

(2010) 10 MAD CK 0205

In the Madras High Court

Case No : Writ Petition No. 6952 of 2008 and M.P. No. 1 of 2008

C. Narendra Kumar, Proprietor, Eswari Traders

APPELLANT

Vs

State Bank of India, Salem Main Branch and Others

RESPONDENT

Date of Decision : 01-10-2010

Acts Referred:

Constitution of India, 1950 — Article 226

Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 — Section 10

Foreign Exchange Management Act, 1999 — Section 35

Limitation Act, 1963 — Section 14, 5

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 14, 17, 17(1)

Citation : (2010) 10 MAD CK 0205

Hon'ble Judges : R. Banumathi, J;B. Rajendran, J

Bench : Division Bench

Advocate : A.S. Narasimhan, for the Appellant; K. Sankaran, for RR1, 3 and 4 and B. Balachander, for Ashok Menon, for R2, for the Respondent

Final Decision : Dismissed

Judgement

B. Rajendran, J.—The petitioner has filed the above writ petition for a Writ of Certiorari calling for the records of the impugned Order in unnumbered O.A. (Sr No. 253/08) dated 10.01.2008 passed by the Presiding Officer, Debts Recovery Tribunal, Coimbatore, the sixth respondent herein as wholly unsustainable in law.

2. The contention of the petitioner in brief is as follows:

The petitioner was granted a loan by the respondents bank in the year 1995 to the tune of Rs. 5 lakhs and he was paying the instalments regularly till 1999 and thereafter, due to his inability to pay the instalment amount, the firm was declared as NPA on 27.02.2003 by the first respondent bank. Thereafter, on 27.02.2003, the bank offered a one time settlement fixing the total outstanding as Rs. 5.84 crores which the petitioner accepted, but he could not pay the amount within the time. One year thereafter, the bank again offered second OTS

on 12.03.2004 and this time, the amount was fixed at Rs. 5.87 lakhs. Though the petitioner agreed to the offer made by the bank, he prayed for time to mobilize the amount. The petitioner also disputed the quantum at Rs. 5.87 lakhs. As the petitioner has not paid the amount, the bank issued a notice dated 21.11.2005 u/s 13(2) of the SARFAESI Act, calling upon the petitioner to pay Rs. 8.79 lakhs with interest thereon. In the meanwhile, on 14.11.2005, just before the notice u/s 13(2) was issued, the petitioner paid a sum of Rs. 1 lakhs. But surprisingly after the issuance of the notice u/s 13(2) of the SARFAESI Act, the bank again offered another OTS on 22.11.2005 and this time, after giving deduction to the amount of Rs. 1,00,000/- paid by the petitioner, the amount demanded by the bank was Rs. 4.87 lakhs. Though the petitioner wanted to pay the entire amount, he could not pay immediately but paid various amount on various dates from 30.03.2005 till 29.12.2006 totalling Rs. 3,33,000/-. According to the petitioner, including the original payment of Rs. 1,00,000/- on 14.11.2005, he has paid a total sum of Rs. 4,33,000/-. According to the petitioner, he is bound to pay a balance of Rs. 1,09,000/- and he was ready to pay the same. Therefore, he would only contend that he is a bonafide borrower and he is always ready and willing to pay the amount. In the affidavit, he would further contend that the third respondent, who was the Manager then, demanded a bribe amount of Rs. 1,00,000/- and if it is not paid, the bank would withdraw the OTS Scheme. Since the amount demanded was high, the petitioner has not paid the bribe amount. Subsequently, the OTS offer was withdrawn by the bank on 03.07.2006. Thereafter, the matter was entrusted for recovery to Hayagriha Associates by the bank on 28.10.2006 and on 06.01.2007, the premises was sealed. The bank has also issued possession notice on 10.01.2007 which was received by the petitioner on 17.01.2007. As against the same, the petitioner has filed the first writ petition No. 2449 of 2007 and obtained interim stay on 22.01.2007 in M.P. No. 1 of 2007 in WP No. 2449 of 2007. According to the petitioner, in the affidavit, he would contend that the interim order was in force till 09.05.2007, but the auction sale was conducted on 03.05.2007 and therefore, he would claim that the withdrawal of OTS offer was unilateral, arbitrary and malafide. According to the petitioner, the property was worth more than Rs. 30 lakhs and even as per the guideline value fixed by the Government, the property would fetch Rs. 20 lakhs, but it was sold for a paltry sum of Rs. 13 lakhs. Therefore, according to the petitioner, the sale is illegal. He would further contend that earlier, as against the order passed in the writ petition, he has taken the matter upto Supreme Court and later the SLP itself was withdrawn on 04.01.2008. Immediately, the petitioner has filed the present Application before the Tribunal on 07.01.2008 challenging the auction sale and for other reliefs. In the application before the Tribunal, the petitioner would contend that u/s 14 of the Limitation Act, the period, during which he was prosecuting the matter before this Court as well as the Supreme Court has got to be excluded. Immediately after withdrawing the SLP before the Honourable Supreme Court on 04.01.2008, he has filed the present application before the Tribunal and therefore, the impugned order of rejection passed by the Tribunal on the ground of limitation is not in accordance with law. Challenging the order

of the Tribunal dated 10.01.2008, the present writ petition has been filed. According to the petitioner, the prayer of the petitioner for exclusion of time during which he has prosecuted the matter before this Court as well as the Supreme Court has not been properly considered or appreciated by the Tribunal and the impugned order dated 10.01.2008 has been summarily passed by the Tribunal.

3. At the time of admission itself, notice was issued to the respondents and the learned Counsel for the respondents have taken notice and filed their counter as well as typed set of papers.

4. The first respondent has filed a detailed counter accepting the details in respect of the sanctioning of the loan, offering of OTS Scheme on more than two occasion in favour of the petitioner. But the first respondent would contend that the notice u/s 13(2) of the SARFAESI Act was validly issued on 21.11.2005 in view of the inordinate delay in payment and refusal on the part of the petitioner to accept the OTS offer and his failure to adhere to the repayment schedule as per the OTS Scheme. The petitioner has not evinced any interest in settling the matter or making the payment. Therefore, on 03.07.2006, the OTS offered to the petitioner was withdrawn but the allegation that it was withdrawn due to a malafide action of the third respondent in seeking bribe was specifically denied. The third respondent has also filed a separate affidavit contending that no such demand was ever made by him and he intend to take criminal action or defamatory proceedings against the petitioner.

5. The first respondent further contended that originally, the petitioner filed W.P. No. 2449 of 2009, the first writ petition, challenging the 13(2) notice dated 21.11.2005 and the letter dated 03.07.2006 issued by the bank. Thereafter, another WP No. 14533 of 2007 was filed for a relief of declaration to declare Sub-sections 2 to 7 of Section 17 of the SARFAESI Act, as amended and substituted by Section 10(b) of Enforcement of Security Interest and Recovery of Debt Laws (Amendment) Act 2004 as ultra vires. This writ petition was filed after the dismissal of the earlier writ petition in WP No. 2449 of 2007 and also the writ appeal. In fact, in the earlier writ petition, a direction was issued in M.P. No. 1 of 2007 in WP No. 2449 of 2007 directing the petitioner to deposit the entire sum of Rs. 4.87 lakhs within a period of eight weeks in two instalments and also permitted the petitioner to remove the seal on payment of first instalment by himself. Aggrieved by such a direction to remove the seal by the petitioner himself, the bank has filed W.A. No. 240 of 2007 and obtained interim stay on 20.02.2007 in so far as removal of the seal by the petitioner himself is concerned. The petitioner has also filed a separate W.A. No. 188 of 2007 against the direction directing him to deposit the entire amount. By consent of both sides, the writ petitions and the writ appeals were taken up together and ultimately, on 09.03.2007, both the writ petition as well as the writ appeals were dismissed. As against the order of dismissal of WP No. 2449 of 2007 along with writ appeals, the petitioner has preferred SLP (Civil) No. 7532 of 2007 and that

was also dismissed on 04.05.2007. After dismissal of the writ petition, the writ appeal and vacation of interim stay, the petitioner has filed the second writ petition namely WP No. 14533 of 2007 challenging the validity of Sub-sections 2 to 7 of Section 17 of the SARFAESI Act as amended and substituted by Section 10(b) of Enforcement of Security Interest and Recovery of Debt Laws (Amendment) Act 2004 as ultra vires and obtained interim order in MP No. 1 of 2007 on 20.04.2007. The said writ petition was also ultimately dismissed on 25.06.2007. As against the dismissal of this writ petition, the petitioner has preferred SLP No. 12556 of 2007. It is pertinent to point out that in the SLP before the Honourable Supreme Court, on 12.12.2007, the petitioner has obtained an order of status quo and later the SLP itself was withdrawn on 04.01.2008. While withdrawing the Special Leave Petition, no permission was obtained to approach the Tribunal or to exclude the period during which the petitioner prosecuted the writ petition or writ appeal before this Court as well as the SLP before the Supreme Court. Therefore, the present application is belated.

7. In the earlier writ petition filed before this Court in WP No. 2449 of 2007, as early as on 09.03.2007 itself, this Court passed an order dismissing the writ petition stating that the OTS offered to the petitioner is not applicable to him as the scheme would apply only to manufacturers having industrial units. After the order dated 09.03.2007, taking advantage of the fact that the interim stay granted earlier was extended for a period of four weeks to enable the petitioner to approach the appropriate Forum, without moving the Debt Recovery Tribunal, the petitioner once again filed W.P. No. 14533 of 2007, but for a Declaration to declare Sub-sections 2 to 7 of Section 17 of the the SARFAESI Act, as amended and substituted by Section 10(b) of Enforcement of Security Interest and Recovery of Debt Laws (Amendment) Act 2004 as ultra vires. As there was already a batch of writ petitions challenging the validity of the above said Act in which interim stay was in force, in the writ petition filed by the petitioner, the same order of interim stay was passed. After the disposal of the writ petition and the writ appeal, the bank took steps and on 14.04.2007, issued a paper publication inviting tenders for sale of the secured asset. The bank also conducted auction on 03.05.2007 in which the highest bid made by a bidder was accepted. The bidder also remitted a sum of Rs. 4,00,000/- on 03.05.2007 and the balance of Rs. 9,10,501/- on 09.05.2007. Pursuant to the same, sale certificate was also issued to the highest bidder, possession of the property handed over to him by delivering the key on 09.05.2007. After adjusting the sale proceeds towards the amount payable to the bank and after giving credit to the account of the petitioner, still, there remains a due of Rs. 3,32,635/- payable by the petitioner to the bank and therefore the action of the bank is justified and reasonable.

8. The first respondent further contended in the counter affidavit that the allegation of the petitioner that the sale was effected during the period when interim stay was in force is incorrect. In fact, in WP No. 14533 of 2007, interim stay was granted on 18.04.2007 only to the effect that the introduction of Sub-

section 2 to 7 of Section 17 was stayed as the writ petition itself is only filed challenging the vires of the Act. After the disposal of the SLP before the Supreme Court, even in the present application before the Debt Recovery tribunal, no where it was pleaded that the period taken in prosecuting the cases should be excluded as the proceedings were initiated bonafide. It is pertinent to point out here that the first writ petition in WP No. 2449 of 2007 was filed only challenging the notice issued u/s 13(2) of the Act and the letter dated 03.02.2006 of the bank withdrawing the OTS, whereas the second writ petition in WP No. 14553 of 2007 was filed for a declaration to declare Sub-sections 2 to 7 of Section 17 of the Act as ultra vires. Therefore, these two proceedings do not relate to the notice issued by the bank u/s 13(4) or the possession taken by the bank or anything connected with the present application filed before the Tribunal. Therefore, the Tribunal has rightly rejected the contention that the period during which the petitioner prosecuted the writ petition, writ appeal and the SLP cannot be excluded as contemplated u/s 14 of the Limitation Act. The first respondent further contended that no application u/s 5 of the Limitation Act has been filed to condone the delay, nor any application, as required u/s 14 of the Limitation Act was filed. The Registry only returned the application and subsequently it was heard by the Tribunal as regards the maintainability of the application. After hearing the argument of the counsel for the petitioner, the Tribunal rejected the plea on the ground of delay in filing the application. In any view of the matter, the present writ petition has been filed only to harass the bank. The petitioner is not diligent enough in prosecuting the cases. Atleast when the second writ petition was dismissed by this Court on 25.06.2007, the petitioner ought to have taken steps and approached the Tribunal but the same was not done and prayed for dismissal of the writ petition.

6. The third respondent has filed a separate counter affidavit stating that the allegations leveled against him that he demanded Rs. 1 lakh from the petitioner is incorrect and baseless. For the first time in the writ petition, such an allegation has been made by the petitioner. Therefore it was stated that the third respondent reserves his right to proceed against the petitioner in the appropriate criminal court for defamation.

7. We have heard the counsel for both sides at length. By consent of the counsel for both sides, the writ petition itself is taken up for final disposal.

8. This writ petition has been filed by the borrower, who has successfully dragged on the proceedings for quite long time. Now, the petitioner is tapping the doors of this Court with a prayer that he had truly and diligently prosecuted the proceedings before various forums without jurisdiction and therefore the period during which he adjudicated the matter before the Courts of law should be excluded from computing the period of limitation and the rejection of such a prayer made by him by the Tribunal is illegal. The petitioner would specifically contend that Section 14 of the Limitation Act would come to his rescue and therefore, he should be allowed to contest the matter afresh by challenging the

possession notice issued by the bank. Though we have extracted in detail the factual submission made by both sides, the gist of dates and events would clearly prove the petitioner's unsuccessful endeavour before the various Courts.

9. The bank has sanctioned loan in favour of the petitioner firm in the year 1995. Though the petitioner has initially paid the instalments, he committed default from 1998-1999 onwards and ultimately, in spite of repeated reminders by the bank, he has not chosen to pay the amount with the result, the firm was declared as NPA. In spite of the fact that the firm was declared as NPA, the bank offered OTS as early as on 27.02.2003. Even though the petitioner would contend that he agreed for OTS proposal, he has not chosen to follow the terms of the OTS nor paid any amount. Therefore, under Law, the petitioner has not accepted or acted upon the OTS. Later on, again on 12.03.2004, the Bank offered OTS. Here also, the petitioner has not paid any amount as per the schedule of payment granted by the bank under OTS. Therefore, the bank initiated proceedings by issuing notice dated 21.11.2005 u/s 13(2) of the SARFAESI Act. Therefore, it is clear that in spite of the offer made by the bank under the OTS, both in the year 2003 and in the year 2004, the petitioner has not availed the opportunity or paid any amount. Therefore, ultimately, the bank issued the notice u/s 13(2) of the SARFAESI Act but only one saying grace was, just one week before the issuance of the notice u/s 13(2) of the Act, on 14.11.2005, the petitioner has remitted a sum of Rs. 1 lakh. Therefore, after the issuance of the notice dated 21.11.2005 u/s 13(2) of the Act, immediately, on the next day i.e., 22.11.2005, for the third time, the bank again offered OTS, after giving credit to the amount of Rs. 1,00,000/- paid by the petitioner on 14.11.2005. But even for the third OTS proposal given by the bank, the petitioner has agreed to settle the matter, but he has not acted upon the proposal by paying any amount. Later on, after a period of four months, at the end of the financial year on 30.03.2006, he paid Rs. 48,000/- but not complied with the proposal dated 22.11.2005. Therefore, the bank withdrew OTS proposal as per their communication dated 03.07.2006 which is also admitted by the petitioner. After the withdrawal of OTS, the petitioner, on his own, deposited three sums on the following dates namely Rs. 10,000/- on 12.09.2006; Rs. 1,10,000/- on 22.12.2006 and Rs. 1,75,000/- on 29.12.2006. It is pertinent to mention that even as early as on 28.10.2006, the bank, as per the SARFAESI Act, entrusted the collection of the amount to Hayagraha Associates. Thereafter, possession notice was given and possession was taken on 06.01.2007 by sealing the premises. On 10.01.2007, possession notice was issued, which was admittedly received by the petitioner on 17.01.2007. On receipt of the notice u/s 13(4) of the SARFAESI Act, the petitioner, of course, filed WP No. 2449 of 2007 challenging the notice issued u/s 13(2) of the Act on 21.11.2005 and the letter dated 03.07.2006 of the bank by which the OTS was withdrawn. In that writ petition, the petitioner obtained interim stay in M.P. No. 1 of 2007 on 22.01.2007 on condition the petitioner deposit Rs. 4.85 lakhs, being the demand made by the bank within eight weeks in two instalments and on payment of first

instalment, the petitioner was permitted to remove the seal. As against that portion of the order directing the petitioner to remove the seal, the bank has filed W.A. No. 240 of 2007 and the Division Bench of this Court granted interim stay on 20.02.2007. In the meanwhile, the petitioner has also filed W.A. No. 188 of 2007 against the order in M.P. No. 1 of 2007 in WP No. 2499 of 2007 directing him to deposit the amount. By consent of both sides, the writ petition as well as the writ appeals were taken up for final disposal. By an order dated 09.03.2007, the first Division Bench of this Court categorically held that the petitioner is only a trader and not a medium industrialist coming within the meaning of the scheme for OTS, hence, he is not eligible to get the benefits of the scheme. The Division Bench further clarified that the circular dated 16.10.2005 by which OTS was offered, would only apply to manufacturers having industrial units and therefore the very scheme is not applicable to the petitioner and the notice u/s 13(2) issued on 06.01.2007 by the bank is valid. Therefore, the only grievance of the petitioner that he should have been given the OTS benefits, was rejected by the Division Bench and ultimately the interim stay was vacated and the writ petition and the writ appeals were dismissed. Against this order dated 09.03.2007, the petitioner filed SLP No. 7532 of 2007 before the Honourable Supreme Court which was dismissed on 04.05.2007. Therefore, the prayer in the first writ petition No. 2449 of 2007 seeking the benefits of OTS and challenging the notice issued u/s 13(2) of the SARFAESI Act has become final by the order dated 04.05.2007 of the Honourable Supreme Court. But when the Division Bench dismissed the writ appeals, in the last paragraph, it was mentioned that on the request made by the learned Counsel for the petitioner, the interim stay granted earlier by the Court was extended for a further period of four weeks from 09.03.2007. Therefore, the interim stay was in force from 09.03.2007 to 07.04.2007. In the meanwhile, the SLP was filed and dismissed on 04.05.2007.

10. The petitioner, without making any payment to the bank or without challenging the proceedings before the appropriate Forum, even after the dismissal of Special Leave Petition, once again filed WP No. 14533 of 2007 on 18.04.2007, curiously, challenging the vires of Sub-section 2 to 7 of Section 17 of the Act. In this writ petition, the petitioner sought for interim order restraining the bank not to proceed under the SARFAESI Act and this Court also granted interim order on 20.04.2007 in MP No. 1 of 2007 staying the operation of Section 17 (3) and (4) of SARFAESI Act. The said writ petition was also subsequently dismissed on 04.05.2007. Challenging the same, the petitioner has filed another SLP in SLP (Civil) No. 12356 of 2007 before the Honourable Supreme Court on 12.12.2007. Ultimately, the petitioner sought to withdraw the SLP on 04.01.2008 and accordingly it was withdrawn. It is pertinent to point out here that when the petitioner withdrew the Special Leave Petition, which was filed challenging the order dismissing the writ petition filed by the petitioner challenging the vires of the Act, which is not concerned in any way with the proceedings initiated by the bank against the petitioner, he did not seek any liberty or permission from the Supreme Court for extension of time to approach the Debt Recovery Tribunal. In

fact, the Order dated 04.01.2008 passed in SLP No. 12356 of 2007 is produced before us wherein it was stated that "Heard the learned Counsel for the Petitioner. After some argument, the learned Counsel for the petitioner is permitted to withdraw this petition. The SLP is accordingly disposed of. In any view of the matter, in both the writ proceedings, which ended before this Court on 09.03.2007 and 25.06.2007, the petitioner has not pleaded that time may be extended or sought permission for condonation of delay. The petitioner successfully obtained interim order from this Court and when that was subsequently rejected, immediately he filed appeal or another writ petition and obtained interim order. The petitioner even went upto the Supreme Court twice, but conveniently withdrew the second Special Leave Petition. In fact, in the last attempt made before the Honourable Supreme Court, against the disposal of the writ petition and writ appeals on 25.06.2007, the petitioner filed an application to condone the delay of 66 days in filing the SLP and the matter was mentioned on 12.12.2007 before the HONourable Supreme Court on which date an order of status quo was granted till 04.01.2008. Conveniently, on 04.01.2008, the petitioner withdrew the Special Leave petition. Thereafter, the present application was filed before the Tribunal on 07.01.2008.

11. The second writ petition filed by the petitioner before this Court is not in any way related to the proceedings initiated by the Bank against him. At the time when the second writ petition was filed, there was a batch of writ petitions pending before this Court challenging the amendment Act and therefore, the petitioner also filed the second writ petition and obtained interim order against the implementation of the Act. In that process, the petitioner restrained the bank from proceeding further.

12. It is seen from the records that the premises was sealed by the bank on 06.01.2007 and possession notice was issued on 10.01.2007. At every stage, the petitioner made attempts to drag on the proceedings knowing fully well that under the Act, his remedy is only before the Debt Recovery Act. As against the dismissal of the first writ petition, the petitioner went upto Supreme Court, but he did not take any steps to approach the Debt Recovery Tribunal. Had the petitioner approached the Tribunal by then, he could have been vested with some semblance of right. Instead, the petitioner has filed the second writ petition, which has nothing to do with the proceedings initiated by the Bank. This would clearly indicate the attitude of the petitioner not to settle the amount to the bank but to drag on the proceedings by filing one writ petition or the other before this Court.

13. Taking into consideration the present application filed before the Tribunal, it is seen that the petitioner has not filed any application u/s 5 of the Limitation Act or u/s 14 of the Limitation Act or stated that he has been diligently prosecuting the case in other forum. But only in column No. 4 of the present application filed before the Tribunal relating to limitation, he would only state that "the applicant further declare that the application is within the limitation prescribed and as per

the judgment of the Honourable Madras High Court dated 03.07.2007 and the order of the Honourable Supreme Court dated 04.01.2008." But for this one sentence in the limitation column, the petitioner has not stated anything about the diligent prosecution in other forum. When the present application was filed challenging the auction sale and for restoration of the ownership of the property, the Registry of the Tribunal returned the appeal on the ground that the appeal is not maintainable as it has been filed beyond the period of 45 days as contemplated under Sub-section 1 of Section 17 of the SARFAESI Act. Thereafter, at the instance of the petitioner, the matter was posted before the Tribunal for deciding the question of maintainability. As stated supra, the petitioner has not filed any application u/s 5 or 14 of the Limitation Act. Therefore, the Tribunal had come to the conclusion that neither in the order passed by the Honourable Supreme Court nor the order passed by this Court, time was extended for condonation of delay. u/s 17(1) of the Act the petitioner ought to have filed the application within 45 days from the date of issuance of the notification u/s 13(4) of the Act by the Bank or the petitioner has not stated anything in the affidavit as to how the present application is maintainable. Therefore, the Tribunal rejected the application. The Tribunal also referred to the decisions relied on by the Petitioner in Raghunath Das v. Gokal Chand and Anr. AIR 1987 SC 827 and Ramco Super Leather Limited and four Ors. v. UCO Bank and Anr. 2007 5 MLJ 986 and stated that those decisions are not applicable to the claim made by the petitioner. The Petitioner criticized the same in this writ petition by stating that the Tribunal has not considered the decisions relied on by him in the proper perspective.

14. The learned Counsel for the petitioner fairly admitted that the decision rendered in Ramco Super Leather Limited and four Ors. v. UCO Bank and Anr. 2007 5 MLJ 986 is not applicable to the facts of this Case or the decision is in any way concerned with the issues involved in this case. As far as the decision rendered in Raghunath Das Vs. Gokal Chand and Another, , he would only say that the Honourable Supreme Court has stated that Section 14 of the Indian Limitation Act will apply to those cases where the prosecution in other forum was made diligently and in good faith. In that case, the Honourable Supreme Court held that the suit itself was filed within the time prescribed and therefore, the order of the Division Bench, which was under challenge before the Supreme Court, was not sustainable. In that case, the Execution Proceedings were initiated by the appellant therein. The appellant, having lost in the Execution Court approached the High Court and succeeded before the learned single Judge. Eventually, the Division Bench reversed the order. Therefore, the Supreme Court stated that there can be no question of want of due diligence and good faith on the part of the appellant. In that context, it was also stated that since the time has been spent in both the Courts of first instance and the Court of appeal, the prosecution was made in good faith and in due diligence. In this case, the second writ petition is not at all related to the proceedings initiated by the Bank against the petitioner as he only challenged the vires of the Act. Ultimately, the said

proceedings went upto Supreme Court at the instance of the petitioner and it was withdrawn by him on 04.01.2008 without any reservation. It is also to be pointed out that the earlier writ petition went upto Supreme Court and that was dismissed way back in the year 2007. Therefore, necessarily, the petitioner has not duly prosecuted the case in another forum and the plea now raised by the petitioner that he has got right u/s 14 of the Limitation Act does not subsist.

15. The learned Counsel for the petitioner relied on the decision reported in *Laxmidas Morarji (Dead) by LRs. Vs. Miss Behrose Darab Madan*, for the proposition that when a person continued the proceedings due to jurisdictional defect, Section 14 of the Limitation Act could be made applicable. In that case, it was found that in a eviction case, a person proceeded before the Small Causes Court at Bombay which has no jurisdiction to entertain the suit. Therefore, the Supreme Court held that since the appellant in that case was bonafidely prosecuting the suit before the Court, which has no jurisdiction to entertain the same, Section 14 of the Limitation Act would come to his rescue to exclude the period during which the suit was instituted till the date of Judgment rendered by the Supreme Court for the purpose of computing the period of limitation in filing the suit in the proper Court. The facts of the case on hand is different. Here a Special Forum has been created before the Debts Recovery Tribunal. The petitioner, knowing fully well that any order passed u/s 13(4) of the SARFAESI Act or any other notice issued by the bank can only be challenged before the Tribunal by filing a petition u/s 17, being a special enactment, has not chosen approach the Tribunal, but filed writ petition before this Court and taken the matter twice before the Supreme Court. Can this conduct of a party be equated to a person, who has bona-fidely filed a case before a Court, which has no jurisdiction? The answer is an emphatic "No". The attitude of the petitioner is nothing but an abuse of process of the Court. The petitioner was hunting before a forum for getting interim order, enjoyed the interim order for some time and when it was vacated, he filed appeal or writ petitions one after the other and successfully dragged on the proceedings for a considerable long time. Therefore, the petitioner cannot be allowed to plead that he has bona-fidely prosecuted the matter and therefore he should be given the benefits conferred u/s 14 of the Act.

16. Above all, as per the latest decision of the Honourable Supreme Court in *United Bank of India Vs. Satyawati Tondon and Others*, a writ petition is not maintainable when the aggrieved person has a statutory remedy before the Debt Recovery Tribunal. In para Nos. 17 and 18, it was held thus:

17. ...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 redressal 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 Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, , Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order. (underlining added)

17. In the said Judgment of the Honourable Supreme Court, in para No. 25, referred to the decision of the Supreme Court reported in Raj Kumar Shivhare

Vs. Assistant Director, Directorate of Enforcement and Another, wherein in Para Nos. 31 and 32, it was held as follows:

31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

32. No reason could be assigned by the appellant's Counsel to demonstrate why the appellate jurisdiction of the High Court u/s 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum.

18. Therefore, as held by the Honourable Supreme Court in the latest decision referred to above, a writ petition is not maintainable when there is alternative remedy available before a statutorily created forum namely Debt Recovery Tribunal. Therefore, in our considered view, the Tribunal has rightly held that the Original Application is not maintainable and it is belated. The writ petition, or writ appeal or SLP filed by the petitioner will not enure to his benefit for condonation of the delay and Section 14 of the Limitation has no application at all to the facts of the present case. Therefore, the writ petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.