

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.11.2018

CORAM:

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

W.P.No.29515 of 2018
and WMP No.34488 of 2018

Mrs.Kabira Mariyam ... Petitioner

vs.

The Assistant General Manager /
Authorized Officer,
Indian Overseas Bank,
Royapuram, Chennai - 600 013. ... Respondent

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorari, calling for the records of the proceedings in pursuance of the E-Auction sale notice dated 05.10.2018 issued by the respondent and quash the same as illegal without jurisdiction.

For Petitioner : Mr.S.N.Amarnath

ORDER

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

Petitioner has availed a Term Loan from Indian Overseas Bank, Chennai, for purchase of house under the Home Loan Scheme. According to the petitioner, she has paid a sum of Rs.12,09,207/- to the vendor towards land cost and construction. A sum of Rs.50 Lakhs was availed as loan on 12.09.2011 and as per the terms and conditions, she has to repay the same by EMI of Rs.54,250/- per month, inclusive of interest for 240 months. Petitioner has further submitted that till October 2015, she was making payment promptly. Her husband fell sick. Business came to stand still and therefore, she could not repay the EMI for about eight months, due to paucity of funds.

2. Petitioner has further contended that even before the demand notice dated 17.04.2017 was issued under Section 13(2) of the SARFAESI Act, 2002, she made an attempt to settle the loan account and hence, sent a representation dated 07.04.2017 to the bank. As the said representation, was not answered, petitioner has filed, WP No.28466 of 2018, for a writ of

mandamus, directing the respondent to consider the representation dated 07.04.2017. Though notice has been ordered, respondent has not entered appearance.

3. Demand notice dated 07.04.2017, is followed with possession notice dated 02.03.2018, issued under Section 13(4) of the SARFAESI Act, 2002. Petitioner is stated to have challenged the said possession notice before the Debts Recovery Tribunal-II, Chennai.

4. Now bank has issued E-auction sale notice dated 05.10.2018 under Rule 8(6) and 9(1) of the Security Interest (Enforcement) Rules, 2002. To quash the same, instant writ petition is filed.

5. Inviting the attention of this Court to the definition 2 (zf) "Security Interest", and a decision of the Honble Division Bench of Orissa High Court in Subash Chandra Panda Vs. State of Orissa & Ors., reported in I (2009) BC 443 (DB), Mr.S.N.Amarnath, learned counsel for the petitioner submitted that there should be a creation of security interest in terms of Section 2(zf) of SARFAESI Act, 2002 and that registration of the memorandum of title deeds, as per the provisions of the Registration Act, are mandatory. Learned counsel for the petitioner further submitted that merely because title deeds are deposited with the bank, it would not create any security interest.

6. Placing emphasis on the word "created", learned counsel for the petitioner submitted that in the absence of satisfaction of the above said provision viz., 2(zf), as mandated under the SARFAESI Act, 2002, sale notice issued, is liable to be set aside.

7. Though the instant sale notice is challenged on the abovesaid grounds, having regard to the availability of an alternate remedy under the SARFAESI Act, 2002 we are not inclined to delve into the abovesaid grounds. 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.

.....

iv) Even issuance of sale certificate can be questioned. In *Simon's Foot Wear Pvt. Ltd. v. Indian Bank*, reported in (2015) 2 MLJ 166, a Hon'ble Division Bench of this Court held as follows:

"9.As against the confirmation of sale and issuance of the sale certificate, the writ petitioners did have their remedy of filing an appeal under Section 18 of the SARFAESI Act before the Debts Recovery Appellate Tribunal. The appeal remedy is an effective and efficacious remedy. When such an effective and efficacious remedy is available, this court will decline exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India.

10. So far as the challenge made to the order dated 24.06.2013 is concerned, since an appeal remedy is available the writ petitioners ought to have exhausted the appeal remedy before approaching this Court with this writ petition."

8. Further, when the petitioner has approached the tribunal challenging possession notice dated 02.03.2018 issued under Section 13(4) of the SARFAESI Act, 2002, petitioner can also

challenge the sale notice before the said tribunal. Prayer in WP No.28466 of 2018, is to consider the representation dated 07.04.2017. Even taking for granted that the said writ petition is pending, bank can always take measures for recovery. Pendency of the said writ petition is not a bar. Hence, the instant Writ Petition is dismissed. No Costs. Consequently, the connected Writ Miscellaneous Petition is closed.

s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

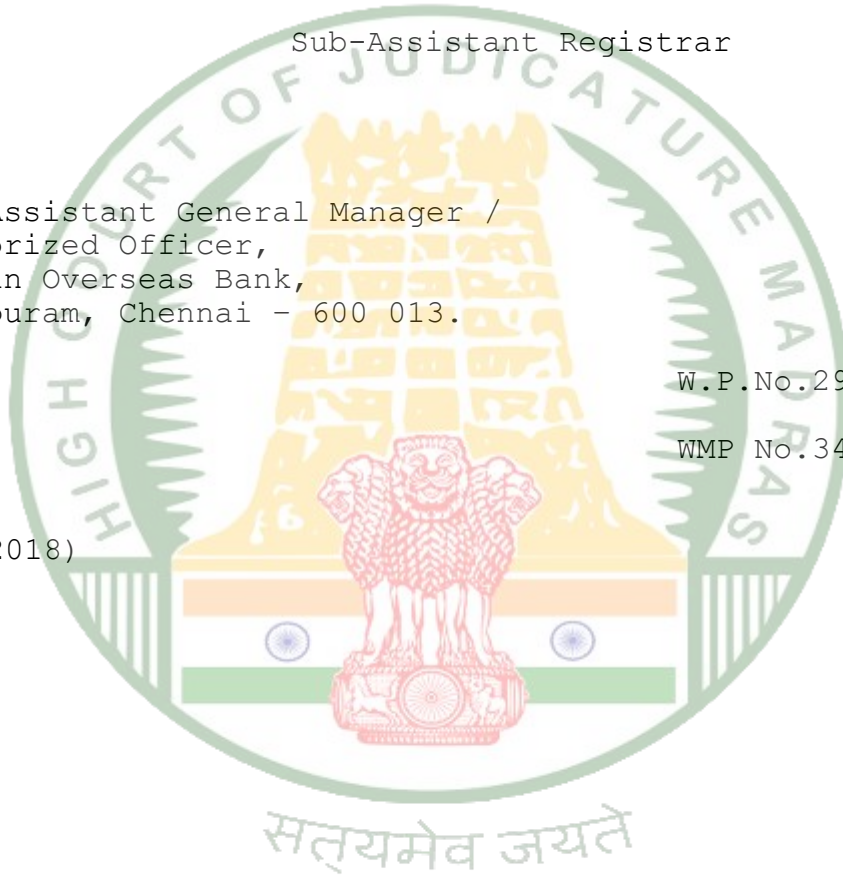
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To

The Assistant General Manager /
Authorized Officer,
Indian Overseas Bank,
Royapuram, Chennai - 600 013.

W.P.No.29515 of 2018
and
WMP No.34488 of 2018

SP(09/11/2018)



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