IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.8069 of 2010

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Nizam Khan S/O Late Niyamat Khan R/O Vill.- Baswaria, P.O. And P.S.- Bettiah, Distt.- West Champaran

.... Petitioner/s

Versus

1. The Punjab National Bank, through its Regional Manager, Saraiyaganj, Muzaffarpur, Bihar
2. The Authorised Officer, Circle Officer, Punjab National Bank, Saraiyaganj, Muzaffarpur, Bihar
3. The Branch Manager, Punjab National Bank, Bettiah Branch, Hazaratmal Dharamshala, Lal Bazar, P.O. Bettiah, P.S. Bettiah, Town and Distt.- West Champaran
4. Nurul Imam S/O Md. Salam Khan, R/O Joda Eenar Kalibagh, P.O.+ P.S. Bettiah, Distt.- West Champaran

.... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. P.K.Verma, Sr. Adv. Mr. Suman Kumar Jha
For the Respondent No.1 to 3	:	Mr. Mahesh Narayan Parbat, Sr. Adv. Mr. Ved Prakash Srivastava
For the Respondent No.4	:	Ms. Sushmita Mishra
For the State	:	Mr. Sunil Kumar Mandal, SC-24 Mr. Bipin Kumar, AC to SC-24

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA PRASAD VERMA
ORAL JUDGMENT
Date: 23-03-2015

Heard the parties.

2. The matter at issue in the present proceeding is the actions/ steps taken by the secured creditor i.e. the Punjab National Bank (In short 'the Bank') and/or its functionaries under Section 13(2) and 13(4) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (In short "SARFAESI Act"). The petitioner has filed the present writ petition under Article 226 of the Constitution of India assailing the validity and correctness of the sale notice dated 12.04.2010 (Annexure-5) and consequential sale of the secured assets in favour of the respondent no.4.

3. Learned senior counsel appearing on behalf of the petitioner submits that the respondent Bank had granted term loan of

Rs. 3.80 Lakhs to the petitioner for construction of his house. However, after payment of certain instalments, the petitioner defaulted in making payment of outstanding debts to the Bank and thereafter a notice under Section 13(2) of the SARFAESI Act was issued on 10.12.2007 asking the petitioner to make payment of the outstanding debts within a period of 60 days. It is the case of the petitioner that without following the mandate of the SARFAESI Act and the Rules made thereunder, action under Section 13(4) of the SARFAESI Act was taken by the respondent Bank with respect to the secured assets and subsequently, the secured assets were auction sold in favour of the respondent no.4. It is contended by the learned senior counsel that the secured assets is the residential house of the writ petitioner and procedure prescribed under the SARFAESI Act and the Rules made thereunder have not been complied with. Therefore, according to him, entire action of the respondent Bank is liable to be set aside and quashed by this Court. In support of his above contention he has placed reliance on a judgment of the Hon'ble Apex Court in the case of **Marthew Varghese v. Amritha Kumar** *[(2014)5 SCC 610]*.

4. Learned counsel appearing on behalf of the respondent Bank and its functionaries, i.e., the respondent no. 1 to 3 and the learned counsel appearing on behalf of the respondent no.4 have strongly opposed the prayer made on behalf of the petitioner in the present writ petition. At the very outset they have raised the question of maintainability of the present writ petition at this stage. According to them, the entire action taken under Section 13(4) of the SARFAESI Act by the secured creditor or his authorised officer can be subject matter of challenge under Section 17(1) of the SARFAESI Act before the learned Debts Recovery Tribunal, but the petitioner has not exhausted availability of the statutory alternative remedy either under Section 17 or under Section 18 of the SARFAESI Act and has directly approached this Court in the present proceeding filed under Article 226 of the Constitution of India. Therefore, according to them, in view of the law laid down by the Hon'ble Apex Court in the case of **United Bank of India vs. Satyawati Tondon** *[(2010)8 SCC 110]*, the present writ petition is fit to be dismissed.

5. Learned counsel appearing on behalf of the respondent Bank, by referring to the averments made in the counter-affidavit filed on behalf of the respondent no. 1 to 3, has submitted that on account of default made by the petitioner in repayment of the instalments of the Bank, his account was classified as NPA on 31.03.2007 and thereafter notice was issued under Section 13(2) of the SARFAESI Act, yet payment of outstanding dues was not made by the petitioner. Representation filed on behalf of the petitioner was considered in terms of Section 13(3A) of the SARFAESI Act, but it was finally rejected. Consequently, action was taken under section 13(4) of the SARFAESI Act, by taking over the possession of the secured assets and subsequent sale of the secured assets in favour of the respondent no. 4, which, according to him, cannot be legally faulted.

6. The respondent no.4 has also filed a separate counter-affidavit contesting the claim made on behalf of the petitioner. According to the respondent no.4, the secured assets is not the only residential house belonging to the petitioner, rather he is having other houses at his village home and at other town also. Learned counsel appearing on behalf of the respondent no.4 has fairly submitted that the issues raised on behalf of the petitioner in the present proceeding can well be raised by him before the learned Debts Recovery Tribunal in terms of Section 17(1) of the SARFAESI Act. It has earnestly been pleaded that in view of the availability of alternative statutory remedy to the petitioner, the matter may not be examined on its own merits at this stage and it may be left to be decided by the learned Debts Recovery Tribunal, Patna in accordance with law.

7. After having heard the parties and on consideration of the materials available on record, this Court finds that there are serious disputes amongst the parties about factual matrixes as involved in the present writ petition and there are claims and counter-claims by the parties over same. However, there cannot be any dispute that the action/ measures taken by the secured creditor or its authorised officer under Section 13(4) of the SARFAESI Act is appealable under Section 17(1) of the SARFAESI Act. The Hon'ble Supreme Court, after examining the entire scheme and scope of the SARFAESI Act and The Recovery of Debts Due to Banks & Financial Institutions Act, 1993 (In short "the Act, 1993") as also large number of judicial pronouncements of the Hon'ble Apex Court, has finally laid down the law in paragraphs- 43, 44 and 45 in the case of **United Bank of India vs. Satyawati Tondon** (Supra). In paragraph-55 of the aforesaid judgement, the Hon'ble Apex Court has, in fact, deprecated the entertainment of the writ petitions by different High Courts for exercising power of judicial review under Article 226 of the Constitution of India at this stage with respect to the action taken either under the Act, 1993 or under the SARFAESI Act.

8. For better appreciation, paragraphs-43, 44 and 45 as also paragraph 55 of the aforesaid judgement are reproduced herein below:-

> *"43. 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 a 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, the 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.

44. 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.

45. 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.

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x x x

55. 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."

9. In view of the above judicial pronouncement by the Hon'ble Apex Court, this Court is of the opinion that the petitioner must approach the learned Debts Recovery Tribunal under Section 17(1) of the SARFAESI Act raising all the pleas, which have been raised in the present proceeding. If such an application is filed on behalf of the petitioner before the learned Debts Recovery Tribunal, Patna within a period of four weeks from today with a certified copy of the present order, then the learned Debts Recovery Tribunal, Patna shall consider and decide the same on its own merit in accordance with law and shall not dismiss the same on the ground of limitation, as under a bonafide legal advice the present writ petition was filed on 6.5.2010 and it remained pending before this Court till date.

10. In order to expedite the matter, since all the parties are represented before this Court, they are directed to appear before the learned Debts Recovery Tribunal, Patna on 30th April, 2015, as the petitioner shall be filing his application u/s 17(1) of the SARFAESI Act prior to that within a period of four weeks from today, as directed above. The learned Presiding Officer of the Debts Recovery Tribunal, Patna shall fix a firm date thereafter subject to his own convenience and shall take up the case on priority basis and all endeavours shall be made to conclude the same at an early date preferably within a period of two months from the first date fixed in that matter. It is clarified that the parties shall be at liberty to raise all the issues of facts and law, which are available to them, and the findings recorded/ observations made in the present order shall not adversely affect the case of any parties.

11. If any petition is filed by the petitioner for grant of interim protection, then the same shall be considered and decided on its own merit in accordance with law.

12. The present writ petition stands finally disposed of with the observations and directions made above. Interim orders dated 7.5.2010 and 17.5.2010 passed by a Bench of this Court stand merged with the present final order/ judgment. The parties are left to bear their own costs.

(Birendra Prasad Verma, J)

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