



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 9155/2023 and CM APPL. 34810/2023**

Date of Decision: **24.07.2023**

IN THE MATTER OF:

VANYA JAIN
W/O SH. SUNIL KUMAR JAIN
R/O C - 3/ 15, ASHOK VIHAR, PHASE - 2,
NEW DELHI - 110052

..... PETITIONER

Through: Mr.Sanjeev Ralli, Sr. Advocate with
Mr.Aproov Parashari, Mr.Vivek
Singh, Mr.Piyush M. Dwivedi and
Mr.Chetanya Baweja, Advocates.

Versus

AMBIT FINVEST PVT LTD
HAVING ITS OFFICE AT:
A - 506 - 510, 5TH FLOOR, A WING, KANAKIA WALL STREET,
ANDHERI KURLA ROAD, CHAKALA, ANDHERI (EAST),
MUMBAI, MAHARASHTRA - 400093

.... RESPONDENT NO.1

ORBIIGO HEAVY LIFTERS PRIVATE LIMITED
FORMERLY, PTAAANS LOGISTICS (I) PVT. LTD.
HAVING ITS OFFICE AT:
318, 3RD HOAR, PD MELLOW ROAD, CARNAL BUNDER,
NAVRATNA BUILDING,
PLOT NO. 69, MASJID,
MUMBAI, MAHARASHTRA - 400009

.... RESPONDENT NO.2

Signature Not Verified
Digitally Signed By: NEHA
CHOPRA
Signing Date: 28.07.2023
18:28:20

Signature Not Verified
Digitally Signed
By: PURUSHAINDR
KUMAR RAURAV

MR. PRAVEEN JAIN

301, NASEEB CHS LTD., PLOT 1\10. 115, SV ROAD,
NEAR ICICI BANK, KHAR (WEST),
MUMBAI, MAHARASHTRA – 400052

.... RESPONDENT NO.3

NIPUN JAIN

301, NASEEB CHS LTD., PLOT NO. 115,
SV ROAD, NEAR ICICI BANK, KHAR (WEST),
MUMBAI, MAHARASHTRA - 400052

.... RESPONDENT NO.4

Through: None.

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

JUDGEMENT

PURUSHAINDRA KUMAR KAURAV, J. (ORAL)

CM APPL. 34811/2023 (for exemption)

1. Allowed, subject to all just exceptions.
2. The application is disposed of.

W.P.(C) 9155/2023 and CM APPL. 34810/2023

3. The petitioner, *vide* the instant writ petition has prayed for the following reliefs:-

“a. Pass a Writ, Order or Direction in the nature of certiorari while quashing and setting aside the impugned Notice under Section 13(2) issued by Respondent No. 1 dated 02.05.2023, and any proceedings emanating therefrom with respect to tile said property of the Petitioner; and

b. Issue a Writ, Order or Direction in the nature of mandamus, restraining the Respondents from interfering with the said Property

being the Second Floor alongwith 1/3rd undivided rights in the roof of property bearing No. C - 3/ 15, Ashok Vihar, Phase - 2, Delhi- 110052 in any manner whatsoever.”

4. Mr.Sanjeev Ralli, learned senior counsel appearing on behalf of the petitioner submits that the impugned notice dated 02.05.2023 is issued without jurisdiction and even otherwise the same is completely illegal and improper. According to him, the instant writ petition is maintainable on the ground that the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter ‘**SARFAESI Act**’) are not attracted. According to him, for taking an action under Section 13(2) of the SARFAESI Act, there has to be a ‘security interest’ created in favour of any ‘secured creditor’. He states that it is only the ‘security interest’ which can be enforced under the provisions of Section 13 of the SARFAESI Act.

5. Learned senior counsel submits that in the instant case, the petitioner is neither a borrower nor a director. He also states that the second floor of the property mortgaged to the respondent no.1 belongs to the petitioner as per the registered Sale Deed dated 23.01.2019. He has also taken this court through public notice issued in January, 2022 which has been placed on record as *Annexure-P6*.

6. According to the learned senior counsel, the said notice was pasted on the property in question which was duly replied *vide* legal notice dated 11.01.2022. In terms of paragraph nos.5 and 6 thereof, it was categorically stated that the petitioner i.e. Ms. Vanya Jain is the lawful owner of the property bearing no.C - 3/15, Ashok Vihar, Phase- 2, New Delhi-110052 and is under lawful possession of the said property.

7. According to the averments made in the legal notice dated 11.01.2022, it is submitted that the petitioner has never created any charge over the said property. It was also stated that the petitioner neither took any loan from respondent no.1 nor stood as a guarantor in any other loan agreement. For the sake of clarity, paragraph nos.5 and 6 of the legal notice dated 11.01.2022, which was sent in reply to the public notice are reproduced as under:-

“5. That our client and his wife Smt Vanya Jain are the lawful owners of the property bearing no. C-3/15, Ashok Vihar Phase-2 Delhi and are under lawful possession of the same. Our client or his wife have never created any kind of charge over the said property. They have neither taken any kind of Loan from you noticee nor are they guarantors in any other Loan Agreement.

6. That the contents of the said notice are patently false, fictitious, malafide and devoid of any substance whatsoever. Our Client has never taken any Loan from you noticee M/s Ambit Finvest Pvt. Ltd. secured or unsecured, in his own name or in the name of any company. There is no charge on property bearing no. of C-3/15, Ashok Vihar Phase-2 Delhi. You have pasted the notice outside the property of our client deliberately to cause him disrepute. Your act of pasting the notice without any substance has caused extreme harassment to our client, he has received calls and messages from his neighbours asking if he has defaulted in paying the loan. Our client has become the topic of gossip in the society solely on account of your erroneous act.”

8. He further submits that after the aforesaid reply was sent to the respondents; the respondents thereafter did not take any action and they have maintained silence for a considerable period of one year. The petitioner presumed that the respondents were satisfied with the stand taken by the petitioner. However, to her utter surprise, *vide* impugned notice dated 02.05.2023 (*Annexure-P1*), the respondents went on to issue a Demand Notice under Section 13(2) of the SARFAESI Act.

9. Learned senior counsel has also pointed out the reply to petitioner's legal notice dated 11.01.2022 by respondent no.1 dated 17.05.2023 (*Annexure-P8*) to highlight that respondents in the said reply dated 17.05.2023 in paragraph 4(c) stated that the loan agreement dated 08.01.2018 was executed between the borrower and respondent no.1 and in order to secure the said loan facility, Mr. Praveen Jain also created mortgage in favour of respondent no.1 and further deposited the original disclaimer deed dated 26.02.2016.

10. He, therefore, states that even the stand of respondent no.1 at the two stages is inconsistent. According to him, the aforesaid disclaimer deed dated 26.02.2016 and the registered sale deed of the property in question was executed on 23.01.2019 in favour of the petitioner which unequivocally states that the same is free from all encumbrances.

11. Learned senior counsel while taking this court through the provisions of Section 13(1) and (2) of the SARFAESI Act has also highlighted the definition of 'security interest' under Section 2(zf) and 'security agreement' under Section 2 (zb) of the SARFAESI Act.

12. Learned senior counsel also relied upon the decisions of the Hon'ble Supreme Court in the cases of *Radha Krishan Industries vs. State of Himachal Pradesh & Ors.*¹ and *Satwati Deswal vs. State of Haryana and Ors.*², a decision of the Madras High Court in the case of *M/s Moneyline Credit Ltd. vs. Sh. Sanjeev Kumar And Ors.*³ and a decision passed by the

¹(2021) 6 SCC 771.

²(2010) 1 SCC 126.

³2014:DHC:4920.

Single Judge of this court in the case of *R. Janakiraman vs. State by Inspector of Police, CBI, SPE, Madras*⁴.

13. According to him, under exceptional circumstances, a writ petition would be maintainable, and in a case, where the petitioner is able to satisfy that the impugned action is wholly without jurisdiction, there is no bar to entertain a writ petition under Article 226 of the Constitution of India. Learned senior counsel appearing on behalf of the petitioner has also read over various paragraphs of the decision of the Hon'ble Supreme Court to substantiate his submissions.

14. I have heard the learned senior counsel appearing on behalf of the petitioner and perused the record.

15. Sections 13(1), 13(2) and 13(3A) of the SARFAESI Act are reproduced as under:-

“13. Enforcement of security interest.-

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as on- performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub- section (4).”

⁴(2006) 1 SCC 697.

(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate [within fifteen days] of receipt of such representation or objection the reasons for non acceptance of the representation or objection to the borrower”

16. In the instant case, the petitioner seeks to challenge the initiation of the recovery proceedings. If the provisions of Section 13(3A) of the SARFAESI Act are perused, the same would indicate that after service of the demand notice under Section 13(2) of the SARFAESI Act, the borrower can make a representation or raise objection before the secured creditor. The secured creditor is under an obligation to consider such representation or objection made by the borrower and if the secured creditor comes to a conclusion that such representation or objection is not acceptable or tenable, he shall communicate the reasons for non-acceptance of the representation or objection to the borrower within 15 days of receipt of such representation or objection.

17. Learned senior counsel submits that the petitioner made a representation under Section 13(3A) of the SARFAESI Act *vide* notice dated 19.05.2023(*Annexure-P11*) and raised objections against the demand notice dated 02.05.2023. The respondents *vide* letter dated 03.06.2023(*Annexure-P12*) replied that the petitioner, by the way of such representation, intends to procrastinate and derail the proceedings initiated under the SARFAESI Act, and for that reason the representation made and the objections raised by the petitioner *vide* notice dated 19.05.2023 are not acceptable and tenable.

18. It may also be considered, at this stage, that the *proviso* to Section

13(3A) as also the explanation to Section 17(1) of the SARFAESI Act explicitly provide that the reasons so communicated or the likely action of the secured creditor shall not confer any right upon the borrower, to challenge the action of the creditor by way of an application to the Debt Recovery Tribunal ('DRT') under Section 17 of the SARFAESI Act. The *proviso* to Section 13(3A) and the explanation to Section 17(1) are reproduced as under:

"13(3A)

...

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.

...

17(1)

...

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 this sub-section."

19. This *proviso* to Section 13(3A) and the explanation to Section 17(1) was inserted through the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 (hereinafter '**Amending Act of 2004**'). In order to decipher the intention of the legislature, the Statement of Object and Reasons of the amending act may be referred to. The material part of it reads as under:

"Statement of Objects and Reasons.—The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was enacted to regulate securitisation and reconstruction of

financial assets and enforcement of security interest and for matters connected thereto. The Act enables the banks and financial institutions to realise long-term assets, manage problems of liquidity, asset liability mismatch and improve recovery by exercising powers to take possession of securities, sell them and reduce nonperforming assets by adopting measures for recovery or reconstruction. The Act further provides for setting up of asset reconstruction companies which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured assets and take over the management of the business of the borrower.

2. *The Hon'ble Supreme Court, in the case of Mardia Chemicals Ltd. v. Union of India, A.I.R. 2004 S.C. 2371 : (2004) 4 S.C.C 311, inter alia,—*

(a) upheld the validity of the provisions of the said Act except that of sub-section (2) of Section 17 which was declared ultra vires Article 14 of the Constitution. The said sub-section provides for deposit of seventy-five per cent. of the amount claimed before entertaining an appeal (petition) by the Debts Recovery Tribunal (DRT) under Section 17;

(b) observed that in cases where a secured creditor has taken action under sub-section (4) of Section 13 of the said Act, it would be open to borrowers to file appeals under Section 17 of the Act within the limitation as prescribed therefor. It also observed that if the borrower, after service of notice under sub-section (2) of Section 13 of the said Act, raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief that may be, must be communicated to the borrower. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal under Section 17 of the Act, at that stage.

3. In view of the above judgment of the Hon'ble Supreme Court and also to discourage the borrowers to postpone the repayment of their dues and also enable the secured creditor to speedily recover their debts, if required, by enforcement of security or other measures specified in sub-section (4) of Section 13 of the said Act, it had become necessary to amend the provisions of the said Act.

4. *Since the Parliament was not in session and it was necessary to take immediate action to amend the said Act for the above reasons, the Enforcement of Security Interest and Recovery of Debts Laws*

(Amendment) Ordinance, 2004 was promulgated on the 11th November, 2004.”

[Emphasis supplied]

20. It can thus be seen that the Amending Act of 2004 intended to prevent, and further prescribe, intervention to take place at the stage of Section 13(2) and 13(3A) of the SARFAESI Act.

21. The Hon’ble Supreme Court in *M/s. Hindon Forge Pvt. Ltd. & Anr. vs. State of Uttar Pradesh*⁵ while discussing the Amending Act of 2004 and its effect upon the scheme of the SARFAESI Act, explained the rationale for disallowing a borrower from preferring an application to the DRT against assailing the steps taken by a secured creditor under Section 13(2) and 13(3A) of the SARFAESI Act. In paragraph no.10, the Hon’ble Supreme Court observed as under:

*“10. A reading of section 13 would make it clear that where a default in repayment of a secured debt or any instalment thereof is made by a borrower, the secured creditor may require the borrower, by notice in writing, to discharge in full his liabilities to the secured creditor within 60 days from the date of notice. It is only when the borrower fails to do so that the secured creditor may have recourse to the provisions contained in section 13(4) of the Act. **Section 13(3-A) was inserted by the 2004 Amendment Act, pursuant to Mardia Chemicals (supra), making it clear that if on receipt of the notice under section 13(2), the borrower makes a representation or raises an objection, the secured creditor is to consider such representation or objection and give reasons for non acceptance. The proviso to section 13(3-A) makes it clear that this would not confer upon the borrower any right to prefer an application to the Debts Recovery Tribunal under section 17 as at this stage no action has yet been taken under section 13(4).”***

[Emphasis supplied]

22. It can thus be seen that at the stage of Section 13(2) of the SARFAESI

⁵(2019) 2 SCC 198.

Act, wherein a demand notice is to be sent by a secured creditor to its borrower demanding discharge of liabilities, as also when the secured creditor is obligated to consider the reply of a borrower made to the demand notice, as provided for under Section 13(3A) of the SARFAESI Act, there is no actual harm that is caused to a borrower.

23. It is also of significance to note that the legislature through its SARFAESI Act has provided the borrower an opportunity to challenge the actions of the secured creditor at the stage of Section 13(4) by preferring an application under Section 17 of the SARFAESI Act. The scheme of the SARFAESI Act, therefore, envisages a procedure that attempts to shield a secured creditor from the interventions of the judicial process till the stage of Section 14 has been reached.

24. This finding may be better appreciated in light of the broader purpose for which the SARFAESI Act was enacted. The material part of the Statement of Objects and Reasons for the SARFAESI Act reads as under:

“THE SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002

(Act No. 54 of 2002)

STATEMENT OF OBJECTS AND REASONS

*The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. **Our existing legal framework***

relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of nonperforming assets of banks and financial institutions...

...These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court."

[Emphasis supplied]

25. It can thus be seen that in order to allow secured creditors to realize their security interests, the SARFAESI Act, aimed to keep judicial intervention at a minimum. The pronouncements of the Hon'ble Supreme Court and the various High Courts have further resonated this opinion. This court considers it appropriate to consider a few judgments relevant to the present factual matrix.

26. The Hon'ble Supreme Court in *Punjab National Bank and Anr. vs. Imperial Gift House and Ors.*⁶ decided an appeal assailing an order of the concerned High Court that involved a *pari materia* factual scenario. The material part of the judgment is reproduced as under:

"2. By the impugned order, in effect and substance, the High Court has quashed notice issued by the bank under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, [for short, "the Act"].

3. Upon receipt of notice, respondents filed representation under Section 13(3)(A) of the Act, which was rejected. Thereafter, before any further action could be taken under Section 13(4) of the Act by the Bank, the writ petition was filed before the High Court.

4. In our view, the High Court was not justified in entertaining the writ petition against the notice issued under Section 13(2) of the Act and quashing the proceedings initiated by the bank.

⁶(2013) 14 SCC 622.

5. Accordingly, the appeal is allowed, impugned order passed by the High Court is set aside and the writ petition filed before it is dismissed.

[Emphasis supplied]

27. In the case of **United Bank of India vs. Satyawati Tondon**,⁷ Hon'ble Supreme Court, upon a detailed consideration of the statutory scheme under the SARFAESI Act, held that the writ petition ought not to be entertained in view of the alternate statutory remedy available. The relevant paragraph nos. 42, 43, 44, 45 and 55 read as under-

“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-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

⁷(2010) 8 SCC 110.

Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

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.”

28. Thus, the Hon’ble Supreme Court in catena of cases has held that the writ jurisdiction being equitable, is discretionary in nature, and should not be exercised unless there are exceptional circumstances. Similar observations were made in ***Commissioner of Income Tax & Ors vs. Chhabil Dass***

Aggarwal⁸ and General Manager, Sri Siddeshwara Cooperative Bank Ltd. and Anr. vs. Ikbal & Ors⁹.

29. The Hon'ble Supreme Court in the matter of ***Radha Krishan Industries (supra)*** has held as under:-

“27 The principles of law which emerge are that:

27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

27.3, Exceptions to the rule of alternate remedy arise where: (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction: otherwise of a legislation is challenged.

27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

27.5 When a right is created by a statute, which itself prescribes the remedy? or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view

⁸(2014) 1 SCC 603.

⁹(2013)10 SCC 83.

that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.

28. These principles have been consistently upheld by this Court in Chand Ratan v. Durga Prasad, Babubhai Muljibhai Patel v. Nandlal Khodidas Barol and Rajasthan SEBI v. Union of India among other decisions.”

30. No doubt, if the writ court is satisfied that the action is wholly without jurisdiction, it can entertain a writ petition. However, in the instant case the petitioner is not remediless. The petitioner has already availed the right of making a representation, which is duly replied by the respondents. The petitioner, therefore, will have to wait till measures under Section 13(4) of the SARFAESI Act are taken by the respondents to avail the remedy under Section 17 of the SARFAESI Act. In the interregnum, the scope for interference in writ jurisdiction is not warranted.

31. The High Court normally should not entertain a writ petition under Article 226 of the Constitution of India at this stage. The aforesaid legal position has been summarized by the Hon’ble Supreme Court in the case of ***Mardia Chemicals Ltd. v Union of India***¹⁰. Paragraphs nos. 39 and 40 of the said decision read as under:-

"39. Sub-section (4) provides for four measures which can be taken by the secured creditor in case of non-compliance with the notice served upon the borrower. Under clause (a) of sub-section (4) the secured creditor may take possession of the secured assets including the right to transfer the secured assets by way of lease, assignment or sale; may take over the management of the secured assets under clause (b) including right to transfer; under clause (c) of sub-section (4) a manager may be appointed to manage the secured assets which have been taken possession of by the secured creditor and may require any person who has acquired any secured assets from the borrower or from whom any money is due to the

¹⁰(2004)4 SCC 311.

borrower to pay the same to him as it may be sufficient to pay the secured debtor as provided under clause (d) of Section 3(4) of the Act. Sub-section (8) of Section 13, however, provides that if all the dues of the secured creditor including all costs, charges and expenses, etc. as may be incurred are tendered to the secured creditor before sale or transfer, no further steps be taken in that direction.

40. Now coming to Section 17, it provides for filing of an appeal to the Debts Recovery Tribunal within 45 days of any action taken against the borrower under sub-section (4) of Section 13 of the Act. It reads as under:

“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 authorized officer under this chapter, may prefer an appeal to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken.

(2) Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal seventy-five per cent of the amount claimed in the notice referred to in sub-section (2) of Section 13:

Provided that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

(3) Save as otherwise provided in this Act, the Debts Recovery 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.”

It is thus clear that an appeal under sub-section (1) of Section 17 would lie only after some measure has been taken under sub-section (4) of Section 13 and not before the stage of taking of any such measure. According to sub-section (2), the borrower has to deposit 75% of the amount claimed by the secured creditor before his appeal can be entertained.”

32. In paragraph no. 45 it is further explained as under:-

“45. In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non-compliance with notice within 60 days.

The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfilment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly, we must make it clear unequivocally that communication of the reasons for not accepting the objections taken by the secured borrower may not be taken to give occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debts Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub-section (4) of Section 13 of the Act.”

33. The Hon’ble Supreme Court in the case of ***Standard Chartered Bank***

v. **V. Noble Kumar**¹¹ has also dealt with the scheme of the SARFAESI Act.

The relevant paragraph nos. 27 and 28 read as under:-

“27. The “appeal” under Section 17 [“17. Right to appeal.—(1) Any person (including the 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 measure had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.”(emphasis supplied)] is available to the borrower against any measure taken under Section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under Section 13(4). Alienating the asset either by lease or sale, etc. and appointing a person to manage the secured asset are some of those possible measures. On the other hand, Section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower (sic the secured creditor). Therefore, the borrower is always entitled to prefer an “appeal” [Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311. The expression “appeal” as originally existed in Section 17 is substituted by the word “representation” in view of the judgment of this Court in Mardia Chemicals case. “59. We may like to observe that proceedings under Section 17 of the Act, in fact, are not appellate proceedings. It seems to be a misnomer. In fact it is the initial action which is brought before a forum as prescribed under the Act, raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing a suit in civil court. As a matter of fact proceedings under Section 17 of the Act are in lieu of a civil suit which remedy is ordinarily available but for the bar under Section 34 of the Act in the present case.” (Mardia Chemicals case, SCC p. 352, para 59)] under Section 17 after the possession of the secured asset is handed

¹¹(2013)9 SCC 620.

over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession of the secured assets. It does not specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under Section 14. We are of the opinion that by whatever manner the secured creditor obtains possession either through the process contemplated under Section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under Section 17 is available.

28. It can be noticed from the language of the proviso to Section 13(3-A) and the language of Section 17 that an “appeal” under Section 17 is available to the borrower only after losing possession of the secured asset. The employment of the words “aggrieved by ... taken by the secured creditor” (emphasis supplied) in Section 17(1) clearly indicates the appeal under Section 17 is available to the borrower only after losing possession of the property. To set at naught any doubt regarding the interpretation of Section 17, the proviso [“Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17-A.”] to sub-section (3-A) of Section 13 makes it explicitly clear that either the reasons indicated for rejection of the objections of the borrower or the likely action of the secured creditor shall not confer any right under Section 17.”

34. The Hon’ble Supreme Court in the case of ***M/s. South Indian Bank Ltd. & Ors. vs. Naveen Mathew Philips & Anr.***¹² held that the High Courts should not interfere in commercial matters where equally efficacious alternative forum exists and the powers conferred under Article 226 of the Constitution of India are to be exercised only in extraordinary circumstances, particularly in commercial matters which involve a lender and a borrower and the legislature has provided specific mechanism for redressal.

“18. While doing so, we are conscious of the fact that the powers

¹²2023 SCC OnLine SC 435.

conferred under Article 226 of the Constitution of India are rather wide but are required to be exercised only in extraordinary circumstances in matters pertaining to proceedings and adjudicatory scheme qua a statute, more so in commercial matters involving a lender and a borrower, when the legislature has provided for a specific mechanism for appropriate redressal.”

35. A similar view has also been taken by this court in the case of **Satpal Singh Kohli and Anr. vs. Canara Bank**¹³ whereby, the court was not inclined to entertain the writ petition under Article 226 of the Constitution of India. The relevant paragraph nos. 14, 15 and 16 read as under:-

“14.The petitioner has a remedy to raise his grievances in terms of Section 13(4) (a) of the SARFAESI Act, 2002, which admittedly has not been availed of.

15. In view thereof and under the facts of the present case, this court is not inclined to entertain the instant writ petition at this stage leaving it open for the petitioner to raise his grievances in terms of Section 13(4)(a) of the SARFAESI Act, 2002 and if in case the petitioner has grievance thereafter the appropriate remedy would be under Section 17 of the SARFAESI Act, 2002.

16. In view of the aforesaid case writ petition against impugned notices under section 13(2) of the SARFAESI Act, 2002 dated 08.08.2022 and 17.08.2022 by the respondent-bank is not entertained.”

36. The Hon’ble Supreme Court in the case of **Phoenix Arc Pvt. Ltd. v. Vishwa Bharati Vidya Mandir and Ors.**¹⁴, has held that the filing of writ petitions under Article 226 of the Constitution of India assailing actions under Section 14 of the SARFAESI Act, while ignoring the statutory remedies provided under Section 17, is an abuse of the process of law. Paragraph no.21 of the said judgment reads as under:

“21.Applying the law laid down by this Court in Mathew

¹³2023:DHC:001427.

¹⁴(2022)5SCC345.

K.C. [State Bank of Travancore v. Mathew K.C., (2018) 3 SCC 85 : (2018) 2 SCC (Civ) 41] to the facts on hand, we are of the opinion that filing of the writ petitions by the borrowers before the High Court under Article 226 of the Constitution of India is an abuse of process of the court. 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 13-8-2015 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.”

37. It is of importance to consider that the judgement of the Hon’ble Supreme Court in the case of ***Phoenix ARC (supra)***, was in the context of actions taken by a secured creditor under Section 14, from which appeal lies under Section 17 of the SARFAESI Act. In other words, the Hon’ble Supreme Court exhorted that ordinarily writ petitions ought not to be entertained that assail actions taken under Section 14, which expressly allow judicial intervention in the form of an appeal under Section 17 of the

SARFAESI Act.

38. This court is of the opinion that the judgement of *Phoenix ARC (supra)*, in relation to the abuse of the process of law, applies with greater rigour against actions taken under provisions of law which are merely aimed at initiating proceedings, and are at a stage at which the Act concerned itself does not allow an appeal. Key distinctions between the stages from which appeals or applications can be preferred to challenge a decision of a creditor, needs to be appreciated. In this context, this court may beneficially refer to another pronouncement of the Hon'ble Supreme Court in the case of *Authorized office, State Bank of Travancore v. Mathew K.C.*¹⁵. The material part of the judgement reads as under:

*“6. ...The writ petition was filed in undue haste in March 2015 immediately after disposal of objections under Section 13(3-A). **The legislative scheme, in order to expedite the recovery proceedings, does not envisage grievance redressal procedure at this stage, by virtue of the explanation added to Section 17 of the Act, by Amendment Act 30 of 2004, as follows:***

***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 this sub-section.”*

*7. The Section 13(4) notice along with possession notice under Rule 8 was issued on 21-4-2015. **The remedy under Section 17 of the SARFAESI Act was now available to the respondent if aggrieved...**”*

[Emphasis supplied]

39. This court is therefore of the opinion that in the instant case, the respondents, by issuing the demand notice under Section 13(2) of the

¹⁵(2018) 3 SCC 85.

SARFAESI Act have merely attempted to comply with the statutory requirements, that enable them to proceed under the statutory framework of the SARFAESI Act. The stage of Section 13(3A) has been expressly made non-appealable by virtue of the *proviso* to Section 13(3A) and the explanation to Section 17(1). It would thus be a disservice to the will of the legislature, if this court through the means of the present writ petition, circumvents the statutory process. The petitioner in order to assail the actions of the respondents has to await the stage of Section 13(4), and thereafter approach the DRT to agitate its concerns. The present petition is therefore found to be premature.

40. At this stage, this court may briefly consider the contention of the petitioner relating to the respondents allegedly committing a fraud by virtue of them not disclosing the charge upon the property in issue, at the time at which the sale deed dated 23.01.2019 was executed.

41. Per contra, the respondents in their communication dated 03.06.2023 categorically submitted that the sale deed dated 23.01.2019 was executed between the parties having full knowledge of the fact that the subject property was mortgaged with respondent no.1. For the sake of clarity, paragraph nos. 3 to 10 of the communication dated 03.06.2023 are reproduced as under:-

"3. It is pertinent to mention here that Mr. Praveen Jain is brother of your client's husband. In order to secure the subject loan facility, Mr. Praveen Jain also created mortgage in favour of AFPL and further deposited the original "Disclaimer Deed" dated 26/02/2016.

4. It is germane to bring to your kind knowledge that before sanctioning the financial facility AFPL has conducted valuation of the property and has done scrutiny for the title of the subject property.

5. That based on the valuation report and the title search report, it was found that Mr. Jaswant Rai Jain, who is father in law of your client as well as father of Mr. Praveen Jain has bequeathed all his moveable and immoveable properties to his sons and daughters through testamentary succession and in consonance with the same, he had executed a WILL regd. as document no. 5738, in additional book No. III, Volume no. 929, on pages 83 to 85, dated 26/11/2011, wherein Mr. Jaswant Rai Jain had divided the share of the property i.e., Residential Plot of C-3/ 15, Ashok Vihar, Phase-2 Delhi amongst his sons and daughter. In the said WILL, Mr. Jaswant Rai Jain has appointed your client's husband, Mr. Sunil Jain as the executor of the said WILL.

6. That pursuant to this, your client's husband along with his brother and sister has executed a **"Disclaimer Deed"** dated 26/02/2016 in favour of Mr. Praveen Jain, wherein they have unconditionally and irrevocably disclaimed their undivided share, rights, titles and interests in the said portion of the property SECOND FLOORPORTION, AND 1/3RD JOINT SHARE OF TERRACE OVER SECOND FLOOR ALONGWITH 1/3RD OF JOINT SHARE OF LAND UNDERNEATH OF PART OF FREEHOLD BUILTUP PROPERTY BEARING NO. C-3/15, MEASURING 400 SQ. YDS, SITUATED AT ASHOK VIHAR PHASE-II, DELHI-II0052 in favour of Mr. Praveen Jain without any consideration absolutely and forever in full senses and without any pressure.

7. That pursuant to the execution of the aforesaid disclaimer deed, Mr. Praveen Jain became the absolute owner of the said property and thereby he has mortgaged the said property in favour of AFPL at the time of availing the aforesaid loan facility as security for the repayment of the loan facility.

8. That, when the Borrowers have defaulted in repayment of the loan facility availed by them and even after repeated requests and reminders, the Borrowers have not repaid the loan amount availed from us, we had an apprehension that Mr. Praveen Jain may create third party interest in the mortgaged property. Hence, we have pasted a public Notice informing the public at large that the property is mortgaged with AFPL and further informed the public at large to refrain from dealing with property without the written confirmation from our side. However, even though your client was admittedly aware of the said public notice, but your client has neither objected to the said public notice nor has issued any reply to the Same. Hence, it is evident on record that your client has deliberately kept muted until this notice which gives a probable conclusion that the said notice is an afterthought, and your client has deliberately kept muted with an intention to defraud APFL in connivance with Mr. Pravin Jain and other borrowers.

9. However, to our utter shock and surprise, your client's husband along with his brother Mr. Pravin Jain have played a fraud upon AFPL by

admittedly executing a sale deed dated 23.01.2019 with the Borrower, Mr. Pravin Jain for the property bearing SECOND FLOOR PORTION, PART OF FREEHOLD BUILTUP PROPERTY BEARING NO. C-3/15, MEASURING 400 SQ. YDS, SITUATED AT ASHOK VIHAR PHASE-II, DELHI-110052, which is void ab initio as your client, her husband as well as Mr. Pravin Jain were very well aware that the said premises is already mortgaged with us as on 08.01.2018. Accordingly, ABFL has first and exclusive charge over the said property and hence, there is no legal validity of the sale deed dated 23.01.2019. It is also impossible to understand as to how the sale deed has been executed when the said property was admittedly bequeathed in favour of Mr. Pravin Jain, vide "Disclaimer Deed" dated 26/02/2016. Consequently, your client's husband along with Mr. Pravin Jain is liable to be criminally prosecuted for their said illegal acts.

10. After considering the representations made and the objections raised by you, on instruction of your client, in the said Reply, AFPL has come to a conclusion that the representations made and the objections raised in the said Reply are not acceptable and tenable."

42. There is thus a significant dispute between the parties relating to the factual issue of the petitioner possessing the requisite knowledge about the charges upon the property in issue.

43. This court does not consider it appropriate to decide upon this disputed question of fact in a petition under Article 226 of the Constitution of India.

44. The decisions relied upon on behalf of the petitioner are not on the issue of entertaining a writ petition at the stage of Section 13(2) of the SARFAESI Act. The proposition of law laid down therein may have relevance at an appropriate stage. It is for this reason, all the decisions, at this stage, would not help the petitioner.

45. Having considered the submissions and in view of the settled legal position as explained above, this court, at this stage, is not inclined to entertain the instant writ petition and the same is, therefore, dismissed along

with the pending application.

46. All the rights and contentions of the parties are left open to be considered by the appropriate forum at the appropriate stage, in accordance with law. This court has not expressed any opinion on the merits of the case.

PURUSHAINDRA KUMAR KAURAV, J

JULY 24, 2023/nc/rs

Signature Not Verified
Digitally Signed By: NEHA
CHOPRA
Signing Date: 28.07.2023
18:28:20

Signature Not Verified
Digitally Signed
By: PURUSHAINDRA
KUMAR KAURAV