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

WRIT PETITION NO. 12303 OF 2018

M/s. United Construction Company,
Solapur ... **Petitioner**
V/s.
The Sub-Divisional Magistrate,
Solapur No.1, Solapur & Ors. ... **Respondents**

Mr. Shrishail Sakhare for the Petitioner.
Mr. Shashank Fadia for the Respondent No.3.

CORAM : K. K. TATED, &
N.J.JAMADAR, JJ.
DATE : 31st OCTOBER, 2018

P.C.:

. Heard learned Counsel for the parties.

2 When this Court declined to entertain the present Writ Petition, the learned Counsel for the petitioner submits that he received instructions from his client to withdraw the Writ Petition with liberty to file appropriate proceeding before the Debt Recovery Tribunal. At his request, matter was kept back to enable him to give in writing the same.

3 Instead of giving in writing, the learned Counsel for the petitioner submits that he wants to argue the matter on its own merits.

4 By this petition, under Article 226 of the Constitution of India, the petitioner is challenging the order dated 18.05.2015 passed by the

learned Sub-Divisional Magistrate Solapur-1, Solapur in Taran-Hakka Application No. 33 of 2014 allowing respondent No.3's application under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as "**the SARFAESI Act**").

5 The main contention of the petitioner in the present petition is that, as on today, he is the owner of the suit property i.e. Flat No. 323 admeasuring built-up of approx. 78.99 sq. mtrs on the third floor of the Building No. "E", United Heritage, situated at T.P.-III, Final Plot No. 37 at Sought Sadar Bazar, Solapur. He submits that though the petitioner entered into agreement for sale of the said flat with respondent No.5 on 25.10.2004, the respondent No.5 failed and neglected to comply the terms and conditions of the same. Hence, as on today, the petitioner is owner of the suit flat. He submits that as per the said agreement, he agreed to sell the said flat to the respondent No.5 for a sum of Rs.10,50,000/- on following terms and conditions for payment which reflects in paragraph 5 of the said agreement. Paragraph 5 reads thus:

> *"5) That an amount of Rs. 168,000/- (One Lack sixty eight thousand only) has been paid by cheque no. on Bank, by the party of the second part from out of the agreed purchase price as the part payment in the earnest money deposit (15%) to the party of the first part & the remaining amount is to be paid by the party of the second part to the party of the first part as under.*

i) 15% of total cost On completion of plinth level.
ii) 20% of total cost On completion of slab level
iii) 15% of total cost On completion of Brick level
iv) 20% of total cost On completion of plastering and flooring
v) 10% of total cost On completion of plumbing, sanitary
vi) 5% of total cost At the time of handing over the possession."

6 The learned Counsel for the petitioner submits that it was agreed between the petitioner and respondent No.5 that, if there is any default on the part of purchaser to make a payment, then he has to pay interest @ 18% per annum. Not only that, even the possession was not hand over to the purchaser. In support of this contention, he relies on clause Nos. 7,25,37, and 39 of the agreement for sale dated 25.10.2004, which read thus:

> "*7) Without prejudice to the right of the Party of the First Part of take action for breach arising out of delay in payment of the installments on the due dates, the Flat purchaser/s shall be bound and liable to pay interest at 18% per annum on all the amounts which become due and payable by the flat purchaser/s to the Party of the First Part till the date of actual payment, provided that the tender principle amounts and interest or tender of the interest and expenses thereof shall not itself be considered as waiver of the right of the Party of the First Part under this agreement, nor shall it be construed as condonation of the delay by the Party of the First Part. The amount of interest shall be informed by the Party of the First Part to the flat purchaser from time to time or on completion of the said flat but before possession. Any payment in advance payment towards the flat purchaser or housing*

finance companies.

25) The possession of the said premises shall be delivered to the party of the second part wherein the building is ready for use and occupation as per the certificate of the local authority provided all the amounts due under this agreement are paid by the party of the second part to the party of the first part on the regular dates and the necessary papers are signed for possession are signed by party of second part. SUBJECT to the party of the second part paying in time the various amounts to be paid by it from time to time the party off the first part agrees to carry out the construction work and hand over the possession of the said flat to the party of the second part within ***12 months*** *from the date of execution of this agreement. The party of the second part however agrees that in the event of the party of the first part meeting with any unanticipated difficulties, scarcity of the material, alterations in municipal policies, litigation in the said property on any reasons, and prohibitory order or other circumstances beyond the control of the party of the first,the party of the first part shall be entitled to an extension of the period of the completion by the time required for overcoming the difficulties mentioned above and encountered by the party of the first part.*

37) The Party of the First Part shall have possessors lien and first charge on the said flat for all monies that the Flat Purchaser/s is are liable to pay under this agreement to the Party of the First Part and the Party of the First Part is entitled to withhold possession subject to liability as to taxation or otherwise.

39) If any amount due and payable by the Flat Purchaser remains unpaid then the Party of the First Part at his discretion and without prejudice to his other rights shall be entitled to adjust and satisfy such dues from any other amount paid by the Flat Purchaser from any amount payable to the Flat Purchaser and adjust the account accordingly and in case still there are dues from Flat Purchaser make demand accordingly and withhold possession until such time the dues have not been paid in full satisfaction of the Party of the First Part."

7 The learned Counsel for the petitioner submits that the dispute is

pending between the petitioner and respondent No.5 in respect of the suit premises before the Consumer Forum. Therefore, there is no question of allowing respondent No.3 to take forcible possession of the same.

8 The learned Counsel for the petitioner submits that when there was no concluded contract between the petitioner and respondent No.5, there was no question of mortgaging the said property by respondent No.3 for taking loan. In support of this contention, he relies on following authority:

1) Housing Development Finance Corporation Ltd. (HDFC LTD), Nagpur V/s. District Magistrate, Washim and Ors. reported in 2016(5) Mh. L.J. 100.

9 On the basis of this submission, the learned Counsel for the petitioner submits that this Hon'ble Court be pleased to set aside the order dated 18.05.2015 passed by the Special Divisional Magistrate, Solapur in Application No. 33 of 2014. He submits that if the present Writ Petition is not allowed, irreparable loss and injury will be caused to them.

10 On the other hand, learned Counsel for the respondent No.3 Bank submits that respondent No.5 executed several documents i.e. loan agreement (page 96), declaration (page 116) and other

documents. He submits that at the time of taking loan, respondent No.5 handed over no objection certificate dated 26.10.2004 given by the petitioner for loan purpose. He submits that, it is specifically stated in the said No Objection Certificate that respondent No.5 paid an amount of Rs.1,68,000/- and sum of Rs.8,82,000/- to the petitioner towards the cost of the said flat. Not only that, even the petitioner specifically stated in the said No Objection Certificate that they are making a noting in their books, that the said flat is mortgaged by respondent No.5 in favour of respondent No.3. In support of this contention, the learned Counsel for the respondent No.3 Bank relies on paragraph 3 and part of paragraph 5 of the said no objection certificate, which is reads thus:

> *"3) Mr. Adil Abdul Quadir Munshi &Mrs. Kausar Adil Munshi paid an amount of Rs. 168,000/- And a sum of Rs. 8,82,000/- remains to be paid towards the cost of the said flat."*
>
> *5) .... And notwithstanding anything to the contrary contained in the said agreement for Sale, we hereby agree to note the above said charge in our books in respect of the said flat and Mr. Adil Abdul Quadir Munshi & Mrs. Kausar Adil Munshi not be permitted to transfer, assign, sell off/cancel or in any other way / manner deal with the said flat prejudicial to the interest of the aforesaid mortgage without the prior written consent of the aforesaid mortgage"*

11 The learned Counsel for the respondent No.3 submits that after following due process of law i.e. issuing notice under Section 13(2) of

the SARFAESI Act dated 21.06.2011 to the borrower, they preferred application before learned Special Divisional Officer under Section 14 of the SARFAESI Act for taking the possession of the secured assets. He submits that the learned Special Divisional Officer after considering the documents on record passed an impugned order dated 18.05.2015 directing the concerned authority to take appropriate steps for taking the possession of the suit premises. The learned Counsel for the respondent No.3 submits that as on today more than Rs.36 lakhs is due and payable by the borrower i.e. respondent No.5.

12 The learned Counsel for the respondent No.3 submits that earlier the petitioner preferred Writ Petition No. 10776 of 2018 challenging the notice dated 21.08.2018 issued by the concerned Tahsildar, Executive Magistrate, North Solapur for taking the possession of the suit property with following prayers:

> *"a) rule be issued;*
> *b) this Hon'ble court be pleased to call for the records and proceedings of the present case and after examining legality and priority thereof the impugned order of Respondent no. 2 Tahsildar and Executive Magistrate, North Solapur bearing order No. Ja.Kra./Jababi/Kavi/1866,1732/2018 dated 21/8/2018 be quashed and set aside;*
> *c) pending the hearing and final disposal of this writ petition, this Hon'ble court be pleased to stay the execution operation and implementation of impugned order of Respondent no. 2 Tahsildar and Executive Magistrate, North Solapur bearing order No. Ja.Kra./Jababi/Kavi/1866,1732/2018 dated 21/08/2018.*

d) interim/ad interim relief in terms of prayer clause(c) above be granted;
e) this writ petition be allowed with heavy cost;
f) any other just and proper order be passed in the interest of justice."

13 The learned Counsel for the respondent No.3 submits that when this Court declined to entertain the said Writ Petition, the petitioner had withdrawn the same and to that effect this Court had passed order on 12.10.2018. The said order reads thus:

> "*1. When this Court declined to entertain the present Writ Petition, learned Advocate Mr. Shrishail Sakahre appearing for the petitioner, after taking instructions from his client who is present in the Court, seeks permission to withdraw the present petition with liberty to file appropriate proceedings. To that effect, he has given in writing. The said writing is taken on record and marked **"X"**for identification. Same is accepted. In view of these facts, the Writ Petition is disposed of as withdrawn with liberty as prayed for."*

14 The learned Counsel for the respondent No.3 submits that in any case, alternate efficacious remedy is available to the petitioner to approach the Debt Recovery Tribunal in the present proceeding. Therefore, there is no question of entertaining the Writ Petition under Article 226 of the Constitution of India.

15 We heard both the sides at length. We have perused the authorities cited by the petitioner in support of his contention. It is to be noted that in the present proceeding, the petitioner has given no

objection certificate dated 26.10.2004 in favour of respondent No.3 for creating mortgage in favour of it. Apart from that the respondent No.3 issued notice under Section 13(2) of the SARFAESI Act dated 21.06.2011 to the borrower and after following due process of law, it approached the learned Sub-Divisional Magistrate for order under Section 14 of the SARFAESI Act. Apart from that alternate efficacious remedy is available to the petitioner, if he is aggrieved by the order dated 18.05.2015 passed by the Sub-Divisional Magistrate.

16 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 226 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."

17 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."

18 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 <u>United Bank of India Vs. Satyawati Tandon and Others 2010 (8) SCC 110</u> and <u>Sri Siddeshwara Cooperative Bank Ltd. Vs. Iqbal and Others *2013 (10) SCC 83*</u>*. 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."*

19 In view of the above mentioned facts and the law declared by the Apex Court, we do not find any substance in the present Writ Petition.

20 At this stage, the learned Counsel for the petitioner submits that the respondent may be restrained from taking the forcible possession of the secured assets at least for six weeks so that petitioner can take appropriate steps according to law. Same is opposed by the learned Counsel for the respondent No.3 Bank.

21 Considering the fact that this is the second round of litigation by the petitioner for same cause of action and as of today the respondent No.3 has to recover more than 36 lakhs from respondent No.5, we do not find any reason to stay this order.

22 Hence, oral request of the petitioner is rejected.

23 Hence, the following order:

a) Writ Petition stands dismissed with cost of Rs.25000/-.

b) Cost to be paid to respondent No.3 within three months from today, failing which respondent No.3 is free to recover the same according to law.

(N.J.JAMADAR, J.) **(K.K.TATED, J.)**