

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.5379 OF 2018

Narendra Jagdish Palse .. Applicant

V/s.

Indiabulls Housing Finance Ltd. and Ors. .. Respondents

Mr.Shrishail Sakhare for the applicant

Mr.Shyam Devani with Mr.Chirag Chanani i/b M/s.Dewani and Associate for the respondent no.1

Mr.A.A.Alaspurkar, A.G.P. for the respondent nos.2 and 3

**CORAM: K.K. TATED &
SANDEEP K. SHINDE, JJ.**

DATED : OCTOBER 1, 2018

P.C. :

1 By this petition under Article 226 and 227 of the Constitution of India the Petitioner challenges the order dated 27.02.2018 passed by learned District Magistrate, Pune, under section 14(3) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002.

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2 The main contention of the learned counsel for the Petitioner is that alternate remedy is not provided against this order before DRT. In support of this contention he relies on the judgment of the Apex Court in the matter of ***Harsh Govardhan Sondagar vs. International Assets Reconstruction Company Ltd. And Others, 2014(4) Mah.L.J. 151.*** He relies on paragraph 22, 23 and 24 which reads thus:

*“22. Sub-section (3) of Section 14 of the SARFAESI Act provides that no act of the Chief Metropolitan Magistrate or the District Magistrate or any officer authorised by the Chief Metropolitan Magistrate or District Magistrate done in pursuance of Section 14 shall be called in question in any court or before any authority. The SARFAESI Act, therefore, attaches finality to the decision of the Chief Metropolitan Magistrate or the District Magistrate and this decision cannot be challenged before any court or any authority. But this Court has repeatedly held that statutory provisions attaching finality to the decision of an authority excluding the power of any other authority or Court to examine such a decision will not be a bar for the High Court or this Court to exercise jurisdiction vested by the Constitution because a statutory provision cannot take away a power vested by the Constitution. To quote, the observations of this Court in *Columbia Sportswear Company v. Director of Income Tax, Bangalore* [MANU/SC/0613/2012MANU/SC/0613/2012 : (2012) 11 SCC 224];*

17. Considering the settled position of law that the powers of this Court under Article 136 of the Constitution and the powers of the High Court under Articles 226 and 227 of the Constitution could not be affected by the provisions made in a statute by the Legislature making the decision of the tribunal final or conclusive, we hold that Sub-section (1) of Section 245S of the Act, insofar as, it makes the advance ruling of the Authority binding on the applicant, in respect of the transaction and on the Commissioner and income-tax

authorities subordinate to him, does not bar the jurisdiction of this Court under Article 136 of the Constitution or the jurisdiction of the High Court under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling of the Authority.

In our view, therefore, the decision of the Chief Metropolitan Magistrate or the District Magistrate can be challenged before the High Court under Articles 226 and 227 of the Constitution by any aggrieved party and if such a challenge is made, the High Court can examine the decision of the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, in accordance with the settled principles of law.

23. We may next consider whether a lessee has any remedy by way of an appeal under Section 17 of the SARFAESI Act when the secured creditor attempts to take over possession of the secured asset which is in possession of the lessee. Sub-sections (1), (2) and (3) of Section 17 of the SARFAESI Act are extracted hereinbelow:

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 subsection.

(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.

24. When we read Sub-section (1) of Section 17 of the SARFAESI Act, we find that under the said sub-section "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 the Chapter, may apply to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measures had been taken. We agree with the Mr. Vikas Singh that the words 'any person' are wide enough to include a lessee also. It is also possible to take a view that within 45 days from the date on which a possession notice is delivered or affixed or published under Sub-rules (1) and (2)

of Rule 8 of the Security Interest (Enforcement) Rules, 2002, a lessee may file an application before the Debts Recovery Tribunal having jurisdiction in the matter for restoration of possession in case he is dispossessed of the secured asset. But when we read Sub-section (3) of Section 17 of the SARFAESI Act, we find that the Debts Recovery Tribunal has powers to restore possession of the secured asset to the borrower only and not to any person such as a lessee. Hence, even if the Debt Recovery Tribunal 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 the Act, it cannot restore possession of the secured asset to the lessee. Where, therefore, the Debts Recovery Tribunal considers the application of the lessee and comes to the conclusion that the lease in favour of the lessee was made prior to the creation of mortgage or the lease though made after the creation of mortgage is in accordance with the requirements of Section 65A of the Transfer of Property Act and the lease was valid and binding on the mortgagee and the lease is yet to be determined, the Debts Recovery Tribunal will not have the power to restore possession of the secured asset to the lessee. In our considered opinion, therefore, there is no remedy available under Section 17 of the SARFAESI Act to the lessee to protect his lawful possession under a valid lease.”

3 The learned counsel for the Petitioner further submits that the Respondents already accepted part payments from the Petitioner. Therefore, there is no question of allowing them to proceed as per the order dated 27.02.2018 passed by District Magistrate.

4 The learned counsel for the Petitioner also raised several issues about the account as NPA etc. He also submits that even though alternate remedy is available, petition under Article 226 and 227 of the Constitution of India is maintainable. In support of this contention, he

relies on the judgment in the matter of ***Narendra Ishulal Rahangdale vs. State of Maharashtra 2005(3) Mh.L.J. 567.*** He relies on paragraph 8 which reads thus:

“8. We will first deal with the objection regarding alternate remedy available to the petitioners and non-maintainability of the present petitions on the said ground. Rule of non-entertaining a writ petition by this Court in its jurisdiction under Article 226 of the Constitution of India, on the ground of availability of alternate remedy, is a rule of self-constraint. In case where this Court finds that the facts of the case demand entertaining the grievance of the parties under Article 226 of the Constitution of India, it is not necessary that such a party should be relegated to the alternate remedy available to such a party. In the present case, the question involved is an important question as to whether the seniority of the Teachers in Zilla Parishad would be governed by the said Code or MCSR Rules. We, therefore, find that the present case is a fit case wherein the petitioners should not be relegated to an alternate remedy of an appeal before the Divisional Commissioner. We, therefore, reject the preliminary objection raised by the learned counsel for the respondents regarding maintainability of the present petitions.”

5 On the basis of these facts, the learned counsel for the Petitioner submits that the impugned order passed by the learned District Magistrate dated 27.02.2018 is required to be set aside.

6 On the other hand, the learned counsel for the Respondent bank vehemently opposed the present Writ Petition. He submits that alternate efficacious remedy is available to the Petitioner under section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. Therefore, there is no

question of entertaining the present Writ Petition before this court. In support of this contention, he relies on the judgment of the Apex Court in the matter of ***United Bank of India vs. Satyawati Tondon and Others, (2010) 7 SCC 110***. Paragraph 22 reads thus:

“22. Section 17 speaks of the remedies available to any person including borrower who may have grievance against the action taken by the secured creditor under Sub-section (4) of Section 13. Such an aggrieved person can make an application to the Tribunal within 45 days from the date on which action is taken under that Sub-section. By way of abundant caution, an Explanation has been added to Section 17(1) and it has been clarified that the communication of reasons to the borrower in terms of Section 13(3A) shall not constitute a ground for filing application under Section 17(1).”

7 The learned counsel for the Respondent submits that as per their calculation near about Rs.1 Crore is due and payable by the Petitioner. Therefore, there is no question of entertaining the present Writ Petition at all.

8 We have heard both the sides at length. It is to be noted that in the present proceedings, the main contention of the Petitioner is that order passed by the District Magistrate 27.02.2018 to be set aside because the Respondent bank wrongly declared petitioner's account as NPA. Second contention is that they already made part payment to the Respondent bank.

9 It is to be noted that learned District Magistrate passed order

dated 27.02.2018 under section 14(3) of the said Act after compliance of the procedure as required under Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. Apart from that, the contention raised by the learned counsel for the Petitioner that appeal is not maintainable against the said order is not correct. Bare reading of section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 shows that order passed by learned Magistrate cannot be challenged before the DRT under section 17 of the said Act.

10 The authorities cited by the Petitioner are not applicable in the facts and circumstances of the present case.

11 It is to be noted that the Apex Court in the matter of ***Punjab National Bank Vs. O.C. Krishnan & Ors. (2001) 6 SCC 569*** held that if an alternate remedy is available, then the High Court should not entertain the petition under Article 227 of the Constitution of India and should direct the party to take recourse to the appeal mechanism provided by the Act. Paragraph 6 of the said judgment reads thus:

“6 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 cannot 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.”

12 Similarly, the Apex Court, in the matter of ***General Manager, Sri Siddeshwara Cooperative Bank Ltd. & Ors. Vs. Ikbal and Ors. (2013) 10 SCC 83*** held that if an alternate efficacious remedy is available under the SARFAESI Act, the High Court should not exercise the powers under Article 226 of the Constitution of India in respect of the matters arising from SARFAESI Act. Portion of paragraph 28 reads thus:

“28.In our view, there was no justification whatsoever for the learned Single Judge to allow the borrower to bypass the efficacious remedy provided to him under Section 17 and invoke the extraordinary jurisdiction in his favour when he had disentitled himself for such relief by his conduct. The Single Judge was clearly in error in invoking his extraordinary jurisdiction under Article 226 in light of the peculiar facts indicated above. The Division Bench also erred in affirming the erroneous order of the Single Judge.”

13 The Apex Court also in the matter of ***Authorized Officer, State Bank of Travancore and Ors. Vs. Mathew K.C. (2018) 3 SCC 85*** held that the SARFAESI Act is a complete Code by itself providing for expeditious recovery of the dues out of loans granted by the Financial Institutions, the remedy of appeal by the aggrieved under section 17 before the DRT is provided. It is also held by the Apex Court that 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. Paragraphs 3, 7 and 8 of the said judgment read thus:

3. *The SARFAESI Act is a complete code by itself, providing for expeditious recovery of dues arising out of loans granted by financial institutions, the remedy of appeal by the aggrieved under Section 17 before the Debts Recovery Tribunal, followed by a right to appeal before the Appellate Tribunal under Section 18. The High Court ought not to have entertained the writ petition in view of the adequate alternate statutory remedies available to the Respondent. The interim order was passed on the very first date, without an opportunity to the Appellant to file a reply. Reliance was placed on United Bank of India Vs. Satyawati Tandon and Others 2010 (8) SCC 110 and Sri Siddeshwara Cooperative Bank Ltd. Vs. Iqbal and Others 2013 (10) SCC 83. The writ petition ought to have been dismissed at the threshold on the ground of maintainability. The Division Bench erred in declining to interfere with the same.*

7. *The Section 13(4) notice along with possession notice under Rule 8 was issued on 21.04.2015. The remedy under Section 17 of the SARFAESI Act was now available to the Respondent if aggrieved. These developments were not brought on record or placed before the Court when the impugned interim order came to be passed on 24.04.2015. The writ petition was clearly not instituted bona fide, but patently to stall further action for recovery. There is no pleading why the remedy available under Section 17 of the Act before the Debt Recovery Tribunal was not efficacious and the compelling reasons for by-passing the same. Unfortunately, the High Court also did not dwell upon the same or record any special reasons for grant of interim relief by direction to deposit.*

8. *The statement of objects and reasons of the SARFAESI Act states that the banking and financial sector in the country was felt not to have a level playing field in comparison to other participants in the financial markets in the world. The financial institutions in India did not have the power to take possession of securities and sell them. The existing legal framework relating to commercial transactions had not kept pace with changing commercial practices and financial sector reforms resulting in tardy recovery of defaulting loans and mounting non-performing assets of banks and*

financial institutions. The Narasimhan Committee I and II as also the Andhyarujina Committee constituted by the Central Government Act had suggested enactment of new legislation for securitisation and empowering banks and financial institutions to take possession of securities and sell them without court intervention which would enable them to realise long term assets, manage problems of liquidity, asset liability mismatches and improve recovery. The proceedings under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, (hereinafter referred to as 'the DRT Act') with passage of time, had become synonymous with those before regular courts affecting expeditious adjudication. All these aspects have not been kept in mind and considered before passing the impugned order.

14 In view of these facts and the law declared by the Apex Court, we are of the opinion that efficacious alternate remedy is available. Therefore, there is no question of entertaining the present Writ Petition.

15 Hence, Writ Petition stands rejected. No order as to costs.

16 At this stage, the learned counsel for the Petitioner submits that ad-interim protection granted by this court by order dated 18.06.2018 be continued. He submits that this court directed Respondent bank not to take possession of the secured assets. He submits that the said order be continued for four weeks.

17 Considering the submissions made by the learned counsel for the Petitioner, as the petitioner failed to comply the order dated 24th August, 2018, 29th August, 2018 i.e. to pay part loan amount to the extent of Rs.20,00,000/-, as impugned order was passed by District Magistrate on 27.02.2018 and as Respondent bank have to recover

more than Rs.1 crore, we do not find any reason to continue the ad-interim protection granted by this court in favour of the petitioner. Hence, petitioner's oral request stands rejected.

(SANDEEP K. SHINDE, J.)

(K.K. TATED, J.)