

IN THE HIGH COURT OF ORISSA AT CUTTACK
W.P.(C) No. 7934 of 2022

Umesh Chandra Nayak

....

Petitioner

Mr. Jayadeba Behera, Advocate

-versus-

***Authorized Officer, UCO Bank,
Regional Office, Bhubaneswar &
Another***

....

Opposite Parties

Mr. Gurudutta Kar,
Advocate for the Bank

CORAM:
JUSTICE JASWANT SINGH
JUSTICE M.S. RAMAN

ORDER
05.05.2022

Order No.

- 02.**
1. This matter is taken up by virtual/physical mode.
 2. The Petitioner, defaulting borrower of business loan, prayed for the following reliefs:-

“..... To issue a writ by quashing the impugned E-auction sale notice to be in the local daily newspaper The Sambad dated 22nd March, 2022 under Annexure-2 and directing the Opposite Parties to allow the Petitioner to pay back the outstanding loan amount by rephasing the same or settled it by way of one time settlement within a time stipulated by this Court and to allow this writ application”

3. Having availed the business loan for an amount of Rs.80,000/- on 22nd August, 2006, due to financial indiscipline, the outstanding dues could not be repaid to the Opposite Party No.2-UCO Bank, Ranpur Branch in the district of Nayagarh.

Consequently, the said business loan account was declared as NPA on 6th February, 2016. A demand notice U/s. 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, “the SARFAESI Act”) was issued by the Bank on 9th December, 2019 and symbolic possession U/s. 13(4) of the Act was assumed on 12th March, 2020 for default of an amount of Rs.2,34,198/-. Subsequent thereto notice dated 21st March, 2022 for e-auction of secured asset was issued fixing date of auction on 22nd April, 2022.

4. The writ petition was taken up for hearing on 20th April, 2022, on which date the following order has been passed by this Court:

“***

2. *The Petitioner is a defaulter of a term loan for a sum of Rs.80,000.00 availed from UCO Bank, Ranpur Branch, Ranpur, District-Nayagrah on 22.08.2006. The loan account is stated to have been classified as NPA on 6.02.2016.*

3. *Learned counsel for the Petitioner submits that for the outstanding liability of around Rs.3,44,000.00 as on today, the sole residential house with the reserved price of Rs.5.79 lakhs is being put to auction sale on 22.04.2022. To save the said house, the Petitioner is stated to be prepared to clear the entire outstanding liability provided some reasonable time is extended. To show the bona fides, the Petitioner is prepared to pay a substantial amount as upfront money.*

5. *As an interim measure, subject to the Petitioner depositing a sum of Rs.1,75,000.00 on or before 22.04.2022, the successful bid, if any, shall not be confirmed without leave of the Court. The Petitioner shall*

also file his undertaking by way of an affidavit to clear the remaining balance within next four months.”

5. On the resumed hearing today, Mr. Gurudutta Kar, Counsel for the Bank has brought to the notice of this Court that the direction contained in the Order dated 20th April, 2022 has not been complied with by the Petitioner.

6. Mr. Jaydeba Behera, Counsel for the Petitioner submitted that his client is not in a position to arrange money for repayment of the business loan.

7. In this regard it is apt to quote the following observation made by the Hon’ble Delhi High Court in *C.B. Aggarwal Vrs. P. Krishna Kapoor*, AIR 1995 Delhi 154:

“It is true that in a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for vindication for men’s right and enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end.”

Keeping in view such observation, this Court, therefore, does not feel inclined to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India in favour of dubious loanee. It is noteworthy that the Hon’ble Supreme Court has strongly deprecated the tendency of the High Courts in entertaining the writ petitions filed under Article 226 of the Constitution of India by the aggrieved persons without availing alternative and efficacious remedy prescribed under the statute

and more so, in the matters, which arise under the SARFAESI Act.

In *Authorised Officer, State Bank of Travancore Vrs. K.C. Mathew*, (2018) 3 SCC 85, the Hon'ble Supreme Court while dealing with alternative remedy under the SARFAESI Act held as follows:

“3. *The SARFAESI Act is a complete code by itself, providing for expeditious recovery of dues arising out of loans granted by financial institutions, the remedy of appeal by the aggrieved under Section 17 before the Debt Recovery Tribunal, followed by a right to appeal before the Appellate Tribunal under Section 18. The High Court ought not to have entertained the writ petition in view of the adequate alternate statutory remedies available to the Respondent. The interim order was passed on the very first date, without an opportunity to the Appellant to file a reply. Reliance was placed on United Bank of India Vrs. Satyawati Tandon and others, (2010) 8 SCC 110, and General Manager, Sri Siddeshwara Cooperative Bank Limited and another Vrs. Ikbali and others, (2013) 10 SCC 83. The writ petition ought to have been dismissed at the threshold on the ground of maintainability. The Division Bench erred in declining to interfere with the same.*

8. *The statement of objects and reasons of the SARFAESI Act states that the banking and financial sector in the country was felt not to have a level playing field in comparison to other participants in the financial markets in the world. The financial institutions in India did not have the power to take possession of securities*

and sell them. The existing legal framework relating to commercial transactions had not kept pace with changing commercial practices and financial sector reforms resulting in tardy recovery of defaulting loans and mounting non-performing assets of banks and financial institutions. The Narasimhan Committee I and II as also the Andhyarujina Committee constituted by the Central Government Act had suggested enactment of new legislation for securitisation and empowering banks and financial institutions to take possession of securities and sell them without court intervention which would enable them to realise long term assets, manage problems of liquidity, asset liability mismatches and improve recovery. The proceedings under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, (hereinafter referred to as 'the DRT Act') with passage of time, had become synonymous with those before regular courts affecting expeditious adjudication. All these aspects have not been kept in mind and considered before passing the impugned order.

10. *In Satyawati Tandon (supra), 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:*

'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.

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 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.'*

15. *It is the 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 institutions are granted from public money generated at the tax payers 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 Tandon (supra), has also not been kept in mind before passing the impugned interim order:*

'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 Vrs. Antarim Zila Parishad, AIR 1969 SC 556; Whirlpool Corporation Vrs. Registrar of Trade Marks, Mumbai, (1998) 8 SCC 1 and Harbanslal Sahnia and another Vrs. 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 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.*

17. *We cannot help but disapprove the approach of the High Court for reasons already noticed in Dwarikesh Sugar Industries Ltd. Vrs. Prem Heavy Engineering Works (P) Ltd. and Another, (1997) 6 SCC 450, observing:*

'32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts

to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops. 'xxx''

In yet another case before the Hon'ble Supreme Court being *ICICI Bank Limited and ors. Vrs. Umakanta Mohapatra and ors.*, (2019) 13 SCC 497, wherein it was observed as under:

- ‘2. *Despite several judgments of this Court, including a judgment by Hon'ble Mr. Justice Navin Sinha, as recently as on 30.01.2018, in Authorized Officer, State Bank of Travancore and Anr. vs. Mathew K.C ., (2018) 3 SCC 85, the High Courts continue to entertain matters which arise under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), and keep granting interim orders in favour of persons who are Non-Performing Assets (NPAs).*
3. *The writ petition itself was not maintainable, as a result of which, in view of our recent judgment, which has followed earlier judgments of this Court, held as follows:*
 - ‘17. *We cannot help but disapprove the approach of the High Court for reasons already noticed in Dwarikesh Sugar Industries Ltd. Vrs. Prem Heavy Engineering Works (P) Ltd. and Another, (1997) 6 SCC 450, observing:*

'32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops.' "

8. While challenging the E-auction sale notice the Petitioner with reference to Para-9 of the writ petition submitted that it has applied for one time settlement of the business loan account by way of an application dated 23rd March, 2022. Even though, this Court granted opportunity *vide* Order dated 20th April, 2022 for clearing up the outstanding liability of around Rs.3,50,000/-, with a scope to deposit a sum of Rs.1,75,000/- on or before 22.04.2022 and the balance within next four months, the said direction stands non-complied.

9. Against the prayer of the petitioner in the writ petition for issue of writ of *mandamus* to opposite party-Bank for allowing rephasing or payment by way of one time settlement, this Court does not inhere such a power under Article 226 of the Constitution of India. Suffice it to notice the following observation made by the Hon'ble Supreme Court of India in the

case of *Bijnor Urban Cooperative Bank Limited, Bijnor and others Vrs. Meenal Agarwal and others* reported in AIR 2022 SC 56:-

“xxx xxx xxx

9. Even otherwise, as observed hereinabove, no borrower can, as a matter of right, pray for grant of benefit of One Time Settlement Scheme. In a given case, it may happen that a person would borrow a huge amount, for example Rs. 100 crores. After availing the loan, he may deliberately not pay any amount towards installments, though able to make the payment. He would wait for the OTS Scheme and then pray for grant of benefit under the OTS Scheme under which, always a lesser amount than the amount due and payable under the loan account will have to be paid. This, despite there being all possibility for recovery of the entire loan amount which can be realised by selling the mortgaged/secured properties, if it is held that the borrower can still, as a matter of right, pray for benefit under the OTS Scheme, in that case, it would be giving a premium to a dishonest borrower, who, despite the fact that he is able to make the payment and the fact that the bank is able to recover the entire loan amount even by selling the mortgaged/secured properties, either from the borrower and/or guarantor. This is because under the OTS Scheme a debtor has to pay a lesser amount than the actual amount due and payable under the loan account. Such cannot be the intention of the bank while offering OTS Scheme and that cannot be purpose of the Scheme which may encourage such a dishonesty.

10. If a prayer is entertained on the part of the defaulting unit/person to compel or direct the financial corporation/bank to enter into a one-time settlement on the terms proposed by it/him, then every defaulting unit/person which/who is capable of paying its/his dues as per the terms of the agreement entered into by it/him would like to get one time settlement in its/his favour. Who would not like to get his liability reduced and pay lesser amount than the amount he/she is liable to pay under the loan account? In the

present case, it is noted that the original writ petitioner and her husband are making the payments regularly in two other loan accounts and those accounts are regularised. Meaning thereby, they have the capacity to make the payment even with respect to the present loan account and despite the said fact, not a single amount/installment has been paid in the present loan account for which original petitioner is praying for the benefit under the OTS Scheme.

11. The sum and substance of the aforesaid discussion would be that no writ of mandamus can be issued by the High Court in exercise of powers under Article 226 of the Constitution of India, directing a financial institution/bank to positively grant the benefit of OTS to a borrower. The grant of benefit under the OTS is always subject to the eligibility criteria mentioned under the OTS Scheme and the guidelines issued from time to time. If the bank/financial institution is of the opinion that the loanee has the capacity to make the payment and/or that the bank/financial institution is able to recover the entire loan amount even by auctioning the mortgaged property/secured property, either from the loanee and/or guarantor, the bank would be justified in refusing to grant the benefit under the OTS Scheme. Ultimately, such a decision should be left to the commercial wisdom of the bank whose amount is involved and it is always to be presumed that the financial institution/bank shall take a prudent decision whether to grant the benefit or not under the OTS Scheme, having regard to the public interest involved and having regard to the factors which are narrated hereinabove.”

10. In view of the aforesaid clear guidelines set forth by the Hon’ble Supreme Court of India to the effect that writ petition is not entertainable against the action of the Bank under the SARFAESI Act, 2002 for recovery of an outstanding loan liability, this Court declines to exercise jurisdiction under Article 226 of the Constitution of India in the aforesaid matter. However, it is upon for the Petitioner to seek his remedy before

the learned Debts Recovery Tribunal U/s. 17 of the SARFAESI Act, 2002.

11. Accordingly, the writ petition is dismissed.

(JASWANT SINGH)
JUDGE

(M.S. RAMAN)
JUDGE

Laxmikant

May 5, 2022
Cuttack

