HON'BLE SRI JUSTICE RAMESH RANGANATHAN
AND
HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI

Writ Petition No.34173 of 2018

ORDER: {Per Hon'ble Sri Justice Ramesh Ranganathan}

The proceedings under challenge in this writ petition are the notices issued under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act") dated 14.05.2018, and the possession notice issued under Section 13(4) of the SARFAESI Act dated 24.07.2018, as being arbitrary and illegal, in as much as the said proceedings were issued without ascertaining the balance amount due from the petitioners, without giving credit to the lumpsum amounts paid by them, in failing to adjust the excess amount of interest collected from them, and without giving them credit for reduction in the rate of interest. A consequential direction is sought to the respondent not to take recourse to the provisions of the SARFAESI Act till then.

A notice was issued to the petitioners under Section 13(2) of the SARFAESI Act on 14.05.2018 informing them that a sum of Rs.1,60,17,849.12/-, along with costs and expenses, should be paid within 60 days from the date of receipt of the notice failing which appropriate legal proceedings would be initiated, and recourse to the measures prescribed under Section 13(4) of the SARFAESI Act would be taken. The petitioners were also informed that, as per Section 13(13) of the SARFAESI Act, they should not transfer/assign/ surrender/sell/lease or dispose of the property.

By their reply letter dated 03.07.2018, the petitioners informed the respondent that a notice of arbitration was already issued on

03.05.2018; the arbitrator had passed an interim order, under Section 17 of the Arbitration and Conciliation Act, 1996, on 02.05.2018; and, since arbitration proceedings had already commenced, the notice issued under Section 13(2) of the SARFAESI Act was illegal. The interim order of the Arbitrator, referred to in the petitioners' letter dated 03.07.2018, is the order passed by the Arbitrator on 02.05.2018 restraining the petitioners from selling, transferring, creating third party rights or charge or parting with the possession of the property in R.S.No.142, Door No.40-12-9, Behind Eenadu Office, Patamata lanka,520010.

In challenge to both the notices, issued under Sections 13(2) and 13(4) of the SARFAESI Act, Sri S. Satyannarayana Prasad, learned Senior Counsel appearing for the petitioners, would submit that, as against a sum of Rs.2.87 crores borrowed by the petitioners on 31.10.2014, they were required to pay monthly EMIs of around Rs.4.53 lakhs; they had made a lumpsum payment of Rs.60.00 lakhs in June, 2016 which had resulted in reduction in the EMIs to Rs.3.31 lakhs per month; they had again made a lumpsum payment of Rs.40.00 lakhs on 31.10.2017 which was adjusted on 26.04.2018; on fixation of the EMIs, the petitioners were given the benefit of paying monthly instalments by ECS; a similar ECS facility was not granted on reduction of the EMIs to Rs.3.31 lakhs; the petitioners cannot, therefore, be faulted for non-payment of a few EMIs; if the petitioners are given credit to the lumpsum amounts paid by them, then there would be no default on their part; and, having invoked the provisions of the Arbitration and Conciliation Act, 1996, it is not open to the respondent to invoke the provisions of the SARFAESI Act.

While an obligation is cast on the respondent, under Section 13(3A) of the SARFAESI Act, to pass an order on receipt of the reply given by the petitioners to the notice under Section 13(2) of the SARFAESI Act, the only objection taken by the petitioners, in their reply letter dated 03.07.2018, is that, once the remedy under the Arbitration and Conciliation Act, 1996 is availed and an interim order is passed under Section 17 thereof, the respondent cannot initiate proceedings under the SARFAESI Act.

Section 37 of the SARFAESI Act expressly stipulates that the provisions of the said Act, or the rules made thereunder, shall be in addition to, and not in derogation of, the Acts mentioned therein or any other law for the time being in force. We must, therefore, express our inability to agree with the submission of Sri S.Satyanarayana Prasad, learned Senior Counsel appearing for the petitioners, that the respondent, having invoked the jurisdiction of the Arbitral Tribunal, under the provisions of the Arbitration and Conciliation Act, 1996, is barred from invoking the provisions of the SARFAESI Act for recovery of the amount due.

As all the other contentions, which are urged before us, can also be agitated by the petitioners in an application made by them, under Section 17 of the SARFAESI Act, to the Debt Recovery Tribunal having jurisdiction over the matter, we asked Sri S.Satyanarayana Prasad, learned Senior Counsel appearing for the petitioners, as to why the petitioners should not be relegated to avail the remedy under Section 17 of the SARFAESI Act. Learned Senior Counsel would submit that this Court would refrain from exercising its power of judicial review, under Article 226 of the Constitution of India, only where there are serious disputed questions of fact; in the present case, the facts are not in dispute; the action of the respondent in seeking to recover the entire amount due, when the petitioners have been paying most of the EMI instalments in time, besides periodical lumpsum payments, discloses a glaring error apparent on the record; the petitioners merely seek to know what their ECS status is, whether credit has been given for the interest collected from them in excess of the prescribed rate of interest, whether the lumpsum amounts paid by them have been given credit to or not, and whether the EMIs have been re-scheduled or not; and this Court may, therefore, entertain the writ petition without requiring the petitioners to approach the Debt Recovery Tribunal.

While the jurisdiction which this Court exercises, under Article 226 of the Constitution of India, is part of the basic structure of the Constitution of India **(L.Chandra Kumar vs. Union of India : AIR 1997 SC 1125)** and cannot be curtailed or negated even by a constitutional amendments let alone by legislation–plenary or subordinate, this Court, while exercising jurisdiction under Article 226 of the Constitution of India, would exercise discretion on whether or not to entertain a writ petition. One of the rules which this Court would bear in mind, in deciding whether or not to entertain a writ petition, is whether the petitioners have an effective and efficacious alternative remedy.

Under Section 17 of the SARFAESI Act any person aggrieved, including the borrower, is entitled to invoke the jurisdiction of the Debt Recovery Tribunal against any of the measures, referred to under Section 13(4) of the SARFAESI Act, being taken by a secured creditor. As held by the Supreme Court, in **State Bank of Travancore vs. Mathew K.C**[1], this Court, in matters under the SARFAESI Act, would ordinarily exercise restraint where the petitioners have an effective alternative statutory remedy. Since the petitioners have the remedy of approaching the Debt Recovery

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[1] (2018) 3 SCC 85

Tribunal, under Section 17 of the SARFAESI Act, we see no reason to exercise discretion, under Article 226 of the Constitution of India, to entertain the writ petition.

Sri S.Satyanarayana Prasad, learned Senior Counsel appearing for the petitioners, would submit that the petitioners would avail the remedy under Section 17 of the SARFAESI Act within two weeks from today.

Leaving it open to the petitioners to do so, the Writ Petition fails and is, accordingly, dismissed. Miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.

(RAMESH RANGANATHAN, J)

(KONGARA VIJAYA LAKSHMI, J)

01st October, 2018
JSU

HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI

Writ Petition No.34173 of 2018

Date: 01.10.2018

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