

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on 03.12.2019****Judgment Delivered on 11 .12.2019****Writ Petition (C) No. 3729 of 2019**

1. Dr. Animesh Shrivastava S/o Shri P.K. Shrivastava Aged About 45 Years R/o House No. 52/6, Nehru Nagar (West), Bhilai, District Durg, Chhattisgarh.
2. Dr. Smita Shrivastava W/o Dr. Animesh Shrivastava Aged About 42 Years R/o House No. 52/6, Nehru Nagar (West), Bhilai, District Durg, Chhattisgarh.
3. Praveen Rai S/o V.N. Rai Aged About 40 Years R/o A-41, Vidya Nagar, Nehru Nagar (West), Bhilai, District Durg, Chhattisgarh.
4. Amit Rai S/o V.N. Rai Aged About 38 Years R/o A-41, Vidya Nagar, Nehru Nagar (West) Bhilai, District Durg, Chhattisgarh.
5. Sumit Rai S/o Late V.N. Rai Aged About 36 Years R/o A-41, Vidya Nagar, Nehru Nagar (West) Bhilai, District Durg, Chhattisgarh.
6. Smt. Priya Jumnani W/o Shri Harish Jumnani Aged About 34 Years Presently Residing at Plot No. D-15, RDA, Katora Talab, Scheme No. 16, Sector-7, Dr. Rajendra Prasad Ward Number 46, Amlidih, Raipur.

---- Petitioners**Versus**

1. Union of India, through its Secretary, Ministry of Finance
2. State Bank of India, through its Chief Manager, Industrial Estate Branch, Fauji Nagar, Bhilai, District Durg, Chhattisgarh.
3. M/s Kanishk Incorporates a partnership firm its partner Shri Bhowmik Singh, S/o Shri Ram Singh, having its head office at MIG C-2323, MP Housing Board Colony, Industrial Estate, Bhilai, District Durg, Chhattisgarh.

4. Bhowmik Singh S/o Shri Ram Singh, Partner of M/s Kanishk Incorporates, MIG C-2323, MP Housing Board Colony, Industrial Estate, Bhilai, District Durg, Chhattisgarh.
5. Shri Ram Singh Partner of M/s Kanishk Incorporates, MP Housing Board Colony, Industrial Estate, Bhilai, District Durg, Chhattisgarh.

---- Respondents

For Petitioners	:	Shri B.P. Sharma, Advocate.
For Respondent/SBI	:	Shri Prafull N. Bharat and Shri P.R. Patankar, Advocates.
For respective Respondents	:	Shri Ankush Mishra, Advocate.

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice

Hon'ble Shri Justice Parth Prateem Sahu, Judge

CAV Judgment

Per P. R. Ramachandra Menon, Chief Justice

1. Orders passed by the Debt Recovery Tribunal, Jabalpur (MP) (for short, 'the Tribunal') vide Annexure P/4 in O.A. No. 349 of 2015 and Annexure P/3 in S.A. No. 78 of 2016 respectively, are subjected to challenge in this writ petition, simultaneously questioning the constitutional validity of the 2016 amendment of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 (for short, 'Act of 2016') and the Debt Recovery Tribunal (Procedure) (Amendment) Rules, 2016 (vide Annexure P/1 and P/2) by the guarantors to a loan transaction.
2. The factual matrix reveals that the Petitioners herein stood as guarantors to a loan availed by the 3rd Respondent and his partners (Respondents No. 4 and 5) to an extent of Rs. 3 Crores, which was subsequently enhanced to Rs. 4.75 crores, from the Respondent-Bank on the strength of the mortgage created

over the properties belonging to the Petitioners. It is pointed out that the borrowers turned to be defaulters, when the Bank proceeded with the steps under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Act, 2002 (for short, 'SARFAESI Act') by issuing notice under Section 13(2) for realisation of the amount due. This was sought to be challenged by the Petitioners by filing Writ Petition (C) No. 1472 of 2015 before this Court which came to be disposed off on 04.01.2016 relegating the Petitioners to move the Tribunal in terms of the Section 17 of SARFAESI Act. Accordingly, the Petitioners, moved the Tribunal by filing S.A. No. 78 of 2016 challenging the course and proceedings on various grounds.

3. In the meanwhile, the Respondent-Bank, by virtue of availability of another course of action/remedy under the statute had already moved the Tribunal by filing O.A. No. 349 of 2015. The pleadings and prayers were considered by the Tribunal and after threadbare analysis of the facts and figures and the provisions of law, the O.A. preferred by the Bank was allowed as per Annexure P/4 order dated 13.09.2019; whereas the S.A. preferred by the Petitioners came to be dismissed as per Annexure P/3. This made the Petitioners to challenge the said orders by filing this writ petition, where a challenge is raised also against the Amendment Act and the Rules (Annexure P/1 and P/2) contending that the same is ultra vires to the Constitution of India, having curtailed the rights of the litigants without any regard to the basic provisions under other relevant statutes; such as the Indian Evidence Act, the Indian Stamp Act etc. and also as violative of the Constitution of India.
4. Heard Shri B.P. Sharma, the learned counsel for the Petitioners as well as Shri Prafull N. Bharat, the learned counsel appearing for the Respondent-Bank.
5. The learned counsel for the Petitioners submits that, by virtue of the recent amendment as aforesaid, much of the vested rights of the Petitioners has been

watered down and the Tribunal was forced to have the dispute finalized, compromising with the fundamental provisions of law as to the rule of evidence and admissibility of various documents. The learned counsel submits that the amendment was brought about for speedy disposal of the matters pending before the Tribunal involving financial disputes, but the same could not have been at the cost of other statutory provisions and the Constitution. It is pointed out that, by virtue of the amendment to the Act and the Rules, it was made possible for the Tribunal to proceed with the matter and finalize the dispute merely on the basis of an affidavit filed by the Branch Manager of the Bank, accepting the documents tendered in evidence. According to the learned counsel, the Petitioners had not actually executed the vital documents sought to be relied on by the Bank in connection with the enhancement of the loan amount, the acceptance of liability, renewal of the transaction and such other instances and that many a document was created making use of the signed blank papers obtained from the Petitioners. It was also pointed out that no proper equitable mortgage was created, as the document in question sought to be relied on the Bank was not properly stamped, paying the requisite stamp duty as per the Indian Stamp Act, 1899. A document which is not properly stamped is not liable to be accepted in evidence and by virtue of the law declared by the Apex Court, it cannot be taken as a piece of collateral evidence as well. Reference is made to the relevant provisions of the Civil Procedure Code, 1908 and also some provisions in the Indian Stamp Act, 1899 and the Indian Evidence Act, 1872. The learned counsel submits that, based on the orders passed by the Tribunal vide Annexure P/3 and P/4, steps are being pursued on war footing, to cause the properties of the Petitioners to be sold in auction scheduled to be held on 20.12.2019 and once the property is sold by creating third party interest, it will be difficult for the Petitioners to establish their case and hence the writ petition for immediate interference, as there is no other efficacious alternate remedy. It is also pointed out that, validity of the

amendment of a statute cannot be challenged before the Tribunal; nor can it be considered by the Tribunal and hence, interference of this Court is essential.

6. Shri Prafull N. Bharat, the learned counsel appearing for the Respondent-Bank submits that the writ petition itself is not maintainable in view of the legal position made clear by the Apex Court on many a occasion and that the remedy can be only by way of appropriate proceedings to be filed in terms of Section 18 of the relevant enactment. Insofar as the challenge against Annexure P/3 and P/4 orders under 'prayer No. 10.3' in the writ petition cannot be entertained by this Court in view of the legal position declared by the Apex Court, it cannot be indirectly sought to be challenged under the garb of challenging the constitutional validity of Annexure P/1 and P/2 (Amendment Act and Rules) as sought for in 'prayer No. 10.2'. It is also pointed out that the challenge as to the constitutional validity of the provisions under prayer No. 10.2 is too vague and is not liable to be acted upon. The learned counsel submits that, it is may be open for the Petitioners to challenge the constitutional validity of any provision, if sufficient grounds exist and are substantiated, but then the prayer with reference to Annexure P/3 and P/4 can't be considered as made clear by the Apex Court and it has to be withdrawn.

7. Shri B.P. Sharma, the learned counsel for the Petitioners submits that the writ petition is maintainable in all respects and that, to sustain the challenge in respect of the constitutional validity of the Act/Rules (prayer No. 10.2), it is not at all necessary for the Petitioners to withdraw the prayer at 10.3 (orders passed by the Tribunal). The learned counsel points out that, if prayer No. 10.3 is withdrawn, the writ petition will remain only with the challenge against the constitutional vires of the statute, which will only be 'academic' and there cannot be a writ petition, merely on academic grounds, without a cause of action. According to the counsel, Annexure P/3 and P/4 orders passed by the Tribunal form the cause of action, which hence have been subjected to challenge,

mainly in view of the constitutional invalidity/infirmity of the statute (Amendment Act/Rules, Annexure P/1 and P/2). The prayers cannot be segregated and the Tribunal will not be in a position to consider the constitutional validity of Act/Rules and hence the matter requires to be considered by this Court on merits; submits the learned counsel.

8. With regard to the challenge raised against the constitutional validity of Annexure P/1 and P/2 (Amendment Act/Rules of 2016), it will be worthwhile to extract the prayers as such in the writ petition:

“10.1 A writ and/or an order in the nature of appropriate writ do issue calling the relevant records pertaining to case of the petitioners for perusal of this Hon'ble Court, if thinks fit in the facts and circumstances of case.

10.2 A writ and/ or an order in the nature of appropriate writ do issue declaring the Act of 2016 and the Rules of 2016 (Annexure P/1 and P/2) so far as it relates to adjudication of debt and other liabilities concerned of which reference has been given herein above, to be ultra vires to the Constitution of India and other statutory legislations and laws in force in India.

10.3 A writ and/ or an order in the nature of appropriate writ do issue quashing the judgments dated 13.09.2019 (Annexure P/3 and P/4) being illegal, laconic and not sustainable in law.

10.4 Cost of the proceedings.

10. 5 Any other writs and directions that may be deemed fit and just in the facts & circumstances of case.”

9. On going through the prayer at 10.2 with regard to the alleged ultra vires nature of the Amendment Act/Rules to the constitution, we find considerable force in the submission made by the learned counsel for the Respondent-Bank that is too vague. We searched through the various grounds raised by the Petitioners at A to G, which are extracted below:

“A. Because the Act of 2016 & the Rules of 2016 (Annexure P/1 & P/2) are unconstitutional being unreasonable, arbitrary and in violation of the petitioners' fundamental and constitutional rights and guaranteed

under Articles 14, 19, 21 & 300A of the Constitution of India and also the human rights.

B. Because by the impugned legislations, part of which has been challenged herein, so far as it contravene the provisions of the Indian Stamp Act, 1899, the Registration Act, 1908, the Panchayat Adhiniyam, 1993 or which is in direct conflict with these provisions and other provisions of law, are liable to be declared unconstitutional and *ultra vires* to the Central and the State legislations.

C. Because adjudicating authority cannot be permitted to adopt biased mode as has been secured in the present case towards the banks or financial institutions by the impugned legislations and in the garb of increasing non-performing assets (NPA) the citizens rights to seek independent, impartial and judicial decision cannot be taken away as the same is, if not fundamental right, definitely comes within the purview of directive principles of the State policy taking shape of human right or in other words, essence of justice has been taken away by the legislations quoted above.

D. Because the principles of natural justice are treated as 'God Made Law', which cannot be amended by the legislation and the impugned legislation if allowed to stand so far as it takes away essence of natural justice, it will effect as tyranny or doing injustice or will destroy the fundamentals of rule of law.

E. Because the stage has come to reverse the process which has begun by conferring jurisdiction of the regular Court of law on the Tribunals or atleast the procedure made for court of law should not be curtailed for the Tribunals to such an extent that it may be treated as injustice as justice not only be done but seem to have been done is the fundamental principles of law.

F. Because the judgments impugned are illegal, laconic and not sustainable in law.

G. Because the grounds urged in the preceding paragraphs entitle the petitioner to seek the redressal from this Hon'ble Court without prejudice to each other."

10. The above grounds do not disclose anything specific with regard to the *ultra vires* nature of the Amended Act/Rules. We have gone through the various averments in the writ petition as well. The version given by the Petitioners in paragraph 8.11 of the writ petition in this regard, is as follows:

"By Amendment Act of 2016 brought into force on 12.08.2016, so far as the Act of 1993 is concerned, certain amendments have been incorporated as mentioned in Chapter-III, in particular amendment has been made in

Section 19 and further procedure has been prescribed which may be followed by the DRT. The petitioners crave leave to refer to and rely upon the relevant provisions at the time of hearing as the petitioners do not wish to burden present petition by pleading arguments which may be advanced before this Hon'ble Court. Suffice it to say that under Section 22 of the Principal Act i.e. the Act of 1993, Section 22A has been added as it appears that relying on it and also with the aid of Section 36, the Rules of 2016 have been framed by the Central Government laying down the procedure and in particular Rule 12 in place of earlier rule w.e.f. 4.11.2016. A glance of the amendment rules will make it clear that rights of borrower/guarantor have been taken away or reduced substantially."

11. It is the burden of the party who challenges the vires of the provision to substantiated it, as there is always a presumption as to the validity of law. It is also a settled position that constitutional validity of an Act or Rule can be challenged only under limited grounds, such as incompetence of the authority to have legislated it, and the like, as made clear by the Apex Court. But for the vague averments and that too, without specifying which of the provisions of the Amendment Act/Rules has contravened the constitutional mandate, has not been demonstrated by the Petitioners. Though, it has been said in 'paragraph 8.11' of the writ petition (extracted above) that it will be made clear during the course of arguments, no satisfactory version is forth coming.
12. After hearing both the sides, we are of the firm view that the challenge against the Annexure P/1 and P/2, in respect of the Amendment of the Act/Rules by way of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, cannot be entertained by this Court in the form as it now stands in the writ petition. This is more so, in view of the fact that the adverse consequences resulted by virtue of the parent legislation replacing the Civil Court have already been considered elaborately by the Apex Court and the constitutional validity of the said legislation was upheld in ***Marida Chemicals Ltd. and Others vs. Union of India and Others*** reported in **(2004) 4 SCC 311**.

13. Coming to the challenge raised by the Petitioners against the Annexure P/3 and P/4 orders passed by the Tribunal, there can't be any dispute that a proper alternate remedy is provided under Section 18 of SARFAESI Act by approaching the Appellate Tribunal. Despite the specific remedy provided in the Statute, disputes were being entertained by various High Courts, interdicting the proceedings, causing much loss and hardships to the financial institutions, virtually defeating the very purpose of the enactment. This was deprecated by the Apex Court on many an occasion. The decision rendered by the Apex Court in the case of ***United Bank of India vs. Satyawati Tondon & Others*** reported in **2010 AIR SCW 5267** is specifically relied on from the part of the Respondent-Bank to press the contention that the writ petition is not maintainable. Paragraphs 18 and 27 of the said verdict are very much relevant and hence, the same are extracted below:

“18. While expressing the aforesaid view, we are conscious that the powers conferred upon the high Court under Article 226 of the Constitution to issues 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 redressal 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 exception carved out in *Baburam Prakash Chandra Maheshwari v. Antarim Zila Parisad* AIR 1969 SC 556; *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai* (1998) 8 SCC 1; (AIR 1999 SC 22: 1998 AIR SCW 3345) and *Harabanslal Sahnia and another v. Indian Oil Corporation Ltd. And others* (2003) 2 SCC 107 : (AIR 2003 SC 2120 : 2003 AIR SCW 126) 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 Court will exercise their discretion in such matters with greater caution, care and circumspection.”

14. The above dictum was reiterated by the Apex Court in the subsequent judgment in ***Authorized Officer, State Bank of Travancore and Another vs. Mathew K.C.*** reported in **(2018) 3 SCC 85** paragraphs 10, 15 and 16 of which are to the following effect:

“10. In *Satyawati Tondon* the High Court had restrained further proceedings under Section 13(4) of the Act. Upon a detailed consideration of the statutory scheme under the SARFAESI Act, the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding: (SCC pp. 123 & 128, paras 43 & 55)

“43. 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 a 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, the 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.

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55. 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 the SARFAESI Act and exercise jurisdiction under Article 225 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 matter with greater caution, care and circumspection.”

15. It is solemn duty of the court to apply the correct law without waiting for an objection to be raised by a party, especially when the law stands well settled. Any departure, if permissible, has to be for reasons discussed, of the case falling under a defined exception, duly discussed after noticing the relevant law. In financial matters grant of ex parte interim orders can have a deleterious effect and it is not sufficient to say that the aggrieved has the remedy to move for vacating the interim order. Loans by financial institution are granted from public money generated at the taxpayer's expense. Such loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same. The caution required, as expressed in *Satyawati Tondon*, has also not been kept in mind before passing the impugned interim order: (SCC pp. 123-24, para 46)

46. 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 (sic will) 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 vs. Antarim Zila Parishad*, *Whirlpool Corpn. vs. Registrar of Trade Marks* and *Harbanslal Sahnia vs. Indian Oil Corpn. Ltd.* and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order.

16. The writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum. The opinion of the Division Bench that the counter-affidavit having subsequently been filed, stay/modification could be sought of the interim order cannot be considered sufficient justification to have declined interference.”

15. The Apex Court had to deprecate the casual approach being pursued by the subordinate Courts and the High Courts in entertaining matters arising under the SARFAESI Act, as a matter of course, with specific observation to the law declared in the case of ***Authorized Officer, State Bank of Travancore*** (supra) as mentioned above, vide judgment dated 05.10.2018 in the case of ***ICICI Bank Ltd. vs. Umakanta Mohapatra*** reported in **2018 SCC Online SC 2349**.
16. The learned counsel for the Respondent-Bank also places reliance on the verdicts passed by Division Bench of various High Courts including Mumbai High Court in ***M/s Kalyani Exporters vs. Indusland Bank & Others*** reported in **2016 SCC Online Bom 515** and the Madras High Court in ***Hotel Amuthas (Partnership Firm) vs. Indian Overseas Bank & Another*** reported in **2016 SCC Online Mad 29986**, categorically asserting that the remedy is not before the High Court, but before the Tribunal. We find considerable force in the above submissions.
17. In the above facts and circumstances, we find it difficult to accept the proposition mooted by the Petitioners to entertain this matter, in exercise of

discretionary jurisdiction vested with this Court. We hold that the pleadings and prayers raised by the Petitioners challenging Annexure P/1 and P/2 (Amendment Act/Rules, 2016) are too vague and obscure and it is not liable to be entertained in this writ petition.

18. With regard to the challenge against the Annexure P/3 and P/4 orders passed by the Tribunal, there is an effective alternative remedy under Section 18 of SARFAESI Act and in view of the binding juridical precedents rendered by the Apex Court, we cannot entertain the said prayers in the writ petition.
19. Without prejudice to rights and liberties of the Petitioners to move the appropriate forum, by appropriate proceedings, in accordance with law, interference is declined and the writ petition stands dismissed.

Sd/-
(P. R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge