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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No.1809 of 2017

Smt. Sarita Bajpai, W/o Late Sanjay Bajpai, aged about 51 years, R/o Flat No.402, Exotica Grand, Shankar Nagar, Raipur, Civil & Revenue District Raipur.

---- Petitioner

Versus

PNB Housing Finance Limited, a nationalized company duly incorporated under the relevant provisions of the Companies Act, 1956 and also National Housing Act, 1987 having its corporate office at 9th Floor, Antariksh Bhawan, 22 K.G. Marg, New Delhi – 110 001 and inter-alia amongst other offices a branch office at Office No.111 & 112, 1st Floor, Plot No.1, Block No.9, DB Corporate Park, Dainik Bhaskar Bhawan, Rajbandha Maidaan, Raipur (CG) through its Authorized Officer.

Email: www.pnbhousing.com

---- Respondent

For Petitioner:	Mr. B.P. Sharma, Advocate.
For Respondent:	Mr. Vikram Dixit, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

24/08/2017

1. Respondent PNB Housing Finance Limited has issued pre-sale notice dated 2-6-2017 and also issued auction notice to the petitioner, who is a co-borrower along with Late Shri Sanjay Bajpai, for sale/auction of secured asset, under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'the SARFAESI Act') against which the present writ petition has been preferred.

2. Learned counsel for the petitioner would submit that the entire proceeding initiated against a dead person is unsustainable and

bad in law and as such, the notices Annexure P-1 and P-2 deserve to be quashed.

3. Learned counsel for the respondent would submit that the petitioner is co-borrower along with Late Shri Sanjay Bajpai which is apparent from Annexure P-2 (serial No.7) as well as notice Annexure P-5 and, therefore, the Bank has rightly proceeded and physical possession has already been taken from the petitioner. Therefore, the petitioner has alternative remedy of filing application under Section 17 (1) of the SARFAESI Act.

4. I have heard learned counsel for the parties and gone through the impugned notices and also the record with utmost circumspection.

5. At this stage, it would be appropriate to notice Section 17 of the SARFAESI Act which states as under: -

> "**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 along with 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 measures had been taken:
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> Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.
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> 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 sub-section (1) of section 17.
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> (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 secured assets 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 assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets 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. A studied and focused perusal of sub-section (1) of Section 17 of the SARFAESI Act would show that any person including borrower,

dissatisfied with the measures referred to in sub-section (4) of Section 13 of the SARFAESI Act taken by the secured creditor, is entitled to make an application before the DRT having jurisdiction and the DRT has power and jurisdiction to require restoration of possession of the secured assets to the borrower if it finds 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 the SARFAESI Act and also entitled to pass such order as it may consider appropriate and necessary in relation to any of the measures taken by the secured creditor under sub-section (4) of Section 13 of the SARFAESI Act.

7. The Supreme Court in the matter of **Mardia Chemicals Ltd. v. Union of India**[1] while deciding the vires of the SARFAESI Act referred to the recommendations of the Committees constituted on the issue of constitution of special tribunals to deal with cases relating to recovery of the dues of banks, etc. and observed as under: (SCC p. 340, para 36)

> "36. ... One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the assets without intervention of the court and for reconstruction of assets. It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting attention and the matter was considered in depth by the Committees specially constituted consisting of the experts in the field. In the prevalent situation where the amounts of dues are huge and hope of early recovery is less, it cannot be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the Report of the

1 (2004) 4 SCC 311

> Narasimham Committee, yet another Committee was constituted headed by Mr. Andhyarujina for bringing about the needed steps within the legal framework. We are therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of Debts Due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances and the financial climate world over, if it was thought as a matter of policy to have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor is it a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy."

8. Thereafter, the Supreme Court in **Mardia Chemicals Ltd.** (supra) further held that the borrower has a remedy of challenging the action taken under Section 13(4) by filling an application under Section 17 of the SARFAESI Act and in para 81 observed as under: (SCC p. 362)

> "81. In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debts Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of the economy of the country and welfare of the people in general which would subserve the public interest."

9. The principle of law laid down in **Mardia Chemicals Ltd.** (supra) was followed with approval by Their Lordships of the Supreme Court in the matter of **United Bank of India v. Satyawati Tondon and others**[2] and the Supreme Court has held in no uncertain terms

2 (2010) 8 SCC 110

that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, and observed as under: -

> "36. ... Normally, this Court does not interfere with the discretion exercised by the High Court to pass an interim order in a pending matter but, having carefully examined the matter, we have felt persuaded to make an exception in this case because the order under challenge has the effect of defeating the very object of the legislation enacted by Parliament for ensuring that there are no unwarranted impediments in the recovery of the debts, etc. due to banks, other financial institutions and secured creditors.
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> 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."

10. Their Lordships further held that the High Court should be extremely careful and circumspect in exercising the discretion to grant stay in the matters of recovery and held as under in para 46:

> "46. 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 (sic will) 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 v. Antarim Zila Parishad*[3], *Whirlpool Corpn. v. Registrar of Trade*

3 AIR 1969 SC 556

> *Marks*[4] and *Harbanslal Sahnia v. Indian Oil Corpn. Ltd.*[5] and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order."

11. Their Lordships ultimately, in para 55 held 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. Very recently, the Supreme Court in the matter of **Devi Ispat Limited and another v. State Bank of India and others**[6] also did not interfere with the order of the High Court holding that where alternative remedy of making representation is provided under statute, compliance with statutory remedy is mandatory in absence of cogent reasons, and observed as under: -

> "9.1. Firstly, Devi Ispat had an alternate remedy to make a representation to the Bank under the provisions of Section 13(3-A) of the Act and there was no reason to by-pass the statutory mechanism.
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> 9.2. Secondly, Devi Ispat did in fact make a representation to the Bank under Section 13(3-A) of the SARFAESI Act and that representation was rejected on 2-4-2013 during the pendency of the intra-court appeal. The statutory remedy having been availed of by Devi Ispat, nothing really survived in the dispute raised.
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> 9.3. Thirdly, we now find from the written submissions submitted by the Bank that it has taken possession of the secured assets of Devi Ispat on 25-5-2013 and 27-5-2013 under the provisions of Section 13(4) of the SARFAESI Act and a possession notice was also

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4 (1998) 8 SCC 1
5 (2003) 2 SCC 107
6 (2014) 5 SCC 762

published in the newspapers on 31-5-2013."

13. Thus, the petitioner has effective efficacious alternative remedy to file an application under Section 17 (1) of the SARFAESI Act. I do not find any jurisdictional error in the notices Annexures P-1 and P-2. The petition as framed and filed is liable to be dismissed and is accordingly, dismissed, in limine. However, the petitioner is at liberty to approach the DRT and raise all such grounds open to her. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

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