

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.06.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.14367 of 2018
and WMP No.16976 of 2018

C.Venkitupathi Petitioner

vs.

1. The Central Bank of India,
Kalapatti Branch,
28, Sri Vari Towers, Avanashi Road,
Coimbatore - 641 048.
Rep. by its Chief Manager.

2. The Authorised Officer,
Central Bank of India,
Kalapatti Branch,
28, Sri Vari Towers, Avanashi Road,
Coimbatore - 641 048.

.... Respondents

Prayer:

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorarified Mandamus, calling for the records of the respondents culminating in the notice of the second respondent dated 09.03.2018 and his consequent possession notice dated 15.05.2018 issued to the petitioner and quash the same, and further direct the respondents to accept the settlement agreed to between the parties herein for a total amount of Rs.63.00 Lakhs as already agreed and accepted by the First respondents letters dated 07.11.2017 and 18.11.2017 by (i) receiving payment of the balance amount of Rs.55.00 Lakhs treating it as a mere settlement and not a compromise settlement so that the CIBIL rating of the petitioner and his Firm / Concern would not be affected and (ii) issuing a valid Certified Copy of the lost original title deed, (iii) obtaining a Non-traceable certificate, and (iv) executing and causing to be registered a Mortgage Release Deed stating therein that the original title deeds of the Petitioners property deposited by him with the First Respondent has been lost from the First Respondent Bank;

and consequently to and refrain from proceeding any further under the provisions of the SARFAESI Act, 2002.

For Petitioners : Mr.P.N.Radhakrishnan

ORDER

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

Petitioner has availed Housing Loan for a sum of Rs.9,65,000/- from Central Bank of India, Kalapatti Branch, Coimbatore, the 1st respondent herein under Loan No.302478047, by mortgaging his property, bearing Site No.10, comprised in S.F.No.934/2, Kalapatti Village, Coimbatore. Not satisfied with the services of the first respondent bank, petitioner has approached Indian Bank, Peelamedu Branch for take over of the Housing Loan and also for grant of Cash Credit Facility.

2. Indian Bank, Peelamedu granted sanction for takeover of the Housing Loan and also granted in-principle sanction of the Cash Credit Limit, subject to the condition that the property document is taken from the first respondent bank and handed over to them. In order to facilitate closure and take over the Housing Loan, Indian Bank, paid balance outstanding of Rs.9.65 Lakhs to the first respondent.

3. Central Bank of India, Coimbatore, first respondent herein, vide letter dated 01.11.2011, informed Indian Bank, Peelamedu Branch that the property document was misplaced and that they are searching for the same. Therefore, Indian Bank, cancelled the sanction and demanded back Rs.9.65 Lakhs and petitioner was directed to pay interest for the interim period to Indian Bank. On 10.11.2011, the first respondent bank, revived the Housing Loan of the petitioner under a fresh account and also granted Cash Credit Facility of Rs.20 Lakhs, as sought for by the petitioner for his business requirement. First respondent bank, further refunded the sum of Rs.9.65 Lakhs to Indian bank on 13.12.2011.

4. Thereafter, cash credit facility was enhanced by the first respondent Bank upto Rs.33 Lakhs. But the original documents of the property was not traceable. On 29.07.2017, petitioner sent a One Time Settlement proposal to the bank offering Rs.35 Lakhs, against his dues.

5. Material on record discloses that bank has issued a notice dated 13.09.2017 under Section 13(2) of the SARFAESI Act, 2002, demanding a sum of Rs.82,62,651/- (which represents, the principal plus interest, as on 12.09.2017) to be paid within the statutory period, from the date of the said notice, failing

which bank would be invoking Section 13(4) of the SARFAESI Act, 2002, against the secured assets. Petitioner has sent an objection dated 28.10.2017 under Section 13(3-A) of the SARFAESI Act, 2002, for which, bank has sent a reply dated 04.11.2017.

6. Material on record further discloses that there was correspondence for one time settlement and yet another notice dated 09.03.2018 under Section 13(2) of the SARFAESI Act, 2002, has been issued. There were complaints to the police.

7. Notice under Section 13(2) dated 09.03.2018 has been responded, under Section 13(3-A) of the Act, by the petitioner on 22.03.2018, for which a reply dated 28.03.2018, has also been issued by the bank. Thereafter, bank has issued possession notice dated 15.05.2018 under Section 13(4) of the SARFAESI Act, 2002. Paper publication dated 20.05.2018 has also been issued.

8. Being aggrieved by the measures taken by the Central Bank of India, Coimbatore, instant writ petition has been filed for a writ of certiorarified mandamus, calling for the records of the respondents culminating in the notice of the second respondent dated 09.03.2018 and his consequent possession notice dated 15.05.2018 issued to the petitioner and quash the same, and further direct the respondents to accept the settlement agreed to between the parties herein for a total amount of Rs.63.00 Lakhs as already agreed and accepted by the First respondents letters dated 07.11.2017 and 18.11.2017 by (i) receiving payment of the balance amount of Rs.55.00 Lakhs treating it as a mere settlement and not a compromise settlement so that the CIBIL rating of the petitioner and his Firm / Concern would not be affected and (ii) issuing a valid Certified Copy of the lost original title deed, (iii) obtaining a Non-traceable certificate, and (iv) executing and causing to be registered a Mortgage Release Deed stating therein that the original title deeds of the Petitioners property deposited by him with the First Respondent has been lost from the First Respondent Bank; and consequently to and refrain from proceeding any further under the provisions of the SARFAESI Act, 2002.

9. Though averments have been made assailing the measures taken by the bank, for realisation of the debt due and payable, and submissions were made by the learned counsel for the petitioner, that action of the bank is malafide and further contended that instant writ petition would fall under the exceptional circumstances for invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, going through the averments we are not inclined to accept the same.

10. Notice under Section 13(2) is only a demand made by the Bank and the Hon'ble Supreme Court in Mardia Chemicals v. Union

of India reported in AIR 2004 SC 2371 : 2004(4) SCC 311 has held that notice under Section 13(2) would not give rise to a cause to challenge. However, as per Section 13(3A) of the SARFAESI Act, 2002, if, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower: PROVIDED that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.

11. In a recent decision in ITC Limited Vs. Blue Coast Hotels Ltd., & others, reported in 2018 (2) CTC 569, while declaring that Section 13(3-A) of the SARFAESI Act, 2002, is mandatory, at paragraph No.23, the Hon'ble Supreme Court held as hereunder

"23. Sub-section (3A) of Section 13 was introduced in the Act by the Parliament in pursuance of the following observations of this Court in Mardia Chemicals Ltd v. Union of India, 2004 (2 CTC 759 (SC): 2004 (4) SCC 311.

"45.... The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non-compliance with notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section

13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfillment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly, we must make it clear unequivocally that communication of the reasons for not accepting the objections taken by the secured borrower may not be taken to give occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debts Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub-section (4) of Section 13 of the Act". (emphasis supplied)

12. Bank has taken steps and issued notice under Section 13(4) of the SARFAESI Act, 2002. In SARFAESI Act, there is an effective and alternative remedy. Time and again, the Hon'ble Supreme Court as well as this Court has held that when there is an effective and alternative remedy, ordinarily writ jurisdiction should not be invoked and on the facts and circumstances of this case, we do not find that there is any extraordinary / exceptional circumstances invoking the

jurisdiction of this Court under Article 226 of the Constitution of India. On this aspect, we deem it fit to consider few judgments.

(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 SAREAFESI 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.

.....

9. In the light of the above decision of the Honourable Supreme Court, the writ petition filed by the petitioner seeking to set aside the possession notice issued to her long back is legally not sustainable. We are of the considered view that this petition has been filed only to drag on the proceedings and to evade repayment of the loan. That be so, the petitioner has no legal

right to compel the bank to accept the one time settlement offer made by her."

13. In Satyawati Tondon's case, the Hon'ble Supreme Court has held that the tribunals constituted under the SARFAESI Act, 2002, is competent to decide all questions of law and fact. Grounds raised in this instant writ petition, can always be urged before the tribunal.

14. In the light of the discussion and decisions, we are not inclined to entertain the writ petition and the same is dismissed. No costs. Consequently, the connected Writ Miscellaneous Petition is closed.

15. After the dismissal of the writ petition, Mr.P.N.Radhakrishnan, learned counsel for the petitioner submitted that the petitioner would take appropriate steps to challenge the action taken by the bank.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1. The Chief Manager,
Central Bank of India,
Kalapatti Branch,
28, Sri Vari Towers,
Avanashi Road,
Coimbatore - 641 048.

2. The Authorised Officer,
Central Bank of India,
Kalapatti Branch,
28, Sri Vari Towers,
Avanashi Road,
Coimbatore - 641 048.

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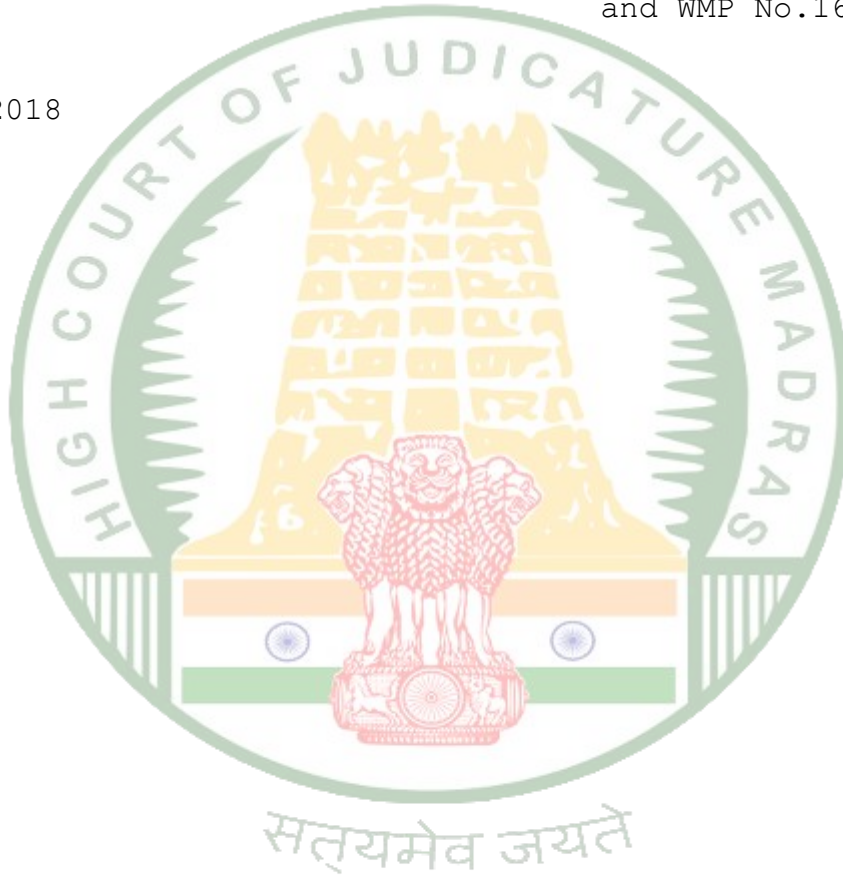
The Section Officer,
ER Section,
High Court, Madras

(To follow up the direction as mentioned in the order)

+1cc to Mr.P.N.Radhakrishnan, Advocate in sr.no.37989

W.P.No.14367 of 2018
and WMP No.16976 of 2018

mr(co)
nr 26/06/2018



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