

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31/1/2018

C O R A M

The Honourable Mr.Justice S.Manikumar
a n d
The Honourable Mrs.Justice V.Bhavani Subbaroyan

Writ Petition Nos.1946 to 1948 of 2018

M/s. D.M.Modern Rice Mill

rep. By its Partner

Mr.D.Sampath

59, Karukinil Amarthaval Koil Street

Kancheepuram 631 501.

Petitioner in W.P.No.
1946 of 2018

D.Sampath

....

Petitioner in W.P.No.
1947 of 2018

Mrs.S.Geetha

....

Petitioner in W.P.No.
1948 of 2018

Vs

1. The Authorised Officer
Tamilnad Mercantile Bank Ltd
Chennai Region
No.45 Pulla Avenue
Shenoy Nagar
Chennai 600 030.

2. The Presiding Officer
The Debts Recovery Tribunal - III
Anna Salai
Chennai 600 002.

Respondents in all the
writ petitions

Petitions filed under Article 226 of the Constitution of India praying for the issuance of writs of certiorari to call for the records, on the file of the second respondent, in S.A.No.236 of 2014, dated 1/1/2018 and quash the same as being without jurisdiction, authority of law and contrary to the principles of natural justice.

For petitioners

... Mr.R.Senniappan

- - - - -

C O M M O N O R D E R

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

Writ Petitions have been filed to quash the order passed by the Debts Recovery Tribunal, second respondent, in S.A.No.236 of 2014, dated 1/1/2018. Tribunal, which passed the order, need not be impleaded as a party to the proceedings. But the Tribunal has been arrayed as a respondent. Lis is not between the petitioner and the Tribunal. Registry is directed to delete the second respondent in the cause title.

2. As all the writ petitions arise out of same set of facts and submissions being common, they are taken up together and disposed of by a common order.

3. On the basis of the averments made in the supporting affidavits, Mr.R.Senniappan, learned counsel for the petitioners submitted that the Authorised Officer, Tamil Nadu Mercantile Bank, Chennai, the first respondent has failed to communicate the date of NPA to the petitioners, required to be done, as per paragraph 4.2.4, under the heading, "upgradation of loan accounts", classified as NPA's of the RBI's NPA guidelines for commercial Banks, and this act of the first respondent, has prevented the petitioner from making their accounts, as standard accounts, by way of payment of interest, due to bank.

4. He further submitted that failure of the first respondent Bank, to intimate the date of declaration of NPA, i.e., 30/6/2013, to the petitioner, is against the decision of Signal Apparels Pvt Ltd., Vs. Canara Bank and Another {2010 (5) CTC 337}.

5. Learned counsel for the petitioner further submitted that the first respondent has collected interest, at an enhanced rate at 18%, as against the contractual rate of 11.50%, without the authority of law, and it is against the decision of Hon'ble Supreme Court of India, reported in 2002 (1) SCC 367, in the case of Central Bank of India Vs. Ravindra and Others.

6. Contending that the Debts Recovery Tribunal - III, Chennai, has not answered the above grounds raised in S.A.No.236 of 2014, learned counsel for the petitioner submitted that order impugned has been passed, without jurisdiction, authority of law, contrary to the principles of natural justice, and that for the reasons stated supra, prayed to entertain the writ petitions.

7. Heard the learned counsel for the petitioners and perused the material available on record.

8. Petitioner has approached the Tribunal, to adjudicate the issues raised. At that point of time, there was no doubt in the mind of the petitioner that the Tribunal, has jurisdiction to delve and adjudicate the issues raised. May be the tribunal has not adjudicated the issues, in the manner, as expected by the petitioner, but certainly, it is not open

to contend that the Tribunal lacks jurisdiction. Having approached the Tribunal, petitioner cannot approbate and reprobate on jurisdiction.

9. On the issue of approbate and reprobate", let us consider few decisions.

(i). In New Bihar Biri Leaves Co. Vs. State of Bihar, reported in 1981 (1) SCC 537, at paragraphs 48 and 49, the Hon'ble Supreme Court held as follows:-

"48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbat non reprobatur (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (Per Scrutton, L.J., Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co., reported in 1921 2 KB 608 Douglas Menzies v. Umphelby, reported in 1908 AC 224, 232 see also Stroud's judicial dictionary, Vol. I, p. 169, 3rd Edn.).

49. The aforesaid inhibitory principle squarely applies to the cases of those petitioners who had by offering highest bids at public auctions or by tenders, accepted and worked out the contracts in the past but are now resisting the demands or other action, arising out of the impugned Condition (13) on the ground that this condition is violative of Articles 19(1)(g) and 14 of the Constitution. In this connection, it will bear repetition, here, that the impugned conditions though bear a statutory complexion, retain their basic contractual character

also. It is true that a person cannot be debarred from enforcing his fundamental rights on the ground of estoppel or waiver. But the aforesaid principle which prohibits a party to a transaction from approbating a part of its conditions and reprobating the rest, is different from the doctrine of estoppel or waiver.

(ii). In R.N.Gosain Vs. Yashpal Dhir, reported in 1992 (4) SCC 683, at paragraph 10, the Hon'ble Supreme Court held as follows:-

10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage". [See: Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd, reported in 1921 (2) KB 608, 612 (CA) Scrutton, L.J.] According to Halsbury's Laws of England, 4th Edn., Vol. 16, "after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside". (para 1508)

(iii). In I.T. Commissioner Vs. Firm Muar, reported in AIR 1965 SC 1216, at paragraph 13, the Hon'ble Supreme Court held as follows:-

".....The doctrine of "approbate and reprobate" is only a species of estoppel; it applies only to the conduct of parties. As in the case of estoppel, it cannot operate against the provisions of a statute."

(iv). In Prashant Ramachandra Deshpande Vs. Maruti Balaram Haibatti, reported in 1995 Supp (2) 539, the principle of "approbate and reprobate" has been explained. At Paragraph 2, the Hon'ble Supreme Court, held thus:-

"2.Similarly, on the principle that a person may not approbate and reprobate, "a species of estoppel has arisen which seems to be intermediate

between estoppel by record and estoppel in pais. The principle that a person may not approbate and reprobate expresses two propositions: (1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent". Vide Halsbury's Laws of England, 4th Edn., Vol. 16, para 1507."

(v). In Cauvery Coffee Traders, Mangalore, Vs. Hornor Resources (International) Company Limited., reported in 2011 (10) SCC 420, the Hon'ble Supreme Court, at paragraphs 33 to 35, held as follows:-

33. In R.N. Gosain v. Yashpal Dhir, reported in 1992 (4) SCC 683 = 2011 (1) SCC (Civ) 451, this Court has observed as under: (SCC pp.687-88, para 10)

"10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage'."

34. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide Nagubai Ammal v. B. Shama Rao, reported in AIR 1956 SC 593, CIT v. V.MR.P. Firm Muar, reported in AIR 1965 SC 1216, Maharashtra SRTC v. Balwant Regular Motor Service, reported in AIR 1969 SC 329, .R. Deshpande v. Maruti Balaram Haibatti, reported in 1998 (6) SCC 507 = AIR 1998 SC 2979, Babu Ram v. Indra Pal Singh, reported in 1998 (6) SCC 358 = AIR 1998 SC 3021, NTPC Ltd. v. Reshmi Constructions,

Builders & Contractors, reported in 2004 (2) SCC 663 = AIR 2004 SC 1330, Ramesh Chandra Sankla v. Vikram Cement and Pradeep Oil Corpn. v. MCD. reported in 2008 (14) SCC 58 = 2009 (1) SCC (L&S) 706 = AIR 2009 SC 713.

35. Thus, it is evident that the doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

(vi). In Joint Action Committee of Air Line Pilots' Association of India (ALPAI) Vs. Director General of Civil Aviation, reported in 2011 (5) SCC 435, the Hon'ble Supreme Court, at paragraph 12, held as follows:-

"12. The doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily. [Vide Babu Ram v. Indra Pal Singh, reported in 1998 (6) SCC 358, P.R. Deshpande v. Maruti Balaram Haibatti, reported in 1998 (6) SCC 507, and Mumbai International Airport (P) Ltd. v. Golden Chariot Airport [2010 (10) SCC 422 = 2010 (4) SCC (Civ) 195]."

10. On the facts and circumstances of the case, we hold that the Debts Recovery Tribunal has jurisdiction to adjudicate the issues raised. Decision of the Tribunal can be challenged, as provided for, in the statute. Repeatedly, the Hon'ble Supreme Court, as well as this Court, have held that when there is an effective and alternative remedy, writ is not maintainable. We deem it fit to consider the following 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 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...."

11. Contention of the learned counsel for the petitioners that the Tribunal has failed to consider the decision in *Signal Apparels Pvt Ltd., Vs. Canara Bank & Another* {2010 (5) CTC - 337}, and that rate of interest 18% collected was higher, can always be urged before the appellate forum.

12. In the light of the above discussion and decisions, writ petitions are dismissed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

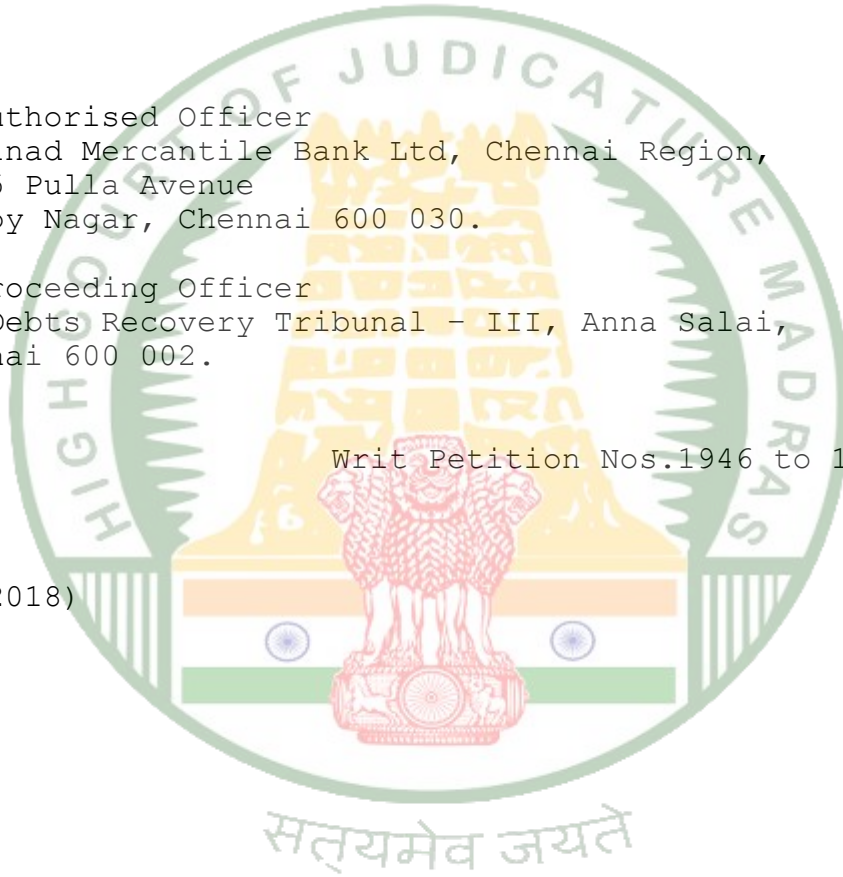
mvs.

To

1. The Authorised Officer
Tamilnad Mercantile Bank Ltd, Chennai Region,
No.45 Pulla Avenue
Shenoy Nagar, Chennai 600 030.
2. The Proceeding Officer
The Debts Recovery Tribunal - III, Anna Salai,
Chennai 600 002.

Writ Petition Nos.1946 to 1948 of 2018

CNR (CO)
TR(21/02/2018)



WEB COPY