

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 8/2/2018

C O R A M

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

Writ Petition No.2789 of 2018
a n d
W.M.P.No.3438 of 2018

N.S.Suresh

... Petitioner

Vs

1. The Authorised Officer
Vijaya Bank
ARM Branch
No.144 Moore Street
Chennai 600 001.

2. The Branch Manager
Vijaya Bank
Indhira Nagar Branch
No.25, III Avenue
Adyar
Chennai 20.

... Respondents

Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of mandamus to forbear the respondents from proceeding with e-auction of the property viz., "all that piece and part of land and building property 443 sq.ft UDS in land measuring 3690 sq.ft bearing Door No.New No.8, Old No.6, Raja Street, Sivagamipuram (as per Corporation Records Door No.8/1 Raja Street, Extension, R.A.Puram), Mylapore, Chennai 600 028, comprised in R.S.No.4230/28, Block No.90 and one unit of Residential Flat bearing No.A of an extent of 794 sq.ft located in Ground floor of Apartment named "Arun Flats", situated within the sub-Registration District of Mylapore and registration District of South Chennai. Bounded on the North by - Plot owned by R.Sundaram and R.Santhanam; South by - Raja Street, East by - 40 feet, Raja Gramani Thottam; West by - Plot No.38 on 17/2/2018 or any other subsequent dates, pursuant to the e-auction notice dated 1/2/2018 of the first respondent published on 2/2/2018 in Tamil Daily Dinamani and English Daily New Indian Express.

For petitioner ... Mr.S.D.Venkateswaran

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O R D E R

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

Borrower has challenged the e-auction notice, dated 2/2/2018, which is extracted hereunder:-

Property for E-auction

It is notified for all concerned that the following property is secured in favour of Vijaya Bank, Indira Nagar, Chennai Branch and as secured creditor taken possession under SARFAESI Act, 2002 will be sold by e-auction on 17/2/2018, "as is where is and as is what is basis" for recovery of Bank dues. This is a notice to the borrower/s and to the guarantor/s of the below said loan about the holding of E-Auction sale on the said dates. If their outstanding dues are not repaid in full by the said auction date.

Name and Address of Borrower/s, Mortgagor/s and Guarantor/s:

1. Borrower/Mortgagor: Mr.N.S.Suresh, S/o. Sundaram, 2. Co-borrower: Mrs.S.Rajalakshmi, W/o. N.S.Suresh, Both residing at No.43/8 G1 Arun Flats, Raja Street, RA Puram, Mylapore, Chennai 600 028.

2. Amount due to the Bank: Rs.37,80,968.96/- (Rupees Thirty Seven lakhs Eighty thousand Nine hundred sixty eight and paisa ninety six only) as on 30/1/2018 along with further interest from 31/1/2018 together with cost, charges other monies etc.

3. Symbolic possession taken on 8/5/2015
The undermentioned properties will be sold by "Online e-Auction through website <https://vijayabank.auctiontiger.com> on the date and terms mentioned herein for recovery of an amount as mentioned herein Rs.37,80,968.96/- (Rupees Thirty seven lakhs eighty thousand nine hundred sixty eight and paisa ninety six only) together with costs, charges other monies.

Schedule property

Description of the Immovable property mortgaged to the bank by - Mr.N.S.Suresh, S/o.

Sundaram: All that piece and part of land and building property 443 sq.ft UDS in land measuring 3690 sq.ft bearing Door No.New No.8, Old No.6, Raja Street, Sivagamipuram (as per Corporation Records Door No.8/1 Raja Street Extrension, RA Puram), Mylapore, Chennai 600 028, comprised in R.S.No.4230/2B, Block No.90 and one unit of residential flat bearing No.A of an extent of 794 sq ft located in Ground Floor of Apartment named "Arun Flats" situated within the sub-Registration District of Mylapore and Registration District of South Chennai. Bounded on the North by Plot owned by R.Sundaram & R.Santhanam, South by Raja Street, East by 40 feet, Raja Gramini Thottam, West by Plot No.38.

Date and Time of E-auction	17/2/2018 between 11.00 am and 1.00 p.m., with unlimited extension of 10 minutes i.e., the end time of e-auction will be extended by 10 minutes each time if bid is made within the last 10 minutes before closure of action
Reserve Price	Rs.48,00,000 (Rupees forty eight lakhs only)
Earnest Money deposit	Rs.4,80,000/- (Rupees four laksh eighty thousand only)
Incremental amount	Multiples of Rs.25,000/- only
Date of Inspection by intending purchasers	12/2/2018 between 11.00 am and 4 p.m
Last date for submission of tender form	16/2/2018 till 2.00 pm
The sealed cover should be superscribed with	Quotation for participating in e-auction sale - "N.S.Suresh, S/o. Sundaram"
Date, time & place of opening of online offers	16/2/2018 at 2.00 p.m at Vijaya Bank, ARM Branch, 144 Moore Street, Chennai 600 001.

2. Contentions have been raised that the Bank has issued a

notice, dated 3/3/2015, under Section 13 (2) of the SARFAESI Act, 2002, demanding a sum of Rs.28,01,670.94, together with interest. Bank has also obtained an order, in CrI.M.P.No.6540 of 2015, dated 25/11/2015, under Section 14 of the SARFAESI Act, 2002, from the learned Chief Metropolitan Magistrate, Chennai, for taking possession of the mortgaged property and Bank has also taken physical possession of the said property, on 20/1/2018, as per the orders of the learned Chief Metropolitan Magistrate.

3. Bank has issued a e-auction notice, on 24/7/2015, describing the outstanding amount, as Rs.28,73,613.94 and fixed the reserve price, as Rs.65,00,000/-. Auction did not take place. Now, in the instant auction notice, dated 2/2/2018, the Bank has grossly reduced the reserve price to Rs.48,00,000/-, fixing the e-auction, on 17/2/2018. Contending inter alia that the Bank has not followed the procedure, as per Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002 and that reduction of the upset price, is erroneous and clear 30 days notice has not been given, instant writ petition has been filed, to quash the e-auction notice. Added further, the petitioner has contended that Bank can wait for three months, for realisation of the entire debts payable by the petitioner, with interest.

4. Heard Mr.D.Venkateswaran, learned counsel for the petitioner and perused the material available on record.

5. All the above grounds can be raised before the Debts Recovery Tribunal. 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 Certiorari 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 instant writ petition.

11. Accordingly, the writ petition is dismissed. No costs. Consequently, the connected Writ Miscellaneous Petition No.3438 of 2018 is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

mvs

To

1. The Authorised Officer
Vijaya Bank
ARM Branch
No.144 Moore Street
Chennai 600 001.

2. The Branch Manager
Vijaya Bank
Indhira Nagar Branch
No.25, III Avenue
Adyar
Chennai 20.

+1cc to Mr.S.D.Venkateswaran, Advocate, S.R.No.9571

Writ Petition No.2789 of 2018

VGI(CO)
RRK(08/02/2018)



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