

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 6/2/2018

C O R A M

The Honourable Mr.Justice S.Manikumar
a n d
The Honourable Mrs.Justice V.Bhavani Subbaroyan

Writ Petition No.2593 of 2018
a n d
W.M.P.No.3202 of 2018

Sarathy Ginning Factory
rep. By its Partner
Mr.A.Govindarajan
Factory At No.38/2D3
Kandampatty Main Road
Kandampatty
Salem 636 005.

...

Petitioner

Vs

The Authorised officer
Andhra Bank
Salem Branch
Narasu's Arcade
No.53/24, 2nd Agraharam
Salem 636 001.

....

Respondent

Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of certiorarified mandamus to call for the records pertaining to the e-auction sale notice, dated 5/1/2018, issued by the respondent Bank and quash the same and consequently direct the respondent Bank to consider the petitioner's representation dated 5/1/2018, requesting to properly determine the value of the property and re-fix the reserve price for the property, as described in the 'Schedule of Property'.

*Xerox copy of the Schedule of Property is Enclosed.

For petitioner ... Mr.M.Aravind Subramaniam

O R D E R

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

Borrower has challenged, the e-auction sale notice, dated 5/1/2018, on the grounds inter alia that upset price fixed in

the said sale notice, is contrary to the guidelines of the Reserve Bank of India. When the value of the subject property, mortgaged with the Bank is Rs.42,50,000/-, as per the certificate, dated 16/9/2014, issued by the Village Administrative Officer, Andikulam Village, Rs.22 lakhs has been fixed as upset price, for property No.1, in the schedule, to the e-auction notice, is erroneous, as against the reserve price of Rs.2,28,00,000/-, fixed in the first e-auction sale notice, dated 25/2/2015.

2. According to Mr.M.Aravind Subramaniam, learned counsel for the petitioner, such gross reduction, in fixing the upset price, is without any basis and that therefore, when such prima facie illegality is made out, this Court, can entertain a writ petition, de hors the availability of an alternative and efficacious remedy, under Section 17 of the SARFAESI Act, 2002.

3. In support of the above contention, learned counsel for the petitioner, placed reliance on a decision of the Hon'ble Supreme Court, in Ram Kishun & Ors Vs. State of Uttar Pradesh and Others, in Civil Appeal No.6204 of 2009, dated 24/5/2012.

4. Learned counsel for the petitioner also submitted that petitioner was not provided with 30 days clear notice, as contemplated in Rule 9 of the Security Interest (Enforcement) Rules, 2002. He also submitted that inasmuch as the upset price has been fixed, by grossly reducing the value of the subject property, mortgaged with the Bank, a representation, dated 5/1/2018, has been submitted to the Bank and that the same may be directed to be considered, to redetermine and re-fix the reserve price for the said property.

5. Heard the learned counsel for the party and perused the materials available on record.

6. Representation, dated 5/1/2018, of Sarathy Ginning Factory, Salem, writ petitioner herein, is extracted hereunder:-

"With reference to your notice cited above, we bring the following proposals for your kind consideration.

Our friends circle are ready to buy the property 1 and 2 for the price of Rs.55,00,000 lakhs approximately as against your Reserve Price of Rs.49,00,000/- (both) shown in your notice.

In addition to the above, we will arrange another Rs.10,00,000/- to Rs.15,00,000/- from our relative and friends circle and in total Rs.65,00,000/- to Rs.70,00,000/- approximate and ready to pay

the same as One Time Settlement (OTS) in 30 to 45 days.

Further we thankful for hearing our problems and financial difficulties faced by us and agreed for Rs.90,00,000/- (Rupees Ninety lakhs) as One Time Settlement (OTS) on 16/9/2017 at Zonal Office in the presence of Senior Executives from Head Office and Zonal Office.

But we sorry to say that we are unable to mobilize the funds as agreed due to prolonged financial problems.

But assure you that we will arrange to make payment for the revised terms as One Time Settlement (OTS) at the earliest. The Reserve Price quoted in your notice for the both properties slashed heavily when compared with your earlier sale notice. Hence we once again pray for your goodself to give us an appointment to appraise the above facts in person and to settle the matter amicably.

Please do the needful and assuring our co-operation."

7. The said representation, dated 5/1/2018, has been considered and a reply, dated 6/1/2018, has been given by Andhra Bank, Salem, to M/s. Sarathi Ginning Factory, Salem and that the same is extracted hereunder:-

"We are in receipt of your letter dated 5/1/2018, if any of your friends are interested in purchasing the property through private treaty, they are welcome and please ask them to come and meet us to further processing the sale and their intention for purchase, may please be given in writing to us, with specific amount against each property offered for sale, duly following the guidelines as per SARFAESI. Regarding your intention for settlement may be represented to the competent Authority, by depositing initial payment and giving relevant details to us.

8. Inasmuch as the representation, dated 5/1/2018, has been replied, the question of issuing mandamus, directing the Bank, to consider the representation, dated 5/1/2018, and to redetermine and refix the reserve price, does not arise. If the Bank has not given a clear 30 days notice, as contemplated, under Rule 9 of the Security Interest (Enforcement) Rules, 2002,

certainly the same give rise to a cause of action, to challenge the auction notice, dated 5/1/2018, before the Debts Recovery Tribunal, under Section 17 (1) of the SARFAESI Act, 2002. If any challenge is made, judgment relied on by the petitioner, can also be pressed into service.

9. Statute provides for an alternative remedy. Further, Courts have consistently held that when there is an effective and alternative remedy, writ is not maintainable. We deem it fit to consider the following decisions.

(i) In Precision Fastenings v. State Bank of Mysore, reported in 2010(2) LW0 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...."

10. In the light of the above discussion and decisions stated supra, we are not inclined to entertain the challenge of the sale notice.

11. Learned counsel for the petitioner submitted that sale notice, dated 5/1/2018, is stated to have been sent on 19/1/2018 and received by the petitioner only on 21/1/2018.

12. Accordingly, writ petition is dismissed. Liberty is given to the petitioner, to approach the Tribunal, under Section 17 (1) of the SARFAESI Act, 2002. If any application is filed under Section 17 (1) of the SARFAESI Act, 2002, while computing limitation, Tribunal shall take note time spent in this court and the observation at para 12 of this order. No costs. Consequently, the connected Writ Miscellaneous Petition No.3202 of 2018 is closed.

Sd/-
Asst.Registrar (CS IX)

/true copy/

Sub Asst. Registrar

To

The Authorised officer
Andhra Bank
Salem Branch
Narasu's Arcade
No.53/24, 2nd Agraharam
Salem 636 001.

+1cc to Mr.M.Aravind Subramaniam, Advocate sr.no.8760

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nr 07/02/2018

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