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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.11.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

AND

THE HONOURABLE MR.JUSTICE J.SATHYA NARAYANA PRASAD

W.P.(MD)No.26446 of 2022
and
W.M.P.(MD)No.20628 of 2022

A.Kalist ... Petitioner

-Vs-

1.The Chief Judicial Magistrate,
Kanniyakumari District,
Nagercoil.

2.The Authorized Officer,
Aptus Value Housing Finance India Ltd.,
8B, Doshi Towers,
205, Ponnamalle High Road,
Kilpauk, Chennai – 600 010.

3.The Branch Manager,
Aptus Value Housing Finance India Ltd.,
Nagercoil Branch,
No.78, Thasor Agham,

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W.C.C.Road, Nagercoil,
Kanniyakumari District. ... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, to call for the records of the impugned communication of the Advocate Commissioner dated 15.11.2022 in pursuant to the order passed by the 1st respondent in Cr.M.P.No.9109 of 2022, dated 13.09.2022 and quash the same and consequently forbearing the respondents 2 and 3 and his force from taking physical possession of the secured asset from the writ petitioner.

For Petitioner : Mr.K.Esakki
For Respondents : Mr.V.Sukumar for R2 & R3

ORDER

[Order of the Court was made by R.MAHADEVAN, J.]

Challenging the communication of the Advocate Commissioner dated 15.11.2022 in pursuant to the order passed by the 1st respondent in Cr.M.P.No. 9109 of 2022, dated 13.09.2022, the petitioner has filed this Writ Petition with a consequential direction to forbear the respondents 2 and 3 and their force from taking physical possession of the secured asset from the writ petitioner.

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2. Heard Mr.K.Esakki, learned counsel appearing for the petitioner and Mr.V.Sukumar, learned Standing Counsel, who takes notice for the respondents 2 and 3.

3. Though there is availability of expeditious and effective remedies under the SARFAESI Act, this writ petition has been filed, since the Debts Recovery Tribunal, Madurai, is not functional. Before going into the issue raised in this writ petition, we deem it fit to consider the following sequence of the provisions under the SARFAESI Act and the decisions of the Hon'ble Supreme Court as well as this Court in this regard, which will make one understand about the enforcement of security interest by the Banks or financial institutions in case of default in repayment of secured debt, *vice versa* the rights of the borrower against such enforcement.

4. Section 13 of the Act, which deals with enforcement of security interest, states that notwithstanding anything contained in Sections 69 or 69A of the Transfer of Property Act, 1882, any security interest created in favour of any

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secured creditor may be enforced, without the court's intervention, by such creditor in accordance with the provisions of the Act.

5. Section 13(2) of the Act provides that when a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt, and his account in respect of such debt is classified as non-performing asset, then the secured creditor may require the borrower, by notice in writing, to discharge his liabilities within sixty days from the date of the notice, failing which the secured creditor shall be entitled to exercise all or any of the rights given in Section 13(4) of the Act.

6. Section 13(3) of the Act provides that the notice under Section 13(2) of the Act shall give details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank. Section 13(3-A) of the Act was inserted by Act 30 of 2004 after the decision of this Court in **Mardia Chemicals vs. Union of India** reported in **(2004) 4 SCC 311** and provides for a last opportunity for the borrower to make a representation to the

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secured creditor against the classification of his account as a non-performing asset. The secured creditor is required to consider the representation of the borrowers, and if the secured creditor comes to the conclusion that the representation is not tenable or acceptable, then he must communicate, within one week of the receipt of the communication by the borrower, the reasons for rejecting the same.

7. Section 13(4) of the Act provides that if the borrower fails to discharge his liability within the period specified in Section 13(2), then the secured creditor, may take recourse to any of the following actions, to recover his debt, namely-

> "(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
>
> (b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:
>
> Provided that the right to transfer by way of lease, assignment or

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sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

8. Section 14 of the Act provides that the secured creditor can file an application before the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction, the secured asset or other documents relating thereto, are found for taking possession thereof. If any such request is made, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor. Therefore, it follows that a secured creditor may, in order to

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enforce his rights under Section 13(4), in particular Section 13(4)(a), may take recourse to Section 14 of the Act.

9. Section 17 of the Act which provides for an appeal to the Debts Recovery Tribunal, reads as follows:-

> "17. Right to appeal.--(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:
>
> Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.
>
> Explanation.--For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of Section 17.
>
> (2) The Debts Recovery Tribunal shall consider whether any of the

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measures referred to in sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder."

10. As per Section 18(1) of the Act, any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal along with such fee, as may be prescribed, to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.

The first proviso states that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower.

The second proviso to Section 18 of the Act states that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less.

The third proviso states that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty five per cent of debt referred to in the second proviso.

As per Section 18(2) of the Act, save as otherwise provided in this Act,

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the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder.

11. As regards the Non-Maintainability of writ petition under Article 226 against proceedings under SARFAESI Act, it is relevant to consider the following judgments:-

(i) In **S.Ganesamoorthi Vs. The Branch Manager & Ors., W.P.(MD).No.22536 of 2021, dated 20.12.2021,** the Hon'ble First Bench of this Court has held that though Presiding officer is not available in DRT, Madurai, incharge is given to Coimbatore and therefore, liberty is given to writ petitioner to move DRT, Coimbatore.

(ii) In **ICICI Bank Ltd. v. Umakanta Mohapatra, (2019) 13 SCC 497 : (2018) 5 SCC (Civ) 812: 2018 SCC OnLine SC 2349,** the Hon'ble Supreme Court has held as follows:-

> "2. Despite several judgments of this Court, including a judgment by Hon'ble Navin Sinha, J., as recently as on 30-1-2018, in State Bank of Travancore v. Mathew K.C. [State Bank of Travancore v. Mathew K.C.,

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(2018) 3 SCC 85 : (2018) 2 SCC (Civ) 41] , 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: (SCC p. 94, para 17)

"17. We cannot help but disapprove the approach of the High Court for reasons already noticed in Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. [Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd., (1997) 6 SCC 450] , observing: (SCC p. 463, para 32)

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."

(iii) In **United Bank of India v. Satyawati Tondon, (2010) 8 SCC 110,**

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the Hon'ble Supreme Court has held as follows:-

"42. There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression "any person" used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

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-

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judicial bodies for redressal of the giievance 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."

(iv) In **Kanaiyalal Lalchand Sachdev v. State of Maharashtra(2011) 2 SCC 782,** the Apex Court has held as follows:-

"23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See Sadhana Lodh v. National Insurance Co. Ltd. [(2003) 3 SCC 524 : 2003 SCC (Cri) 762] , Surya Dev Rai v. Ram Chander Rai [(2003) 6 SCC 675] and SBI v. Allied Chemical Laboratories [(2006) 9 SCC 252].)"

(v) In **Agarwal Tracom (P) Ltd. v. Punjab National Bank (2018) 1 SCC 626,** the Apex Court has held as follows:-

"33. In the light of the foregoing discussion, we are of the considered opinion that the writ court as also the appellate court were justified in dismissing the appellant's writ petition on the ground of availability of alternative statutory remedy of filing an application under Section 17(1) of the SARFAESI Act before the Tribunal concerned to challenge the action of PNB in forfeiting the appellant's deposit under

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Rule 9(5). We find no ground to interfere with the impugned judgment."

(vi) In **C. Bright v. Distt. Collector (2021) 2 SCC 392,** the Hon'ble Supreme Court has held as follows:-

> "22. Even though, this Court in United Bank of India v. Satyawati Tondon [United Bank of India v. Satyawati Tondon, (2010) 8 SCC 110 (2010) 3 SCC (Civ) 260] held that 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 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. Hindon Forge (P) Ltd. [Hindon Forge (P) Ltd. v. State of U.P., (2019) 2 SCC 198 : (2019) 1 SCC (Civ) 551] has held that the remedy of an aggrieved person by a secured creditor under the Act is by way of an application before the Debts Recovery Tribunal, however, borrowers and other aggrieved persons are invoking the jurisdiction of the High Court under Articles 226 or 227 of the Constitution of India without availing the alternative statutory remedy. The Hon'ble High Courts are well aware of the limitations in exercising their jurisdiction when effective alternative remedies are available, but a word of caution would be still necessary for the High Courts that interim orders should generally not be passed without hearing the secured creditor as interim orders defeat the very purpose of expeditious recovery of public money."

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12. As regards the non-maintainability of the writ petition against Private financial institutions like assets re-construction companies in respect of their action under SARFAESI Act, it is relevant to consider the decision of the Hon'ble Supreme Court in **Phoenix ARC (P) Ltd. v. Vishwa Bharati Vidya Mandir, (2022) 5 SCC 345 : 2022 SCC OnLine SC 44**, wherein, it has been held as follows:-

> "18. Even otherwise, it is required to be noted that a writ petition against the private financial institution — ARC — the appellant herein under Article 226 of the Constitution of India against the proposed action/actions under Section 13(4) of the SARFAESI Act can be said to be not maintainable. In the present case, the ARC proposed to take action/actions under the SARFAESI Act to recover the borrowed amount as a secured creditor. The ARC as such cannot be said to be performing public functions which are normally expected to be performed by the State authorities. During the course of a commercial transaction and under the contract, the bank/ARC lent the money to borrowers herein and therefore the said activity of the bank/ARC cannot be said to be as performing a public function which is normally expected to be performed by the State authorities. If proceedings are initiated under the SARFAESI Act and/or any proposed action is to be taken and the borrower is

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aggrieved by any of the actions of the private bank/bank/ARC, borrower has to avail the remedy under SARFAESI Act and no writ petition would lie and/or is maintainable and/or entertainable. Therefore, decisions of this Court in Praga Tools Corpn. [Praga Tools Corpn. v. C.A. Manual, (1969) 1 SCC 585] and Ramesh Ahiuwalia [Ramesh Ahluwalia v. State of Punjab, (2012; 12 SCC 331 : (2013) 3 SCC (L&S) 456: 4 SCEC 715] relied upon by the learned counsel appearing on behalf of the borrowers are not of any assistance to the borrowers."

13. Today, when the matter was taken up for admission, the learned counsel for the petitioner submitted that the petitioner is ready to pay 25% of the entire outstanding amount as on date on or before 23.12.2022 and after deducting the said payment, the entire remaining outstanding amount in six consecutive equal monthly installments, for which, the learned Standing Counsel for the respondents 2 and 3 is agreeable, however, with liberty to the respondents - Bank to proceed against the petitioner in case of default in payment of any one of the installments.

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14. Recording the above submissions, the Writ Petition is disposed of directing the petitioner to pay 25% of the entire outstanding amount on or before 23.12.2022 and after deducting the said payment, the entire remaining outstanding amount in six consecutive equal monthly installments. The first installment shall be paid on or before 23.01.2023 and the subsequent five installments shall be paid on or before the 23rd day of every English Calendar month until the entire payment is made. Till such time, the respondents - Bank shall not take any coercive action against the petitioner. If the petitioner fails to make any one of the above installments, the respondents - Bank may proceed further in accordance with law. No costs. Consequently, connected miscellaneous petition is closed.

[R.M.D., J.] & [J.S.N.P., J.]
23.11.2022

Index : Yes / No
Internet : Yes / No

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To

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