

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

RESERVED ON : 30.01.2019

DELIVERED ON : 25.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH**AND****THE HONOURABLE MR.JUSTICE B.PUGALENDHI****W.P(MD)No.24768 and 24769 of 2018****and****W.M.P(MD)Nos.22461 to 22464 of 2018****W.P(MD)No.24768 of 2018:**

A.Bagurudeen

... Petitioner

Vs.

1. M/s.Sundaram BNP Paribas Home Finance Limited,
Sundaram Towers,
46, Whites Road,
Chennai - 600 014.

2. The Sole Arbitrator,
K.Ilayarani,
Retired District Judge,
No.29A, 1st Main Road,
ERI Scheme, Mogappair,
Chennai - 600 037.

3.Nizamudeen

4.Asrafali.A.

5.Benazir Begum.U.

6.Habeebunisha.A.

... Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India, praying for issuance of a writ of Certiorarified Mandamus to call for the records of the Arbitration Case No.46/2017 on the file of the second respondent and quash the same and forbear the second respondent from proceeding the above Arbitration Case.

For Petitioner : Mr.V.Singan

For Respondents : Mr.M.Jerin Mathew for R.1

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<https://hmc.judiciary.gov.in/cases> **W.P(MD)No.24769 of 2018:**

A.Bagurudeen

... Petitioner



Vs.

1. M/s.Sundaram BNP Paribas Home Finance Limited,
Sundaram Towers,
46, Whites Road,
Chennai - 600 014.

2. The Sole Arbitrator,
K.Ilayarani,
Retired District Judge,
No.29A, 1st Main Road,
ERI Scheme, Mogappair,
Chennai - 600 037.

3.Nizamudeen

4.Asrafali.A.

5.Benazir Begum.U.

6.Habeebunisha.A.

... Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India, praying for issuance of a writ of Certiorarified Mandamus to call for the records of the Arbitration Case No.45/2017 on the file of the second respondent and quash the same and forbear the second respondent from proceeding the above Arbitration Case.

For Petitioner : Mr.V.Singan

For Respondents : Mr.M.Jerin Mathew for R.1

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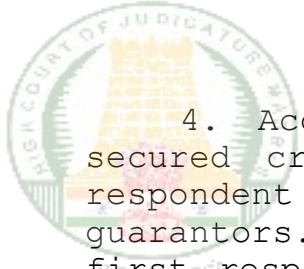
COMMON ORDER

R. SUBBIAH, J.

W.P(MD)No.24768 of 2018 has been filed seeking a writ of Certiorarified Mandamus to call for the records of the Arbitration Case No.46/2017 on the file of the second respondent and quash the same and forbear the second respondent from proceeding the above Arbitration Case.

2. W.P(MD)No.24769 of 2018 has been filed seeking a writ of Certiorarified Mandamus to call for the records of the Arbitration Case No.45/2017 on the file of the second respondent and quash the same and forbear the second respondent from proceeding the above Arbitration Case.

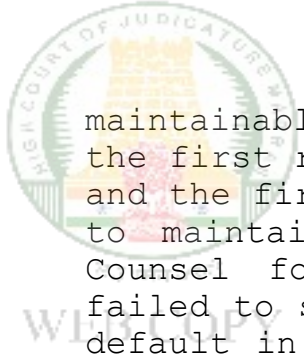
3. Since the relief sought for in both the writ petitions is one and the same, these writ petitions are taken up for hearing together and this common order is being passed.



4. According to the petitioner, the first respondent is a secured creditor in respect of the Loan No.30006461. The third respondent is a co-applicant and the respondents 4 to 6 are the guarantors. Since there is a default in payment of the loan, the first respondent initiated the proceedings under the SARFAESI Act and issued a notice under Section 13(4) of the SARFAESI Act on 16.08.2017 and took possession of the property in question. The petitioner filed an appeal in S.A.No.88 of 2016 on the file of the Debts Recovery Tribunal, Madurai and also filed I.A.No.1927 of 2017 for stay of the sale of the property. The Tribunal granted an order of interim stay on condition that the petitioner should deposit a sum of Rs.29,18,500/- to the first respondent on or before 27.10.2017 as a first installment and another sum of Rs.29,18,500/- on or before 27.11.2017 and also further sum of Rs.29,18,500/- on or before 26.12.2017. As per the directions of the Tribunal, the petitioner paid a sum of Rs.46,18,500/- to the first respondent. The petitioner also submitted that the first respondent can impose simple interest at the rate of 9% per annum for the amount due and payable by the petitioner. He also referred to the Government Order in G.O.Ms.No.406 (Co-operation), dated 05.07.1997. Meanwhile, the first respondent appointed the second respondent as Arbitrator under the provisions of the Arbitration and Conciliation Act, in Arbitration Case.No.46/2017. When the first respondent had already taken possession of the property of the petitioner and the SARFAESI Appeal is pending before the Debts Recovery Tribunal, Madurai, the Arbitration proceedings initiated by the first respondent is not sustainable in law and hence, he has come forward with W.P(MD) No.24768 of 2019 seeking to quash the Arbitration Case.No.46/2017 on the file of the second respondent. In respect of another loan availed by the petitioner, the first respondent initiated Arbitration proceedings in Arbitration Case No.45/2017 and the same is pending on the file of the second respondent. Seeking the similar relief, the petitioner filed W.P(MD)No.24769 of 2018.

5. When the matters are taken up for hearing, the learned Counsel for the petitioner submitted that the second respondent after having secured the possession of the property under Section 13 (4) of the SARFAESI Act, cannot make a re-exercise of the same by resorting to Arbitration and Conciliation Act. Further, the arbitration proceedings before the second respondent is bad for the reason that it will amount to re-calculation of the entire amount and re-opening of the account after issuance of possession notice as on date of taking possession of the property by the first respondent. Moreover, when the SARFAESI proceedings have attained finality, any further resort to the provisions of the Arbitration and Conciliation Act would tantamount to partially re-opening the proceedings under the SARFAESI Act and therefore, the Arbitration Case Nos.46/2017 and 45/2017 are liable to be quashed.

6. *Per contra*, the learned Counsel for the first respondent, reiterating the averments in the counter affidavit filed by the first respondent, contended that the writ petition itself is not

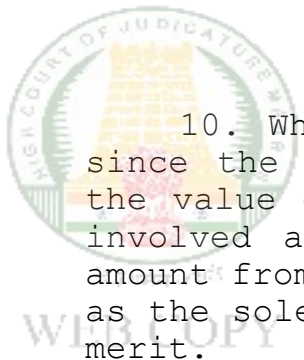


maintainable against the private housing financial institution as the first respondent would not fall within the definition of 'State' and the first respondent is not discharging any public duty in order to maintain the writ petition against it. Further, the learned Counsel for the first respondent contended that the petitioner failed to satisfy the terms of the loan agreement and had committed default in repaying the loan amount and hence, a demand notice was issued under Section 13(2) of the SARFAESI Act and symbolic possession was taken on 30.04.2015 and the paper publication was made on 05.05.2015 and the application under Section 14 of the SARFAESI Act came to be filed on 08.05.2015 before the District Collector, Trichy and the orders are yet to be passed. While the matter stood thus, the amount due to be recovered exceeded the value of the property in view of the long pendency of the recovery proceedings and also several expenses were made during the course of time. Therefore, in order to determine the actual amount involved and also to take effective steps to realise the entire amount from the petitioner, it had been decided to take necessary steps under the Arbitration and Conciliation Act and as such, the second respondent had been appointed as the sole arbitrator as per law. The proceedings had been taken under the two Acts is only to recover the money due from the petitioner and it is only a different mode of recovery. The petitioner had no discretion to choose the mode of recovery under which the first respondent ought to have proceeded with and hence, the writ petitions are liable to be dismissed.

7. In support of his contention that SARFAESI proceedings and arbitration proceedings, can be proceeded with simultaneously, the learned Counsel for the first respondent relied upon the decision of the Honourable Supreme Court in **M.D.Frozen Foods Exports Pvt. Ltd., and others v. Hero Fincorp Ltd.**, reported in **AIR 2017 SC 448**. Further, he placed heavy reliance on the decision of the Division Bench of this Court in **D.Krishnan and 2 others v. The Branch Manager, The Federal Bank Ltd., Br.Kotagiri 27/131L. Johnstore Square, Kotagiri Post 643 217, The Nilgiris District, Tamil Nadu and another** [W.P.No.33123 of 2014, decided on 06.09.2017], to contend that mandamus cannot be issued against a scheduled private financial institution.

8. We have carefully considered the submissions made on either side and also perused the materials available on record, including the judgments relied on.

9. It is the main grievance of the petitioner that once appropriate proceedings have been initiated under the SARFAESI Act, the first respondent cannot resort to the provisions of the Arbitration and Conciliation Act. When the SARFAESI proceedings have attained finality, any further resort to the provisions of the Arbitration and Conciliation Act would tantamount to partially re-opening the proceedings under the SARFAESI Act and prayed for allowing the writ petitions.



10. Whereas it is the stand of the first respondent bank that since the amount due to be recovered from the petitioner exceeded the value of the property, in order to determine the actual amount involved and also to take effective steps to realise the entire amount from the petitioner, the second respondent had been appointed as the sole arbitrator as per law and hence, the writ petitions lack merit.

11. In **M.D.Frozen Foods Exports Pvt. Ltd., and others v. Hero Fincorp Ltd.**, reported in **AIR 2017 SC 448**, the Honourable Supreme Court, in paragraphs 33 and 34, held as follows:

"33. SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is an adjudicatory process. In the event that the secured assets are insufficient to satisfy the debts, the secured creditor can proceed against other assets in execution against the debtor, after determination of the pending outstanding amount by a competent forum.

34. We are, thus, unequivocally of the view that the judgments of the Full Bench of the Orissa High Court in *Sarthak Builders Pvt. Ltd., vs. Orissa Rural Development Corporation Limited*, the Full Bench of the Delhi High Court in *HDFC Bank Limited vs. Satpal Singh Bakshi* (supra) and the Division Bench of the Allahabad High Court in *Pradeep Kumar Gupta vs. State of U.P* lay down the correct proposition of law and the view expressed by the Andhra Pradesh High Court in *M/s.Deccan Chronicles Holdings Limited vs. Union of India* following the overruled decision of the Orissa High Court in *Subash Chandra Panda v. State of Orissa* does not set forth the correct position of law. SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand."

[emphasis supplied.]

12. In **D.Krishnan and 2 others v. The Branch Manager, The Federal Bank Ltd., Br.Kotagiri 27/131L. Johnstore Square, Kotagiri Post 643 217, The Nilgiris District, Tamil Nadu and another** [W.P.No.33123 of 2014, decided on 06.09.2017], the Division Bench of this Court, while holding that mandamus cannot be issued against a scheduled private limited bank, observed as under:

"17. Writ petition is filed only against the notice, under Section 13(2) of the SARFAESI Act, 2002. Notice under Section 13(2) is only a demand made by the Bank. However, as per Section 13(3A) of the SARFAESI Act, 2002, introduced with effect from 11.11.2004, inserted by Act 30 of 2004, if, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of



receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower. Proviso to the said Section states that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A. In the light of the above decision and the statutory provision, writ of certiorari, cannot be issued to quash the notice under Section 13(2) of the SARFAESI Act, 2002.

18. In the light of the decision of Federal Bank of India Ltd's case (cited supra), mandamus cannot be issued against a scheduled private limited bank. Federal Bank of India is a party in this writ petition and hence, the above decision is squarely applicable to the case on hand."

[emphasis added.]

13. In the light of the above decisions, we are of the considered view that the present writ petitions are not maintainable and thus, they fail.

14. Accordingly, both the writ petitions stand dismissed. No costs. Consequently, the connected writ miscellaneous petitions are also dismissed.

sd/
Assistant Registrar

/True Copy/

Sub Assistant Registrar

2 CC to Mr.V.SINGAN, Advocate (SR-56656[F],56657 dated 26/03/2019)

+1 CC to Mr.M.E.ILANGO, Advocate (SR-56766[F] dated 26/03/2019)

rsb
AE/10.04.2019/6P/4C

COMMON ORDER MADE IN
W.P (MD) No.24768 and 24769 of 2018
and
W.M.P (MD) Nos.22461 to 22464 of 2018
25.03.2019