IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.11.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE N.AUTHINATHAN

W.P.No.41684 of 2016
W.M.P.Nos.35675 to 35677 of 2016

Bharath Post Graduate College,
SPE Trust, through its authorized signatory,
Mr.Bhaskar, .. Petitioner

versus

Indiabulls Housing Finance Ltd.,
Rep., by its Chairman,
Old No.60-A, New No.20/23,
1st and 3rd Floor, Apex Chambers,
Thyagaraja Road, T.Nagar,
Chennai 600 017. .. Respondent

Writ Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorari, to call for the records pertaining to the issue of impugned notice in Ref.No.2385/HLAPCHE00203191, dated 10.06.2016, issued by the respondent under Section 13(2) of the SARFAESI Act and quash the same.

For Petitioner : Mr.G.Veerapathiran

ORDER
(Order of the Court was made by S.MANIKUMAR, J.)

Challenge in this writ petition is to the notice, dated 10.06.2016, issued by M/s.Indiabulls Housing Finance Ltd., represented by its Chairman, respondent herein, under Section 13 (2) of the SARFAESI Act.

2. Facts leading to the writ petition are as follows:
A trust running educational institutions, such as, schools, colleges in Arts, Engineering, Medicine, Law and other faculties, has approached M/s.Indiabulls Housing Finance Ltd., in 2014 for financial assistance. According to the petitioner, agricultural properties, comprised in Survey Nos.392/1, 392/1

Part, 392/2, 392/3, 392/3 Part in N.H.45, Varadarajapuram Village, Poonamallee Taluk, Thiruvallur District, measuring an extent of 29.772 Sq.Ft. have been offered as security. The respondent-Institution agreed to finance Rs.7,55,02,506/-. Accordingly, on 30.09.2014, the abovesaid sum was sanctioned. A loan agreement was executed. The said amount has to be repaid in 120 equated monthly installments, with interest at the rate of 15% per annum. Among other documents, blank cheques were obtained. Because of non-admission of new students, there was a cash crunch, resulting in default of payment of monthly instalment. Cheques presented were dishonoured. On 10.06.2016, a letter purporting to a notice, under Section 13(2) of the SARFAESI Act, 2002, was received, wherein, a demand of Rs.7,82,26,477/-, along with future interest @ 14.50% per annum, w.e.f. 10.06.2016, was raised. The petitioner sent a reply, dated 29.06.2016, for which, there was no reply. In the above factual background, instant writ petition has been filed, to quash the notice, dated 10.06.2016.

3. Supporting the prayer sought for and inviting the attention of this Court to the mortgage deed, dated 09.10.2014, Mr.G.Veerapathiran, learned counsel for the petitioner submitted that while sanctioning loan of Rs.7,55,02,506/-, with interest, it was agreed that if the mortgagor does not pay the mortgage amount with interest, due and payable, the mortgagee shall be entitled to sell the mortgage properties, through a competent Court, to realise and receive the said mortgage amount and interest, out of the sale proceeds of the property. He therefore submitted that when recovery is through a competent court, action taken by the respondent to recover the amount, by resorting to the provisions of the SARFAESI Act, is bad in law. According to him, the respondent is entitled to only to file a suit for foreclosure, and consequently, to realise the mortgage amount, only through the competent Court.

4. Inviting the attention of this Court to the schedule of the property, mortgaged with the respondent, chitta, patta and adangal, Mr.G.Veerapathiran, learned counsel for the petitioner further submitted that right from the date of execution of the simple mortgage deed, dated 09.10.2014, the properties, offered as securities, are classified and continued to remain only as agricultural lands, in the revenue records and as per Section 31 (i) of the SARFAESI Act, 2002, any security created from agricultural lands, then the provisions of the SARFAESI Act, 2002, cannot be invoked. He therefore submitted that the SARFAESI action is exempted, insofar as agricultural lands are concerned and hence, notice issued under Section 13(2) of the SARFAESI Act, 2002, is liable to be set aside. In this context, he also relied on a judgment of this Court in Eshwar Purushothaman Gardens v. AO, Indian Bank Zonal Office reported in 2012 (5) MLJ 571.

5. Taking this Court through the contents of the impugned notice, dated 10.06.2016, issued under Section 13(2) of the SARFAESI Act, 2002, learned counsel for the petitioner submitted that the notice issued is a combination of acts, under Section 13(4) of the SARFAESI Act and therefore, it is bad in law. He also submitted that there was no intimation from the respondent-bank, as to when the loan account was declared as NPA. According to him, without declaring the loan account as NPA, the respondent has no authority to issue any notice, under Section 13(2) of the SARFAESI Act.

Heard the learned counsel appearing for the parties and perused the materials available on record.

6. Before adverting to the contentions of the learned counsel for the petitioner, it is relevant to have a cursory look, at the provisions under Sections 13 and 17 of the SARFAESI Act.

> "13. Enforcement of security interest (1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such creditor in accordance with the provisions of this Act.
>
> (2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under subsection (4).
>
> (3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower. (3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower: PROVIDED that the reasons so

communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt: PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

17. Right to appeal (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

PROVIDED that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation : For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application: PROVIDED that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the

Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder."

7. Revenue records enclosed in the typed set of papers, filed along with the writ petition, may indicate that the properties, offered as security, for availing loan of Rs.7,55,02,506/- and agreed to be repaid in 120 equated monthly installments, with interest at the rate of 15% per annum, as agricultural lands. As per Section 31(i) of the SARFAESI Act, 2002, provisions of the Act, 2002, shall not apply to any security interest created in agricultural properties. However, notice, dated 10.06.2016, has been issued by the respondent, demanding payment of Rs.7,82,26,477/-, along with future interest @ 14.50% per annum, w.e.f. 10.06.2016 (outstanding amount). Demand notice, dated 10.06.2016 also states that in addition to the outstanding amount, the petitioner is liable to pay the interest, penal interest, cheque bouncing charges, cost and other charges due in future, till the entire outstanding amount, is paid. Notice, dated 10.06.2016, further reads that failure of the above conditions, the secured creditor would exercise powers, under the SARFAESI Act, 2002, as mentioned in Sub-Section (4) of Section 13 of the Act, which includes, one or more of the following measures to recover the secured debit of the secured creditor, viz.,

"(a) Take possession of the secured asset of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;

(b) Take over the management of the secured asset of the borrower including the right to transfer by way of lease, assignment or sale and realize the secured asset;

(c) Appoint any person (hereafter referred to as the Manager), to manage the secured asset the possession of which has been taken over by the secured creditor;

(d) Require at any time by notice in writing, any person who has acquired any of the secured asset from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

8. Responding to the notice, dated 10.06.2016, issued under Section 13(2) of the SARFAESI Act, 2002, the petitioner is stated to have sent a reply, dated 29.06.2016, denying the averments made therein. The petitioner has further stated that signatures in blank papers have been obtained, without their knowledge and cheque presented has been dishonoured. According to the petitioner, there is no reply from the Bank.

9. In Eshwar Purushothaman Gardens v. AO, Indian Bank Zonal Office reported in 2012 (5) MLJ 571, the petitioner-firm therein, engaged in agricultural operations, made an application to Indian Bank, Coimbatore, requesting grant of term loan for agricultural operations. The petitioner therein offered their agricultural properties, as collateral securities. The bank sanctioned the loan, categorising it, as, "agricultural loan". After obtaining the loan amount, the petitioner engaged in various kinds of agricultural operations. The petitioner therein could not pay the loan amount, within the stipulated time. Application was given for one-time settlement. The proposal was not considered. Subsequently, the Bank issued notice, under Section 13(2) of the Act. The petitioner therein, submitted their reply, stating that the secured property is an agricultural land and as such, SARFAESI Act, 2002, has no application. The Bank overruled the objection and issued possession notice, under Section 13(4) of the Act, which was challenged, on the grounds, inter alia that the loan in question was sanctioned for agricultural purpose and that security was created on agricultural land, and therefore, Bank is not entitled to invoke the provisions of the SARFAESI Act, 2002. Though the Bank has raised a plea of alternative remedy, after considering the statutory provisions of the SARFAESI Act, 2002 and case laws, a Hon'ble Division Bench of this Court quashed the notice, under Section 13(4) of the Act.

10. In the case on hand, there are no materials placed before this Court, indicating that the respondent-Bank has rejected the reply of the petitioner, dated 29.06.2016, stated to have sent under Section 13(3) of the SARFAESI Act. We have gone through the reply of the petitioner. Reply does not indicate that the writ petitioner has raised any specific plea that the Bank has no jurisdiction to initiate proceedings, under Section 13(2) of the SARFAESI Act, for the loan offered, as security of agricultural lands. From the reply, it could be noticed that the petitioner has stated that the property secured were agricultural lands.

11. After considering a catena of judgments, a Hon'ble Apex Court in United Bank of India Vs. Satyawati Tondon and others reported in 2010 (8) SCC 110, at Paragraphs 12 and 13, held as follows:

> "12. Section 13 of the SARFAESI Act contains detailed mechanism for enforcement of security interest. Sub-section (1) thereof lays down that notwithstanding anything contained in Sections 69 or 69-A of the Transfer of Property Act, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act. Sub-section (2) of Section 13 enumerates first of many steps needed to be taken by the secured creditor for enforcement of security interest. This subsection provides that if a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt and his account in respect of such debt is classified as nonperforming asset, then the secured creditor may require the borrower by notice in writing to discharge his liabilities within sixty days from the date of the notice with an indication that if he fails to do so, the secured creditor shall be entitled to exercise all or any of its rights in terms of Section 13(4).
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> 13. Sub-section (3) of Section 13 lays down that notice issued under Section 13(2) shall contain details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank or financial institution. Sub-section (3-A) of Section 13 lays down that the borrower may make a representation in response to the notice issued under Section 13(2) and challenge the classification of his account as non-performing asset as also the quantum of amount specified in the notice. If the bank or financial institution comes to the conclusion that the representation/objection of the borrower is not acceptable, then reasons for non-acceptance are required to be communicated within one week."

The Hon'ble Supreme Court in United Bank of India Vs. Satyawati Tondon and others reported in 2010 (8) SCC 110, observed as under:

> "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."

12. In a recent decision of this Court in S.Vijayamoorthy v. The Manager, State Bank of India, Somangalam [W.P.No.15650 of 2016, dated 27.04.2016], a Hon'ble Division Bench of this Court, after considering the above judgment, held as follows:

> "3. The issue that emerges for consideration of this Court in this writ petition is as to whether this writ petition is maintainable, if the petitioners are aggrieved by demand notice issued under Section 13(2) of the 3 SARFAESI Act and possession notice issued under Section 13(4), ibid. This issue is no longer res integra.
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> ....
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> 7. In view of the foregoing, we are of the considered view that this writ petition is not maintainable, at this stage, after issuance of possession notice, since, thereagainst, the only remedy available to the petitioners, is to take recourse to the jurisdictional Debts Recovery Tribunal under the provisions of the SARFAESI Act."

13. Notice under Section 13(2) of the SARFAESI Act, 2002, is only a demand. Under Section 13(3) of the SARFAESI Act, 2002, the borrower or the guarantor, has a right to reply, which the petitioner, is stated to have sent. Further, there is no action. Exchange of notice, under Section 13(2) of the SARFAESI Act, 2002, and reply sent on 29.06.2016, under Section 13(3) of the SARFAESI Act, 2002, has not fructified into an action, for recovery or for the matter, under Section 13(4) of SARFAESI Act, 2002, for possession, warranting any cause of action for challenge.

14. In view of the above, the Writ Petition is dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
ASST. REGISTRAR

/TRUE COPY/

SUB ASST. REGISTRAR

To

The Chairman,
Indiabulls Housing Finance Ltd.
Old No.60A New No.20/23
1st and 3rd floor, Apex chambers,
Thyagaraja Road, T.Nagar,
Chennai 17.

+1 cc to MR.G.VEERAPATHIRAN, ADVOCATE SR.NO. 70340

W.P.No.41684 of 2016

MMP 28.12.2016