

GAHC010265202023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/6819/2023

MD. ATOWAR RAHMAN AND 3 ORS.
S/O- MUSLIM ALI, R/O- HOUSE NO. 29, AEC ROAD, NEAR SUNDARBARI
L.P. SCHOOL, JALUKBARI, KHANAMUKH, KAMRUP(M), GUWAHATI,
ASSAM, PIN- 781014.

2: MD. BAKHTIAR AHMED KHAN
S/O- MUSLIM ALI
R/O- HOUSE NO. 43
DAKHINGAON
KAHILIPARA
GUWAHATI-19.

3: MD. JAHIR AKHTIAR KHAN
S/O- MUSLIM ALI
R/O- HOUSE NO. 43
DAKHINGAON
KAHILIPARA
GUWAHATI-19.

4: MD. MUSLIM ALI
S/O- LATE MAQBOOL ALI
R/O- HOUSE NO. 43
DAKHINGAON
KAHILIPARA
GUWAHATI-19

VERSUS

BANK OF BARODA AND ANR
A BODY CORPORATE CONSTITUTED UNDER THE BANKING COMPANIES
(ACQUISITION AND TRANSFER OF UNDERTAKING) ACT, 1970 HAVING ITS
REGISTERED OFFICE AT MANDVI, BARODA, GUJARAT, CARRYING ON
BANKING BUSINESS AT VARIOUS PLACES THROUGH ITS VARIOUS
OFFICES AND BRANCHES INCLUDING ONE AT GUWAHATI (MAIN)

BRANCH B.R. KALITA COMPLEX, M.S. ROAD, FANCY BAZAR, GUWAHATI-781001, DIST. KAMRUP(M), ASSAM

2:THE AUTHORISED OFFICER
BANK OF BARODA
GUWAHATI (MAIN) BRANCH
B.R. KALITA COMPLEX
M.S. ROAD
FANCY BAZAR
GUWAHATI-781001
DIST. KAMRUP(M)
ASSA

Advocate for the Petitioner : MR. S P ROY

Advocate for the Respondent : SC, BANK OF BARODA

BEFORE
HONOURABLE MR. JUSTICE MANASH RANJAN PATHAK
HONOURABLE MRS. JUSTICE MITALI THAKURIA

ORDER

Date : 23.11.2023
(M. R. Pathak, J)

Heard Mr. S. P. Roy, learned counsel for the petitioners and Mr. M. Sharma, learned Standing Counsel, Bank of Baroda, for the respondents.

2. Petitioners have filed this writ petition on 22.11.2023 praying to set aside and quash the Possession Notice dated 08.11.2023, issued by the respondent No.2, Chief Manager & Authorised Officer, Bank of Baroda, Guwahati Main Branch, M.S. Road, Fancy Bazar, Guwahati, Kamrup (Metro) Assam (Annexure-12 to this writ petition), issued in exercise of the power under Section 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, in short) read with

Rule 8 of the Security Interest (Enforcement) Rules 2002 (2002 Rules).

3. It is contended by the petitioners that — without issuing any prior Notice under Section 13(2) of the SARFAESI Act, without furnishing them proper statement of account with relevant rate of interest, the statement of account that was furnished to them includes amount given to some other borrowers, namely M/S. M. B. Construction and that the statement of account furnished by the respondent Bank contained the amount and other financial benefits which the petitioners did not even borrowed and/or availed from the said Bank. Petitioners stated that the authorities in the respondent Bank issued the said Possession Notice dated 08.11.2023 in violation of the provisions of the SARFAESI Act, 2002 as well the Security Interest (Enforcement) Rules 2002.

4. It is seen that on his approach on 23.05.2018, the respondents in the Bank of Baroda, Main Branch, Guwahati vide communication No. BOB/GAUHATI/ADV/2018-19 dated 25.05.2018 sanctioned an Overdraft Facility to the petitioner No.1, with the limit of Rs. 70,00,000/-, with certain specific terms and conditions and for the said purpose, the petitioner Nos. 2 and 3 mortgaged their land and further, the petitioner Nos. 2, 3 and 4 also gave their personal guarantee, where the petitioner Nos. 1, 2 and 3 are the sons of the petitioner No. 4.

5. Mr. M. Sharma learned counsel for the respondents stated that due to failure on the part of the Borrower, i.e., petitioner No. 1 to repay the overdrawn amounts in due time to the respondent Bank, his account became Non Performing Asset (NPA). Mr. M. Sharma stated that, therefore, the respondent Bank on 09.08.2023 issued Notice under Section 13(2) of the SARFAESI Act to the said Borrower as well as to his concerned Guarantors, i.e., petitioner No. 1

and petitioner Nos. 2, 3 and 4, respectively, for realization of Rs. 58.04,467.59 as total amount claimed as on 07.07.2023 + (plus) interest and other charges thereon for the period from 01.01.2023 to 07.07.2023 requesting them to repay the said amount within sixty days.

6. Mr. Sharma learned counsel for the respondents also submitted that for realization of said amount of Rs. 58.04,467.59 and interest thereon from the petitioners, the respondent Bank on 31.07.2023 filed an application before the Debts Recovery Tribunal at Guwahati, being O.A. No. 518/2023 against the present petitioners.

7. Section 17 of the SARFAESI Act provides for right to Appeal that includes the action taken under Section 13(4) of the SARFAESI Act. It is settled that — *the expression "any person" used in Section 17(1) is of wide import and it takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14 of the SARFAESI Act. Both, the Tribunal (DRT) as well as the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 of the said Act 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. (United Bank of India -Vs- Satyawati Tondon, (2010) 8 SCC 110).*

8. In the case of *State Bank of India -Vs- Indexport Registered*, reported in (1992) 3 SCC 159, the Hon'ble Apex Court have held that — *the decree-holder Bank can execute the decree against the guarantor without proceeding against the principal borrower.*

9. The Hon'ble Supreme Court in the case of *Industrial Investment Bank*

of India Limited -Vs- Biswanath Jhunjhunwala, reported in (2009) 9 SCC 478 have held that — *the liability of the guarantor and principal debtor is coextensive and not in alternative and the creditor/decreed-holder has the right to proceed against either for recovery of dues or realisation of the decretal amount.*

10. In a case of from this High Court, the Constitution Bench in *Thansingh Nathmal -Vs- Supdt. of Taxes*, reported in AIR 1964 SC 1419 while considering the question whether the High Court should have entertained the writ petition filed by the appellant under Article 226 of the Constitution questioning the order passed by the Commissioner of Taxes under the Assam Sales Tax Act, 1947, the Hon'ble Apex Court dismissed the appeal and observed that —

"7. ... The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created

under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

11. In the case of *Titaghur Paper Mills Co. Ltd. -Vs- State of Orissa*, reported in (1983) 2 SCC 433, a three-Judge Bench of the Hon'ble Supreme Court where their Lordships considered the question whether a petition under Article 226 of the Constitution should be entertained in a matter involving challenge to the order of the assessment passed by the competent authority under the Central Sales Tax Act, 1956 and corresponding law enacted by the State Legislature, while answering the same in the negative, observed as follows —

"11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of."

12. The Hon'ble Supreme Court in the case of *United Bank of India -Vs- Satyawati Tondon*, (supra) have observed that —

"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 the 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."

13. In *CIT -Vs- Chhabil Dass Agarwal*, reported in (2014) 1 SCC 603, the Hon'ble Apex Court have held that —

"15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case (supra), Titaghur Paper Mills case (supra) and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

14. The Hon'ble Supreme Court in the case of *State Bank of Travancore -Vs- Mathew K.C.*, reported in (2018) 3 SCC 85 have held that —

"The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well-defined exceptions as observed in CIT v. Chhabil Dass Agarwal (supra)".

15. The Hon'ble Apex Court in *Phoenix ARC (P) Ltd. -Vs- Vishwa Bharati Vidya Mandir*, reported in (2022) 5 SCC 345, have held that —

"18. it is required to be noted that a writ petition against the private

financial institution - ARC — the appellant herein under Article 226 of the Constitution of India against the proposed action/ actions under Section 13(4) of the SARFAESI Act can be said to be not maintainable. In the present case, the ARC proposed to take action/actions under the SARFAESI Act to recover the borrowed amount as a secured creditor. The ARC as such cannot be said to be performing public functions which are normally expected to be performed by the State authorities. During the course of a commercial transaction and under the contract, the bank/ARC lent the money to the borrowers herein and therefore the said activity of the Bank/ARC cannot be said to be as performing a public function which is normally expected to be performed by the State authorities. If proceedings are initiated under the SARFAESI Act and/or any proposed action is to be taken and the borrower is aggrieved by any of the actions of the private bank/bank/ARC, borrower has to avail the remedy under the SARFAESI Act and no writ petition would lie and/or is maintainable and/or entertainable.”

16. In the said case of *Phoenix ARC (P) Ltd.* (supra) the Hon’ble Apex Court applying the law laid down by the said Court in the case of *Mathew K.C* (supra) opined that — *The secured creditor and/or its assignor have a right to recover the amount due and payable to it from the borrowers. Filing of the writ petitions by the borrowers before the High Court under Article 226 of the Constitution of India against a notice issued under Section 13(4) of the SARFAESI Act, in view of the statutory, efficacious remedy available by way of appeal under Section 17 of the SARFAESI Act, is an abuse of process of the Court and the High Court should not entertained the writ petition except in cases falling within the well-defined exceptions and even in such circumstances the High Court should be extremely careful and circumspect in exercising its discretion while entertaining and/ or granting stay in such matters and to se that the rights of the secured creditor to recover the amount due and payable are not seriously prejudiced considering the fact that such entertainment of and/or granting of the stay granted order by the High Court should not have serious adverse impact on the financial health of the secured creditor/ assignor.*

17. For the reasons above and considering the fact that the petitioners have the statutory, efficacious, alternative remedy available to them by way of Appeal under Section 17 of the SARFAESI Act, against the impugned Possession Notice dated 08.11.2023, that has been issued by the respondent Bank of Baroda in exercise of the power under Section 13(4) of the SARFAESI Act, more particularly, when the matter relates to recovery of public money by the respondent Financial Institution from the borrower and the guarantors, we are of the opinion that filing of this writ petition by the petitioners is an abuse of process of the Court.

18. Accordingly, this writ petition, being not maintainable, stands dismissed.

JUDGE

JUDGE

Comparing Assistant