

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.2901 of 2018
a n d
W.M.P.Nos.3569 and 3570 of 2018

A.M.Construction
Rep. by its Managing Partner
Manicavassalodu Annamale
Maria Tower, II Floor
No.10, Vellavari Street
Muthialpet
Puducherry - 605 003 ... Petitioner

Vs

1. The Presiding Officer
The Debts Recovery Tribunal - II
Spencer's Towers
Anna Salai, Chennai - 600 002
2. M/s.Religare Finvest Ltd.
having office at D-3, P3B, District Centre
Saket, New Delhi - 110 017
having its Branch Office at
Bascon IT Park, 12th Floor
Venkata Narayana Road
T.Nagar, Chennai - 600 017
Rep. by its Authorised Signatory ... Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorarified Mandamus calling for the records culminated in the impugned order dated 06.02.2018 made in S.I.A. No.76 of 2018 in S.A. No.27 of 2018 passed by the 1st respondent, and quash the same as illegal.

For petitioner ... Mr.R.Prabhakaran

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

Inviting the attention of this court to loan accounts (i) Rs.2,50,00,000/-, under the loan agreement, in ref.XMORSAI00046870 dated 27.02.2013; (ii) Rs.84,50,000/-, under the loan agreement in ref.XMORSAI00046871 dated 27.02.2013; (iii) Rs.1,21,00,000/-, under the loan agreement in ref.XMORSAI00046922 dated 27.02.2013; and (iv) the loan agreement in ref.XMORSAI00073601 dated 04.04.2016 for Rs.40,00,000/-, Mr.R.Prabhakaran, learned counsel for the petitioner, submitted that as per M/s.Religare loan payment details, as against the first loan amount of Rs.1,21,00,000/-, due and payable a sum of Rs.91,65,628/-, has been paid, with balance of Rs.29,34,372/-. As regards second loan amount of Rs.84,50,000/-, the borrower/writ petitioner has paid a sum of Rs.64,14,170/-, with balance of Rs.20,35,830/-. As regards the third loan account, as against a sum of Rs.2,55,00,000/-, the borrower has paid Rs.1,93,68,945/-, with a balance of Rs.61,31,055/-.

2. Learned counsel for the petitioner, further submitted that a sum of Rs.1,11,01,257/-, was due and payable by the borrower, as on 06.07.2017. However, bank has issued a notice dated 06.09.2017 under Section 13(2) of the SARFAESI Act, 2002, demanding a huge sum of Rs.4,75,83,804.22 and also issued possession notice dated 09.12.2017 under Section 13(4) of the SARFAESI Act, 2002, mentioning a sum of Rs.4,90,61,194.45.

3. According to the learned counsel, petitioner is not a chronic defaulter, but was bona fide, in repayment. Though one of the objects of SARFAESI Act, 2002 was to realise public money lent at the earliest, provisions in the Act should not be invoked, to squeeze a bona fide person in repayment. Considering that an amount of Rs.1,11,01,257/-, which according to the petitioner, was due and payable as against Rs.4,75,83,804.22, mentioned, in the notice issued under Section 13(2) of SARFAESI Act, 2002, learned counsel for the petitioner, prayed to invoke the principles of equity, good conscience and belief, which can be applied to the facts of the case on hand and prayed to issue suitable orders to prevent sale.

4. He further submitted that, being aggrieved by the Sale Notice dated 04.01.2018, fixing the date of auction on 09.02.2018, petitioner has filed S.A. No.27 of 2018, along with an interim application in S.I.A. No.76 of 2018. In the said application, the Tribunal has insisted to make deposit of Rs.1,00,00,000/-, within two days. As the oral direction was onerous, petitioner could not accede to the same. Consequently, the Tribunal, has directed the sale to proceed and confirmation be stayed. According to the learned counsel, bringing the property to sale, would invite third parties to the lis. Besides, if the order in S.I.A. No.76 of 2018, has to be

challenged by way of an appeal under Section 18 of the SARFAESI Act, 2002, the petitioner is mandated to make a pre-deposit, on the amount claimed under Section 17(2) of the SARFAESI Act, 2002 or the amount determined by the Tribunal. As auction is fixed by 09.02.2018, learned counsel for the petitioner has prayed for indulgence of this court, under Article 226 of the Constitution of India.

5. Learned counsel for the petitioner submitted that for the amounts due, three arbitration cases have been filed in Arbitration Case Nos.88/2014, 106/2014 and 118/2014 and after consideration of the claim and documents, separate award has been passed in each case, on 05.06.2015 and consequently, execution petitions 1/2016 and 2/2016 have been filed before the Principal District Judge, Puducherry. According to the learned counsel for the petitioner, that when the bank had initiated proceedings for execution on the basis of awards, bringing the property for sale to realise the alleged debt due, is not warranted. He further submitted that the Tribunal has failed to consider the above factual and legal submissions.

6. Heard the learned counsel for the petitioner and perused the materials available on record.

7. S.A. No.27/2018 has been filed before the Debts Recovery Tribunal - II, Chennai, to set aside the auction notice dated 04.01.2018. Perusal of the supporting affidavit to the instant writ petition, shows that it is nothing but a replica of the averments made in S.A. No.27/2018. On the basis of the averments made in S.A. No.27/2018, when the petitioner in S.I.A. No.76/2018 sought for interim stay of the auction notice, in S.I.A. No.76 of 2016 dated 06.02.2018, the Tribunal, ordered as hereunder:

"Counsel for both sides present. Passed over and called again. Mr.S.Namasivayam, Advocate filed vakalat for respondent. Heard and perused. Sale will proceed and confirmation of sale is stayed. Counter by 22.02.2018."

8. The amount claimed under Section 13(2) notice is Rs.4,75,83,804.22. Though Mr.R.Prabhakaran, learned counsel for the writ petitioner, submitted that there was an oral direction to remit Rs.1,00,00,000/- as a condition, for grant of sale of auction, within two days and when the petitioner expressed his difficulty, the Tribunal, directed that the sale be conducted and confirmation of the same be stayed, there is nothing in the proceedings dated 06.02.2018, infer that there was any oral direction. Record of the proceedings will speak for itself.

9. The Hon'ble Supreme Court in T.P.Vishnu Kumar Vs. Canara Bank, P.N.Road, Tiruppur and Others reported in 2013 (10) SCC 652, at paragraph Nos.10 & 11, held as follows:

"10. Powers of the High Court under Article 226 cannot be invoked in the matter of recovery of dues under the Act, unless there is any statutory violation resulting in prejudice to the party or where such proceedings or action is wholly arbitrary, unreasonable and unfair. When the Act itself provides for a mechanism, by an appeal under Section 20 of the Act, in our view, the High Court is not justified in invoking jurisdiction under Article 226 of the Constitution of India to examine that the rejection of the applications by the Tribunal was correct or not. The petitioner and the contesting respondents have no case that either the Bank or the Tribunal had violated any statutory provisions by rejecting their applications.

11. A writ petition was preferred against the rejection of applications and the same were entertained by the learned Single Judge and decided on merits and which in our view is impermissible while exercising its jurisdiction under Article 226 of the Constitution. If the correctness or otherwise of each and every interim order passed by the Tribunal is going to be tested in a writ Court, it will only defeat the object and purpose of establishing such Tribunal. We have already noticed that due to the intervention of the writ Court, the matter got delayed for four years defeating the very purpose and object of the Act. We therefore, find no merit in these petitions and the same are dismissed."

10. When the petitioner has raised more or less the same grounds before the Tribunal in S.A. No.27/2018, to set aside the Sale Notice dated 04.01.2018, it would be appropriate to usurp the jurisdiction of the Tribunal and make any observation or decision relating to any one of the issues of challenge, both on facts and law, in this writ petition.

11. S.I.A. No.76/2018 has not been finally disposed of. It is at the interim stage and that therefore, it is always open to the petitioner to seek for any modification of order, if so advised.

12. Tribunal has directed the sale to go on and restrained confirmation. Contention of the learned counsel for the petitioner that permitting the auction to go on, would invite third parties to the lis, cannot be countenanced for the reason that, unless and until confirmation is made, auction purchasers cannot claim any right in the property, till sale certificate is

issued. As per the Security Interest (Enforcement) Rules, 2002, auction purchaser has to remit the balance amount within 15 days.

13. Whether the bank can seek for enforcement of their rights under the provisions of the SARFAESI Act, when execution proceedings have been filed for enforcement of arbitral award, whether the petitioner was bona fide in repayment and what amount is due and payable, and other issues, are all subject matter of S.A. No.27/2018 and it is for the Tribunal, to record to follow the DRT Procedure Rules and accord the categorical finding.

14. Learned counsel for the petitioner, has strongly relied on the decision of the Hon'ble Supreme Court in Harbanslal Sahnia and another vs. Indian Oil Corporation Ltd and others reported in (2003) 2 SCC 107 and contended that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. He stated that in an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

15. Though Mr.R.Prabhakaran, learned counsel for the petitioner, submitted that power under Article 226 of the Constitution of India, is extraordinary and therefore, notwithstanding the pendency of the challenge in S.A. No.27/2018 on the file of the Debts Recovery Tribunal-II, Chennai, appropriate orders can be passed in exercise of extraordinary jurisdiction, we are not inclined to accept the said contention. There cannot be any parallel proceedings on the same issues, as to whether sale notice is valid or not. When the main grounds of challenge in this writ petition, relate to validity of the sale notice dated 04.01.2018 in S.A. No.27/2018, which is pending on the file of Debts Recovery Tribunal - II, Chennai. For the reasons stated in the foregoing paragraphs, we refrain from entertaining the writ petition.

16. Though Mr.R.Prabhakaran, learned counsel for the petitioner prayed that leave be granted to file an appeal under Section 136 of the Constitution of India, we are of the view that there is no substantial questions of law involved and the request is not acceded.

Accordingly, the writ petition is dismissed. However, there shall be no order as to cost. Consequently, the connected writ miscellaneous petitions are closed.

-s/d-

Assistant Registrar (CS-II)

True Copy

Sub-Assistant Registrar

asr

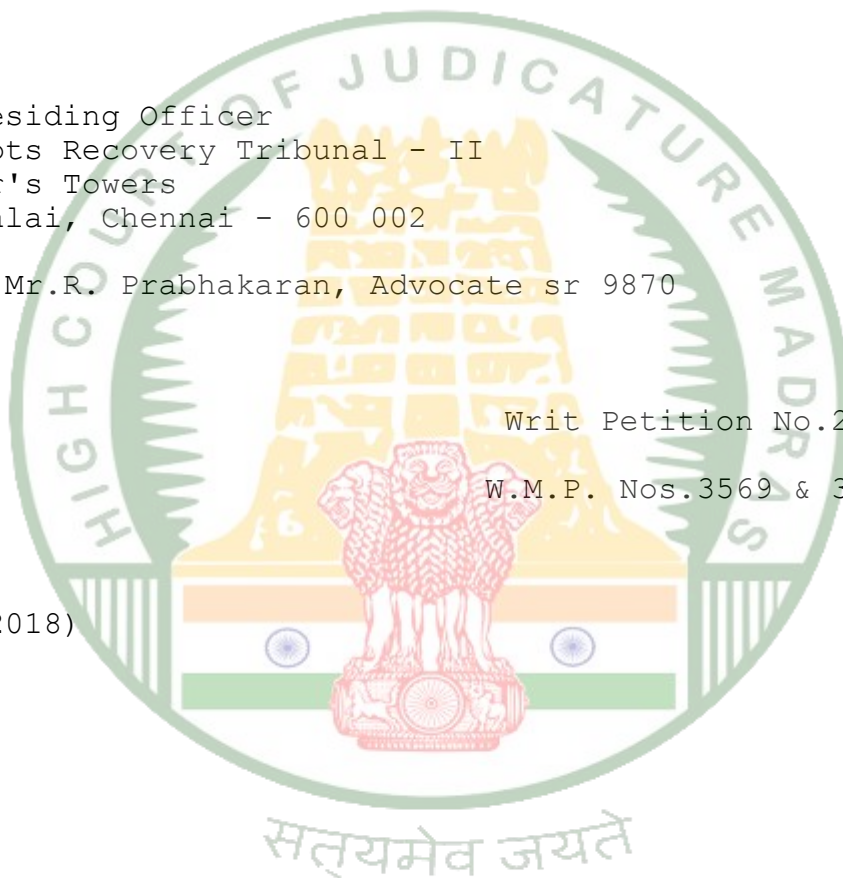
To

1. The Presiding Officer
The Debts Recovery Tribunal - II
Spencer's Towers
Anna Salai, Chennai - 600 002

+2 Ccs to Mr.R. Prabhakaran, Advocate sr 9870

Writ Petition No.2901 of 2018
and
W.M.P. Nos.3569 & 3570 of 2018

PA (CO)
SP (22/02/2018)



WEB COPY