

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 4/6/2018

C O R A M

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

Writ Petition No.13131 of 2018

1. M/s. Skytel Informatics Pvt Ltd
Plot No.21 Sripuram Colony
1st Cross Street, St.Thomas Mount
Chennai 600 016.
 2. R. Maran
Director
Flat A, I Floor, Plot No.1183
Tamil Solai Apartment
Old D.No.7, New No.21 Dr.Natesan Salai
Ashok Nagar
Chennai 83.
 3. Mrs.Vasanthi Maran
Director
Flat A, I Floor, Plot No.1183
Tamil Solai Apartment
Old D.No.7, New No.21 Dr.Natesan Salai
Ashok Nagar
Chennai 83.
- Vs
1. The Authorised Officer
Union Bank of India
Egmore Branch
No.9 Elcanso Building
Casa Major Road, Egmore
Chennai 600 008.
 2. The Chief Manager
Union Bank of India
Egmore Branch
No.9 Elcanso Building
Casa Major Road
Egmore
Chennai 600 008.

...Petitioners

...Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of certiorari, calling for the records from the Debt Recovery Tribunal - II, Chennai, in S.A.No.226 of 2017, dated 15/5/2018 and quash the same.

For petitioners ... Mr.S.Muthukrishnan

O R D E R

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

Order impugned in the instant writ petition is as follows:-

"1. The applicant filed this application under Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) (hereinafter called as 'Act') to set aside the possession notice, dated 26/10/2017.

Brief Averments of the Application

2. The demand notice and possession notice issued by the respondent Bank is contrary to law. Classification of NPA is not proper. The applicant is not a willful defaulter. After the demand notice, the applicant paid Rs.8,60,000/-, which was not considered by the respondent Bank. The value of the property is more than the liability and as such the account cannot be classified as NPA. In the present case, the property value is more than the liability. Therefore, the classification of NPA is not proper. The respondent Bank failed to follow the procedures under Rule 8 (i) and 8 (ii) to keep the interest. Thus, the applicants prayed to set aside the impugned possession notice.

Brief Averment of the respondent counter:

3. The respondent Bank classified the loan account as NPA as per RBI norms and it is proper. After the classification, the respondent Bank issued demand notice to the applicant. But they have not settled the demand amount full within 60 days. Therefore, the respondent Bank issued the impugned possession notice on 26/10/2017. The respondent Bank also served the same to the applicant by hand delivery. It is also sent to the guarantor. The possession notice was also

affixed on the conspicuous place of the secured property. Within seven days from the possession notice, it was published both in English and Tamil Newspapers on 1/11/2017. Therefore, the respondent Bank meticulously followed all the procedures laid down in the Security Interest (Enforcement) Rules, 2002. Hence the respondent Bank prayed for dismissal of the SA.

Points for consideration

Whether the impugned possession notice has to be set aside as prayed by the applicant?

Point

4. Heard both side arguments.

5. On perusal of both side pleadings and both side typed set of papers, it is found that the applicants are the borrowers to the respondent Bank. The schedule mentioned property was mortgaged by the applicant. The respondent Bank classified the loan account as NPA on 30/4/2017 as per the RBI norms. Thereafter, on 31/5/2017, the demand notice was issued by the respondent Bank and it was delivered to the applicant. But there is no representation or objection from the applicant as per Section 13 (3-A) of the Act. The applicant failed to settle the demand amount. Therefore, the respondent Bank issued the impugned possession notice after 60 days from the date of the demand notice. It was served to the applicant. It was affixed at the conspicuous place of the secured assets. It was also published in Tamil and English Newspapers on 1/11/2017. Further, the statement of account shows that the payments made by the applicant were credited towards the loan account properly. All these facts are evidenced by the respondent Bank's typed set of papers. Therefore, I find there is no defect or infirmity to take possession of the secured assets.

6. The main submissions of the applicant is that the value of the property is more than the liability. But it can't curtail the respondent Bank to classify the loan account as Non Performing Assets. As per the RBI Guidelines, the respondent Bank classified the loan account as NPA and issued demand notice. Hence I find that all the procedures were meticulously followed by the respondent Bank to take possession of the secured

property in the instant case. Hence, the grounds raised by the applicants are unsustainable.

7. In the result, the SA is dismissed. No costs."

2. As against the above, Section 18 of the SARFAESI Act, 2002 provides for a statutory appeal, which is reproduced.

"Appeal to Appellate Tribunal - (1) Any person aggrieved, by any order made by the Debts Recovery Tribunal (under Section 17, may prefer an appeal along with such fee, as may be prescribed) to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal:

[Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower]

[Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent, of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of debt referred to in the second proviso]

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder."

3. Answering the question as to why a statutory appeal, under Section 18 of the SARFAESI Act, 2002 was not availed, learned counsel for the petitioners submitted that the Hon'ble Chair Person, DRAT, Chennai, is on leave, resuming office, on 8/6/2018 and therefore, instant writ petition has been filed, on 29th May 2018. Temporary absence, cannot be a ground to prefer a writ petition. 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...."

4. Even if a statutory appeal is filed, same can be taken up for hearing, on 8/6/2018 or sooner thereafter, provided the appeal is in order. In the light of the decisions of the Hon'ble Supreme Court, deprecating entertaining writ petitions except for exceptional reasons, which we do not find on the facts and circumstances of the instant case, writ petition is dismissed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

-s/d-
Assistant Registrar (CS-IX)

True Copy

Sub-Assistant Registrar

mvs

To

1. The Authorised Officer
Union Bank of India
Egmore Branch
No.9 Elcanso Building
Casa Major Road
Egmore
Chennai 600 008.

2. The Chief Manager
Union Bank of India
Egmore Branch
No.9 Elcanso Building
Casa Major Road
Egmore
Chennai 600 008.

3. The Debts Recovery Tribunal II
Chennai.

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W.P.No.13131 of 2018

AD(CO)
SP(29/06/2018)