IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L.) NO. 3548 OF 2018

Mrs. Zubaida Mohammed Yunus … Petitioner.

V/s.

Bank of India & 9 Others. … Respondents.

Mr. Mathews Nedumpara, Advocate, i/by Ms. Rohini M. Amin, for the Petitioner.
Mr. O. A. Das, Advocate, for the Respondent-Bank.

CORAM : K.K. TATED & N.J. JAMADAR,JJ.

DATE : OCTOBER 16, 2018.

PC :

1 Heard learned counsel for the parties.

2 By this petition under Article 226 of the Constitution of India, the Petitioner is challenging the validity of several sections under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (for short, “SARFAESI Act.”). The main challenge in the present proceedings is to the order dated 21.01.2012 passed by the learned Chief Metropolitan Magistrate, Mumbai, under section 14 of the SARFAESI Act and orders dated 05.09.2018

and 27.09.2018, as described in prayer clause (k) of the petition, which reads thus :

> (k) pending the hearing and final disposal of the present petition, stay all further proceedings pursuant to the Notice dated 21.06.2010 issued by Respondent No. 1 under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002; the notice issued by Respondent No. 1 under section 13(4) of the said Act (Exhibit "C") and published in the Free Press Journal dated 17th January, 2011; the order dated 21st January 2012 (issued by the learned Chief Metropolitan Magistrate, Mumbai, under section 14 of the said Act, the orders dated 05.09.2018 (Exhibit "Q") and 27.09.2018 (Exhibit "R") passed by the Chief Metropolitan Magistrate, Mumbai; and the notice dated 01.10.2018 issued by the Court Commissioner (Exhibit "S") be stayed;

3 It is to be noted that in the present proceedings, the Petitioner has already filed Securitisation Application No. 540 of 2018 before the Debt Recovery Tribunal-II, Mumbai. In that application, the DRT-II passed order dated 10.10.2018. The said order is not annexed to the present petition.

4 Learned counsel appearing on behalf of the petitioner submits that the petitioner is a tenant of the suit premises i.e. Flat No. 603, K.S.A. Regency, 13/15, Huseini Baug, Maulana Azad Road, Mumbai-400 008. He submits that the petitioner is not liable to pay any amount to the

Respondent-Bank. He submits that being the tenant and on the basis of the judgement dated 05.01.2017 passed by the Small Causes Court at Mumbai in RAD Suit No. 20 of 2015, the petitioner has legal right to protect his possession, being the tenant. In support of his contention, the learned counsel for the petitioner relies on the judgment of the Apex Court dated 20.01.2016 in the case of **Vishal N. Kalsaria** vs. **Bank of India & Ors.,** in criminal appeal no.52 of 2016. He relies on para nos. 28, 29 and 30 of the said judgment, which reads thus :

> "28. The decision of this Court rendered in the case of Harshad Govardhan Sondagar (supra) cannot be understood to have held that the provisions of the SARFAESI Act override the provisions of the Rent Control Act, and that the Banks are at liberty to evict the tenants residing in the tenanted premises which have been offered as collateral securities for loans on which default has been done by the debtor/landlord.
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> 29. As far as granting leasehold rights being created after the property has been mortgaged to the bank, the consent of the creditor needs to be taken. We have already taken this view in the case of Harshad Govardhan Sondagar (supra). We have not stated anything to the effect that the tenancy created after mortgaging the property must necessarily be registered under the provisions of the Registration Act and the Stamp Act.
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> 30. It is a settled position of law that once tenancy is created, a tenant can be evicted only after following the due process of law, as prescribed under the

provisions of the Rent Control Act. A tenant cannot be arbitrarily evicted by using the provisions of the SARFAESI Act as that would amount to stultifying the statutory rights of protection given to the tenant. A non-obstante clause (Section 35 of the SARFAESI Act) cannot be used to bulldoze the statutory rights vested on the tenants under the Rent Control Act. The expression 'any other law for the time being in force' as appearing in Section 35 of the SARFAESI Act cannot mean to extend to each and every law enacted by the Central and State legislatures. It can only extend to the laws operating in the same field. Interpreting the non obstante clause of the SARFAESI Act, a three Judge Bench of this Court in the case of Central Bank of India v. State of Kerala & Ors. (2009) 4 SCC 94 has held as under:

> *"18. The DRT Act and Securitisation Act were enacted by Parliament in the backdrop of recommendations made by Vishal N. Kalsaria Vs. Bank of India & Ors. (SC) the Expert Committees appointed by the Central Government for examining the causes for enormous delay in the recovery of dues of banks and financial institutions which were adversely affecting fiscal reforms. The committees headed by Shri T. Tiwari and Shri M. Narasimham suggested that the existing legal regime should be changed and special adjudicatory machinery be created for ensuring speedy recovery of the dues of banks and financial institutions. Narasimham and Andhyarujina Committees also suggested enactment of new legislation for securitisation and empowering the banks etc. to take possession of the securities and sell them without intervention of the Court.*
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> *XXX XXX XXX*

110. The DRT Act facilitated establishment of two-tier system of Tribunals. The Tribunals established at the first level have been vested with the jurisdiction, powers and authority to summarily adjudicate the claims of banks and financial institutions in the matter of recovery of their dues without being bogged down by the technicalities of the Code of civil Procedure. The Securitisation Act drastically changed the scenario inasmuch as it enabled banks, financial institutions and other secured creditors to recover their dues without intervention of the Courts or Tribunals. The Securitisation Act also made provision for registration and regulation of securitisation/reconstruction companies, securitisation of financial assets of banks and financial institutions and other related provisions.

111. However, what is most significant to be noted is that there is no provision in either of these enactments by which first charge has been created in favour of banks, financial institutions or secured creditors qua the property of the borrower.

112. Under Section 13(1) of the Securitisation Act,limited primacy has been given to the right of a secured creditor to enforce security interest vis-à-vis Section 69 or Section 69A of the Transfer of Property Act. In terms of that sub-Section, a secured creditor can enforce security interest without intervention of the Court or Tribunal and if the borrower has created any mortgage of the secured as set, the mortgagee or any person acting on his behalf cannot sell the mortgaged property or appoint a receiver of the income of *the mortgaged property or any part thereof in a manner which may defeat the right of the secured creditor to enforce security interest. This provision was enacted in the backdrop of Chapter VIII of Narasimham Committee's 2nd Report in which specific reference was made to the provisions relating to mortgages under the Transfer of Property Act.*

113. In an apparent bid to overcome the likely difficulty faced by the secured creditor which may include a bank or a financial institution, Parliament incorporated the non obstante clause in Section 13 and gave primacy to the right of secured creditor vis a vis other mortgagees who could exercise rights under Sections 69 or 69A of the Transfer of Property Act. However, this primacy has not been extended to other provisions like Section 38C of the Bombay Act and Section 26B of the Kerala Act by which first charge has been created in favour of the State over the property of the dealer or any person liable to pay the dues of sales tax, etc.

....

116. The non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act give overriding effect to the provisions of those Acts only if there is anything inconsistent contained in any other law or instrument having effect by virtue of any other law. In other words, if there is no provision in the other enactments which are inconsistent with the DRT Act or Securitisation Act, the provisions contained in those Acts cannot override other legislations."

(emphasis laid by this Court)

On the basis of this submission, the learned counsel for the petitioner submits that the Respondents may be restrained from disturbing the petitioner's possession in respect of the suit property.

5 The learned counsel for the petitioner submit that the petitioner had already filed suit no. 0104576 of 2012 before the City Civil Court at Mumbai. He submits that though the said suit is dismissed for non-prosecution on 14.08.2018, the petitioner has already preferred an application for restoration and it is pending for hearing on its own merit. He relies on the order dated 14.08.2018 passed by the City Civil Court, Mumbai in the said suit, which reads thus :

> "Business : None for plaintiff. Adv. Ms. Mandira for D-1 and 2 present. Cost is not paid by plaintiff as per order dated 14.06.2018. In view of deletion of section 9A of CPC, the preliminary issues framed on 21.03.2014 shall be considered while framing issues in the suit. Kept back Later on at 12.30 pm. Same appearance. Since last several dates the plaintiff was appearing in person and his advocate is not appearing except on 19.1.2018. Today also none appears for the plaintiff and the plaintiff is also absent even after second call. He has not complied with order dated 14.06.2018. It appears that plaintiff is not interested in prosecuting the suit. Hence, suit is dismissed for want of prosecution. No order as to costs. Chamber

summons or notice of motion, if any, is disposed of as infructuous.

Nature of Disposal : Dismissed.
Disposal Date : 14.08.2018.

COURT 3 ADDL. SESSIONS JUDGE."

6 Learned counsel for the petitioner further submits that initially they filed writ petition no. 209 of 2013 before this court, challenging the order of rejection of the application for amendment to the Securitization Appeal filed by the petitioner under section 17 of the SARFAESI Act. He submits that in that petition, this court by order dated 07.03.2013, granted protection to the petitioner, directing the respondent - bank to maintain status-quo in respect of the property upto and including 15th April, 2013. It is clarified that the petitioner shall also maintain status-quo in respect of the property in all respects. Learned counsel for the petitioner also relies on the ground raised by him in the petition.

7 On the other hand, the learned counsel Mr. Das, appearing on behalf of the Respondent No. 1 filed affidavit -in-reply dated 16.10.2018. Learned counsel for Respondent No. 1 submits that the petitioner has suppressed the fact that they filed the securitisation application no. 540 of 2018 before the Debts Recovery Tribunal-II, Mumbai and the same was decided by order dated 10.10.2018. He submits that

Respondent No. 1 annexed the copy of the order dated 10.10.2018 in their affidavit-in-reply at Exh. 'A” at page 291. He submits that against this order, an appeal is provided under the SARFAESI Act before the Debts Recovery Appellate Tribunal. Hence, the present petition is not maintainable in law, in view of alternate efficacious remedy is available to the petitioner. Learned counsel for Respondent No. 1 in support of his contention relies on para nos. 2 and 3 of their affidavit-in-reply which reads thus :

> “2. At the outset, I say and submit that this writ petition is not maintainable, in law or in fact. The impugned order dated 10.10.2018, is passed by Hon'ble DRT-II Mumbai is an appealable before the Hon'ble DRAT. They have filed the present writ petition against the order passed by the Ld. DRT. The trial court order is always an appealable order. I It is therefore, respectfully submit that the present writ petition is not maintainable by invoking by Article 226/227 of India Constitution. However, there is no prayer to challenge the order dated 10.10.2018; nor the order is annexed in the petition. I further say that order is signed by the Hon'ble DRT. I respectfully submit that since the Petitioner made false statement the Petitioner is not entitled for any reliefs as prayed for.
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> 3. I further say and submit that in the present petition, most of the averments are about the Appeal filed before DRAT. However, the writ petition filed against the order dated 10.10.2018 passed by the Hon'ble DRT. Neither the order copy is enclosed in the petition nor it is challenged, and / or made out any case to grant any relief.”

On the basis of these facts, the learned counsel for Respondent No. 1 submits that there is no substance in the present writ petition and the same is required to be dismissed with costs.

8 We have heard both the sides at length. The sum and substance of the present petition is that when an alternate efficacious remedy is available to the petitioner, whether this court can entertain writ petition under Article 226 of the Constitution of India.

9 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."*

10 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."*

11 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.

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."

12 In view of this fact and the law declared by the Apex Court, we are of the opinion that the present petition is not maintainable under Article 226 of the Constitution of India, in view of the alternate efficacious remedy available under the Securitisation Act.

13 Hence -

(a) The petition is rejected.

(b) No order as to costs.

(c) At this stage, the learned counsel for the petitioner submits that the petitioner's possession in respect of the suit property be protected at least by 48 hours. Considering earlier orders passed by this court as well as when efficacious remedy is available to the petitioner, we find no reason to grant ad-interim relief in favour of the petitioner. Hence, oral application made by the petitioner is rejected.

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

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