IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20/6/2018

C O R A M :

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

Writ Petition No.14937 of 2018
a n d
W.M.P.Nos.17661 and 17662 of 2018

D.Ramani
w/o.Dhandapani ...Petitioner

Vs

1.The Authorised Officer
Bank of India
Credit Monitoring and Recovery Department
Star House
Coimbatore - 641 001

2.M/s.Covai Bottles
No.6/6/3, Theppakulathu Parai
Masthigoundanpatti Post
Thirumalyampalayam
Coimbatore - 641 032 ...Respondents

Petition filed under Article 226 of the Constitution of India praying for a writ of certiorari calling for the records of the first respondent in issuance of the notice dated 18.05.2018 and quash the notice dated 18.05.2018 with regard to petitioner's residential property situated at the land measuring to an extent of 2504 sq ft comprised in T.S. No.1267 part (G.S.232) T.S.Ward No.11, Block No.35 and situated at Door No.37 (Old No.62 & 63) Gandhipuram 6th extension, Ganapathy Village, Coimbatore North Taluk, Coimbatore District.

For petitioner : Mr.S.R.Rajagopal
For Mr.P.Gurusamy

O R D E R

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

Petitioner has sought for a writ of certiorari calling for the records of the first respondent in issuance of the notice dated 18.5.2018 and quash the same with regard to his residential property measuring an extent of 2504 sq ft comprised in T.S. No.1267 part (G.S.232) T.S.Ward No.11, Block No.35 and situated at door No.37 (Old Door No.62&63) Gandhipuram 6th extension, Ganapathy Village, Coimbatore North Taluk, Coimbatore District.

2. Short facts leading to the filing of the writ petition are that the petitioner is the owner of residential building, measuring an extent of 2504 sq ft comprised in T.S. No.1267 part (G.S.232) T.S.Ward No.11, Block No.35, situated at Door No.37 (Old Door Nos.62 and 63) Gandhipuram 6th extension, Ganapathy Village, Coimbatore North Taluk, Coimbatore District and he has been residing in the said property along with his family for several decades.

3. Petitioner stood as a guarantor to the loan obtained by M/s.Covai Bottles/2nd respondent, to the tune of Rs.350 Lakhs for their business. M/s.Covai Bottles/2nd respondent, have availed term loans for a sum of Rs.200 Lakhs towards cash credit in A/c No.817630110000037 and Rs.150 Lakhs towards Term Loan I in A/c No.817647041000067. The second respondent has paid more than Rs.50 Lakhs and has defaulted in repayment of the remaining amount.

4. First respondent bank issued a notice dated 05.07.2017 under Section 13(2) of the SARFAESI Act, 2002 to the borrowers and guarantor to the loan, stating that a sum of Rs.3,53,10,257/- was due, as on 30.06.2017. From the said notice, it could be deduced that the second respondent has availed the loan showing the petitioner's property as collateral security apart from the primary security of the other two properties owned by the relatives of the partners of the second respondent partnership firm. The loan was availed and the borrower has defaulted. Hence the first respondent bank has issued notice invoking the provisions of SARFAESI Act, 2002.

5. The first respondent bank has issued the notice claiming that the loan amount has been classified as a Non Performing Asset (NPA) and called upon the petitioner to pay amount due. On 09.11.2017, without prejudice to any of their rights as regards tenability and validity of the notice issued by the bank, the second respondent replied to the said notice, questioning the authority of the bank, in invoking the provisions of SARFAESI Act, 2002, insofar as petitioner is concerned.

6. In the said reply, the second respondent has stated that he had approached the 1st respondent bank and that the bank advised the second respondent to sell one of the properties, mortgaged to the bank and pay the said sale consideration to the

bank to regularise their loan accounts. Further the bank has also assured that on payment of the sale consideration to them, loan accounts will be regularised and that the the second respondent has to pay regular EMIs. Believing such assurance, the 2nd respondent agreed to sell the property, situated at T.S. No.7/3531, Door No.1033-1033A, Range Gouda Street, Coimbatore belonging to Mr.C.R.Sundarajan for Rs.45.00 Lakhs even though the property is worth about Rs.70.00 Lakhs, given as collateral security to the loan.

7. Pursuant to that, the bank, by letter dated 24.08.2017, has released the above said property with a condition to pay Rs.45 Lakhs. Out of which a sum of Rs.15 Lakhs and Rs.30 Lakhs in total Rs.45 Lakhs has been paid by the 1st respondent on 22.09.2017 and the said amount has been credited in the cash credit account. Subsequently, on 25.09.2017, a sum of Rs.7,05,534.00 has been debited from the said cash credit account to the Term Loan Account No.17670410000067. After payment of the above said Rs.45.00 Lakhs against the due of Rs.3,53,10,257/-, bank has sent a reply dated 19.11.2017 to the notice dated 05.07.2017 issued under Section 13(2) of SARFAESI Act, 2002 requesting the bank to remove name of the petitioner in the willful defaulters list, as caused in the notice dated 25.06.2017 and that there will not be any NPA in their accounts. Apart from that, after the issuance of the notice dated 05.07.2017, the 2nd respondent has paid a sum of Rs.3,00,000/- on 27.11.2017 and another sum of Rs.50,000/- on 15.12.2017. Moreover, the second respondent has also paid a sum of Rs.52 Lakhs on 30.12.2016 and the same were not taken on account.

8. However, to the shock and dismay, a notice alleged under Section 13(4) of the SARFAESI Act (Possession Notice) dated 12.02.2008 has been pasted in the premises, alleging that a sum of Rs.3,53,10,257.46 as mentioned in the notice dated 05.07.2017 issued under Section 13(2) of SARFAESI Act, 2002, was due. Pursuant to that, the 2nd respondent has sent a detailed reply dated 08.03.2018 to the aforesaid possession Notice dated 12.02.2018, stating that the possession notice has been issued without jurisdiction and without any application of mind. Even after the demand of Rs.3,53,10,257.46 made in the notice dated 05.07.2017, the 2nd respondent has paid a sum of Rs.45 Lakhs by selling the property of Mr.C.R.Sundarajan as stated above and further on 27.11.2017 the 2nd respondent has paid a sum of Rs.3 lakhs and another sum of Rs.50,000/- on 15.12.2017 and the said payment has not been credited, in the loan account and the notice dated 12.02.2018 alleging that a sum of Rs.3,53,10,257.46 as due is totally arbitrary and unsustainable in law. Totally the 2nd respondent has paid a sum of Rs.1,00,50,000/- after 30.12.2017 to till date. The above payment made by the 2nd respondent in their loan accounts has been regularised and that

there is no need to issue the alleged notice dated 12.02.2018. It was also stated by the 2nd respondent in that letter that only as per the 1st respondent's bank assurance, the 2nd respondent has agreed to sell the property for Rs.45 Lakhs, which is worth Rs.70 Lakhs and that on payment of Rs.45 Lakhs received from the sale consideration, their accounts will be regularised and removed from NPA. However on account of the 1st respondent's arbitrary action, the 2nd respondent has suffered.

9. Further in the said letter, the 2nd respondent has also stated that levy of interest towards due amount, even after declaration of NPA, is contrary to the guidelines of RBI. Further it was stated that the 2nd respondent has repaid the due amount by selling their property and in consequence of demonetisation and GST, their business has come to halt. Further, they are making all endeavours to tide over the financial crisis and once their accounts are regularised, they will extend their business transaction further, in all aspects and further requested the 1st respondent to propose One Time Settlement (OTS) offer to the 2nd respondent.

10. Petitioner has further contended that, after the issuance of the said reply by the 2nd respondent, petitioner has not received any communication from the bank, clarifying the payments of Rs.45 Lakhs made by the 2nd respondent after the issuance of 13(2) notice dated 5.7.2017. In the meantime, petitioner has made representation orally to the 1st respondent bank that the primary property, which is owned by the 2nd respondent firm is the factory building constructed in a vast land, which would fetch several crores and the machinery in the factory which would fetch more than a crore rupees and above said movables and immovables can be brought for sale under SARFAESI Act, 2002 for the alleged due. It is the further contention of the petitioner that the bank is very well aware of the fact that the cost of machinery is more than enough for recovering the due amount and the 2nd respondent can sell those machinery to recover the due amount. In fact the bank in the inventory list dated 12.02.2018 has categorically stated that stocks (uncleared bottles) are worth of Rs.100 Lakhs and the Ten machineries are worth of Rs.25 Lakhs lying in the factory premises of the second respondent, hypothecated to the said loan. There is no necessity for initiating any proceedings under the SARFAESI Act, 2002 with regard to petitioner's residential property and that too without initiating sale proceedings of the primary property (Factory land and building) and that further even after sale of the primary property and the machinery, if there is any shortfall in the due, bank can take steps to recover the due amount by selling petitioner's residential property which has been given as secondary security.

11. It is the further contention of the petitioner that in the first week of June, 2018, he learnt from the borrower that

the bank without considering his representation, published a mega e-Auction sale notice dated 18.05.2018, in a news daily alleging to sell petitioner's residential property along with other properties, given as collateral security, through a public e-Auction scheduled on 20.06.2018. It is pertinent to note that petitioner was not served with any notice about sale of his property by public auction. Petitioner has further submitted that the bank has no jurisdiction to bring his residential property before the sale of the primary properties, machinery and the stocks etc. which would fetch more value than the due amount. Petitioner has further submitted that he is aged 76 years and his whole family is depending only on his pension and he has to take take care of his widow daughter. Petitioner's family members are depending on this residential property and they are not having any other source of income. Petitioner has further submitted that the 2nd respondent has filed an application before the Debts Recovery Tribunal, Coimbatore, claiming that their property, as an agricultural property by leaving petitioner's property. The intention behind the application filed by the 2nd respondent before the DRT is nothing but to bring petitioner's property for sale and thereby saving their property and the machinery in the factory. The bank is hand in glove with the 2nd respondent, without serving any notice to the petitioner, regarding the sale and that he has been kept in dark and thereby brought his property for auction sale, which is arbitrary and highly illegal.

12. Being aggrieved by the said action of the 1st respondent bank in issuance of the notice dated 18.05.2018, petitioner, contending that left with no other efficacious alternative remedy, has invoked the jurisdiction of this Hon'ble Court and challenged the saidnotice dated 18.05.2018, on the following grounds:

i) The act of the bank is in violation of the principles of natural justice and equity. It is also arbitrary, unconstitutional, illegal and hence, liable to be set aside.

ii) Under Section 13(4) of the SARFAESI Act, the bank is bound to take action first against the principal security particularly when the asset of the guarantor is a residential house. Having taken action against the same by issuing notice under Section 13(2), the bank is estopped from proceeding against his residential property.

iii) The bank cannot in law in time being in force and as per provisions of the SARFAESI Act, invoke powers and proceed against the residential property of the guarantor when the business of the principal borrower against which they have proceeded against is more in value than the claim of the bank.

iv) The bank failed to note that the object of Act 54 of 2002 is to regulate securitisation and reconstruction of financial assets. In this case, having proceeded against the business, there is no necessity to proceed against his property, which act defeats the object of the enactment and is in violation of the fundamental rights guaranteed under the Constitution of India and more particularly contravene the provision of the SARFAESI Act.

v) The bank ought to have first initiated proceedings to sell the factory land and building which has been given as primary security. Even after the sale of the primary property and the machinery, if there is any shortfall in the due after the sale of the primary properties , the 1st respondent would have initiated proceedings against petitioner's residential property which has been given as collateral/secondary security.

vi) The respondent bank has no powers to issue the impugned notice in this writ petition and the same is in violation of the provisions of the SARFAESI Act and natural justice.

vii) The issuance of the notice dated 18.05.2018 by the bank has been done to cause harassment to the petitioner and furthermore, only reveals collusion of the 1st respondent with some of the partners of the 2nd respondent firm.

viii) The bank has deliberately issued notice dated 18.05.2018 by including petitioner's property to safeguard 2nd respondent's property and 2nd respondent's factory machinery and stocks.

ix) The act of the bank reveals highhandedness, arbitrariness and the intention of the bank, to somehow, usurp and purport to exercise power, which the Act did not confer on them and thus warranting interference of this Hon'ble Court.

x) The bank has not complied with the mandatory procedure contemplated under the SARFAESI Act for declaration of an NPA. Moreover, the notice dated 18.05.2018 does not contain any of the requirements with regard to the object of SARFAESI Act, not even referring the date of classification of the account as NPA.

xi) The notice alleged under Section 13(4) of SARFAESI Act (Possession Notice) dated 07.03.2018 alleging the same amount vis Rs.3,53,10,257.46 as mentioned in the notice dated 05.07.2017 issued under Section 13(2) of SARFAESI Act is due stating that notice has been issued to pay a sum of Rs.3,53,10,257.46 is totally arbitrary and unsustainable in law since even after the demand of Rs.3,53,10,257.46 made in the notice dated 05.07.2017, the 2nd respondent have paid a sum of Rs.45 Lakhs by selling the property of Mr.C.R.Sundarajan as stated above and further on 27.11.2017 the 2nd respondent have paid a sum of Rs.3 lakhs and other sum of Rs.50,000/- on 15.12.2017 and the said payment has not been credited in our loan account and the notice dated 12.02.2018 alleging a sum of Rs.3,53,10,257.46 is totally arbitrary and unsustainable in law. Totally the 2nd respondent has paid a sum of Rs.1,00,50,000/- after 30.12.2017 to till date. The above payment made by the 2nd respondent in their loan accounts has been regularised and there is no need of issuance of the alleged notice dated 12.02.2018 and e-auction notice dated 18.05.2018 alleging sum of Rs.3,53,10,257.46 as due.

xii) No e-auction notice alleged to sell petitioner's residential property by public auction has been served on the petitioner and the bank has no jurisdiction to bring petitioner's residential property before the sale of the primary properties and the machinery and the stocks etc which is of more value than the due amount.

xiii) Petitioner is aged 76 years and their whole family is depending only on the pension and they have to take care of widow daughter. All the family members are only depending on this residential property and they are not having any other source of income of any other property.

xiv) Bank vide Annexure D dated 12.02.2018 in the inventory list has categorically stated that stocks (uncleaned bottles) were worth Rs.100 Lakhs and the ten machinery were worth of Rs.25 lakhs is lying in the factory premises of the bank which were also been hypothecated to the said loan.

xv) The second respondent has filed an appeal before DRT, Coimbatore agains their property as if their property as agricultural property by leaving petitioner's property. The intention behind the appeal filed by the 2nd respondent before DRT is nothing but to bring petitioner's property for sale and thereby save their property and the machinery in the factory. The bank was in glove hands with the 2nd respondent without serving any notice to the petitioner about the sale proceedings and he has been kept in dark and thereby bringing petitioner's property for auction sale is nothing but arbitrary and highly illegal.

xvi) Impugned notice has been issued usurping powers and the same is without jurisdiction or authority and is liable to be set aside.

13. Substantiating the averments, Mr.S.R.Rajagopal, learned counsel appearing for Mr.P.Gurusamy made arguments.

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

15. Though Mr.S.R.Rajagopal, learned counsel, appearing for Mr.P.Gurusamy, counsel on record for the petitioner, made strenuous submissions on the grounds stated supra and prayed to entertain the instant writ petition, this court is not inclined to do so, as the statute provides for an alternative remedy. Further, Courts have consistently held that when there is an effective and alternative remedy, writ is not maintainable. In this regard, we deem it fit to consider few decisions.

(i) In Precision Fastenings v. State Bank of Mysore, reported in 2010(2) LW0 86, Karnataka High 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: —
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> "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.
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> 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, a Hon'ble Division Bench of this 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...."

16. That apart, going through the grounds of challenge, we are also of the view that the same can be adverted to and adjudicated by the Tribunal, which is efficacious and an effective alternative remedy.

17. In the light of the above decisions and discussions, writ petition is dismissed. However, there shall be no order as to cost. Consequently, the connected writ miscellaneous petitions are also dismissed. However, it is open to the petitioner to prefer a SARFAESI application under Section 17(1) if so advised. If any such application is filed, the same be entertained excluding the period of limitation provided therefor under Section 17 (1) of the SARFAESI Act, 2002.

asr

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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and
W.M.P. Nos.17661 and 17662 of 2018

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