IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) NO. 5172 OF 2022

Dhiranjan Nayak and others .... ***Petitioners***

Mr. Suvendu Kumar Ray, Advocate

-versus-

Secretary, Urban Co-operative Bank, Cuttack and another .... ***Opp. Parties***

Mr. Millan Kanungo, Senior Advocate
(For Opp. Party Nos.1 and 2)

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER

Order No.	**05.09.2022**
8.	

1. This matter is taken up through hybrid mode.

2. The Petitioners in this writ petition pray for a direction to set aside the order dated 3rd August, 2019 (Annexure-5) passed by the Inspector of Co-operative Societies-cum-Arbitrator, Cuttack Circle, Cuttack in Dispute Case No. 4 of 2018.

3. Mr. Ray, learned counsel for the Petitioners submits that one Kamal Barik had incurred a loan of Rs.90,000/- from the Opposite Party No.1-Bank and one Iswar Nayak was the guarantor by mortgaging his residential house at Gopal Sahi, Ranihat, Cuttack as co-lateral security. Since said Kamal Barik defaulted in repayment of loan amount, the Opposite Party No.1-Bank in terms of the ratio decided in the case ***Manorama Mohanty and Ors. –v-. Authorized Officer, The Urban Co-operative Bank Ltd. and Ors.***, reported in 2013 (I) OLR 613, issued a demand notice under Sections 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act') on 31st October, 2014. Subsequently, possession notice under Section

13(4) was also made on 20th March, 2015. In the meantime, said Iswar Nayak died leaving behind his legal heirs, namely, the present Petitioners. Against the said notice, the Petitioners approached the Debt Recovery Tribunal, Cuttack Bench, Cuttack (for short 'Tribunal') in S.A. No. 11 of 2017, which was allowed vide order dated 17th September, 2019 under Annexure-1 setting aside the notice under Sections 13(2) & 13(4) of the SARFAESI Act and all other subsequent actions pursuant to the said notice. Learned Tribunal also directed the Opposite Party No.1-Bank to deliver all documents in respect of mortgaged property to the Petitioners within a period of one month from the date of the said order. The Opposite Party No.1-Bank assailing the same filed M.A. No.2285 of 2019 for modification of the said order dated 17th February, 2019 with regard to delivery of original documents of the schedule property, which was also rejected vide order dated 6th December, 2019 under Annexure-3. During pendency of the proceeding before learned Tribunal, the Opposite Party No.1-Bank initiated Dispute Case No. 4 of 2018 under the provisions of Section 68 of the Orissa Co-operative Societies Act, 1962 (for short 'the Act'). The Inspector of Co-operative Societies-cum-Arbitrator vide order dated 3rd August, 2019 (Annexure-5) in the said Dispute Case passed an award directing the Petitioners to pay a sum of Rs.11,85,540/- along with 17% interest on the principal amount together with future cost till the date of realization of the entire dues. The Petitioners being aggrieved by the said order have filed this writ petition.

4. Mr. Kanungo, learned Senior Advocate appearing for the Opposite Party No.1-Bank submits that the Arbitrator is

competent to pass an award under Section 68 of the Act. As the impugned award under Annexure-5 has been passed by a competent authority, the only remedy available to the Petitioners to assail the said award is by filing an appeal under Section 109 of the Act and not otherwise. He further submits that the ratio decided in the case of ***Manorama Mohanty*** (supra), this Court has categorically held at Paragraph-14 as under:

> *"14. It may be seen from the above provisions that the expression "or any other law for the time being in force" appearing in Section 37 of the SARFAESI Act is missing in Section 34 of the R.D.B. Act. This is crucial, because it would show that the remedy provided is in addition to the remedy under any other law for the time being in force, which includes the remedy available under the Orissa Co-operative Societies Act. We are therefore of the considered view that pendency of the Dispute Case under Sections 68 and 70 of the O.C.S. Act does not debar the Co-operative Bank from invoking the provisions of the SARFAESI. Act to enforce security interest for liquidation of loan not repaid. In view of the above, we do not find any merit in the writ petitions, and all the writ petitions are accordingly dismissed."*

He, therefore, submits that in addition to the provisions under SARFAESI Act, the Opposite Party No.1-Bank has a remedy to adhere to the procedure provided under the Act for realization of the unpaid loan dues. As such, the award passed by the Arbitrator in Dispute Case No. 4 of 2018 should not be interfered with in this writ petition. The Petitioners, if so advised, may file an appeal under Section 109 of the Act in assailing the award under Annexure-5. As such, this writ petition being not maintainable is liable to be dismissed.

5. Taking into consideration the rival contentions of the parties and on perusal of the materials available on record as well as case law cited, it is crystal clear that the Opposite Party No.1-Bank has remedy both under the Act and SARFAESI Act to seek for recovery of unpaid loan amount. In the instant case, the Opposite Party No.1-Bank taking recourse to the provisions under SARFAESI Act issued notice under Sections 13(2) & 13 (4) of the SARFAESI Act. The Petitioners being aggrieved by the said notice assailed the same before learned Tribunal. The Opposite Party No.1-Bank participated in the said proceeding. Ultimately, learned Tribunal vide its order dated 17th September, 2019 in S.A. No.11 of 2017 set aside the notice issued under Sections 13(2) & 13(4) of the SARFAESI Act and all consequential actions pursuant thereto. The Opposite Party No.1-Bank had also sought for modification of the said order dated 17th September, 2019 by filing an application in M.A. No.2285 of 2019. Said application was dismissed. It appears from the record that the Opposite Party No.1-Bank has not assailed either the order dated 17th September, 2019 passed in S.A. No.11 of 2017 or the order dated 6th December, 2019 passed in M.A. No. 2285 of 2019. Thus, said orders reached their finality.

6. No doubt, remedy provided under Section 37 of the SARFAESI Act is in addition to the remedy available under any other law including that under the Act, but not vice-versa. No such provision as in section 37 of the SARFAESI Act is available under the Act. Thus, action under the Act (as taken under Section 68 of the Act in the instant case) is no more available to the Petitioner, after action under Sections 13(2) and 13(4) has been

taken to recover the unpaid loan dues. In that view of the matter, the Arbitrator under the Act is not competent to pass any award under Section 68 of the Act.

7. True it is that the Petitioner has a remedy to assail the impugned award by filing an appeal under Section 109 of the Act. But the award being without jurisdiction in view of the order passed by learned Tribunal, this Court is competent to entertain the writ petition and adjudicate the same.

8. Taking into consideration the rival contentions of the parties, this Court is of the considered opinion that since the order of learned Tribunal has attained its finality, the Opposite Party No.1-Bank should comply with the same forthwith. Accordingly, the impugned award under Annexure-5 is set aside and the Opposite Party No.1-Bank is directed to comply with the direction of learned Tribunal within a period of two months from the date of production of certified copy of this order.

9. With the aforesaid observation and direction, this writ petition is disposed of.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge

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