IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

(121) **CWP-4560-2023**
Decided on: 08.05.2023

M/s Ambala Automobile India Ltd.

....Petitioner

Versus

Kotak Mahindra Bank

.... Respondent

CORAM : HON'BLE MR.JUSTICE G.S. SANDHAWALIA
HON'BLE MR.JUSTICE GURBIR SINGH

Present: Mr. Aalok Jagga, Advocate
and Mr.H.S.Jagdev, Advocate, for the petitioner.

Mr.Akshay Bhan, Sr.Advocate
with Mr.Aman Bansal, Advocate, for the respondent-caveator.

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G.S. Sandhawalia, J.

Petitioner in the present writ petition filed under Article 226/227 of the Constitution of India challenges the letter dated 20.05.2022 (Annexure P-10) wherein the Bank rejected the OTS offer of Rs.5 crores against the outstanding of Rs.12,81,93,071/- as on 27.09.2019. Similarly, challenge is also raised to the subsequent rejection to the offer dated 04.07.2022 (Annexure P-11) wherein it was noticed that e-auction was taking place on 12.07.2022 and the OTS amount offered had been enhanced to Rs.5.60 crores. The petitioner thereafter enhanced his offer to Rs.6.40 crores which was also rejected on 15.09.2022 (Annexure P-14) and eventually, the last offer was made of Rs.7.05 crores which was rejected on 27.02.2023 (Annexur P-18).

2. The case of the petitioner is that there is a violation of the One Time Settlement guidelines of the Bank as similarly situated persons

have been granted the said benefit. Resultantly, challenge has been raised to the e-auction notice dated 15.02.2023 (Annexure P-16) wherein the property had been put to sale on 06.03.2023 which is stated to be in violation of the Security Interest (Enforcement) Rules, 2002.

3. Counsel for the respondent-Bank has pointed out that in the auction which took place on 06.03.2023, the property which was subject matter of notice dated 27.09.2019 issued under Section 13(2) of the Securitization and Re-construction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, the 'Act') has been put to sale for Rs.5.31 crores.

4. A perusal of the notice under Section 13(2) of the Act would go on to show that amount was classified as Non Performing Asset on 31.08.2019 in the books of the respondent-Bank and resultantly, the amount was claimed. The notice under Section 13(4) of the Act was thereafter issued on 20.12.2019 (Annexure P-3) wherein possession of the mortgaged property was taken, details of which were mentioned in the said notice which is a commercial plot and the boundaries of which were duly given abutting Ambala-Jagadhri road. Apparently, no effort was made to challenge the said notice under Section 13(4) of the Act before the Tribunal under Section 17 of the Act and the petitioner waited till the property was put to auction. It is not disputed that the right to challenge the Section 13(4) proceedings gives vast powers to the Tribunal under Sections 17(2) & (3) wherein the Tribunal, while exercising its jurisdiction has to consider whether the measures referred to in Sub-section (4) of Section 13 of the Act were in accordance with the provisions of the rules made thereunder. Similarly, under Section 17(3), the Tribunal has to keep in mind that any of the measures referred to by the secured creditor under

Section 13(4) of the Act are in accordance with the provisions of the Act and the rules thereunder would, if not so, it would require restoration of the management of the possession of the secured asset to the borrower or other aggrieved person. Thus, the power under Section 17(3) of the Act is to declare the recourse to any of the measures taken by the secured creditor under Section 13(4) of the Act as invalid and also to restore possession or the management of the secured assets, including the residuary powers to pass any order which may be appropriate or necessary. The said right is limited by the extent that the application has to be preferred within the period of 45 days from the date when such measures had to be taken.

5. Apparently, when the notice was issued under Section 13(4) on 20.12.2019 (Annexure P-3), the same was not challenged and the property was put to sale firstly on 22.12.2020 but the sale did not fructify. Thereafter, it was followed by another sale notice dated 06.10.2021 (Annexure P-8) which also did not materialize and thereafter, on 01.04.2022 (Annexure P-9), the property was put to sale for 19.04.2022 and the reserve price apparently kept falling from Rs.7.25 crores to Rs.5.3 crores. Eventually, the property was put to auction again on 25.08.2022 (Annexure P-13) for Rs.4.77 crores and also on 30.11.2022 (Annexure P-15), when the reserve price was fixed at Rs.4.06 crores. The last auction which now had materialized eventually was when the property was sought to be auctioned on 06.03.2023 as per the auction notice dated 15.02.2023 (Annexure P-16) when the reserve price was fixed at Rs.3.90 crores. It has been brought to our notice that the property was sold at Rs.5.3 crores and the auction purchaser has deposited 25% of the said amount.

6. It is also to be noticed that OA/127/2020 had also been filed by the Bank claiming recovery of its dues. The petitioner was initially

proceeded ex-parte and thereafter, on 02.03.2022 (Annexure P-21), he had filed an application for setting aside the same which was allowed on 24.01.2023 (Annexure P-22) by noting that the case was at the initial stage. The said order was set aside subject to payment of costs of Rs.30,000/- by the DRT-II. The restraint order was also issued against the petitioner from dealing with the property in question in any way since the application for attachment of the property had also been filed.

7. The reasoning which is given by the Bank while rejecting the proposal of OTS was on account of the low settlement amount which is a meager amount against the amount which was claimed. It was mentioned in the said communication that the offer in the proposal would lead to loss of huge sum to the Bank which is public money and the same cannot be accepted. The reasoning given by the Bank cannot be said to be wholly wrong. The issue of alternate remedy as provided under Section 17 of the Act has been subject matter of debate time and again. Reliance can be placed upon the judgment passed in **G.M., Sri Siddeshwara Co-operative Bank Ltd. & another Vs. Sri Ikbal & others, 2013 (10) SCC 83.** In the said case, the mortgaged property had been auctioned and the sale certificate had been quashed by the learned Single Judge of the Karnataka High Court which was upheld by the Division Bench on the ground that the mandatory requirements of the rules were not followed. Resultantly, it was held that though the said rule is mandatory but there was a remedy provided under Section 17 of the Act which had been brushed aside and once there was alternative and efficacious remedy available, the High Court was not justified to allow the same to be circumvented. Resultantly, the appeals were allowed and the orders were set aside.

8. Similarly, in **Authorized Officer, State Bank of Travancore & another Vs. Mathew K.C., 2018 AIR (SC) 676**, challenge before the Apex Court was to the interim order passed in a writ petition staying further proceedings under Section 13(4) of the Act on the deposit of Rs.3,50,000/- within 2 months. The appeal against the same had been dismissed by the Division Bench. Resultantly, the Apex Court set aside the said orders by the following observations:

> "17. 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.
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> 18. We cannot help but disapprove the approach of the High Court for reasons already noticed in Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd. and Another, 1997 (6) SCC 450, observing :-
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> "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."
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> 19. The impugned orders are therefore contrary to the law laid down by this Court under Article 141 of the Constitution and

unsustainable. They are therefore set aside and the appeal is allowed."

9. A Three Judge Bench of the Apex Court in **Punjab National Bank & another Vs. Imperial Gift House & others, 2013 (14) SCC 622**, set aside the order whereby the writ petition had been entertained which was against the notice issued under Section 13(2) which had been rejected while passing an order under Section 13(3)(A) of the Act.

10. In **Phoenix ARC Private Limited Vs. Vishwa Bharati Vidya Mandir & others, 2022 (5) SCC 345**, the notice under Section 13(2) of the Act had been issued and the credit facilities were assigned by the Bank in favour of the appellant. The restructuring had also been done but borrower failed to pay the outstanding due amount. The demand for the outstanding amount was treated as under Section 13(4) notice and an ex-parte interim order was passed regarding status quo to be maintained subject to the borrower paying Rs.1 crore. The application for vacation of the stay was not decided and the interim order was extended. Resultantly, the Apex Court, while discussing the law in issue, held as under:

> "The writ petitions have been filed against the proposed action to be taken under Section 13(4). As observed hereinabove, even assuming that the communication dated 13.08.2015 was a notice under Section 13(4), in that case also, in view of the statutory, efficacious remedy available by way of appeal under Section 17 of the SARFAESI Act, the High Court ought not to have entertained the writ petitions. Even the impugned orders passed by the High Court directing to maintain the status quo with respect to the possession of the secured properties on payment of Rs.1 crore only (in all Rs.3 crores) is absolutely unjustifiable. The dues are to the extent of approximately Rs.117 crores. The ad-interim relief has been continued since 2015 and the secured creditor is deprived of proceeding further with the action under the SARFAESI ACT. Filing of the writ petition by the borrowers before the High Court

is nothing but an abuse of process of Court. It appears that the High Court has initially granted an ex-parte ad-interim order mechanically and without assigning any reasons. The High Court ought to have appreciated that by passing such an interim order, the rights of the secured creditor to recover the amount due and payable have been seriously prejudiced. The secured creditor and/or its assignor have a right to recover the amount due and payable to it from the borrowers. The stay granted by the High Court would have serious adverse impact on the financial health of the secured creditor/assignor. Therefore, the High Court should have been extremely careful and circumspect in exercising its discretion while granting stay in such matters. In these circumstances, the proceedings before the High Court deserve to be dismissed."

11. Thus, from the above discussion, it would be clear that time and again the Apex Court has held that writ petitions are not to be entertained once possession has been taken under Section 13(4) of the Act and the remedy would thus lie under Section 17 of the Act before the Tribunal. Needless to say that only in exceptional cases, the Writ Court would exercise its jurisdiction. The facts and circumstances of the present case do not make out any such exceptions which would entail the invoking of the extraordinary writ jurisdiction.

12. The Bank is proceeding to recover its dues in accordance with law and the petitioner has no right to dictate the terms of the OTS, in view the law laid down in **The Bijnor Urban Cooperative Bank Ltd., Bijnor & others Vs. Meenal Agarwal & others, 2022 (2) PLR 408**. Relevant portion of the judgment read as under:

"7. In the present case, a conscious decision was taken by the Bank as well as the Settlement Advisory Committee which is reflected from the Board's Resolution dated 28.12.2020 and the decision dated 08.01.2021. Even personal hearing was afforded to the original writ petitioner by the Settlement Advisory Committee on 25.02.2021. The High Court in the impugned judgment and order has observed that no opportunity was given to the original writ petitioner, which is factually incorrect. Therefore, the decision cannot be said to be in violation of the principle of natural justice.

8. While passing the impugned judgment and order, the High Court, in response to the submissions on behalf of the Bank that, there are all possibilities of recovery of the loan amount and the efforts are being made to recover the amount by initiating proceedings under the SARFAESI Act and that the properties mortgaged can be auctioned, has observed that the proceedings under the SARFAESI Act have remained pending for seven years and the Bank has been unable to recover its dues and therefore the hope of recovery is illusory. This conclusion is not supported by any material on record. Merely because the proceedings under the SARFAESI Act have remained pending for seven years, the Bank cannot be held responsible for the same. No fault of the bank can be found. What is required to be considered is a conscious decision by the Bank that the Bank will be able to recover the entire loan amount by auctioning the mortgaged property and a due application of mind by the Bank that there are all possibilities to recover the entire loan amount, instead of granting the benefit under the OTS Scheme and to recover a lesser amount. It is ultimately for the Bank to take a conscious decision in its own interest and to secure/recover the outstanding debt. No bank can be compelled to accept a lesser amount under the OTS Scheme despite the fact that the Bank is able to recover the entire loan amount by auctioning the secured property/mortgaged property. When the loan is disbursed by the bank and the outstanding amount is due and payable to the bank, it will always take a conscious decision in the interest of the bank and in its commercial wisdom.

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."

13. Counsel for the petitioner has sought to raise an argument that under Section 26-D of the Act, secured creditor would only have a right if the security interest created in his favour by the borrower is registered with the Central Registry. The provisions of Section 17(3) as noticed above are very wide that if the measures taken are not in accordance with the provisions of the Act and the Rules, the same can be set aside by the Tribunal which includes the measures whereby possession of the property has been taken and also the challenge raised to the sale if it is not in accordance with the Act or that violation has been done correctly.

14. In such circumstances, keeping in view the settled principle of law, once securitization proceedings have been initiated after taking recourse to Section 13(4) and further possession had already been taken while taking recourse to the provisions of the 2002 Act which was never challenged. Thus, we are of the considered opinion that firstly the remedy would lie with the Tribunal. Only in exceptional cases this Court would

exercise its jurisdiction. Nothing has been shown to bring the case within the ambit of those exceptional circumstances.

15. In SLP(Civil) Nos.5973-5974-2018 titled *G.Vikram Kumar Vs. State Bank of Hyderabad & others,* decided on 02.05.2023, the Apex Court held that against any steps taken by the Bank under Section 13(4) of the Act for the auction of the property, the remedy against the same would lie before the Tribunal under Section 17 of the Act and not before the High Court. Relevant portion of the judgment reads as under:

> "8. At the outset, it is required to be noted that what was challenged before the High Court by respondent no.1 in a writ petition under Article 226 of the Constitution of India was the e-auction notice which was pursuant to the action initiated by the Bank in exercise of powers under Section 13(4) of the SARFAESI Act. At this stage it is required to be noted that e-auction was held/conducted on 31.08.2016 in which the appellant participated and was declared as a successful bidder and he made a payment of 25% of the bid amount on the very day i.e., on 31.08.2016.
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> However, thereafter the respondent no.1 filed the writ petition before the High Court challenging the e-auction notice dated 28.07.2016 on 14.09.2016 that is after conducting of the auction. It is required to be noted that against any steps taken by the Bank under Section 13(4) of the SARFAESI Act the aggrieved party has a remedy under the SARFAESI Act by way of appeal under Section 17 of the SARFAESI Act to approach the DRT.
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> Therefore, in view of the availability of the alternative statutory remedy available by way of proceedings/appeal under Section 17 of the SARFAESI Act, the High Court ought not to have entertained the writ petition under Article 226 of the Constitution of India in which the e-auction notice was under challenge. Therefore, the High Court has committed a very serious error in entertaining the writ petition under Article 226 of the Constitution

> of India challenging the e-auction notice issued by the Bank in exercise of power under Section 13(4) of the SARFAESI Act."

16. Resultantly, we are of the opinion that no case is made out for interference by the Writ Court in its extraordinary writ jurisdiction as the petitioner had a right to tender the amounts due together with interest charges and expenses to the secured creditor any time before the date of publication of the notice for public auction to save his property from being sold, under Section 13(8) of the Act. The petitioner not having done so, the writ jurisdiction of this Court being an extraordinary one, is not liable to be exercised, in the facts and circumstances of the present case.

17. Accordingly, in view of the above discussion, the present writ petition stands dismissed. The petitioner is relegated to avail his alternative remedy before the Tribunal, in accordance with law.

(G.S. SANDHAWALIA)
JUDGE

(GURBIR SINGH)
JUDGE

08.05.2023
sailesh

Whether speaking/reasoned : Yes
Whether Reportable : Yes