**HON'BLE SRI JUSTICE C. PRAVEEN KUMAR**

**WRIT PETITION No. 27619 of 2011**

**ORDER:**

The present writ petition is filed seeking issuance of a writ of mandamus, declaring the action of the second respondent in taking over the possession of the property bearing Plot No.G-18, situated at Rural Industrial Area, Alipur, Zaheerabad vide proceedings dated 15.09.2011 as illegal, arbitrary and contrary to the principles of natural justice and consequently direct the second respondent not to dispossess the said petitioner from the said property by setting aside the proceedings dated 15.09.2011.

The averments in the writ petition are as under:

The petitioner is having an overdraft account in the second respondent bank vide account No.62039000302 and the maximum limit for the said overdraft account was Rs.3,00,000/- while availing the O.D. facility, Land admeasuring 700 square yards bearing plot No.G-18 situated at Rural Industrial Area, Alipur, Zaheerabad was given as security. The petitioner utilized the overdraft facility for the purpose of carrying on business in electrical equipment manufacturing unit. While things stood thus, the second respondent bank got issued a legal notice through his counsel dated 20.05.2011 stating that the petitioner is having an outstanding loan amount of Rs.3,35,359/- including interest calculated upto 30.04.2011 and the said amount shall be paid. In response to the said notice, the petitioner made payment of Rs.35,000/- on different dates. Inspite of payment of the said amount the second respondent bank issued a demand notice stating that an amount of Rs.3,35,359/- is still outstanding. It is stated that the second respondent without following the due procedure as contemplated under the statute, straight away issued the proceedings dated 15.09.2011 under Section 13 (4) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, "SARFAESI Act") which is illegal and against the principles of the natural justice. Hence, the present writ petition.

The second respondent filed a counter affidavit stating that the petitioner availed a overdraft facility to a tune of Rs.3.00 lakhs from the bank and towards security for repayment of the above said loan, the petitioner mortgaged a property bearing Plot No.G-18, D.No.5-1, situated at Rural Industrial Area, Alipur, Zaheerabad. The petitioner availed the said overdraft facility and failed to operate the account as agreed upon and from the beginning itself the account was out of order. Accordingly, the account of the petitioner was classified as non-performing asset as per the guidelines of the Reserve Bank of India. To recover the said non-performing asset, the bank issued a notice under Section 13 (2) of the SARFAESI Act calling upon the petitioner to pay Rs.3,35,359/- within 60 days failing which the powers under Section 13 (4) of the SARFAESI Act would be exercised. As the petitioner failed to act upon the said notice, the bank issued possession notice under Section 13 (4) of the SARFAESI Act on 15.09.2011. It is stated that this Court granted interim stay on 30.09.2011 subject to the petitioner paying a maximum of Rs.15,000/- within one week, but the petitioner has not complied with the said order. It is stated that the bank is proceeding under the provisions of the SARFAESI Act which is a special enactment. It is stated that if the petitioner is aggrieved by any of the measures taken by the second respondent, he can approach the Debts Recovery Tribunal under Section 17 (1) of the SARFAESI Act and not by way of writ. Thus it is contended that as there is an alternative and efficacious remedy available, the writ petition is not maintainable.

Heard learned counsel for the petitioner and Government Pleader for Revenue.

The main ground urged by the learned counsel for the petitioner is that notice under Section 13 (2) of the SARFAESI Act issued by the second respondent was not served on the petitioner and as such, the question of preferring an appeal under Section 17 of the SARFAESI Act would not arise. He submits that proceeding further with the case without serving notice under Section 13 (2) of the SARFAESI Act would be in gross violation of principles of natural justice. He further submits that the bank is said to have issued a notice on 20.05.2011 under Section 13 (2) of the SARFAESI Act and within a week thereafter they issued a legal notice, through an advocate, calling upon the petitioner to pay the amount. He submits that if really a notice under Section 13 (2) of the SARFAESI Act was served, there was no necessity for the respondent to issue legal notice again through an advocate.

On the otherhand, the learned Standing Counsel for the second respondent bank would submit that the notice issued under Section 13 (2) of the SARFAESI Act was served on the borrower and also on the guarantor. In support of the same, he placed on record the endorsements said to have been made by the borrower on a copy of the notice. Relying upon the judgment of a Division Bench of the Apex Court in ***United Bank of India vs. Satyawati Tondon and others***[1] the learned Standing Counsel for the second respondent would contend that as there is alternative and efficacious remedy available to the petitioner under Section 17 of the SARFAESI Act, the writ petition under Article 226 of Constitution of India is not maintainable.

In reply, the learned counsel for the petitioner submits that the said endorsement cannot be accepted for the reason that no date is mentioned below the signature and there is no proof as to when the notice was served.

It is to be noted that the first notice was issued under Section 13 (2) of the SARFAESI Act and the second notice was issued through an advocate under the Revenue Recovery Act. Since the bank has got authority and liberty to proceed under two enactments, issuing two notices, one under Section 13 (2) of the SARFAESI Act and another through an advocate under Revenue Recovery Act, does not mean that the first notice was not served.

The next issue that arises for consideration is whether the second respondent was justified in proceeding further with the case, in view of the allegation that notice as required under Section 13 (2) of the SARFAESI Act is not served.

As stated earlier, the main ground urged by the learned counsel for the petitioner is that no notice was served on the borrower as contemplated under the SARFAESI Act.

On the otherhand, learned counsel for the respondents placed on record, material to show that notice issued under Section 13 (2) of the SARFAESI Act was acknowledged not only by the borrower but also by the guarantor. The issue as to whether the signature on the acknowledgment are not that of the petitioner cannot be gone into in these proceedings. This being a disputed question of fact, the same cannot be adjudicated in the present writ filed under Article 226 of Constitution of India, more so, when the SARFAESI Act provides for an appeal under Section 17.

***In United Bank of India vs. Satyawati Tondon and others(one supra)*** the Apex Court held as under:

> "The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under

> Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act.

In view of the judgment of the Apex Court referred to above, as the issue involves disputed questions of fact and since there is a statutory appeal provided under the Act, it would be appropriate to direct the petitioner to file an appeal before the Debt Recovery Tribunal, in which event the same shall be dealt with in accordance with law.

With the above direction, the writ petition is disposed of. No order as to costs. Consequently, miscellaneous petitions, if any, pending in this Writ Petition shall stand closed.

At the time of pronouncing the judgment in this writ petition, learned counsel for the petitioner submits that the petitioner is willing to pay the amount, if he is allowed to pay the amount in instalments. It is always open to the petitioner to make an application to the respondent-bank seeking time to pay the due amount in instalments, in which event, the same shall be considered in accordance with law.

**JUSTICE C. PRAVEEN KUMAR**

31.07.2015
gkv

[1] AIR 2010 (SC) 3413