IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

2023:PHHC:150915-DB
(224) **CWP-5055-2021**
Date of Decision: 28.11.2023

M/s Hanjara Briks & another --Petitioners

Versus

Bank of Baroda --Respondent

CORAM:- HON'BLE MRS. JUSTICE LISA GILL.
HON'BLE MS. JUSTICE LAPITA BANERJI.

Present:- Mr. Gourave Bhayyia, Advocate for petitioners.

Ms. Tanvi Jain, Advocate for the respondent (through V.C).

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LISA GILL.J (Oral)

1. Prayer in the present petition is for issuance of a writ in the nature of certiorari quashing impugned auction notice dated 10.05.2019 (Annexure P-5) and notice dated 26.02.2021 issued by respondent-Bank, pursuant to order dated 13.01.2021 passed by the Additional District Magistrate, Patiala under Section 14 of SARFAESI Act (for short).

2. Learned counsel for petitioners submits that financial facility was availed of from the respondent-Bank. There are two loan accounts of petitioners since 2008 and 2010. Due to financial indiscipline, accounts of petitioners were declared Non Performing Assets (N.P.A.). Notice under Section 13(2) was issued on 02.02.2019 and notice under Section 13(4) of the SARFAESI Act was issued on 09.05.2019 and petitioners' residential house was sought to be auctioned vide notice dated 10.05.2019. It is further submitted that petitioner had submitted a proposal for a One Time Settlement (O.T.S) but the same was declined on 3.5.2019 (Annexure P-2). Auction notice dated 10.05.2019 was issued in an illegal and arbitrary

manner. Learned counsel submits that at least some breathing time should have been afforded to petitioner to deposit the outstanding amount. It is submitted that out of the outstanding amount, a sum of Rs.10 lakhs was also deposited by petitioners in March, 2023. It is, thus, prayed that writ petition be allowed.

3. Though, reply on behalf of respondent-Bank has not been filed, learned counsel for respondent-Bank submits that present writ petition is not entertainable in any manner as first and foremost petitioners have an efficacious alternate remedy for redressal of their grievances in terms of categoric provisions of SARFAESI Act. Furthermore, earlier two writ petitions filed by petitioners stand dismissed. CWP-17484-2020 was dismissed as withdrawn with liberty to petitioners to file a petition afresh if so advised. Thereafter, CWP-579-2021 filed by the petitioners for the same relief was dismissed as withdrawn on 12.01.2021 with liberty to petitioners to approach the concerned Debt Recovery Tribunal (D.R.T.). Admittedly, petitioners filed SA-70-2019 before the learned D.R.T, though, details thereof have not been mentioned in the writ petition. O.A filed by respondent-Bank was decided ex-parte on 07.02.2023, though, it is brought to our notice by learned counsel for petitioners that ex-parte order has been recalled and O.A is pending adjudication before learned D.R.T.

4. Notice of motion was issued in the present writ petition while noting contention on behalf of the petitioners that they were constrained to approach this Court as Presiding Officer of learned D.R.T had then retired and S.A filed by them was pending with application seeking interim relief not being decided. In view thereof notice was issued to respondent-Bank with a direction that possession of petitioners over property in question be

maintained.

5. Learned counsel for petitioners fairly submits that SA-70-2019 has since been dismissed by the learned D.R.T. When faced with the question of entertainability of present petition in view of the judgements of Hon'ble the Supreme Court in ***Union Bank of India v. Satyawati Tandon and others, 2010(8) SCC 110; Varimadugu Obi Reddy v. B. Sreenivasulu and others, 2023(1) R.C.R.(Civil) 34 and M/s South Indian bank Ltd. and others v. Naveen Mathew Philip and another, 2023(2) RCR (Civil) 771. Hon'ble the Supreme Court in the case of M/s South Indian Bank (supra)***, learned counsel for petitioners submits that proposal for a fresh O.T.S has been submitted by petitioners which should be considered by the respondent-Bank.

5. Having heard learned counsel for the parties, we do not find any ground to interfere in the present writ petition and also find no justification for continuation of present proceedings. S.A filed by petitioners, admittedly, stands dismissed. Remedy of appeal in terms of Section 18 of the SARFAESI Act was available to petitioners. It has been held by Hon'ble the Supreme Court in ***Varimadugu Obi Reddy v. B. Sreenivasulu and others, 2023(1) R.C.R.(Civil) 34*** wherein after referring to its previous judgment in Satyawati Tandon (supra), it was held as under :-

> *"34. In the instant case, although the respondent borrowers initially approached the Debts Recovery Tribunal by filing an application under Section 17 of the SARFAESI Act, 2002, but the order of the Tribunal indeed was appealable under Section 18 of the Act subject to the compliance of condition of predeposit and without exhausting the statutory remedy of appeal, the respondent borrowers approached the High Court by filing the writ application under Article 226 of*

the Constitution. We deprecate such practice of entertaining the writ application by the High Court in exercise of jurisdiction under Article 226 of the Constitution without exhausting the alternative statutory remedy available under the law. This circuitous route appears to have been adopted to avoid the condition of pre-deposit contemplated under 2nd proviso to Section 18 of the Act 2002."

6. In view of the settled position, we do not find any ground to interfere qua grievance raised by petitioners in respect to proceedings under SARFAESI Act.

7. It is further to be noticed that petitioners do not have any vested right for One Time Settlement. Gainful reference can be made to judgement of Hon'ble the Supreme Court in ***The Bijnor Urban Cooperative Bank Ltd. Vs. Meenal Agarwal and others, 2022 AIR (SC) 56.*** The issues/questions for consideration by the Hon'ble Supreme Court were as under:-

(i) Whether benefit under the OTS Scheme can be prayed as a matter of right?;
ii) Whether the High Court in exercise of powers under Article 226 of the Constitution of India can issue a writ of mandamus directing the Bank to positively consider the grant of benefit under the OTS Scheme and that too de hors the eligibility criteria mentioned under the OTS Scheme?"

8. Hon'ble the Supreme Court in the above said case held 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. It was held that:-

"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.

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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."*

9. Keeping in view facts and circumstances of the matter, present petition is dismissed with liberty to petitioners to avail remedy/(ies) available to them in accordance with law. It is always open for the parties to arrive at any mutually acceptable settlement.

(LISA GILL)
JUDGE

28.11.2023 **(LAPITA BANERJI)**
lucky **JUDGE**

Whether speaking/reasoned: Yes/No
Whether Reportable: Yes/No