

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE**

RESERVED ON: 05.01.2024

DELIVERED ON: 19.01.2024

CORAM:

**THE HON'BLE MR. CHIEF JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE SUPRATIM BHATTACHARYA**

**A.P.O. NO. 182 OF 2023
(IA NO: GA/1/2023)**

**THE AUTHORISED OFFICER, STRESSED ASSETS MANAGEMENT BRANCH-
1, STATE BANK OF INDIA**

VERSUS

M/S. KAVITA MARKETING PRIVATE LIMITED AND OTHERS

Appearance:-

Mr. Jaidip Kar, Sr. Adv.

Mr. Anirban Pramanick, Adv.

Mr. Punarbasu Nath, Adv.

....for the Appellant.

Mr. Suddhasatva Banerjee, Adv.

Mr. Ishaan Saha, Adv.

Ms. Sananda Ganguly, Adv.

Mr. Shubradip Roy, Adv.

.....for the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S. Sivagnanam, CJ.)

1. We have heard Mr. Jaidip Kar, Learned Senior Advocate assisted by Mr. Anirban Pramanick and Mr. Punarbasu Nath advocates for the appellant and Mr. Suddhasatva Banerjee, assisted by Mr. Ishaan Saha, Ms. Sananda Ganguly and Mr. Shubradip Roy, advocates for the respondent.
2. The Stressed Assets Management Branch of the State Bank of India, Kolkata is aggrieved by the order dated 27.09.2023 passed in WPO No. 1609 of 2023 filed by the respondents 1 and 2 herein.
3. The respondent writ petitioners prayed for issuance of a writ of certiorari to set aside the decision of the appellant in withholding the title deeds of the property owned by the writ petitioners and demand for a sum of Rs. 8,64,15,886.12 ps in respect of credit facilities including setting aside the notices dated 17.07.2023 and 28.07.2023 issued under Section 13(2) of the SARFAESI Act.
4. M/s Duncans Industries Limited (hereinafter referred to as the borrower) availed credit facilities from the third respondent herein. The credit facilities were renewed/ restructured during 2013. The third respondent bank called upon the borrower to provide additional/replacement of security and the borrower approached the writ petitioner to provide corporate

guarantee/security which are to be provided against two credit facilities namely Working Capital Term Loan and Funded Interest Term Loan.

5. The first respondent writ petitioner agreed to mortgage one of its assets, a flat in Mumbai and accordingly a revised sanction dated 19.04.2014 was issued in favour of the borrower. The total credit exposure of the company/borrower in which the first respondent writ petitioner was a corporate guarantor was Rs. 36.305 crores. A deed of guarantee for a sum not exceeding Rs. 36.305 crores was executed between the first respondent writ petitioner and the third respondent herein. Thus, the corporate guarantee was to the extent of Rs. 36.305 crores only against the two aforesaid credit facilities. The borrower defaulted in repayment and notice under Section 13(2) was issued to the borrower wherein a sum of Rs. 36,32,98,392/- was stated to be payable and in respect of credit facilities, a sum of approximately Rs. 5.2 crores was alleged to be outstanding.

6. The first respondent/writ petitioner by a letter dated 30.12.2017 informed the bank that the corporate guarantee was limited to the outstanding amount in connection with the two credit facilities and subsequently made payment of sum of Rs. 1 crore towards the outstanding of the aforesaid two credit facilities. Though notice under Section 13(2) was issued during October 2017, no further proceedings were taken pursuant to such notice. Subsequently another notice dated 18.01.2018 was issued under Section 13(2) demanding a sum of Rs. 4.71 crores from the first respondent/writ petitioner. The writ petitioners were called

upon to make the aforesaid payment within 60 days from the notice dated 18.01.2018 wherein it was admitted that the total liability in respect of the said credit facilities to the borrower company was limited to the extent of the aforesaid outstanding of Rs. 4.71 cores approximately. The writ petitioners complied with the demand and by letter dated 28.02.2018 requested the bank to release the security created by way of mortgage of the property executed in favour of the third respondent bank and also to return the corporate guarantee and all related documents that were executed/deposited. The outstanding debt payable by the borrower still remains outstanding and it appears that discussion were made between the borrower and the bank for One Time Settlement and ultimately the settlement was arrived at and terms of the settlement were recorded and filed before the Debt Recovery Tribunal No. 1, Kolkata in OA No. 42 of 2018 of 21.11.2019. The One Time Settlement proposal failed as the borrower did not comply with the conditions contained thereunder. The third respondent bank issued notice dated 17.07.2023 under Section 13(2) of the Act and called upon the writ petitioner to pay approximately a sum of Rs. 8.7 crores. Being aggrieved by such notice, the writ petition was filed.

7. The case of the respondent/writ petitioner is that admittedly the liability of first respondent/writ petitioner stood discharged as a corporate guarantor towards the two credit facilities that were extended to the borrower company and on receipt of the second notice under Section 13(2), the writ petitioner had

paid a total outstanding amount of Rs. 4,71,38,280.27 in full and informed the respondent bank that the guarantee stood extinguished upon compliance of the payment and also sought for return of the title deeds. Thus, it was contended that any arrangement between the borrower and the bank subsequently or any transfer of funds which was paid by the writ petitioners towards the loan account of the borrower in no manner could make the writ petitioner liable as liability stood liquidated upon payment of the amount demanded. Thus, it was contended that the Jural relationship between the first respondent/writ petitioner and the third respondent bank had stood terminated and/or ceased to operate. The Learned Single Bench agreed with the submissions of the writ petitioners, rejected the contention raised by the appellant bank and allowed the writ petition.

8. The case of the appellant is largely pitched upon two documents, firstly the letter written by the first respondent writ petitioner to the appellant dated October 30, 2019. The learned Senior Advocate appearing for the appellant while referring to the contents of the said letter submitted that the first respondent writ petitioner had authorized the appellant bank to adjust the amount of Rs. 4,76,83,300/- which was paid by them towards the amount payable by the borrower towards the One Time Settlement (OTS). The copy of the board resolution dated 10.10.2019 was also annexed with the said letter.

9. It is the submission made by the learned Senior Advocate that based on such authorization by the first respondent/writ petitioner the amount of about

Rs. 4.76 crores was adjusted towards the borrower's loan account and consequently, the writ petitioner continues to be in default and the issuance of the notice dated 17.07.2023 under Section 13(2) of the Act was well justified. The other document on which heavy reliance was placed on by the learned Senior Advocate is with regard to the terms of settlement which was filed in OA No. 42 of 2018 on the Debt Recovery Tribunal No. 1, Kolkata and specific reference was made to clause 2(ii) wherein the parties have agreed where the sum of Rs. 4,76,83,300/- paid by the defendants on 30.10.2019 will be appropriated towards the settlement amount. Therefore, it is submitted that the notice issued under Section 13(2) of the Act has to be complied and the writ petition is not maintainable and the attempt of the writ petitioner is to thwart the scheme of the SARFAESI Act and there is an efficacious remedy provided under the Act and such remedy can be invoked after issuance of the notice under Section 13(4) of the Act. With regard to the maintainability of the writ petitioner is concerned, reliance was placed on the decision of the Hon'ble Supreme Court in ***South Indian Bank Ltd. Versus Naveen Mathew Philip***¹ .

10. After elaborately hearing learned Advocates for the parties, the first aspect to be considered is regarding the maintainability of the writ petition. It is no doubt true that after notice under Section 13(4) of the SARFAESI Act is issued the concerned noticee has effective alternative remedy before the Debt Recovery Tribunal. However, in the instant case, the petitioner has approached the learned Writ Court soon after the notice dated 17.07.2023 was issued

¹ (2023) SCC Online SC 435

under Section 13(2) of the SARFAESI Act. To be noted that the notice impugned in the writ petition was the third notice issued under Section 13(2) of the Act. The first notice which was issued dated October 23, 2017 to which the first respondent/writ petitioner had submitted reply dated 30.12.2017 was not acted upon and no notice under Section 13(4) was issued. The second notice under Section 13(2) was issued on January 18, 2018 wherein the amount secured was mentioned as Rs. 36.05 crores. The notice called upon the first respondent/writ petitioner under Section 13(2) to discharge in full their liability to the bank within 60 days from the date of the notice and the outstanding liabilities as guarantor for the borrower (in aggregate) due and knowing to the bank was mentioned as Rs. 4,71,38,280.27/- as on 31.12.2017. The notice also states that if the writ petitioner fails to repay the aforementioned amount, the bank will be entitled to exercise its rights under Sub-section (4) of Section 13 of the Act. It is not disputed by the appellant bank that the writ petitioner had complied with the direction and paid a sum of Rs. 1,00,00,000/- on 09.01.2018, Rs. 3,00,00,000/- on 09.02.2018 and Rs. 71,38,300/- on 13.02.2018 in all Rs. 4,71,38,300/-. After such remittances, on 20.02.2018, the first respondent writ petitioner addressed the appellant informing about the full payment of the dues in terms of the notice dated 18th January, 2018 and requested them to forthwith release the security created by way of a mortgage which was executed on April 30, 2014 and also the corporate guarantee provided by them. The appellant did not comply with the request, did not return the mortgaged documents nor the corporate guarantee though they had

received the entire amount. From the year 2018 till July 2023 the matter was dragged on by the appellant bank and only on 17.07.2023 the third notice under Section 13(2) was issued demanding a sum of Rs. 8,64,15,886.12 ps. The basis of such claim is based upon two documents one is a letter written by the first respondent/writ petitioner to the appellant dated 30.10.2019 and the other is the Terms of Settlement filed before the Debt Recovery Tribunal in OA 42 of 18. The full payment as demanded from the writ petitioner was fully settled as on 13.02.2018. Thus, the demand made under the second notice made under Section 13(2) having been complied with and the liability having been extinguished in full, the appellant is precluded from issuing a third notice under Section 13(2) of the Act. The letter based on which the appellant bank places much emphasis only authorizes the appellant bank to adjust the amount paid by the first respondent/writ petitioner as against the amount paid by the borrower.

11. As rightly pointed out by the learned Single Bench, nothing turns out of the letter dated October 30, 2019, nor the board resolution of the first respondent writ petitioner. This communication was much after effecting full payment which was completed on 13.02.2018. Therefore, even for what little the letter is worth, the same can hardly be an instrument used to resurrect an extinguished liability. The second document is the Term of Settlement. The Term of Settlement were reduced into writing and was filed before the Debt Recovery Tribunal on 21.11.2018. The Terms of Settlement prays for a decree to be made in OA 42 of 2018 as per the terms of the settlement. Clause 6 of the

Settlement makes it clear that if for any reason, the entire compromise amount or any installment agreed is not received within the scheduled period, the bank reserves its rights to cancel the compromise settlement and the entire dues of the bank as claimed in the original application with interest and cost will become due and payable by the defendants. Further, Clause 9 states that the bank shall have liberty to apply for recovery proceedings before the Tribunal in case the full compromise of settled amount is not paid by the defendants and the entire dues of the bank as claimed in the original application together with the interest and cost will become due and payable by the defendants. Admittedly, the settlement did not fructify and consequently, the terms of settlement stood automatically rescinded and nothing hinges out of the said settlement which would enure in favour of the appellant bank. Thus, we are convinced that the case on hand is a peculiar case where at first instance the bank split up the transactions and treated the guarantor as a separate entity as it was limited only to two of the advances and issued notice under Section 13(2) demanding the total amount payable by the guarantor namely the writ petitioners which amount had been settled in full. Presumably, for the reason that the borrower is in the process of liquidation, the appellant bank has resorted to a dubious method of issuing a third notice under Section 13(2) to which they had no jurisdiction to do so because the demand made in the Section 13(2) to notice was fully complied with by the appellant and the entire amount was remitted by the appellant as of February 13, 2018. These

distinguishing features clearly show that the case on hand is rather unique on facts and the learned Single Bench rightly entertained the writ petition.

12. The decision in ***South Indian Bank*** may not be of much assistance to the case of the appellant bank for more than one reason. Firstly, those writ petitions which were filed before the High Court in the said case were challenging the notices issued under Section 13(4) of the Act. Furthermore, when the said writ petitions were filed before the High Court the Tribunal was not functioning and in the light of the fair stand taken by the South Indian Bank before the Hon'ble Supreme Court, the Hon'ble Supreme Court did not interfere with the impugned order. After noting several decisions of the Hon'ble Supreme Court, it was held that the power conferred under Article 226 of the Constitution are required to be exercised only in extra-ordinary circumstances in matters pertaining to proceedings and adjudicatory scheme qua a statute, more so in commercial matters, involving a lender and borrower, as the legislature has provided for a specific mechanism for appropriate redressal. In earlier decisions, the Hon'ble Supreme Court has carved out certain exceptions where a writ Court can exercise jurisdiction despite availability of an alternative remedy and one such exception being when the order of proceedings are wholly without jurisdiction. The facts as pointed out above will clearly show that the third notice under Section 13(2) was not maintainable and the authority which issued a notice did not have jurisdiction to do so, in the light of the fact that the appellant had complied with the demand made in their

Section 13(2) notice dated 8th January, 2018 and the amount having been fully paid by the writ petitioner.

13. In ***U.M. Ramesh Rao Versus Union Bank of India***², the Hon'ble Division Bench held that the rule of exclusion of Writ Jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere.
14. In ***Radha Krishan Industries Versus State of Himachal Pradesh and Others***³, the Hon'ble Supreme Court carved out the exclusion to the rule of alternative remedy and some of the exceptions being; when there has been violation of principles of natural justice; the orders or proceedings are wholly without jurisdiction; when the writ petition has been filed for enforcement of fundamental rights and where the vires of the legislation is challenged. It was further held that alternative 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.
15. In the preceding paragraphs, we have pointed out the factual position which will clearly indicate that the third notice issued under Section 13(2) of the SARFAESI Act was not maintainable and the officer who issued the notice

² 2021 SCC Online Kar 6203

³ 2021 6 SCC 771

did not have jurisdiction to do so. Therefore we deem it appropriate to hold that the writ petition was maintainable.

16. For all the above reasons, we find no good grounds to interfere with the order passed by the learned Single Bench. The appeal stands dismissed. The appellant bank is directed to comply with the direction issued by the learned Single Bench within 2 weeks from date.

(T.S. SIVAGNANAM, CJ.)

I Agree.

(SUPRATIM BHATTACHARYA, J.)

(P.A- PRAMITA/ SACHIN)