

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.1656 of 2018
a n d
W.M.P.No.2064 of 2018

M/s.Cholamandalam Investments and
Finance Company Limited
(formerly known as M/s.Cholamandalam
DBS Finance Limited)
Represented by its Authorised Officer
Mr.B.Muthukumar
'Dare House' at No.2 NSC Bose Road
Chennai 600 001 ... Petitioner

Vs

Mohammed Rafi ... Respondent

Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorarified mandamus calling for the records of the DRT order dated 23/01/2018 passed in S.A. No.104 of 2017 and quash the same and pass such further or other orders.

For petitioner ... Mr.S.Namasivayam

For Respondent ... Mr.S.Patrick
for Mr.K.Rajasekaran

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

Upon Considering the material on record and submissions made, on 25.01.2018, we passed the following orders:

"Contending inter alia that Debts Recovery Tribunal-I, Chennai in S.A.No.104 of 2017 dated 23.01.2018, while setting aside the possession notice

dated 16.12.2016, as not in conformity with the mandatory provisions of the SARFAESI Act, 2002 and the rules made thereunder, has directed M/s.Cholamandalam Investments and Finance Company Limited, Chennai, petitioner herein to restore vacant possession of the secured asset more fully described in the schedule to S.A.No.104 of 2017 on or before 25.01.2018, without fail and being aggrieved by the further direction of the Debts Recovery Tribunal-I, Chennai in S.A.No.104 of 2017 that M/s. Cholamandalam, directing the writ petitioner herein to pay compensation of Rs.1 Lakh to the respondent/applicant in S.A.No.104 of 2017, instant writ petition is filed to quash the order dated 23.01.2018.

2. In normal circumstances, order made by the Debts Recovery Tribunal, is appealable under Section 18 of the SARFAESI Act, 2002. When permission to move writ petition was sought for, submission was made by Mr.S.Namasivayam, learned counsel for the petitioner that though an order dated 23.01.2018 in S.A.No.104 of 2017, has been recorded in the 'A' register, maintained by Debts Recovery Tribunal, full text of the said order, is neither available in the official website of Debts Recovery Tribunal-I, Chennai or the Registry of Debts Recovery Tribunal-I, Chennai has made the copy available. In view of the urgency expressed, we granted permission to move the writ petition.

3. Learned counsel for the petitioner further submitted that without there being any detailed order, furnished to the litigating party viz., M/s.Cholamandalam Investments and Finance Company Limited, the writ petitioner and when the aggrieved party has a right of an appeal under Section 18 of SARFAESI Act, 2002, and the rules framed thereunder, order made in S.A.No.104 of 2017 dated 23.01.2018 has been directed to be given effect within two days i.e. surrender vacant possession on or before 25.01.2018 and that there is also a direction to pay compensation of Rs.1 Lakh.

4. On the merits of the case, submission has also been made that declaration of possession notice dated 16.12.2016 as not in conformity with the provisions of SARFAESI Act 2002 and the rules made thereunder, is an error apparent on the face of record, as the said possession notice, was never the subject matter of challenge in S.A.No.104 of 2017.

5. On the above aspect, attention of this Court was also invited to the prayer sought for in

S.A.No.104 of 2017, dated 11.12.2017 wherein, the applicant/respondent had only sought for directions to the authorised officer to remove the lock and seal and handover the vacant possession on trust to the applicant therein and for a further direction to grant four months time to enable the applicant therein to find out an alternate accommodation.

6. Submission has also been made that neither symbolic possession notice dated 16.12.2016 issued under Section 13(4) of the SARFAESI Act 2002 nor the actual physical possession dated 09.12.2017 were challenged in any proceedings.

7. In the light of the abovesaid contentions, Mr.S.Namasivayam, learned counsel for the petitioner submitted that recourse to an alternate remedy is not mandatory; writ Court in its exercise of discretion, under Article 226 of the Constitution of India, can entertain the instant writ petition and issue suitable orders having regard to the urgency and the error apparent on the face of record.

8. We have heard Mr.S.Namasivayam, learned counsel for the petitioner.

9. We are aware that the Hon'ble Supreme Court in Prestige Lights Ltd., v. State Bank of India reported in 2007 (8) SCC 449 and other decisions of this Court, held that remedy under SARFAESI Act, 2002 and the rules made thereunder is efficacious and that writ petition should not be entertained in a routine manner.

10. In Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others, reported in 1998 (8) SCC 01, the Hon'ble Supreme Court, at paragraphs 14 to 18, held as follows:-

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its

jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

16. Rashid Ahmed v. Municipal Board, Kairana laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another Rashid case, namely, K.S. Rashid & Son v. Income Tax Investigation Commission which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances.

17. A specific and clear rule was laid down in State of U.P. v. Mohd. Nooh as under:

"But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

18. This proposition was considered by a Constitution Bench of this Court in A.V. Venkateswaran, Collector of Customs v. Ramchand Sobhraj Wadhwani and was affirmed and followed in the following words:

"The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner

relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."

11. On the aspect as to whether Debts Recovery Tribunal-I, Chennai has committed an error apparent on the face of record in declaring possession notice dated 16.12.2016, as not in conformity with the provisions of the SARFAESI Act, 2002 and the rules made thereunder, perusal of the prayer made in S.A.No.104 of 2017, shows that as rightly pointed by the learned counsel for the petitioner, there is no challenge to the symbolic possession notice dated 16.12.2016. Relief sought for in S.A.No.104 of 2017 on the file of Debts Recovery Tribunal-I, Chennai, is extracted hereunder,

(i) To direct the Authorised Officer to remove the lock and seal and hand over possession on trust to the petitioner for a period of 4 months and

(2) To grant time of four months to enable the applicant to find out an alternate accommodation.

12. As rightly contended by the learned counsel for the petitioner, actual physical possession taken on 09.12.2017, under the orders of the learned Chief Metropolitan Magistrate, Chennai dated 20.06.2017 in Crl.M.P.No.848 of 2017, is also not under challenge.

13. From the above, it could be deduced that all that respondent/applicant wanted was some time, to move out of the place till an alternate accommodation was found.

14. On the same lines, in S.A.No.104 of 2017, the respondent/applicant seemed to have sought for an interim prayer, which is extracted hereunder,

"Pending final decision on the above SA, the applicant humbly prays that this tribunal may be pleased to direct the Authorised Officer to remove the lock and seal and hand over the vacant possession on trust to the petitioner and to grant time of four months to enable the applicant to find out an alternate accommodation and to surrender

peacefully the premises on completion of 120 days to the respondent. "

15. Material on record discloses that on 14.12.2017 in I.A.No.885 of 2017 Debts Recovery Tribunal-I, Chennai, has passed the following orders.

"Counsel for the petitioner on caveat for Respondent present. Relief sought for in petition is for a direction to the Respondent to remove lock and seal of the apartment described in the schedule of the petition and to hand over the possession back to the petitioner for a period of 4 months and to pass further orders. Counsel for Respondent bank while admitting that the petition Schedule property is under the lock and key of the respondents and states that the Respondent bank has no objection to unlock the premises for the limited purpose of enabling the petitioner to take away his belonging whatever lying therein, within the time frame fixed by the Tribunal and he has objection for handing over the possession back to the petitioner. In view of the submissions while permitting the respondent to file counter in so far as the relief of delivering back the possession of the subject property to the petitioner the following order is passed by the tribunal in the interest of justice. The respondent bank is directed to keep the petitioner schedule premises open between 10.30 and 5.00 p.m. on 16/12/2017 enabling the petitioner to take away / remove the items belonging to the petitioner andr required by him, and thereafter lock the premise and keep the same in the safe custody of the Respondent until further orders of the tribunal. For counter in IA as well as SA, call on 26.12.2017 finally."

16. Mr.S.Namasivayam, learned counsel for the petitioner submitted that the abovesaid interim order has been complied with. Applicant/respondent was permitted to take his belongings lying in the premises and thereafter, physical possession of the premises is with the bank.

17. As per Section 18 of the SARFAESI Act, 2002 a person aggrieved is entitled to file an appeal to the appellate tribunal, within 30 days from the date of receipt of the order of the Debts Recovery Tribunal.

18. Mr.S.Namasivayam, learned counsel for the petitioner submitted that the copy of the order made in S.A.No.104 of 2017 dated 23.01.2018, has not been either uploaded in the website of Debts Recovery Tribunal or furnished to the writ petitioner by the Registry of Debts Recovery Tribunal-I, Chennai.

Prima facie we are of the view that when statute enables an aggrieved person to prefer an appeal within a period provided therefor, execution cannot be done before the said date and if done, it would tantamount to an infringement of right of an aggrieved person to prefer an appeal, within the statutory period of 30 days. Right guaranteed under Section 18 of the SARFAESI Act, 2002, cannot be curtailed.

19. Having regard to the statutory provisions, decisions and the manner in which Debts Recovery Tribunal-I, Chennai, has directed M/s.Cholamandalam Investments and Finance Company Limited, Chennai, writ petitioner herein to hand over possession within two days from the date of pronouncement of the order in S.A.No.104 of 2017 dated 23.01.2018, besides ordering compensation of Rs.1 Lakh and for the reasons stated supra, we are inclined to entertain the instant writ petition and grant an order of interim stay.

20. Accordingly, there shall be an order of interim stay of further proceedings of the order made in S.A.No.104 of 2017 dated 23.01.2018.

21. Notice to the respondent through Court and privately, returnable by 08.02.2018.

22. Post on 08.02.2018.

2. On this day, when the matter came up for hearing, Mr.S.Namasivayam, learned counsel for the petitioner, submitted that the final order made in S.A. No.104/2017 dated 23.01.2018 on the file of the DRT-I, Chennai, was made ready on 31.01.2018, by the Registry of the Tribunal and that the same was taken delivery by the petitioner/financial institution on 01.02.2018. Learned counsel for the petitioner/financial institution further submitted that final order made in S.A. No.104/2017 dated 23.01.2018, is appealable under Section 18 of the SARFAESI Act, 2002, within 30 days from the date of receipt of the order of the Debts Recovery Tribunal, and, the last date for filing the appeal under Section 18 of the SARFAESI Act, 2002, is 03.03.2018.

3. Learned counsel for the petitioner further submitted that the instant writ petition came to be filed due to the directions of the Tribunal, to hand over possession within two days i.e. on or before 25.01.2018, and when the final order was made ready and delivered, otherwise, the petitioner/financial institution would have filed a statutory appeal under Section 18 of the Act, within 30 days from the date of receipt of a copy of the order of the Tribunal. According to the learned counsel, now that the final order made in S.A. No.104/2017 has been received

on 01.02.2018, petitioner/financial institution, be permitted to pursue its right of appeal under Section 18 of the SARFAESI Act, 2002, within the statutory period of 30 days and the time spent in W.P. No.1656/2018, be directed to be excluded and till such time the interim order be continued.

4. Mr.S.Patrick, learned counsel for the respondent/borrower has agreed for a consent order, in the above terms.

5. Heard the learned counsel for the parties and perused the material available on record.

6. By consent, the writ petition is disposed of, permitting M/s.Cholamandalam Investments and Finance Company Limited, Chennai, writ petitioner herein, to challenge the final order made in S.A. No.104/2017 dated 23.01.2018 on the file of DRT-I, Chennai, before the Debts Recovery Appellate Tribunal, within the period of limitation as provided therefor under Section 18 (1) of the SARFAESI Act, 2002. If any appeal is filed, DRAT, Chennai, is directed to exclude the time spent in W.P. No.1656 of 2016. Though in normal circumstances, while disposing of the writ petitions, this court does not extend the interim order granted during the pendency of any proceedings in High Court, till the statutory appeal or revision is filed before the competent Tribunal or court, as the case may be, having regard to the peculiarity of the facts of this case, by which, the Tribunal had directed handing over possession to the borrower, within two days from the date of order i.e. 25.01.2018, disposal of this writ petition, on consensus, granting permission to the bank to approach the Appellate Tribunal, should not entail the bank in any precarious situation, of compliance of the order of the Tribunal, in effect, restoring to the position, as on the date of passing of the order of the Tribunal in S.A. No.104/2017.

7. Therefore, while granting permission to the bank to pursue the statutory appellate remedy, we direct maintenance of status quo as on today, till the appeal is filed. It is open to the petitioner to seek for appropriate interim orders in the appeal, if any filed.

Status quo as on today is directed to be maintained. With the above direction, the writ petition is disposed of. No costs. Consequently, the writ miscellaneous petition, is closed.

Sd/-

Assistant Registrar(CS III)

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Sub Assistant Registrar

asr

To

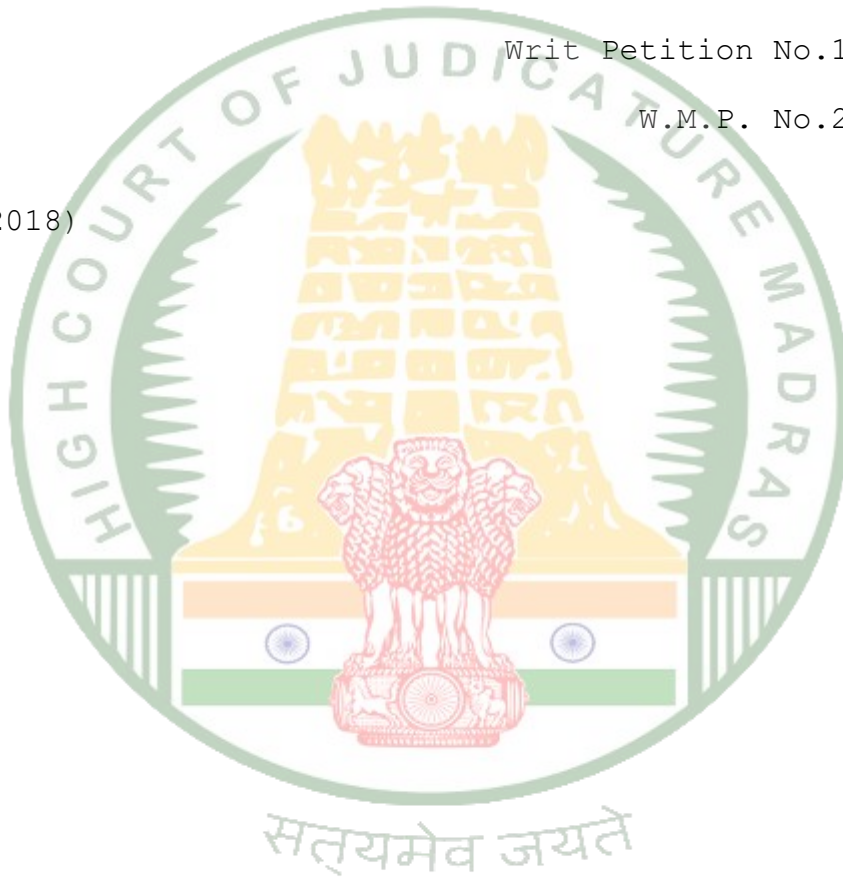
1.The Registrar
Debts Recovery Appellate Tribunal
Chennai

2.The Registrar
Debts Recovery Tribunal - I
Chennai

+1cc to Mr.K.Rajasekaran, Advocate SR.No.10582

Writ Petition No.1656 of 2018
and
W.M.P. No.2064 of 2018

GP(CO)
GN(26/02/2018)



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