

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.02.2018

CORAM

THE HONOURABLE MR. JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.P.NOS.43037 AND 43183 OF 2016
AND CONNECTED MISCELLANEOUS PETITIONS

W.P.NO.43037 OF 2016

M/s.Hotel Milestonnez India Private Ltd.,
Rep. by its Managing Director M.Rajamanickam
No.34, Santhavelur, Sunguvarchatram Post,
Sriperumbudhur,
Kancheepuram District - 602 106.

.. Petitioner

VS.

1.Reserve Bank of India
Fort St. George,
Chennai - 600 009.

2.State Bank of India
by its Authorised Officer
Stressed Assets Management Branch
Office at "Red Cross Buildings"
No.32, Montieth Road, Egmore,
Chennai - 600 008.

.. Respondents

PRAYER:

Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Declaration declaring that classifying the petitioner's loan account as Non Performing Asset by the 2nd respondent Bank in violation of the principles and guidelines prescribed by the 1st respondent / Reserve Bank of India is invalid, void ab initio and nullity in law.

W.P.NO.43183 OF 2016

M/s.Hotel Milestonnez India Private Ltd.,
Rep. by its Managing Director M.Rajamanickam
No.34, Santhavelur, Sunguvarchatram Post,
Sriperumbudhur,
Kancheepuram District - 602 106.

.. Petitioner

VS.

1.Union of India

Rep. by its Secretary to Government
Ministry of Law Justice and Company Affairs
New Delhi.

2.Union of India

Rep. by its Secretary to Government
Ministry of Finance
Banking Division,
New Delhi.

3.Reserve Bank of India

Fort St. George,
Chennai - 600 009.

4.State Bank of India

by its Authorised Officer
Stressed Assets Management Branch
Office at "Red Cross Buildings"
No.32, Montieth Road, Egmore,
Chennai - 600 008.

.. Respondents

PRAYER:

Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Declaration, declaring that the amended Rules 3, 3(c) and amended Rule 8(5) of the Security Interest Enforcement Rules 2002 is illegal, violative of Article 300-A of the Constitution of India and a draconian one.

For Petitioner
(in both WPs')

: Mr.S.Jayakumar

COMMON ORDER

(ORDER OF THE COURT WAS MADE BY M.GOVINDARAJ, J.)

Challenging the action of State Bank of India, Stressed Assets Management Branch, Egmore, Chennai, the second respondent in classifying the petitioner's loan account as Non Performing Asset, M/s.Hotel Milestonnez India Private Ltd., Kancheepuram District, the writ petitioner has preferred the present writ petition viz., W.P.No.43037 of 2016, for declaring the same as invalid, void ab initio and nullity in law.

2. Case of the writ petitioner is that they are running Restaurants and Canteens, in private Hospitals in the peripheral area of Chennai City and catering to the needs of poor and downtrodden. Managing Director, has purchased land at Santhavelur Village, Near Sunguvarchatram, for the purpose of putting up Hotel industry. Initially, Tamil Nadu Mercantile Bank Limited sanctioned a sum of Rs.6 Crores as Term Loan for the Hotel business. But the officials of the second respondent Bank has made promises and allured the Managing Director with an increase in term loan of Rs.10 Crores and Rs.1 Crore, as cash credit facility. Managing Director, Rajamanickam, has mortgaged the immovable properties owned by him and his son on 27.01.2011 and the second respondent also secured the property documents of the Managing Director and his family members towards collateral security. The value of the immovable property situated within the City jurisdiction is about Rs.50 Crores. The family members of the Managing Director have joined as Directors in the hotel industry.

3. Writ petitioner was paying equated monthly instalments promptly and in the process, State Bank of India, Stressed Assets Management Branch, Egmore, Chennai, second respondent, has paid money, on behalf of the Managing Director, to the Tamil Nadu Mercantile Bank Limited, without his knowledge. On 15.05.2012, credit facilities were renewed by the second respondent, under information to the petitioner. From 01.04.2011 to 31.03.2012, the writ petitioner has repaid a sum of Rs.1,17,00,000/-. The said payment was in excess of the dues. Thereafter, on 17.06.2013, the second respondent has sanctioned a sum of Rs.5,25,00,000/- as corporate loan. Thereafter, the writ petitioner has also paid a sum of Rs.1,32,00,000/- between 15.05.2012 and 17.06.2013. Thus, the petitioner has repaid in excess of Rs.2,75,00,000/-. But to the shock and surprise of the petitioner, on 29.06.2013, the second respondent Bank has classified the account of the petitioner as "Non Performing Asset". Such classification is not in accordance with the Reserve Bank of India guidelines, namely the Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003.

4. According to the writ petitioner, as per Section 3(vi) of the said guidelines, "Non Performing Asset" (NPA) means an asset in respect of which (a) interest and principal (or) instalments thereof) is overdue for a period of 180 days or more from the date of acquisition or the due date as per the contract between the borrower and originator and so on. Later, the Reserve Bank of India has reduced the period from 180 days to 90 days. The petitioner has paid the instalments in time. But, at the behest of competitors in the business, the second respondent has purposely declared the petitioner's account as "Non Performing Asset". The second respondent Bank is not entitled to declare the account as "Non Performing Asset", as it was done within a period of 12 days from the date of sanctioning of corporate loan. The second respondent Bank, without following the Reserve Bank of India guidelines, has issued notice under Section 13(2) of the SARFAESI Act, followed by Section 13(4) as well as Rule 8 (6) of the Security Interest (Enforcement) Rules, 2002.

5. Earlier, the writ petitioner has challenged the action of the second respondent by filing a writ petition in W.P.No.30573 of 2016 for a declaration declaring Rule 8(5) and Rule 3 of Security Interest (Enforcement) Rules as unconstitutional. In spite of this Court granting interim relief on condition, the writ petitioner was unable to comply with the same. But a challenge is made that any action taken pursuant to Section 13 (4) of the SARFAESI Act is illegal in view of non adherence of the Reserve Bank of India guidelines in declaring the account as "Non Performing Asset".

W.P.NO.43183 OF 2016

6. The writ petitioner has preferred the above writ petition seeking to declare that the amended Rules 3, 3(c) and amended Rule 8(5) of the Security Interest (Enforcement) Rules 2002 is illegal, violative of Article 300-A of the Constitution of India and a draconian one.

7. According to the writ petitioner, immovable properties were brought to sale by e-auction on 07.09.2016. In the e-auction, second respondent has unilaterally reduced the reserve price from Rs.35,53,00,000/- on 16.02.2016 and further reduced it to Rs.25,41,00,000/- on 25.07.2016 and thereafter also reduced the same. The same was challenged by way of filing writ petition in W.P.No.30573 of 2016. The writ petitioner is aware that any person aggrieved by any measures initiated by the secured creditor is entitled to challenge the same before the Debts Recovery Tribunal under Section 17 (1) of the SARFAESI Act. However, the Reserve Bank of India guidelines were not followed in declaring the account of the writ petitioner as "Non

Performing Asset".

8. Hence, the writ petitioner has approached this Court for a declaration, declaring Rule 3, 3(c) and amended rule 8(5) of the Security Interest (Enforcement) Rules 2002, as null and void. Consequently, the writ petitioner has challenged the auction sale notice dated 02.11.2016 and the auction was scheduled on 09.12.2016, and sought for a stay of all further proceedings pursuant to the auction notice dated 02.11.2016.

9. We have gone through the elaborate pleadings made by the writ petitioner.

10. It is an admitted case that the writ petitioner has secured loan in various forms from the second respondent and executed documents by mortgaging the properties towards security of the loan advanced by the second respondent. The factum of declaring the writ petitioner's account as Non Performing Asset is also not disputed. But the allegation is that declaration of the account as "Non Performing Asset" is not in accordance with the Reserve Bank of India guidelines. Furthermore, the writ petitioner has questioned the vires of Security Interest (Enforcement) Rules, as it confers unfettered powers in fixing the upset price, without any guidelines. Contention has been made that it curtails the redemption of the mortgaged property and abuse of power by the secured creditor.

11. In sum and substance, all these questions revolve around the factual aspects of the individual accounts and transactions. The writ petitioner has also admitted there is a remedy available under Section 17(1) of the SARFAESI Act to approach the Debts Recovery Tribunal for redressal of grievances against the measures taken by the secured creditor. The writ petitioner, at the earlier instance, has approached this Court on the same set of facts, legal issues and prayed for similar relief. The only difference is that the date of auction varied. Otherwise, the parties to the dispute as well as the subject matter are one and the same. Approach of the writ petitioner by filing writ petitions before this Court challenging every auction notice, clearly reveals the dilatory tactics adopted by the petitioner.

12. Rule (3), Rule 3(c) and 8(5) of the Security Interest (Enforcement) Rules 2002, has been upheld by the Supreme Court and the writ petitioner has not made out any case for declaring them as illegal. As the ulterior motive of the writ petitioner is only to challenge the auction and not the vires of the Act as disclosed, writ petition is smacked with malafides and this Court considers the attempt of the petitioner as abuse of Article 226 of the Constitution of India.

13. Hon'ble First Bench of this Court in DIGIVISION ELECTRONICS LTD., VS. INDIAN BANK AND ANOTHER [2005 (3) L.W. 269] has held that when an alternative remedy is available, the writ petition is premature. The petitioner has to exhaust the alternative remedy, by raising all the points in reply to the notice under Section 13(2) of the SARFAESI Act and challenge the auction under Section 13(4) before the appropriate forum. In the absence of any violation of law or error of law apparent on the face of record, the writ petitioner cannot approach the High Court under Article 226 of the Constitution of India for redressal of their grievances.

14. The Hon'ble Supreme Court in UNITED BANK OF INDIA VS. SATYAWATI TANDON AND OTHERS [Civil Appeal No. Nil of 2010 SLP (C) No.10145 of 2010 - decided on 26.07.2010] categorically held that exercise of power under Article 226 of the Constitution of India is not available without exhausting the remedy provided under the SARFAESI Act. Further, it is clearly held that the secured creditor has right to proceed under Section 13(4) of the SARFAESI Act and any interference by High Courts will have the effect of defeating the very object of the Act. Hon'ble Supreme Court further held that the remedy available under Sections 17 and 18 of SARFAESI Act, 2002, has to be exercised and High Courts should not deviate from the rule, and to ensure that the statutory schemes are not defeated by exercise of writ jurisdiction.

15. The Hon'ble Supreme Court in KESHAVLAL KHEMCHAND AND SONS PRIVATE LIMITED AND OTHERS VS. UNION OF INDIA AND OTHERS [2015 (4) SCC 770] held that the Non Performing Asset is classified as (i) substandard (ii) doubtful or (iii) loss, depending on the length of time for which money is overdue. As the length of period of overdue increases, account of borrower is progressively classified from "substandard" to "loss".

16. In the instant case, loan account of the writ petitioner has been declared as "Non Performing Asset". But the factual circumstances, as to which category it belongs, has necessarily to be dealt with, by the Tribunal. High Court under Article 226 of the Constitution of India cannot conduct a roving enquiry on facts. Therefore, declaration of the account as "Non Performing Asset" is a matter to be dealt with by the Debts Recovery Tribunal and without any decision on that point, it is not possible to declare that the action of the second respondent is illegal. Furthermore, the writ petitioner has to canvas as to how the loan account was declared as a "Non Performing Asset" only before the Debts Recovery Tribunal. The past and present conduct of the writ petitioner clearly reveals that the petitioner is in the habit of approaching this Court whenever there is an auction to sell the property and that the same

cannot be encouraged.

17. A mere perusal of the pleadings by itself clearly shows that the writ petitioner has admittedly defaulted repayment taking shelter under some unnatural events like floods and consequential loss of business etc. Loss of business and intervening circumstances are matters to be dealt with by the writ petitioner. If at all the writ petitioner has any grievance, the petitioner has to approach the appropriate forum designated by the statute. On the other hand, on the pretext of challenging the rules the petitioner has challenged the auction, by the Bank, which is not sustainable and therefore, the writ petition does not merit consideration.

18. In the result, both the writ petitions are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

19. After the pronouncement of the order, Mr.S.Jayakumar, learned counsel for the petitioner submitted that the matter has been settled, out of Court. Submission is placed on record.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

TK

To

1.The Secretary to Government
Government of India
Ministry of Law Justice and Company Affairs
New Delhi.

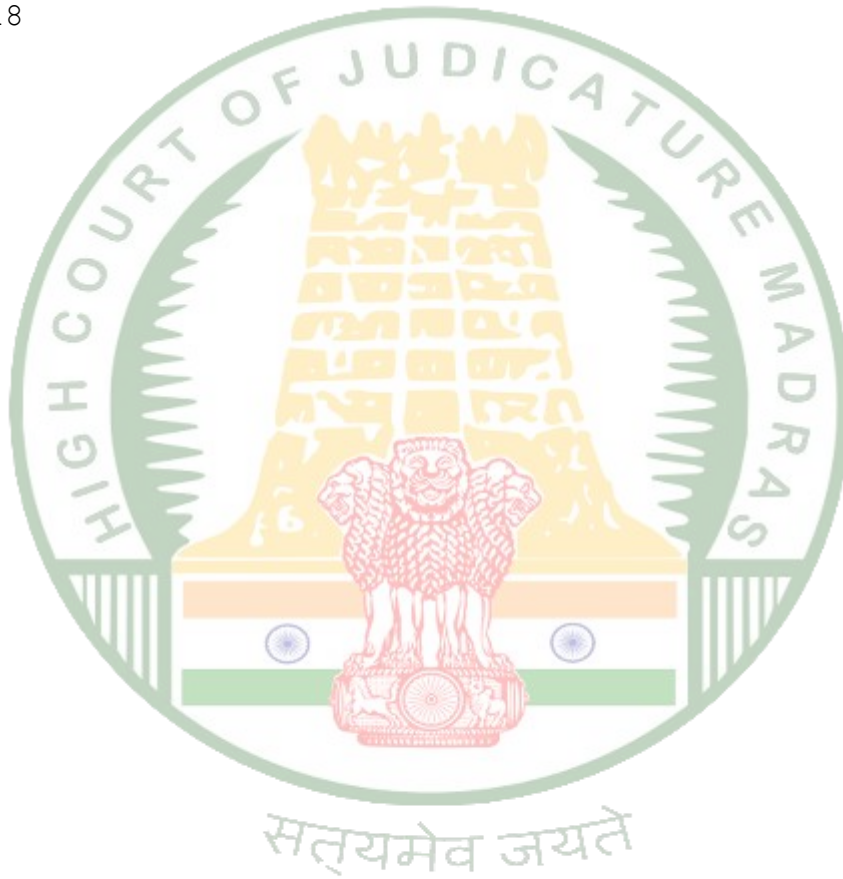
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CS/15/03/18



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