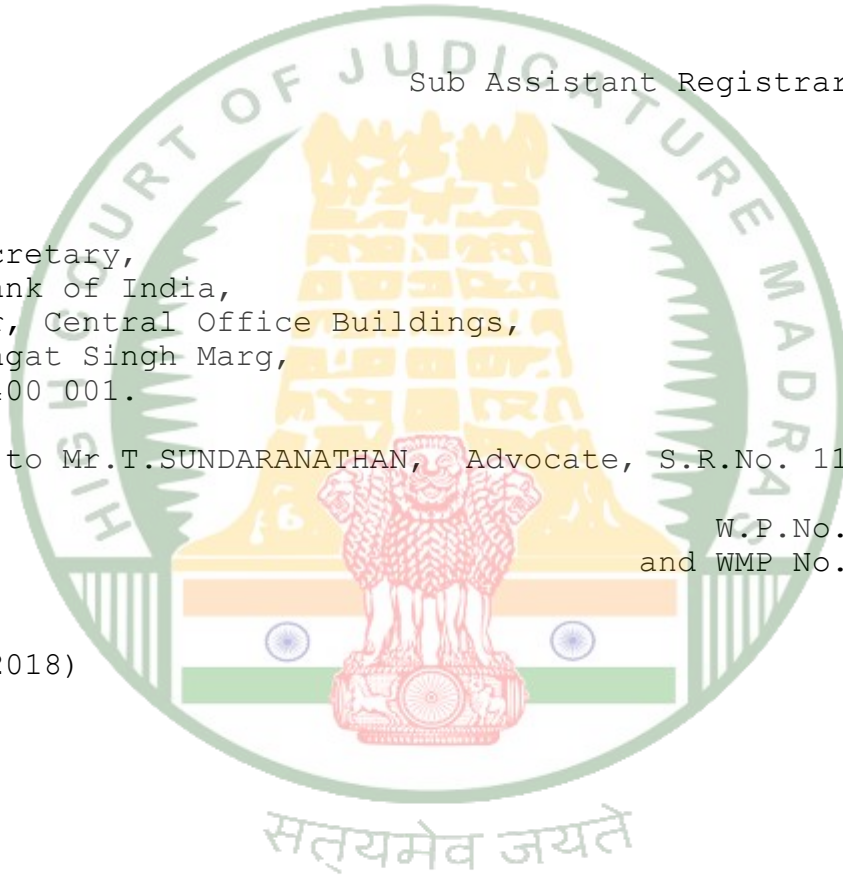
To

1. The Secretary,
Reserve Bank of India,
16th Floor, Central Office Buildings,
Shahid Bhagat Singh Marg,
Mumbai - 400 001.

+1cc to Mr.T.SUNDARANATHAN, Advocate, S.R.No. 1196

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