

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 01.08.2018
CORAM:

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

W.P.No.19634 of 2018
and W.M.P.No.23074 of 2018

M/s.Baapaa Engineers,

Partnership Firm,

46/43-B, SIDCO, Ambattur,
Chennai - 600 098.

By its Partner Mr.A.Pathmanaban

... Petitioner

Vs.

1.M/s.Electronics Finance Limited,
Kailashchandra, 128/1-A, Paul Road,
Kothrud, Pune - 411 038.

Branch Address at:

M/s.Electronics Finance Limited,
1167, TVS Colony,
Anna Nagar West Extension,
Chennai - 600 101.

By its Authorized Officer.

2. The Commissioner of Customs,
Chennai III Commissionerate
No.60, Rajaji Salai, Customs House,
Chennai - 600 001.

3. M/s.Petmoulds (P) Ltd.,
SP 150, Sector I, 4th Lane,
First Main Road, Ambattur,
Chennai - 600 058.

... Respondents

PRAYER: Writ Petition has been filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorari, to call for the records pertaining to the impugned notice dated 23.07.2018 issued by the 1st respondent herein under Section 13 (4) (a) of SARFAESI Act, 2002, demanding possession of the secured assets from the borrower/petitioner herein and to quash the same, in so far as, the said impugned notice has been issued without jurisdiction and authority of law contrary to the provisions of the SARFAESI Act and in total violation of the

principles of natural justice.

For Petitioner : Mr.N.Viswanathan

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J U D G M E N T

(Order of the Court was made by SUBRAMONIUM PRASAD, J.)

The instant Writ Petition is for an appropriate Writ, to call for the records pertaining to the impugned notice dated 23.07.2018 issued by the 1st respondent herein under Section 13 (4)(a) of SARFAESI Act, 2002, demanding possession of the secured assets from the borrower/petitioner herein and to quash the same, in so far as, the said impugned notice has been issued without jurisdiction and authority of law contrary to the provisions of the SARFAESI Act and in total violation of the principles of natural justice.

2. The petitioner is a partnership firm constituted in the year 2000 and engaged in the business of manufacture of Jigs, Fixtures, Spm and High Precision machining components and also involved in the trading of such raw materials which is used in the manufacture of the above products.

3. It is stated that the petitioner, during the course of their business, came in contact with the officers working with the 1st respondent, M/s.Electronics Finance Limited, who offered to sell them an imported machinery viz. "DMG Mori HSC-55 Linear"-made in Germany. The petitioner states that this machinery was originally imported by one M/s.Petmoulds (P) Ltd., SP 150, Sector I, 4th Lane, First Main Road, Ambattur, Chennai, 3rd respondent herein through the seaport of Customs, Chennai, by availing customs duty exemption against Export Promotion Capital Goods (EPCG) License issued by the DGFT authorities by executing a bond or undertaking for the grant of EPCG license within a specified period as per the conditions of the said license.

4. The petitioner states that the above import was financed by respondent No.1. The 3rd respondent had not executed any export under the license granted to them and also committed default in the repayment of the loan obtained by them from the 1st respondent. The petitioner states that the 1st respondent took possession of the machineries.

5. The petitioner states that since they are manufacturers and they were in need of such machine, they entered into negotiation for the purchase of the machine in a sum of Rs.1.20 Crores. The 1st respondent issued a letter

No.3344-2206-2016-57261-7 and agreement No.105-3343-2016-2-4 dated 16.06.2016 in which the details regarding acceptance of the customs duty liability was not mentioned. It is pertinent to state that in point No.2, it was not mentioned and recorded that the "Borrower undertakes to bear the tax liability e.g. sales tax, service tax, etc. that may arise out of the transaction. The sanction letter was modified and it was understood that in case the machine is taken over by Customs for any EPCG violations, the security deposit amount of Rs.13,75,000/- made by the petitioner will be refunded and the additional payment of Rs.10,00,000/- towards customs duty liability agreed to be paid by the petitioner in addition to the price for the goods, can be paid by the petitioner at the time when the 1st respondent paying the customs duty liabilities on the subject imported goods.

6. The petitioner submits that they were asked to execute a term loan agreement without the 1st respondent providing any loan to them, except for sale of the machine and also further obtained a hypothecation agreement of the machines owned by the petitioner in addition to the earlier hypothecation agreement dated 16.06.2016. A sale invoice was issued by the 1st respondent.

7. The petitioner stated that the 1st respondent unequivocally agreed to remit the entire customs duty along with interest incurred on the imported machine within a maximum period of three months. The petitioner were prompt in payment of EMI of Rs.1,60,000/-.

8. The petitioner wrote a letter to the 1st respondent for the payment of customs duty otherwise the liability to pay customs duty would be fastened on them. However, the petitioner contended that the respondent initiated proceedings under SARFAESI Act by declaring the account of the petitioner as NPA. Notice under Section 13(2) of the Act, calling upon the petitioner to discharge the total liabilities to a sum of Rs.1,38,69,436.67 is issued and since the amount was not paid, the impugned notice dated 23.07.2018 under Section 13(4) of the Act was issued, which is under challenge.

9. According to the petitioner, they are debtors. They purchased the machines on installment basis and there was no loan agreement for purchase of these machines. The petitioner would therefore contend that in the absence of any debt proceedings under SARFAESI Act, the action of the 1st respondent would be squarely without jurisdiction.

10. It is the contention of the petitioner that the 1st respondent does not come with the secured creditors under Section 2(zd), there is no security agreement under Section 2

(zb), there is no secured debt under Section 2(ze) and there is no security interest under Section 2(zf) and therefore, the proceedings under SARFAESI Act could not be initiated at all and hence, the petitioner filed the instant Writ Petition.

11. The typed set of papers shows that the term loan-cum-hypothecation agreement had been entered into between the petitioner and the 1st respondent on 16.06.2016, wherein, the petitioner has been described as borrower. The recital clearly states that the borrower had requested the 1st respondent for sanction of term loan for the purpose of purchasing the said asset and for the purpose of discharging payment of liabilities towards their asset.

12. A look at the agreement would show that the loan agreement had been entered into between the parties and that is so, all other things fall in place.

13. In any event, all these contentions can be taken when an application under Section 17 of the SARFAESI Act before the Debts Recovery Tribunal. 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 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.

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14. 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.

15. In view of the above, the Writ Petition stands dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

To

1. The Commissioner of Customs,
Chennai III Commissionerate
No.60, Rajaji Salai, Customs House,
Chennai - 600 001.

+1cc to Mr.N.Viswanathan, Advocate, S.R.No. 52360

W.P.No.19634 of 2018
and W.M.P.No.23074 of 2018

BR (CO)
GN (23/10/2018)