IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.11576/2018

Sanjay Sinha ... Petitioner

V/s.

Bank of India & Ors. ... Respondents

Mr. Navaneetha Krishnan for the Petitioner
Ms. Pooja Karadia i/b. Naush Shah Legal for Respondent No.1.

CORAM: K.K. TATED &
S. K. SHINDE, JJ.

DATED : OCTOBER 9, 2018

P.C. :

1 Heard. By this petition under Article 226 and 227 of the Constitution of India the Petitioner challenges the order dated 08.03.2018 passed by the Additional Chief Metropolitan Magistrate, 3rd Court, Esplanade, Mumbai in case No.804/SA/2017 on the Application made by the bank u/s.14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (said Act) for taking possession of the secured assets i.e. residential Flat Nos.702 and 703, 7th Floor, Breezy Heights, Carter Road, Rizvi Complex, Bandra (W), Mumbai admeasuirng 2380 sq.ft. Standing in the name of the Mr. Sanjay Singh (Director/Guarantor)

2 At this stage, the learned counsel for the Respondent bank undertakes to file vakalatnama within a week. The undertaking is accepted.

3 The learned counsel for the Petitioner submits that in the present proceedings, the Respondent bank has failed and neglected to comply with the statutory provisions as required under law. He submits that before taking any action under the provisions of the said Act, it is the duty cast upon the Bank to issue notice u/s.13(2) of the said act. He submits that they have not received a copy of such notice. He submits that these facts are admitted by the bank itself in their Affidavit of service filed before the Additional Chief Metropolitan Magistrate, 3rd Court, Esplanade, Mumbai at the time of applying u/s.14 of the said Act. He submits that the the Respondent Bank has placed on record a photocopy of the letters issued by them for serving u/s.13(2) of the said Act. He submits that those letters returned unserved with postal remark "left unclaimed". This itself shows that without serving the notice u/s.13(2) of the said Act, the Respondent bank has proceeded to take possession of their properties. On this ground, the impugned order passed by the learned Magistrate is required to be set aside.

4 The learned counsel for the Petitioner submits that before passing the order u/s.14 of the said Act, it is a duty cast upon the Magistrate to see, as to whether the Respondent bank has complied with the statutory provisions i.e. notice u/s.13(2) of the said Act is duly served, whether the Respondent bank has filed affidavit disclosing the fact that the borrower has created charge on their property etc. He submits that in the present proceedings, the learned Magistrate, without considering these facts, passed the impugned order allowing the Respondent bank

to take forcible possession of the secured assets. In support of this contention, the learned counsel for the Petitioner relies on the grounds raised by them in the present Petition. On the basis of these submissions, the learned counsel for the Petitioner submits that the impugned order is required to be set aside. He submits that if the impugned order is not set aside the Petitioner's statutory right to reply u/s.13(2) of the said Act will be deprived.

5 The learned counsel for the Respondent Bank submits that after complying with the provisions of the said Act, they moved learned Magistrate u/s.14 of the said Act. She submits that in the present proceedings, initially they issued notice u/s.13(2) of the said Act to the Petitioner calling upon them to clear their dues to the extent of Rs.173,17,77,673.09 as on 15.03.2017. She submits that the said notice was returned unserved with the postal remark "not claimed, left". As soon as they learnt that the notice issued to the Petitioner returned unserved, they issued public notice in newspaper. During the course of arguments, the learned counsel for the Respondent Bank has placed on record demand notice published by them in Free Press Journal dated 30.05.2017 and Navshakti dated 31.05.2017. Same are taken on record. In the said public notice, it was specifically stated that the notice issued to the Petitioner returned unserved with postal remark "left, unclaimed". On the basis of these facts, the learned counsel for the Respondent Bank submits that they have complied with the procedure as required under the law before approaching the Magistrate u/s.14 of the said Act for taking

possession of the secured assets. Therefore, there is no question of granting any ad-interim relief at this stage. She submits that the Respondent Bank has to recover more than Rs.201 crores from the Petitioner. Therefore, there is no substance in the Writ Petition and same to be dismissed with costs.

6 We heard both sides. It is to be noted that the main contention raised by the Petitioner is about the non service of notice u/s.13(2) of the said Act. Though the notice was issued by the Respondent Bank by RPAD, it returned unserved with remark "left, refused to accept." Thereafter the Respondent Bank has immediately published the said notice in two newspapers, one in English and another in Marathi on 30.05.2017 and 31.05.2017. In that notice also they have specifically stated that the notice issued to the Borrower by RPAD returned unserved. This itself shows that the Respondent Bank has complied with the procedure as required under section 13 of the said Act. All these documents were placed on record by the Respondent Bank before the learned Magistrate. The learned Magistrate, after considering these facts, passed the impugned order dated 08.03.2018.

7 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."*

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."*

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.*
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> *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.*
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> *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.*

8 Considering these facts, we do not find any substance in the grounds raised in the petition.

9 During the course of arguments, we called upon the Petitioner to state whether the Petitioner is ready and willing to deposit 50% to show their *bona fide.* He has shown his inability to do so.

10 Considering these facts, the Writ Petition stands dismissed. No order as to costs.

11 At this stage, the learned counsel for the Petitioner seeks stay of this order.

12 It is to be noted that the Respondent Bank has to recover more than Rs.200 crores and the Petitioner is not ready even to deposit 50% of the said amount. Hence, there is no question of granting any stay. Hence, the oral request for stay is rejected.

(S. K. SHINDE, J.) **(K. K. TATED, J.)**