**AFR**

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**W.P.(C) No. 32099 of 2011**

| | | |
|---|---|---|
| ***Sri Sudhansu Sekhar Mahanta*** | … | ***Petitioner*** |
| | | None |
| | *-versus-* | |
| ***Chief Manager, State Bank of India, SME Branch, Barbil & Another*** | … | ***Opposite Parties*** |
| | | Mr. Debi Prasad Sarangi, Advocate & Mr. Subrat Sarangi, Advocate |

**CORAM:**
**JUSTICE JASWANT SINGH**
**JUSTICE M.S. RAMAN**

**<u>ORDER</u>**

**<u>Order No.</u>** **25.04.2022**

**10.** ***1.*** This matter is taken up by virtual/physical mode.

***2.*** The petitioner, father of Sri Bibhuti Bhusan Mahanta, stood guarantor for Cash Credit loan limit of Rs.10,00,000/- and prayed for the following reliefs:

*"It is therefore respectfully prayed that this Hon'ble Court may graciously be pleased to admit the writ petition, issue notice to the opposite parties inviting show cause, if the opposite parties failed to show cause or show insufficient cause allow the writ petition after hearing and would be pleased to quash the action of the opposite parties through Annexures-2, 3, 5 and 7 and to pass any other appropriate wri/writs, order/orders, direction/directions directing the opposite parties to settle the loan account of the petitioner suitably;*

****"*

P.T.O.

**3.** *Vide* Order dated 16th December, 2011, this Court issued notice to the Opposite Party-State Bank of India, Barbil Branch (formerly, SME Barbil) and in Misc. Case No.19386 of 2011 arising out of the afore-noted writ petition being W.P.(C) No.32099 of 2011, as an interim measure directed for no coercive action with the following terms:

> *"Issue notice as above.*
>
> *Accept one set of process fee.*
>
> *As an interim measure, this Court directs that no coercive action shall be taken against the petitioner till 15.02.2012 subject to deposit of Rs.50,000/- (fifty thousand) before the opposite party-Bank within a month from today.*
>
> *Only after removal of defects, urgent certified copy of this order be granted on proper application."*

**4.** This matter got listed on 16th February, 2022 on which date in the presence of counsel for the Petitioner, the Counsel for the Bank prayed for grant of time to verify the present status of the loan account of the Petitioner. Subsequent thereto the case got posted/reposted on 23.02.2022, 07.03.2022, 14.03.2022, 23.03.2022 and 08.04.2022. On these dates though the counsel for the Bank appeared, none appeared for the Petitioner. Today, an affidavit dated 25th April, 2022 on behalf of Opposite Party Nos. 1&2 being sworn to by the Chief Manager of State Bank of India, Barbil Branch (Formerly SME Branch, Barbil) came to be filed eliciting the current status.

*4.1.* The contents of said affidavit reveals, Sri Bibhuti Bhusan Mahanta son of the Petitioner availed cash credit limit of Rs.10,00,000/- from the Bank being sanctioned on 6th September, 2008 for a period of twelve months, subject to review, as working capital for running his business in car accessories. The loan was secured by equitable mortgage of immovable property of the borrower supported by continuous irrevocable personal guarantee of the father-guarantor, Sri Sudhansu Sekhar Mahanta-petitioner.

*4.2.* Due to financial indiscipline, the loan account was declared as NPA on 27th July, 2011. A demand notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity hereinafter be referred to as "the SARFAESI Act") was issued on 17th February, 2011, recalling an amount of Rs.11,45,739/- outstanding as on 31st January, 2011. Subsequently notice under Section 13(4) *ibid.* was issued on 8th October, 2011, thereby symbolic possession of the secured asset was assumed which fact was also published in two widely circulated newspapers of the locality namely 'the Samaja' dated 28.11.2011 in Odia and 'the Sunday Express' dated 27.11.2011 in English.

*4.3.* It is stated in the aforesaid affidavit that during the pendency of this present writ petition, the Opposite Parties-Bank filed Application being O.A. No. 337 of 2012 in the Debts Recovery Tribunal, Cuttack under Section 19 of THE

RECOVERY OF DEBTS AND BANKRUPTCY ACT, 1993, for issue of certificate of recovery for Rs.20,11,671/- along with interest and costs as also to recover the same from the mortgaged property. The said Original Application was decreed *ex parte* on 17th December, 2015 and at present recovery proceeding is pending before the Recovery Officer.

*4.4.* Further steps have also been taken by the Bank by approaching the District Magistrate and Collector, Keonjhar on 16th November, 2017 under Section 14 of the SARFAESI Act, 2002 for grant of necessary assistance to take over possession of the secured asset. The said Magistrate also accorded necessary permission for deployment of necessary police personnel during taking over physical possession of the secured assets. For this purpose the opposite parties-Bank deposited Rs.7,524/- in shape of bank draft and paid Rs.41,800/- by challan. It is asserted in the affidavit furnished today before this Court that no further action could be taken in this regard in view of the interim orders.

***5.*** The fact as adumbrated herein above clearly depicts that the petitioner having availed loan, evaded repayment and after managing to get order of "no coercive action" way back in the year 2011 from this Court, chose not to participate in the present proceeding, though the counsel for the petitioner did appear on 16.02.2022, but abstained from appearing on subsequent dates, *i.e.,* 23.02.2022, 07.03.2022, 14.03.2022, 23.03.2022 and 08.04.2022. Even today when the matter is called none appeared for the petitioner. Therefore, this Court feels it appropriate not to show any indulgence noticing the conduct of the petitioner.

*5.1.* It has been succinctly stated in *Canara Bank and Ors. Vrs. Debasis Das and Ors., AIR 2003 SCW 1561* as:

> *"A person who seeks equity must come with clean hands. He, who comes to the Court with false claims, cannot plead equity nor the Court would be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner."*

*5.2.* The Hon'ble Delhi High Court *C.B. Aggarwal Vrs. P. Krishna Kapoor, AIR 1995 Delhi 154,* observed:

> *"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."*

*5.3.* In such view of the matter, this Court, therefore, ceases to have inclination to exercise its extraordinary jurisdiction invoking provisions of 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.

5.4. 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. Ikbal 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.'*

*5.5.* 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 r 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.' "*

*5.6.* For the Petitioner to avail sufficient opportunity to appear and take part in the present proceeding sufficient opportunities were extended; nonetheless, the petitioner chose to abstain from appearing before this Court. Taking into consideration the above facts and documents as placed on record by way of affidavit sworn to by the Bank Officer, this Court does not wish to indulge in the matter any further.

*5.7.* The aforesaid being the position of law as enunciated by the Hon'ble Supreme Court laying down restrictions as to exercising power under Article 226 of the Constitution of India save and except exceptions carved out as discussed above, this Court, while condemning the conduct of the petitioner, is of the considered view that the petitioner is not liable to be shown benevolence any further.

***6.*** In the result, taking into account the ruling of the Hon'ble Supreme Court of India through the case laws jotted down *supra*, and appreciating the fact submitted by way of the affidavit of the opposite parties-Bank, it is apt not only to vacate the interim order(s), but also dismiss the writ petition, being not maintainable. Accordingly the writ petition is dismissed and interim orders stand vacated.



**(JASWANT SINGH)**
**JUDGE**

**(M.S. RAMAN)**
**JUDGE**

Laxmikant

April 25, 2022
Cuttack