

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.07.2018

CORAM:

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

W.P.No.19371 of 2018
and WMP No.22776 of 2018

M/s.YRS Enterprises,
Rep. by its Proprietor,
M.Karthikeyan ... Petitioner

vs.

1. Indian Overseas Bank,
Rep. by its Chief Manager,
Sriram Nagar Branch,
No.135, T.T.K.Road,
Alwarpet, Chennai - 18.

2. Recovery Officer,
Debts Recovery Tribunal-II,
4th Floor, Dewa Tower,
No.770A, Anna Salai,
Chennai - 2

... Respondents

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 pertaining to the records Demand Notice dated 17.05.2018 issued by the 2nd respondent in DRC No.187 of 2018 in O.A.No.664 of 2016 Cum Recovery Certificate for Rs.78,35,358.30p (Rupees Seventy Eight Lakhs Thirty Five Thousand Three Fifty Eight and Thirty Paise only) quash and disposed of on merits in accordance with the Banks & Financial Institution Act, 1993, amended from time to time and quash the same.

For Petitioner : Mr.P.Venkateshan

ORDER

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

Material on record discloses that Indian Overseas Bank, Chennai, 1st respondent has sanctioned (a) Term Loan of Rs.50 Lakhs on 26.08.2013, (b) cash credit loan of Rs.18 Lakhs on 23.01.2015. Petitioner has defaulted. Hence, after declaring the loan account as Non Performing

Account, bank has issued notice under the provisions of the SARFAESI Act, 2002 and filed OA No.664 of 2016 on the file of Debts Recovery Tribunal-II, Chennai for a sum of Rs.69,24,962/- with interest at the rate of 13% per annum with monthly rests from the date of application till date of realisation.

2. After hearing the parties, Debts Recovery Tribunal-II, Chennai vide order in OA No.664 of 2016 dated 28.02.2018, allowed the said application as hereunder.

" 14. In the result, application is allowed as under:-

- a) The applicant bank is entitled to recover a total sum of Rs.69,24,962/- (Rupees Sixty Nine lakhs Twenty Four thousand Nine hundred and Sixty Two only) consisting of (a) Rs.49,11,380/- in respect of Term loan and (b) Rs.20,13,582/- in respect of Cash Credit facility with interest at the rate of 9% (simple) p.a., from the date of Original Application till the date of realization in full with costs from the defendant and in case of default in payment by the defendant, proceed and recover the amount by sale of hypothecated properties described in Schedule to the OA.
- b) The applicant is directed to file costs memo within two weeks of the receipt of this order.
- c) Issue recovery certificate in favour of the applicant bank in terms of this final order.
- d) Communicate a copy of the order to the parties concerned in terms of Rule 16 read with Rule 2 (c) of Debts Recovery Tribunal (Procedure) Rules, 1993."

3. Presiding Officer, Debts Recovery Tribunal-II, Chennai has also issued Debts Recovery Certificate No.187 of 2018, which reads thus.

DEBTS RECOVERY CERTIFICATE FOR Rs.78,35,358.30

In terms of final order dated 28.02.2018 passed by this Tribunal in the above mentioned case under section 19 (1) of Recovery of Debts due to Banks and Financial Institutions Act, 1993, it is ordered that the Applicant/Certificate Holder is entitled to recover a sum of Rs.69,24,962.00 as principal consisting (a) Rs.49,11,380.00 in respect of Term Loan and (b) Rs.20,13,582.00 in respect of Cash Credit facility, Rs.8,38,391.30 as future interest @ 9% p.a (simple) from date of institution of OA i.e. 26.10.2016 till the date

of final order and Rs.72.005.00 as cost and expenses of Original Application in all totaling to Rs.78,35,358.30 as per the Schedule of Costs annexed hereunder (Annexure-I) and further interest until realization in full from the Defendant hereinafter referred to as:

Certificate Debtor	M/s.YRS Enterprises, Rep. by its Proprietor Mr.M.Karthikeyan
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The Recovery Officer shall realize the amount as per this Certificate in the manner and more prescribed under Section 25 and 28 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (as amended from time to time) from the above named Certificate Debtor. "

4. Annexures-I& II to the Debts Recovery Certificate No.187 of 2018, in OA No.664 of 2018, issued by the Presiding Officer, Debts Recovery Tribunal-II, Chennai are reproduced.

Annexure-I

SCHEDULE OF COST

S.No.	Item of Costs	Amount (in Rs.)
1	Amount determined against the defendant (Rs.49,11,380.00 + Rs.20,13,582.00)	69,24,962.00
2	Interest @ 12% pa. (simple) on Rs.17,98,033.00 from 26.10.2016 till the date of final order i.e. 28.02.2018	8,38,391.30
3	Application / Court Fees	72,005.00
4	Advocate Fees (Cost Memo not filed)	Nil
5	Others (Cost Memo not filed)	Nil
	TOTAL	78,35,358.30

(Rupees Seventy Eight Lakh Thirty Five Thousand Three Hundred Fifty Eight and Paise Thirty Only)

Annexure-II

SCHEDULE

PROPERTIES HYPOTHECATED

"HYPOTHECATION OF HITECH NW A-700 FULLY AUTO NON WOVEN BAG MAKING MACHINE, FLEXO FOUR COLOUR ROLL TO ROLL PRINTING MACHINE AND OTHER ACCESSORIES PURCHASED OUT OF THE LOANS AVAILED BY THE DEFENDANT HEREIN AND STORED / KEPT OR TO BE STORED / KEPT AT NEW NO.60, SALAVAYALAR

COLONY, 2ND STREET, SAIDAPET, CHENNAI - 600 015
AND / OR IN ANY OTHER PREMISES WHERESOEVER,
WHETHER IN TRANSIT OR IN THE POSSESSION OR
CONTROL OR POWER OF THE DEFENDANT AND ALL OTHER
ASSETS AS MAY COME INTO EXISTENCE IN NATURE."

5. Consequent to the final order, recovery certificate has been issued, in terms of Rule 2 of Second Schedule of Income-Tax Act, 1961 and Section 29 of the Recovery of Debts Due to Banks & Financial Institutions Act, 1993 Act, Recovery Officer, has issued a demand notice dated 17.05.2018 for a sum of Rs.78,35,358.30p, which reads as follows:

"In view of the Recovery Certificate issued in Original Application No.664 of 2016 by the Hon'ble Presiding officer, Debts Recovery Tribunal-2, Chennai an amount of Rs.78,35,358.30p (Rupees Seventy Eight Lakh Thirty Five Thousand Three Hundred and Fifty Eight and Paise Thirty Only) is due against you.

2. You are hereby called upon to deposit the above sum within 15 days of the receipt of the notice, failing which the recovery shall be made as per rules.

3. In addition to the sum aforesaid, you will be liable to pay;

(a) such interests as is payable for the period commencing immediately after this notice of the execution proceedings.

(b) all costs, charges and expenses incurred in respect of the service of this notice and other process that may be taken for recovering the amount due.

4. You are further put on notice that in terms of Rule 16 of the Second Schedule to the Income Tax Act, 1961 read with Section 29 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, you / your representatives in interest shall not be competent to mortgage, charge, lease or otherwise deal with any property belonging to you, except with the permission of the Recovery Officer.

5. You are also directed to appear before this Forum on 08.06.2018 (Friday) at 11.30 am. and report compliance of payment."

6. Demand notice dated 17.05.2018 issued under the abovesaid statutory provision is further reminded with another notice dated 08.06.2018, which reads as follows:

"A copy of Demand Notice dated 17.05.2018 issued in the matter referred above is sent herewith. You are directed to settle the dues mentioned within 15 days of receipt of the notice. You are also directed to appear before this forum on 29.06.2018 at 11.30 am to report compliance on the settlement of the dues."

7. Challenging the demand notice dated 17.05.2018, instant writ petition is filed for a certiorarified Mandamus, to quash the Demand Notice dated 17.05.2018 issued by the Recovery Officer, Debts Recovery Tribunal-II, Chennai, the 2nd respondent herein, in DRC No.187 of 2018 in O.A.No.664 of 2016 and the Recovery Certificate for Rs.78,35,358.30p.

8. Though Mr.P.Venkateshan, learned counsel for the petitioner assailed the correctness of the abovesaid demand notices on the grounds raised, in the supporting affidavit to the writ petition, we are not inclined to entertain the writ petition for the simple reason that the Debts Recovery Tribunal-II, Chennai, vide order made in OA No.664 of 2016 dated 28.02.2018, has passed an award against defendant therein / writ petitioner, that the bank / applicant is entitled to recover a total sum of Rs.69,24,962/- (Rupees Sixty Nine lakhs Twenty Four thousand Nine hundred and Sixty Two only) consisting of (a) Rs.49,11,380/- in respect of Term loan and (b) Rs.20,13,582/- in respect of Cash Credit facility with interest at the rate of 9% (simple) p.a., from the date of Original Application, till the date of realization in full with costs, from the defendant/writ petitioner and in case of default in payment by the defendant/writ petitioner, proceed and recover the amount by sale of hypothecated properties described in Schedule to the OA. In terms of the statutory provisions stated supra, Recovery Certificate has been issued.

9. Final order made in OA No.664 of 2016 dated 28.02.2018, ought to have been challenged before the appellate forum. Issuance of Recovery Certificate is statutory, under sub Section 7 and 22 of Section 19 of the Recovery of Debts Due to Banks & Financial Institutions Act, 1993 and that no manifest error can be attributed to the demand notice dated 17.05.2018 and the Debts Recovery Certificate issued in terms of Rule 2 of Second Schedule to the Income Tax Act, 1961 and Section 29 of the Recovery of Debts Due to Banks & Financial Institutions Act, 1993.

10. For brevity, Rule 2 of Second Schedule to the Income Tax Act, 1961 and Section 29 of Recovery of Debts Due to Banks & Financial Institutions Act, 1993, are reproduced.

Rule 2 of Second Schedule to the Income Tax Act, 1961
"Issue of Notice: When a certificate has been drawn up by the Tax Recovery Officer for the recovery of arrears under this Schedule, the Tax Recovery Officer shall cause to be served upon the defaulter a notice requiring the defaulter to pay the amount specified in the certificate within fifteen days from the date of service of the notice and intimating that in default steps would be taken to realise the amount under this Schedule."

Section 29 of Recovery of Debts Due to Banks & Financial Institutions Act, 1993:

"Application of certain provisions of Income-tax Act.—The provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income-tax:

Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act."

11. Statute provides for an effective and alternative remedy. Time and again, Hon'ble Supreme Court, as well as this Court, have held that when there is an effective and alternative remedy provided under the statute, writ petition should not ordinarily be entertained, reference can be made to few decisions.

(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
<https://hcservices.ecourts.gov.in/hcservices/>

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 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.

....."

12. In the light of the above discussion and decisions stated supra, instant writ petition is not maintainable. Hence, it is dismissed. No costs. Consequently, the connected Writ Miscellaneous petition is closed.

Sd/-
Deputy Registrar(CS)

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Sub Assistant Registrar

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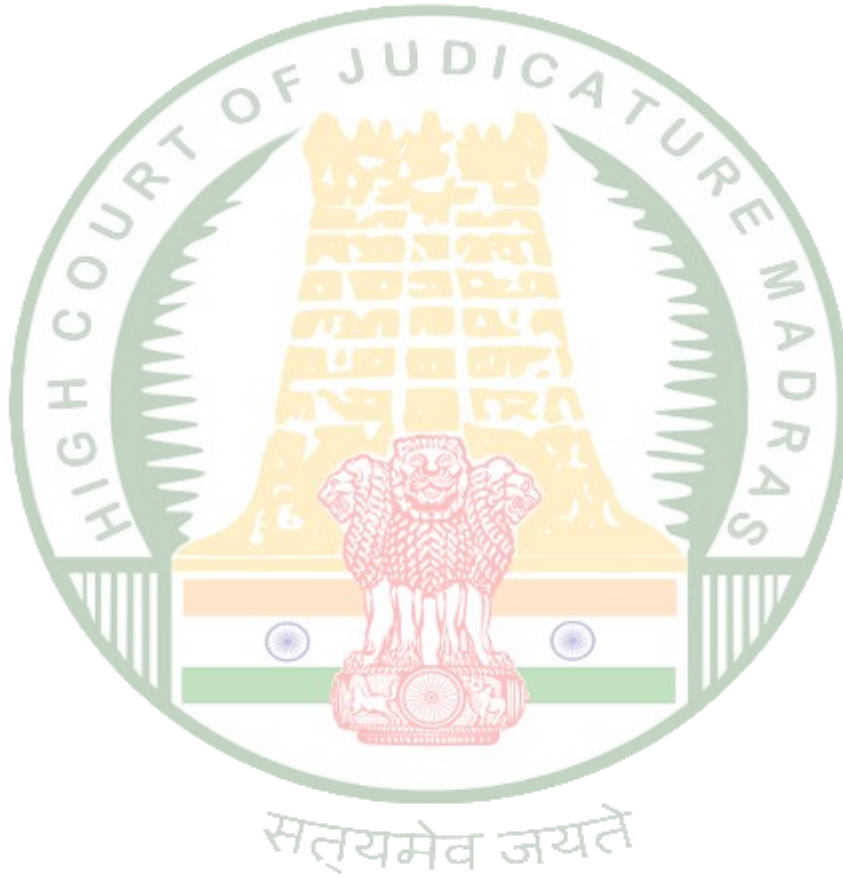
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+1 cc to mr.P.VENKATESAN Advocate SR.NO.51155

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ASK(09/08/2018)



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