

(2010) 09 MAD CK 0331

In the Madras High Court

Case No : Writ Petition No. 15146 of 2010

Mrs. Saraspathy Sundararaj

APPELLANT

Vs

Authorised Officer and Assistant General Manager, State Bank
of India

RESPONDENT

Date of Decision : 16-09-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 17, 18, 35

Citation : AIR 2011 Mad 1 : (2010) 5 LW 560

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

Bench : Division Bench

Advocate : V. Bhiman, for the Appellant; M.L. Ganesh, for the Respondent

Final Decision : Dismissed

Judgement

B. Rajendran, J.—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.

2. The brief facts are that the Petitioner availed credit facilities from the Respondent bank for improving her watch sales business. Since the Petitioner committed default in repayment of the loan, the Respondent issued the notice u/s 13(2) of the SARFAESI Act to the Petitioner on 05.07.2004. According to the Petitioner, since she sustained loss in her business and that she could not repay the loan to the Respondent bank, she constructed six rooms in her residential property, part of which has been mortgaged to the Respondent/bank. According

to the Petitioner, she has been letting the rooms to third parties by charging Rs. 500/- per room per day and earning income out of it. While so, on 16.09.2004, the Respondent bank locked the six rooms and took physical possession of the six rooms constructed by the Petitioner, which was used by her as guest house. On the same day, possession notice was published in the newspaper. The Petitioner sent a letter dated 28.09.2004 to the Respondent offering to pay Rs. 30 lakhs towards full and final settlement, but that was negated by the bank on 09.10.2004. Thereafter, by letter dated 22.02.2005, she increased the offer to Rs. 35 lakhs, which was also declined by the bank on 01.03.2005. Thereafter, the Petitioner further increased the offer to Rs. 36 lakhs and informed the same to the Respondent bank by letter dated 01.03.2005 which was also not accepted by the bank. The offer was further increased by the Petitioner to Rs. 40 lakhs and thereafter she also deposited Rs. 20 lakhs over a period of time from 12.03.2005 to 23.09.2005 for a period of six months in a no lien account to show her bona fide. Thereafter, by letter dated 26.06.2006, the Petitioner increased the offer to pay Rs. 43 lakhs in full quit but it was not accepted by the bank. Thereafter, on 04.07.2006, the bank directed the Petitioner to increase the offer and immediately she increased it to Rs. 45 lakhs and also offered to close the debt with C.I.T. Nagar Branch and close the personal loan, accounts on 09.10.2006. Finally, after a period of one year, on 20.03.2007; she agreed to pay Rs. 44 lakhs towards all the accounts. This was also ultimately rejected by the bank on 27.09.2007 and directed to make arrangement to liquidate the dues without any further loss of time. The bank also sent a telegram on 22.11.2007 directing the Petitioner to close all the accounts, thereafter, nothing transpired. But the Petitioner would contend that she received a letter dated 18.03.2010 informing about the recent one time settlement programme offered by the Respondent bank under which the dues of the Petitioner will also be entitled to be received by the bank. Immediately, the Petitioner sent a letter dated 30.03.2010 agreeing for the said proposal for settling the dues by paying one lump sum. Again on 15.04.2010, the Petitioner sent a letter seeking for confirmation for closing of the account and to get back the document. The Petitioner also made a representation dated 10.06.2010 to immediately settle the accounts and expressed her willingness to pay the amount in one lump sum, but this was rejected by the Respondent by a communication dated 02.06.2010 stating that the Petitioner is not eligible for the benefits of the one time scheme introduced by the bank, which according to the Petitioner is contradictory to the earlier letter dated 18.03.2010 of the Respondent bank, hence, she filed the present writ petition seeking to quash the possession notice dated 16.09.2004 and for Consequential direction.

3. The Respondent/bank has filed a detailed counter specifically contending that the present writ petition is not at all maintainable as the Petitioner is challenging the possession notice dated 16.09.2004 after a lapse of six years. Since no appeal has been filed by the Petitioner u/s 17 of the Act within 45 days from the date of receipt of the possession notice before the Debt Recovery Tribunal, the

writ petition filed as such is not maintainable. The bank would further contend that pending the mortgage with the Respondent bank and after issuance of possession notice issued u/s 13(4) of the SARFAESI Act, the Petitioner has not chosen to challenge the same, hence, the present writ petition is not Maintainable. The benefits of the OTS Scheme introduced by the bank is not applicable to the Petitioner as she has violated the terms of the mortgage by transferring the secured asset in the name of her son thereby created encumbrances over the property with an intention to defeat the rights of the bank from recovering the amount. As per Clause 1.7 of the SBI OTS-SME 2010 Scheme, "Cases of fraud, malfeasance and wilful default will not be eligible for OTS Scheme". The bank also contended that apart from the above loan, the Petitioner availed cash credit facility to the tune of Rs. 20 lakhs and two mortgage loan to the tune of Rs. 20 lakhs, aggregating in all Rs. 40 lakhs from the Respondent/bank. Since the Petitioner has divulged the secured property pending mortgage, the benefits of the scheme will not be made applicable to the Petitioner. Insofar as the amount deposited by the Petitioner between 12.03.2005 to 23.09.2005, it was kept in a no lien account and therefore, it cannot be claimed that the Petitioner has discharged part of her liability to the bank. As per the decision of the Honourable Supreme Court in Satyavati Tandon case, the writ is not maintainable. Further, as per the decision of the Division Bench of this Court in (United Bank of India v. Satyawati Tondon and Ors.) III (2010) BC 495 (SC) proposals for one time settlement are to be in conformity with the guidelines issued by the Reserve Bank of India. In this case, since the Petitioner committed acts of fraud and malfeasance, she is not entitled to the benefits of the scheme introduced by the bank.

4. We have heard both sides. The short point for consideration is whether the writ petition is maintainable and the Petitioner is entitled for a Mandamus to direct the Respondents to consider her claim for one time settlement with the bank.

5. At the outset, it is a clear case where the Petitioner has come to this Court challenging the possession notice dated 16.09.2004 after a period of six years. The possession notice u/s 13(4) of the SARFAESI Act was issued on 16.09.2004 for which the Petitioner has not sent any objection or reply. The possession notice was also published in the newspaper on the same day. Even thereafter, the Petitioner has not come forward to make any payment. On 28.09.2004, the Petitioner sent a letter requesting the Respondent for accepting Rs. 30 lakhs towards full and final settlement, but that was negated by the bank on 09.10.2004. Thereafter, by letter dated 22.02.2005, she increased the offer to Rs. 35 lakhs, which was also declined by the bank on 01.03.2005. The Petitioner further increased the offer to Rs. 36 lakhs by her letter dated 01.03.2005 which was not accepted by the bank. The offer was further increased by the Petitioner to Rs. 40 lakhs and thereafter she also deposited Rs. 20 lakhs over a period of time from 12.03.2005 to 23.09.2005 for a period of six months in a no lien account. Thereafter, by letter dated 26.06.2006, the Petitioner increased the

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6. It is categorically brought out by the bank that pending the SARFAESI proceedings initiated by the bank, the Petitioner, in order to deprive the right of the bank to recover the amount, has clandestinely transferred the secured assets in favour of her son and in that event, the bank has got every right to decline to extend the benefits of One time settlement scheme to the Petitioner. Further, the possession notice sent to the Petitioner way back in the year 2004, remains unchallenged by her till 2010 by approaching the competent Forum namely Debts Recovery Tribunal. When a specific forum has been created which enables the borrower to challenge the action of the financial institution by filing necessary petition u/s 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.

7. In this connection, we are fortified by the decision of the Honourable Supreme Court reported in *United Bank of India Vs. Satyawati Tondon and Others*, : wherein 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).

8. 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 v. Assistant Director, Directorate of Enforcement and Anr. (2010) 4 SCC 7) : (AIR 2010 SC 2239) 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.

9. In the light of the above decision of the Honourable Supreme Court, the writ petition filed by the Petitioner seeking to set aside the possession notice issued to her long back is legally not sustainable. We are of the considered view that this petition has been filed only to drag on the proceedings and to evade repayment of the loan. That be so, the Petitioner has no legal right to compel the bank to accept the one time settlement offer made by her.

10. In the decision of the Division Bench of this Court reported in (Hamosons Apparels Private Limited, rep. By its Managing Director v. Indian Bank, Asset Recovery Management Branch, Chennai-2 and Ors.) (2010) 3 CTC 807 wherein in para No. 22, it was held as follows:

22. The impugned order in the writ petition is the order passed by the Appellate Tribunal upholding the measure taken by the first Respondent bank u/s 13(4) of the Act. The contention raised in the writ petition with regard to the enforcement of the R.B.I. Guidelines in respect of One-time settlement was not raised as a ground before the Appellate Tribunal. If the impugned order is otherwise valid in law, it cannot be set aside on a ground which was not taken before the Appellate Tribunal. On facts also, we have already seen that the proposals submitted by the Petitioner were not in conformity with the guidelines issued by the Reserve Bank of India for One-Time Settlement and the Petitioner is not entitled to seek for enforcement of the same. The impugned order of the Appellate Tribunal is not liable to be set aside.

11. In the above decision, the Division Bench had an occasion to deal with the validity of the possession notice issued u/s 13(4) of the SARFAESI Act. In that case, the Petitioner therein sought for enforcement of one time settlement proposal. Before the Division Bench, on behalf of the bank, it was contended that the offer made by the Petitioner was not in accordance with the Reserve Bank of India guidelines. The Division Bench accepting the submission of the counsel for bank dismissed the writ petition on the ground that the proposal is not in tune with the RBI guidelines.

12. In this context, it is refer to the decision of the Hon''ble Supreme Court reported in (X-Calibre Knives Pvt. Ltd. and Anr. v. State Bank of India) 2006 (131) Comp Cas 274 (SC) wherein one time settlement arrived at between the borrower and the bank, but later on it was withdrawn by the bank. In that case also the debtor approached the State Bank of India for one time settlement scheme evolved by them in accordance with the guidelines of the Reserve Bank of India. But the Debt Recovery Tribunal has already passed an order in favour of the Bank and further a recovery certificate was also issued. Without being aware of the stage of the proceedings before the Tribunal, the One Time Settlement was arrived at by the Bank. Later on, the settlement was withdrawn by the Bank. Even in that case, the Supreme Court passed an order which reads as follows:

Therefore, it is obvious that the letter was issued without being aware of the factual position in regard to the decision of the Debt Recovery Tribunal and the issuance of the recovery certificate.

13. The present case is identical in nature and it is covered by the judgment of the Supreme Court mentioned supra. In this case, the Petitioner has violated the condition of mortgage by transferring the secured asset in favour of her son and therefore, as per Clause 1.7 of the OTS Scheme offered by the bank, the Petitioner has to be excluded from extending the benefits of the scheme which was rightly done by the bank. In any event, without exhausting the alternative remedy, the relief sought for by the Petitioner by invoking the discretionary remedy under Article 226 of the Constitution of India cannot be granted.

14. For all the above reasons, the relief sought for in this writ petition cannot be granted. The writ petition is therefore dismissed No costs. Consequently, connected miscellaneous petition is closed.

15. After dictating the order, the learned Counsel for the Petitioner seeks liberty to enable the Petitioner to move the Debts Recovery Tribunal for condoning the delay. In view of the long delay in filing this writ petition after issuance of the possession notice dated 16.09.2004, we are not inclined to make any comments and we are not giving any liberty as prayed for by the Petitioner. But it is always open to the Petitioner to approach the Debts Recovery Tribunal, if he is so advised.