

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.07.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.12425 of 2018

and

WMP Nos.14553 & 15048 of 2018

Mrs.R.Premalatha
Proprietor of Rakshana Cotton Mills
Tiruppur.

... Petitioner

vs.

State Bank of India,
Rep. by its Authorized Officer,
377/1, Dr.Nanjappa Road,
Behind N.S.Palaniappan Nursing Home,
Coimbatore - 641 608.

... Respondent

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorari, calling for the records of the respondent relating to the impugned notice issued under Section 13(2) of SARFAESI dated 29.11.2016 & Section 13(4) of SARFAESI notice dated 14.03.2017 & consequential sale notice dated 24.04.2018, e-auction notice dated 24.04.2018 published in Dhinamani dated 27.04.2018 and quash the same as illegal.

For Petitioner : Mr.P.J.Sriganesh

For Respondent : Mrs.S.R.Sumathy

ORDER

(Order of the Court was made by S.MANIKUMAR, J)

Borrower who has committed default and aggrieved by the measures under Section 13(4) of the SARFAESI Act, 2002 and the consequential sale notice dated 24.04.2018 issued by the State Bank of India, represented by its Authorized Officer, Coimbatore, who has brought the secured assets for auction, has filed the instant writ petition, challenging the demand notice dated 29.11.2016 issued under Section 13(2) of the SARFAESI Act, 2002 dated 14.03.2017, notice issued under Section 13(4) of the Act and the consequential sale notice dated 24.04.2018, and sought for a writ of certiorari, to quash the same.

2. Brief facts summarised from the supporting affidavit and material available on record are that in the year 2013, State Bank of Patiala, Tiruppur, granted financial assistance of Rs.2.5 Crores to the borrower M/s.Rakshana Cotton Mills, represented by its Proprietrix Mrs.R.Premalatha, Thyennampalayam, Tiruppur. Financial assistance was secured by the personal guarantee of Mr.M.Ravichandran and Mrs.B.Saraswathi, guarantors, whose properties have been offered as secured assets.

3. State Bank of Patiala, Tiruppur Branch, caused a notice dated

<http://www.judis.nic.in> 29.11.2016, under Section 13(2) of SARFAESI Act, 2002, demanding a sum of

Rs.2,74,70,348/- as on 29.11.2016, with future interest at the contractual rate, on the aforesaid sum together with incidental expenses, costs, charges, etc. to be paid, failing which, bank would initiate further action.

4. On 23.01.2017 M/s.Rakshana Cotton Mills, Tiruppur has sent a proposal for one time settlement for Rs.1.25 Crores. Thereafter, on behalf of M/s.Rakshana Cotton Mills, Tiruppur, represented by its Proprietrix and the guarantors, a lawyer's notice dated 28.01.2017, has been sent to the Authorized Officer, State Bank of Patiala, Tiruppur Branch, Tiruppur, calling upon the latter to withdraw the demand notice dated 29.11.2016 issued under Section 13(2) of the SARFAESI Act, 2002 and not to take further action under the said Act.

5. Thereafter, State Bank of Patiala, Tiruppur, has issued possession notice dated 14.03.2017 under Section 13(4) of the SARFAESI Act, 2002 read with Rule 8(1) of the Security Interest (Enforcement) Rules, 2002. Amount mentioned in the said notice is Rs.2,87,20,763/- as on 01.03.2017 and interest thereon.

6. Thereafter, in April 2018, State Bank of Patiala, Tiruppur Branch got merged with State Bank of India.

7. Following the merger, the Authorized Officer, State Bank of India, Stressed Assets Recovery Branch, Coimbatore, issued a sale notice dated 24.04.2018 under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002, bringing the secured assets for e-auction on 29.05.2017. Paper publication dated 28.04.2018 has been effected. Thereafter, M/s.Rakshana Cotton Mills, Tiruppur, petitioner sent a letter dated 05.05.2018, to the Assistant General Manager, Stressed Assets Recovery Branch, Coimbatore, offering one time settlement of Rs.1.75 Crores. On the above facts, Mrs.Premalatha, Proprietrix of M/s.Rakshana Cotton Mills, Tiruppur, has filed the instant writ petition, for the reliefs stated supra.

8. Among other grounds, major thrust of the petitioner is that there is a violation of Section 13(3-A) of the SARFAESI Act, 2002 and that representation / objections dated 28.01.2017 of the petitioner submitted under Section 13(3-A), has not been considered at all and that bank had proceeded to issue possession notice dated 14.03.2017 under Section 13(4) of the Act and also, Sale notice dated 24.04.2018, fixing the sale on 29.05.2018.

9. Supporting the grounds, reliance has been made to paragraph Nos.30 to 34 of the judgment of the Hon'ble Apex Court in *ITC Limited Vs.*

Blue Coast Hotels Ltd., & others, reported in 2018 (2) CTC 569. Further contention has been made that the details of the declaration of NPA are not furnished in the notice dated 29.11.2016, issued under Section 13(2) of the SARFAESI Act.

10. Record of proceedings shows that on 16.05.2018, a Hon'ble Division Bench of this Court admitted the writ petition and ordered notice. In response to the Rule Nisi issued, Assistant General Manager, State Bank of India, Stressed Assets Recovery Branch, Coimbatore has filed a counter affidavit dated 18.05.2018, wherein at paragraph No.18, contention has been made that after the issuance of e-auction notice dated 24.04.2018, a representation dated 05.05.2018 has been given by the writ petitioner, seeking One Time Settlement of Rs.1.75 Crores, against the outstanding dues of Rs.3,31,45,360/- and that the same was rejected on 14.05.2018. Bank has also contended that consideration of the representation dated 23.01.2017 would not arise at all, when the subsequent / latest representation dated 05.05.2018 of the petitioner, has been considered and rejected by the bank.

11. Bank has also contended that writ petition challenging the demand notice dated 29.11.2016, issued under Section 13(2) of the SARFAESI Act, 2002, possession notice dated 14.03.2017 issued under

Section 13(4) of the Act and the e-auction notice dated 24.04.2018, are not maintainable, when there is an effective and alternative remedy. Said counter affidavit dated 18.05.2018 has been filed on 21.05.2018.

12. Proprietrix of M/s.Rakshana Cotton Mills, Tiruppur has filed a rejoinder dated 23.06.2018, contending inter alia that the counter affidavit of the respondent dated 18.05.2018 is conspicuously silent about the details of the undated letter, stated to have been sent by M/s.Rakshana Cotton Mills, Tiruppur, to the Assistant General Manager, State Bank of Patiala, Tiruppur Branch.

13. Material on record discloses that on 14.06.2018, State Bank of India, represented by its Authorized Officer, Coimbatore, has filed an additional typed set of documents enclosing a copy of a letter dated 23.01.2017, stated to have been sent by M/s.Rakshana Cotton Mills, Tiruppur to the Manager, State Bank of Patiala, Tiruppur, offering One Time Settlement for Rs.1.25 Crores and a further undated letter, stated to have been sent by M/s.Rakshana Cotton Mills, Tiruppur, to the Assistant General Manager, State Bank of Patiala, Tiruppur Branch, by which, the petitioner is stated to have withdrawn the reply notice dated 28.01.2017, alleged to have sent through lawyer Mr.T.Rajmahendan, Tiruppur. Petitioner in the rejoinder dated 23.06.2018, has contended that there was no withdrawal or

revocation or cancellation of the representation dated 28.01.2017. Petitioner has further contended that there was no such letter.

14. Bank has filed an additional counter affidavit dated 27.06.2018, wherein it has been denied that it is incorrect to state that the bank has failed to mention anything about the reply given by the bank to the petitioner's representation dated 23.01.2017 and 28.01.2017, respectively. Bank has further contended that on behalf of the petitioner and the guarantors, a legal notice dated 28.01.2017 was issued by the writ petitioner. Contention has also been made that there is no violation of Section 13(3-A) of the SARFAESI Act, 2002 and that the said provision is duly complied with. Further contention has been made that bank through its Authorised Officer, has caused a detailed reply dated 07.02.2017, through its panel advocates and hence there is compliance of Section 13(3-A) of the SARFAESI Act.

15. Placing reliance on a decision of the Hon'ble Supreme Court in Authorized Officer, State Bank of Travancore and Another Vs. Mathew K.C. reported in 2018(3) SCC 85, further contention has been made that when there is an effective and alternative remedy, writ petition should not be ordinarily entertained. Bank has also contended that the reply notice dated 28.01.2017, sent by Mr.T.Rajmahendan, Advocate Tiruppur on behalf of

borrowers and others, has been withdrawn. Bank has also contended that there is a suppression of initiation of proceedings for recovery and steps taken under the Recovery of Debts Due to Bank and Financial Institutions Act, 1993.

16. By inviting the attention of this Court to Rule 2(a) and Rule 3(a) of the Security interest (Enforcement) Rules, 2002, Mr.P.J.Sriganesh, learned counsel for the petitioner submitted that as per the statutory rules, an Authorised Officer, is an officer not less than a Chief Manager of a Public Sector Bank or equivalent, as specified by the Board of Directors or Board of Trustees of the secured creditor or any other person or authority exercising powers of superintendence, direction and control of the business or affairs of the secured creditor, as the case may be, to exercise the rights of a secured creditor under the Act.

17. And that as per Rule 3(A)(a) of the said rules, if the borrower makes any representation or raises any objection to the notice under Section 13(3-A), it is the authorised officer, who shall consider such representation or objection and examine as to whether the same is acceptable or tenable.

18. Referring to sub rule c of Rule 3(A) of the Security Interest (Enforcement) Rules, 2002, Mr.P.J.Sriganesh, learned counsel further contended that after examining the representation made or objection raised, the Authorised Officer comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within 14 days of receipt of such representation or objection, the reasons for non-acceptance of the representation or objection, to the borrower.

19. On the decisions of the Guahati High Court and decisions of Andhra Pradesh, Kerala, Calcutta and Jarkhand High Courts, relied on, Mr.P.J.Sriganesh, learned counsel for the petitioner fairly admitted that there is divergent view on the issue as to whether an authorised officer, defined under Section 2(a) of the Security Interest (Enforcement) Rules, 2002 can delegate, his duty of giving a reply to the borrower or the guarantor, as the case may be, under Rule 3(A) of the Security Interest (Enforcement) Rules, 2002, to a lawyer. Further when the very issue of delegation of such power, involves a jurisdictional issue, notwithstanding the availability of an alternative remedy under Section 17(1) of the SARFAESI Act, 2002, in the abovesaid circumstances, writ petition can be entertained.

20. Referring to the judgment of the Hon'ble Supreme Court in **ITC Limited Vs. Blue Coast Hotels Ltd., & others**, reported in 2018 (2) CTC 569, Mr.P.J.Sriganesh, learned counsel for the petitioner submitted that the said reply under Section 13 (3-A) of the Act, should be given within 14 days and the same has to be done only by the Authorised Officer and not by any other person.

21. Referring to a decision of the Hon'ble Supreme Court in **Bharat Singh and Others Vs. State of Haryana and Others**, reported in (1988) 4 SCC 534, Mr.P.J.Sriganesh, learned counsel for the petitioner submitted that there are absolutely no averments in the counter affidavit dated 18.06.2018 or additional counter affidavit dated 27.06.2018, filed by the bank as to when representation dated 28.01.2017 was received by the Bank. It is also his further contention that there are no averments in the counter affidavit dated 18.06.2018 or the additional counter affidavit dated 27.06.2018 filed by the bank, regarding the undated letter, alleged to have been sent by M/s.Rakshana Cotton Mill, Tiruppur, to the Assistant General Manager, State Bank of Patiala, Tiruppur Branch, wherein it is stated that reply dated 28.01.2017 sent through their Advocate Mr.T.Rajmahendan, Tiruppur, was inadvertently sent and withdrawn.

22. Mr.P.J.Sriganesh, learned counsel for the petitioner further submitted that there are no evidence or proof for the receipt of letter dated 07.02.2017 sent by the panel lawyers of the Bank to Mr.T.Rajmahendan, Tiruppur, advocate of the petitioner. In sum and substance, it is the submission of the learned counsel for the petitioner that in the absence of any specific averments in the counter affidavit dated 18.06.2018 or additional counter affidavit dated 27.06.2018, as the case may be, letters dated 28.01.2017, undated letter said to have been sent by M/s.Rakshana Cotton Mill, Tiruppur, to the Assistant General Manager, State Bank of Patiala, Tiruppur and the further letter dated 07.02.2017 sent by the panel lawyers for the bank to the petitioner stated supra, need not be considered at all by this Court, as they are not in consonance with the decision of the Hon'ble Supreme Court in *Bharat Singh's* case (cited supra).

23. Per contra referring to the notice dated 29.11.2016, issued under Section 13(2) of the SARFAESI Act, 2002, by State Bank of Patiala, Tiruppur Branch, request dated 23.01.2017 for one time settlement, made by the petitioner, representation dated 28.01.2017 of the writ petitioner allegedly sent through their lawyer Mr.T.Rajmahendan, Advocate, Tiruppur and the possession notice dated 14.03.2017 issued under Section 13(4) of the SARFAESI Act, 2002 by State Bank of Patiala, Tiruppur and on the basis of the averments made in counter affidavit dated 18.06.2018 and additional

counter affidavit dated 27.06.2018, Ms.S.R.Saraswathy, learned counsel for the respondent-State Bank of India, Coimbatore submitted that till 2017, there was no objection or representation from the petitioner complaining violation of Rule 13(3-A) of the SARFAESI Act, 2002 nor the petitioner challenged the demand notice dated 29.11.2016, issued under Section 13(2) of the SARFAESI Act, 2002, the possession notice dated 14.03.2017 issued under Section 13(4) of the Act or the e-auction notice dated 24.04.2018, before the tribunal. According to her, after State Bank of Patiala merged with the State Bank of India, bank has issued a sale notice dated 24.04.2018.

24. Contending inter alia that there is an effective and alternative remedy under the SARFAESI Act, 2002, Ms.S.R.Sumathy, learned counsel for the bank submitted that on the facts and circumstances of case, there are no exceptional circumstances, warranting interference, by this Court under Article 226 of the Constitution of India, with the measures taken by the bank, for realisation of Rs.3,31,45,360/- amount outstanding as on 14.05.2018.

25. Referring to the letter dated 23.01.2017 issued by M/s.Rakshana Cotton Mills, Tiruppur, addressed to the Manager, State Bank of Patiala, Tiruppur, for one time settlement and the undated letter by M/s.Rakshana

Cotton Mills, Tiruppur addressed to the Assistant General Manager, State Bank of Patiala, Tiruppur, learned counsel for the bank submitted that earlier on 28.01.2017, on behalf of the guarantors/borrowers, Mr.T.Rajmahendan, Advocate, Tiruppur, sent a reply notice to the demand notice dated 29.11.2016 issued under Section 13(2) of the SARFAESI Act, but thereafter, vide undated letter, M/s.Rakshana Cotton Mills, Tiruppur, informed the Assistant General Manager, State Bank of Patiala, Tiruppur Branch, that the borrowers/guarantors have inadvertently sent a reply dated 28.01.2017 through their advocate and vide undated letter request the bank to treat their letter dated 28.01.2017 as cancelled / revoked. It is her contention that the borrower has requested One Time Settlement Proposal dated 23.01.2017, vide letter dated 28.01.2017 and the same was considered.

26. Learned counsel for the bank further submitted that a reply dated 07.02.2017, has also been sent by a panel advocate to the petitioner. She further submitted that there is no violation of Section 13(3-A) of the SARFAESI Act, 2002.

27. Heard the learned counsel for the parties and perused the materials on record.

28. Affidavit and counter affidavit, rejoinder, additional counter affidavits have been filed on behalf of the parties narrating, the sequences of events viz., demand notice dated 29.11.2016, issued under Section 13(2) of the SARFAESI Act, 2002, possession notice dated 14.03.2017 issued under Section 13(4) of the Act and e-auction notice dated 24.04.2018 fixing the auction on 29.05.2018, resulting in filing of the present writ petition.

29. Dates and events are as follows:

<i>Sl.No.</i>	<i>Date</i>	<i>Events</i>
1	2013	Petitioner availed cash credit facility to the tune of Rs.2.50 Crores from State Bank of Patiala, Tiruppur Branch
2	29.11.2016	Petitioner defaulted and hence, demand notice under Section 13(2) of the SARFAESI Act, 2002 was issued demanding a sum of Rs.2,74,70,348/-, as due as on 29.11.2016.
3	23.01.2017	Petitioner's request to the respondent bank to consider the OTS Proposal of Rs.1.25 Crores
4	28.01.2017	Petitioner issued a detailed representations under Section 13(3-A) of the SARFAESI Act, through his advocate Mr.T.Rajmahendran, requesting the respondent bank to withdraw the demand notice dated 29.11.2016.
5	07.02.2017	Respondent bank's reply to the petitioner's letter dated 28.01.2017, through its panel lawyer
6	14.03.2017	Possession notice was issued under Section 13(4) of the SARFAESI Act
7	24.04.2018	E-auction sale notice was issued bringing the secured asset for auction on 29.05.2018.

30. On the contention as to whether consideration of the representation / objections made under Section 13(3-A) of the SARFAESI Act, is mandatory or not, in *ITC Limited Vs. Blue Coast Hotels Ltd., & others*, reported in **2018 (2) CTC 569**, while declaring that Section 13(3-A) of the SARFAESI Act, 2002, as mandatory, at paragraph No.23, the Hon'ble Supreme Court held as hereunder

"23. Sub-section (3A) of Section 13 was introduced in the Act by the Parliament in pursuance of the following observations of this Court in *Mardia Chemicals Ltd v. Union of India*, 2004 (2 CTC 759 (SC): 2004 (4) SCC 311.

"45.... The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non-compliance with notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures

under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfillment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly, we must make it clear unequivocally that communication of the reasons for not accepting the objections taken by the secured borrower may not be taken to give occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debts Recovery Tribunal as provided

under Section 17 of the Act matures on any measure having been taken under sub-section (4) of Section 13 of the Act". (emphasis supplied)

31. Contentions have also been made that the learned counsel for the parties have exchanged correspondence, regarding the one time settlement offered and on the issue of reply stated to have been sent under Section 13(3-A) of the SARFAESI Act, 2002.

32. One of the documents enclosed in the typed set of papers filed on 14.06.2018, is a letter dated 23.01.2017, said to have been issued by M/s.Rakshana Cotton Mills, Tiruppur to the Manager, State Bank of Patiala, Tiruppur, wherein the borrower has offered one time proposal for Rs.1.25 Crores. Another document filed in the typed set of papers, by the bank is an undated letter stated to have been sent by M/s.Rakshana Cotton Mills, Tiruppur, to the Assistant General Manager, State Bank of Patiala, Tiruppur Branch. Issuance of such undated letter is refuted by the petitioner. However the letter reads that a reply notice dated 28.01.2017, stated to have been sent by the petitioner under Section 13(3-A) of the Act has to be treated as cancelled / revoked. For brevity said undated letter is reproduced hereunder.

“Please refer the above subject, we have borrowed Cash Credit limit of Rs.2.50 Cr. from your bank and we are unable to repay the interest since Aug '16 due to heavy loss incurred in our

business due to which the account has become NPA. In this regard we have received your notice dated 29.11.2016, issued under 13(2) SARFAESI Act, for which we have inadvertently sent a reply notice dated 28.01.2017 through our advocate T.Rajmahendran. We request you to treat the notice from our advocate as cancelled / revoked. You need not take any further action on legal notice as it stands cancelled. Please consider the OTS proposal dated 23.01.2017 sent on 28.01.2017. We further submit that now we proposed to sell the secured properties mortgaged with you after getting due permission from your end. Only out of the sale proceeds we will be able to repay the loan. We request you to consider our request favourably."

33. Yet another letter dated 07.02.2017, said to have been issued by the panel advocate, Mr.P.Vadivel, on behalf of the bank to Mr.T.Rajmahendan, Tiruppur, advocate for the borrower / guarantor also requires to be reproduced and the same is hereunder.

"Sub: Reply to your notice dated 28.01.2017 issued by you on behalf of your client M/s.Rakshana Cotton Mills, rep by its Proprietrix, Mrs.R.Premalata, doing business at No.19, RVE Layout, 5th Street, Thennampalayam, Tirupur 641 604 (2) Mr.M.Ravichandran S/o.Mandarachalam, residing at Door No.19, RVE Layout, th Street, Thennampalayam, Tirupur 641 604 and 3) Mrs. B.Saraswathi W/o.V.R.Balasubramaniam, residing at Door No.13/14, Chokkanthapuram, Kalyanji Mill Road, Pollachi.

Under requisition and instructions from our client, namely, The Authorized Officer, M/s.State Bank of Patiala,

Tirupur Branch, Dharapuram Road, Tirupur, we issue this registered reply notice to you, as under;

1) All the averments in your referred notice are denied as false except those that are expressly admitted herein.

2) All the averments in paragraph No.1 of your notice are denied as false except those that are expressly admitted herein. The account became NPA on 14/11/2016.

3) It is not correct to say that the loan documents mentioned in the demand notice will not confer any right or interest and the said loan documents are not enforceable and our client are not having any right to enforce the loan document or security interest.

4). All the averments in paragraph No.4 of your notice are denied as false except those that are expressly admitted herein. It is false to state that the said loan account was not classified as NPA. As stated, the said loan account was classified as NPA on 14/11/2016.

5) All the averments in paragraph No.5 of your notice are denied as false except those that are expressly admitted herein. It is false to state that the necessary statutory details are NOT available in the demand notice issued by our client.

6) All the averments in paragraph No.6 of your notice are denied as false except those that are expressly admitted herein. It is false to state that the person who has signed in the demand notice is not authorized to issue that notice and the demand notice does not contain the details about the name and designation and therefore the notice is void and unenforceable.

7) All the averments in paragraph No.7 of your notice are denied as false except those that are expressly admitted

herein. That your client's have acknowledged subsistence of liability and also executed confirmation of balance and revival letters in favour of our client bank.

8) All the averments in paragraph No.8 of your notice are denied as false except those that are expressly admitted herein. It is false to state that the loan document referred in Schedule-B of the demand notice are unenforceable as the same does not confer limitation and that your clients have also not acknowledged the liability with our client bank.

9) All the averments in paragraph No.9 of your notice are denied as false except those that are expressly admitted herein. It is false to state that our client had not followed the rules and regulation and that of the RBI Guidelines and the alleged classification of loan account as NPA is false and misleading and are violative RBI guidelines. That our client had followed all the regulations in this regard.

10) All the averments in paragraph No.10 of your notice are denied as false except those that are expressly admitted herein. It is false to state that several payments made by your clients have not been given credit to the above loan account.

11) All the averments in paragraph No.11 of your notice are denied as false except those that are expressly admitted herein. It is false to state that our clients had even after the alleged classifying of the above loan account as NPA debited the interest and charges in the above loan account and that this itself shows that the classifying of the NPA by your bank is not valid as per the RBT Guidelines.

12) All the averments in paragraph No.12 of your notice are denied as false except those that are expressly admitted herein. It is false to state that bank has not followed the

judgment reported in Mardia Chemicals Case and various other judgment of other cases of Supreme Court and Madras High Court in classifying the above loan account as NPA.

13) All the averments in paragraph No.13 of your notice are denied as false except those that are expressly admitted herein. It is false to state that bank has debited usurious amounts from my client's loan account without any reason and your clients are not liable to pay the debited amounts.

14) All the averments in paragraph No.14 of your notice are denied as false except those that are expressly admitted herein. It is false to state that calculation of penal interest is against law and banking practice and it is against the Judgments of Supreme Court.

15) All the averments in paragraph No.15 of your notice are denied as false except those that are expressly admitted herein. It is true that your clients are liable to pay a sum of Rs.2,74,70,348/- as on 29.11.2016.

16) All the averments in paragraph No.16 of your notice are denied as false except those that are expressly admitted herein. It is false to state that the interest calculated is highly excessive and not accordance with RBI guidelines.

17) All the averments in paragraph No.17 of your notice are denied as false except those that are expressly admitted herein. It is false to state that SARFAESI Act is not applicable and enforceable against the secured properties.

18) All the averments in paragraph No.18 of your notice are denied as false except those that are expressly admitted herein. It is false to state that the bank is not entitled to proceed under SARFAESI Act against the secured properties.

19) All the averments in paragraph No.19 of your notice

are denied as false except those that are expressly admitted herein. It is false to state that there is no valid demand in the demand notice and your clients are not liable to pay the amounts as stated in the demand notice.

20) All the averments in paragraph No.20 of your notice are denied as false except those that are expressly admitted herein. It is false to state that the interest charged is not in accordance with the rules and regulations of the Bank. And that therefore, the notice issued under 13(2) of SARFAESI Act is not valid under law and you are not entitled to proceed under SARFAESI Act.

21) All the averments in paragraph No.21 of your notice are denied as false except those that are expressly admitted herein. It is false to state that the demand notice does not contain the date and description of loan documents and the rate of interest charged and thus the demand notice is defective and not enforceable under law of the land.

22) All the averments in paragraph No.22 of your notice are denied as false except those that are expressly admitted herein. It is false to state that the secured properties are not given properly and for the same also the demand notice is defective.

23) All the averments in paragraph No.23 of your notice are denied as false except those that are expressly admitted herein. It is false to state that the demand notice is only sent to the guarantors of the loan and therefore, proper demand has not been made against the guarantors therefore, the demand notice is not valid in Law.

24) All the averments in paragraph No.24 of your notice are denied as false except those that are expressly admitted

herein. It is false to state that guarantee documents do not confer any limitation in favour of Bank as the same were barred by limitations and the demand made based on the said documents is also null and void.

25) All the averments in paragraph No.25 of your notice are denied as false except those that are expressly admitted herein. It is false to state that the person who issued the demand notice is not empowered to issue the demand notice and is not an authorized officer as per the SARFAESI Act.

26) All the averments in paragraph No.26 of your notice are denied as false except those that are expressly admitted herein. It is false to state that Bank has also not provided any copy of statement of accounts to your clients and Bank has also not informed your clients about the alleged NPA of the loan accounts.

27) All the averments in paragraph No.27 of your notice are denied as false except those that are expressly admitted herein. It is false to state that order of the authorized officer is erroneous, illegal, without authority and is ex facio illegal.

28) All the averments in paragraph No.28 of your notice are denied as false except those that are expressly admitted herein. The demand of your client to withdraw the demand notice dated 29.11.2016 issued by the bank under 13(2) of the SARFAESI Act immediately and not to take any further action under the SARFAESI Act is untenable and against law and justice. The bank had initiated lawful steps to collect their amounts due to them and any vexatious legal action on the part of your client shall be defended at the cost and risks of your clients.

29) Thus, the invoking of legal action against your

clients are lawful and valid in the eyes of law.

30) Therefore your clients are cautioned to abide with the lawful demand of our client and not to indulge in issuing vexatious notices. Any vexatious legal action on the part of your clients shall be defended by our client at the cost and risks of your clients. "

34. Admittedly, it is the contention of the learned counsel for the borrower that there are divergent views as to whether on behalf of the bank, an advocate can send a reply under Section 13(3-A) of the SARFAESI Act, 2002, to the borrower or the guarantor, as the case may be and thus, it is his contention that there is a jurisdictional issue involved and therefore, writ under Article 226 of the Constitution of India, is maintainable, de hors, the availability of a statutory appeal.

35. Yet another contention raised by the petitioner, is that when there are no supporting averments in the counter affidavit dated 18.06.2018 and additional counter affidavit dated 27.06.2018, filed by the bank, the documents referred to in the foregoing paragraphs, need not be looked into.

36. On the contra, it is the contention of the bank that documents have been filed to prove that the petitioner had withdrawn the reply dated

<http://www.judis.nic.in> 28.01.2017 stated to have been sent against the demand notice dated

29.11.2016 issued under Section 13(2) of the SARFAESI Act.

37. Rival contentions raised above, are facts to be proved. Writ Court would not ordinarily delve into disputed questions of fact. Section 22 of the Recovery of Debts Due to Bank and Financial Institutions Act, 1993, sets out the procedure and powers of the tribunal and the appellate tribunal and the same is extracted hereunder.

22. Procedure and Powers of the Tribunal and the Appellate Tribunal.— (1) The Tribunal and the Appellate Tribunal shall not be bound the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:--

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) reviewing its decisions;
- (f) dismissing an application for default or deciding it ex

parte;

(g) setting aside any order of dismissal of any application for default or any order passed by it *ex parte*;

(h) any other matter which may be prescribed.

(3) Any proceeding before the Tribunal or the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code (45 of 1860) and the Tribunal or the Appellate Tribunal shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

38. Bare reading of the statutory provision shows that both the tribunals shall have, for the purposes of discharging their functions under this Act, the same powers as vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:--

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) reviewing its decisions;

39. When powers are conferred on the tribunals, as vested under Code of Civil Procedure on the above aspects, we are of the view that when it is well within the scope and exercise of the said power, either by the tribunal or appellate forum, as the case may be, and to examine the rival

contentions and when the Hon'ble Apex Court and this Court have consistently held that when there is effective and alternative remedy under Section 17(1) of the SARFAESI Act, 2002 all the abovesaid contentious issues can be raised, if any application under Section 17 of the Act, is filed challenging the measures taken by the bank.

40. Admittedly on the jurisdictional issue as to whether an advocate can send a reply to the borrower or guarantor, as the case may be, under Section 13 (3-A) of the SARFAESI Act, 2002, as stated supra, there is a divergent view. Jurisdictional issue can always be raised before the same forum, which cannot be said to be incompetent or inefficacious to decide. On the aspect of alternate remedy, we deem it fit to consider few judgments.

(i) In **Precision Fastenings v. State Bank of Mysore**, reported in **2010(2) LW 86**, this Court held as follows:

"This Court has repeatedly held in a number of decisions right from the decision in *Division Electronics Ltd. v. Indian Bank* (DB) Markandey Katju, C.J., (2005 (3) C.T.C., 513), that the remedy of the aggrieved party as against the notice issued under Section 13(4) of SARFAESI Act is to approach the appropriate Tribunal and the writ petition is not maintainable. The same position has been succinctly stated by the Hon'ble the Supreme Court in *Transcore v. Union Of India* (2006 (5) C.T.C. 753) in paragraph

No. 26 wherein the Supreme Court has held as under:

—

“The Tribunal under the DRT Act is also the Tribunal under the NPA Act. Under Section 19 of the DRT Act read with Rule 7 of the Debts Recovery Tribunal (Procedure) Rules, 1993 (1993 Rules), the applicant bank or FI has to pay fees for filing such application to DRT under the DRT Act and, similarly, a borrower, aggrieved by an action under Section 13(4) of NPA Act was entitled to prefer an Application to the DRT under Section 17 of NPA.” (Emphasis added) ”

(ii) In **Union Bank of India v. Satyawati Tondon**, reported in **2010 (5) LW 193 (SC)**, the Hon'ble Apex Court at paragraph Nos.16 to 18 and 27 to 29, held as follows:

"16. The facts of the present case show that even after receipt of notices under Section 13(2) and (4) and order passed under Section 14 of the SARFAESI Act, respondent Nos. 1 and 2 did not bother to pay the outstanding dues. Only a paltry amount of Rs. 50,000/- was paid by respondent No. 1 on 29.10.2007. She did give an undertaking to pay the balance amount in installments but did not honour her commitment. Therefore, the action taken by the appellant for recovery of its dues by issuing notices under Section 13(2) and 13(4) and by filing an application under

Section 14 cannot be faulted on any legally permissible ground and, in our view, the Division Bench of the High Court committed serious error by entertaining the writ petition of respondent No. 1.

17. There is another reason why the impugned order should be set aside. If respondent No. 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression 'any person' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High

Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

18. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution. 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 re-dressal of his grievance. 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 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* AIR 1969 SC 556, *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai* (1998) 8 SCC 1=1999-2-L.W. 200 and *Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others* (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order.

27. 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 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.

28. Insofar as this case is concerned, we are convinced that the High Court was not at all justified in injuncting the appellant from taking action in furtherance of notice issued under Section 13(4) of the Act.

29. In the result, the appeal is allowed and the impugned order is set aside. Since the respondent has not appeared to contest the appeal, the costs are made easy."

(iii) In **Saraspathy Sundararaj v. Authorised Officer and Assistant General Manager, State Bank of India**, reported in (2010) 5 LW 560, the Court held as follows:

"The petitioner has filed this writ petition praying for a Writ of Certiorarified Mandamus calling for the records relating to the possession notice dated 16.09.2004 issued by the respondent under the SARFAESI Act and consequently direct the respondent to effect

the settlement in accordance with the SBI OTS-SME 2010 Scheme as contained in its letter dated 18.03.2010 and unconditionally restore physical possession of the six rooms taken physical possession by it at No. 29, Sarojini Street, T. Nagar, Chennai - 17 with such damages.

... When a specific forum has been created which enables the borrower to challenge the action of the financial institution by filing necessary petition under Section 17, the petitioner is not entitled to invoke the writ jurisdiction of this Court. What could not be achieved by the petitioner by filing a petition before the appropriate Forum, which is at present barred by period of limitation, could not be permitted to be achieved by extending the jurisdiction conferred to this Court under Article 226 of The Constitution of India. Above all, since the petitioner has violated the terms and conditions of the loan by transferring the property in favour of her son, this Court is not inclined to entertain the petition.

.....

सत्यमेव जयते

9. In the light of the above decision of the Honourable Supreme Court, the writ petition filed by the petitioner seeking to set aside the possession notice issued to her long back is legally not sustainable. We are of the considered view that this petition has been filed only to drag on the proceedings and to evade repayment of the loan. That be so, the petitioner has no legal right to compel the bank to accept the one time settlement offer made by her."

41. In **Satyawati Tondon's** case, the Hon'ble Supreme Court has held that the tribunals constituted under the SARFAESI Act, 2002, is competent to decide all questions of law and fact. Grounds raised in this instant writ petition, can always be urged before the tribunal.

42. As we have already observed when there are disputed question of fact, High Court could not venture / delve into the same, at this stage, when there are forums, to decide on facts and law. On this aspect, it is relevant to consider the following judgments.

(a) In (1976) 1 SCC 292 (**Arya Vyasa Sabha and Ors. v. The Commissioner of Hindu Charitable and Religious Institutions & Endowments, Hyderabad and Ors.**) the view taken by the High Court that disputed questions of fact are to be left open to be decided before the Civil Court was upheld by the Supreme Court.

(b) In the decision reported in (2003) 4 SCC 317 (**Rourkela Shramik Sangh v. Steel Authority of India Ltd. and Anr.**) it is held that the disputed questions of fact could not be entertained in the writ proceedings. In paragraph 19, the Supreme Court held as follows:

"19. The question as to whether the workmen concerned had been continuously

working for a period of ten years so as to enable them to derive benefit of the judgment of this Court in *R.K. Panda case (1994) 5 SCC 304* was essentially a question of fact...."

In paragraph 22, the Honourable Supreme Court further held as follows:

"22. ...a disputed question of fact normally would not be entertained in a writ proceeding. This aspect of the matter has also been considered by a Constitution Bench of this Court in *Steel Authority of India Ltd. v. National Union Waterfront Workers (2001) 7 SCC 1....*"

(c) In (2006) 9 SCC 256 (*Himmat Singh v. State of Haryana and Ors.*), the Honourable Supreme Court held that

'the statement of the appellant or the 5th respondent was correct or not could not ordinarily be tested in writ proceedings and it is well known that in writ petition ordinarily such a disputed question of fact could not be entertained'.

(d) In yet another decision reported in (2007) 7 MLJ 687 (*Food Corporation of India v. Harmesh Chand*), the Supreme Court held as follows:

"Since the facts were seriously disputed by the appellant and no factual finding could be recorded

without consideration of evidence adduced by the parties, it was not an appropriate case in which the High Court ought to have exercised its writ jurisdiction. The parties could have approached a civil court of competent jurisdiction to adjudicate the matter."

43. In the light of the decisions and discussion, we are not inclined to entertain the instant writ petition. On the issue as to whether there is compliance of Section 13(3-A) of the SARFAESI Act or violation as averred, the same can always be adjudged by the tribunal, considering the decisions to be relied on by both parties. Hence, writ petition is dismissed. No Costs. Consequently, the connected Writ Miscellaneous Petitions are dismissed.

44. After the dismissal of the writ petition, Mr.P.J.Sriganesh, learned counsel for the petitioner sought liberty to approach the tribunal, challenging the demand notice dated 29.11.2016, issued under Section 13(2) of the SARFAESI Act, 2002 or possession notice dated 14.03.2017 issued under Section 13(4) of the Act or the e-auction notice dated 24.04.2018 before the tribunal.

45. Leave to challenge demand notice dated 29.11.2016, issued under Section 13(2) of the SARFAESI Act, 2002, possession notice dated 14.03.2017

issued under Section 13(4) of the Act and the e-auction notice dated 24.04.2018 before the tribunal, is granted.

46. Mr.P.J.Sriganesh, learned counsel for the petitioner submitted that application under Section 17(1) would be filed before the tribunal, within 15 days from the date of receipt a copy of this order. Submission is placed on record.

(S.M.K., J.) (S.P., J.)
03.07.2018

Note to office:

Registry is directed to return the original impugned order to the learned counsel for the petitioner after obtaining an attested copy of the same.

Index: Yes.

Internet: Yes.

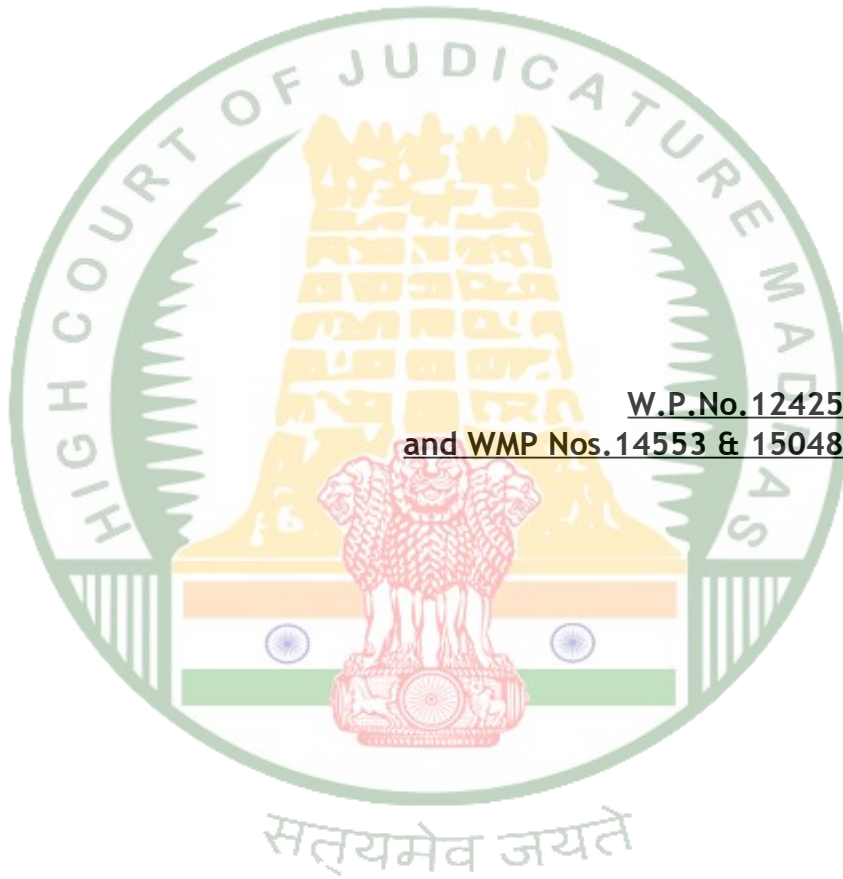
Speaking/Non speaking
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To

The Authorized Officer,
State Bank of India,
377/1, Dr.Nanjappa Road,
Behind N.S.Palaniappan Nursing Home,
Coimbatore - 641 608.

S.MANIKUMAR,J.
AND
SUBRAMONIUM PRASAD, J.

ars



W.P.No.12425 of 2018
and WMP Nos.14553 & 15048 of 2018

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03.07.2018