IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.07.2024

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE MR. JUSTICE N. SENTHILKUMAR

W.P.No.188 of 2024
and
W.M.P.No.208 of 2024

Zubeida Asgar Ali ... Petitioner

Vs.

1.Department of Supervision,
Reserve Bank of India,
Represented by Chief General Manager-in-Charge,
Centre I, World Trade Centre,
Mumbai – 400 005.

2.JM Financial Asset Reconstruction Company Private Limited,
Represented by its Authorised Officer,
7th Floor, Cnergy,
Appasaheb Marathe Marg,
Prabhadevi, Mumbai – 400 025.

3.M/s.Concerna Virginia Chennai Pvt. Ltd.,
No.50, Raja Muthaiah Road, Periamet,
Chennai – 600 003.

4.M/s.Forward Leather Company,
No.50, Raja Muthaiah Road, Periamet,
Chennai – 600 003.

5.M/s.Forward Shoes (India) Pvt. Ltd.,
No.50, Raja Muthaiah Road, Periamet,
Chennai – 600 003.

6.Muhammad Yavar Dhala

7.Ahmed Dhala

8.Atiya Fatima

9.Reihana Yavar Dhala ... Respondents

[R3 to R9 are impleaded as per order in Memo in W.P.No.188 of 2024]

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Declaration declaring the act of the Second Respondent Bank in issuance of the notice under Section 13(2) of the SARFAESI Act dated 16.08.2023 in Ref. No.JMFARC/VS/FY24/024, JMFARC/VS/FY24/025 and JMFARC/VS/FY24/026 and subsequent notice dated 01.12.2023 under Section 13(2) of the SARFAESI Act in Ref. No.JMFARC/VS/FY24/090, JMFARC/VS/FY24/091 and JMFARC/VS/FY24/092 is ultra vires the provisions of the SARFAESI Act, unconstitutional, lacks sanction of law, non-est, void ab inito.

For Petitioner	:	Mr.S.R.Rajagopal Senior Counsel for M/s.Tanya Kapoor
For R2	:	Mr.E.Om Prakash Senior Counsel for Mr.R.Sugumaran
For R3, R4 & R6	:	Mr.S.Satish
For R9	:	Mr.Adarsh S.Ujjwal Jain
For R7	:	No appearance
For R1	:	Tapal due
For R5	:	Batta not filed
For R8	:	Tapal returned as not available

ORDER

(Order of the Court was made by **S.S. SUNDAR, J.**)

This writ petition is for issuance of a Writ of Declaration declaring the act of the 2nd respondent in issuing a notice under Section 13(2) of the SARFAESI Act, dated 16.08.2023, and subsequent notice, dated 01.12.2023, under Section 13(4) of SARFAESI Act is *ultra vires* the provisions of the SARFAESI Act.

2.Short facts that are necessary for the disposal of this writ petition are as follows :

The petitioner is the wife and legal heir of the original borrower. The petitioner's husband, who is the original borrower, is no more and the other legal heirs of the deceased petitioner's husband are arrayed as respondents in this writ petition. The 2nd respondent is an Asset Reconstruction Company incorporated under Section 3 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (hereinafter referred to as "SARFAESI Act"). It is not in dispute that the 2nd respondent got assignment of security interest from the financial institution, namely, State Bank of India, which originally advanced loans in favour of the petitioner's husband. It is not in dispute that the financial institution, which lent money to the petitioner's husband and mother-in-law, initiated proceedings under Section 13(2) on 26.03.2012 of SARFAESI Act, after declaring the assets of the borrower non performing. The financial institution/State Bank of India also took symbolic possession by issuing notice under Section 13(4) of SARFAESI Act in September, 2012. The Bank also initiated proceedings before the Debt Recovery Tribunal invoking provisions of the Recovery of Debts due to Banks and Financial Institutions Act, 1993. In the meanwhile, the 2nd respondent got assignment of the security interest from the State Bank of India and it is in that capacity, it had got substituted in the place of State Bank of India before the Debt Recovery Tribunal. It is at that time, there was a memorandum of compromise on 18.03.2015 and the Debt Recovery Tribunal passed an order recording the terms of compromise on 06.08.2015.

3.Thereafter, there were further developments. The 2nd respondent initiated fresh proceedings by issuing notice under Section 13(2) of SARFAESI Act. It is admitted that the petitioner's husband and son, executed a mortgage in favour of the 2nd respondent in respect of a property comprised in S.No.181/1A, measuring an extent of 16943.342 sq.ft., in Pammal Village, Pallavaram Taluk, Kancheepuram District. It is admitted that the said property is not part of the mortgage originally executed in favour of the financial institution, from whom the 2nd respondent got assignment of security interest. The memorandum of deposit of title deeds was on 20.07.2016. Based on the subsequent mortgage by deposit of title deeds, the 2nd respondent issued notice under Section 13(2) of SARFAESI Act on 16.08.2023. A further notice intimating symbolic delivery of possession under Section 13(4) of the Act was also issued on 01.12.2023.

4.It is pertinent to mention that the property was acquired by the petitioner's husband and son only in 2016 and therefore, this was not a property that was originally mortgaged in favour of the State Bank of India. The present writ petition is therefore filed for a declaration declaring the proceedings initiated by the 2nd respondent under Sections 13(2) and 13(4) of SARFAESI Act in respect of the property mortgaged in favour of Asset Reconstruction Company, as *ultra vires* the provisions of the SARFAESI Act, mainly on the ground that the property, which is not part of security interest assigned in favour of the Asset Reconstruction Company, namely the 2nd respondent, cannot be proceeded against under the SARFAESI Act.

5.Therefore, short question that arises for consideration in this writ petition is whether the 2nd respondent/Asset Reconstruction Company, which had obtained a mortgage in respect of a property which is not a security interest that was assigned in their favour by the State Bank of India, the original mortgagee/lending financial institution, can proceed against the property mortgaged in favour of second respondent by exercising the powers under the provisions of the SARFAESI Act.

6.Heard Mr.S.R.Rajagopal, learned Senior Counsel appearing for the petitioner and Mr.Om Prakash, learned Senior Counsel appearing for the 2nd respondent.

7.Learned counsel on either side, considering the position that the issue is not considered or settled by any other High Court or Hon'ble Supreme Court, submitted that this Court has to decide the issue.

8.An “Asset Reconstruction Company” as defined under Section 2(ba) of SARFAESI Act means a company registered with the Reserve Bank of India under Section 3 for the purposes of carrying on the business of <u>asset reconstruction or securitisation or both</u>. “Asset reconstruction” as per Section 2(b) means acquisition by any Asset Reconstruction Company of any right or interest of any Bank or financial institution in any financial assistance for the purpose of realisation of such financial assistance. "Securitisation" as defined under Section 2(z) means acquisition of financial assets by any Asset Reconstruction Company from any originator, whether by raising of funds by such Asset Reconstruction Company from qualified buyers by issue of security receipts representing undivided interest in such financial assets or otherwise ("originator" means the owner of a financial asset which is acquired by an Asset Reconstruction Company for the purpose of securitisation or asset reconstruction).

9.In the context, this Court has taken note of the definition of "financial assistance" and "financial institution" under Section 2(k) and 2(m) of the Act. For convenience, Section 2(k) and Section 2(m) are extracted as follows :

> ***"2. ... (k)*** *"financial assistance" means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution including funds provided for the purpose of acquisition of any tangible asset on hire or financial lease or*

conditional sale or under any other contract or obtaining assignment or licence of any intangible asset or purchase of debt securities;

(m) "financial institution" means—

(i) a public financial institution within the meaning of section 4A of the Companies Act, 1956 (1 of 1956);

(ii) any institution specified by the Central Government under sub-clause (ii) of clause (h) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);

(iii) the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 (42 of 1958);

(iiia) a debenture trustee registered with the Board and appointed for secured debt securities;

(iiib) asset reconstruction company, whether acting as such or managing a trust created <u>for the purpose of securitisation or asset reconstruction, as the case may be</u>;

(iv) any other institution or non-banking financial company as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934), which the

Central Government may, by notification, specify as financial institution for the purposes of this Act;"

10.Section 5 of the SARFAESI Act deals with acquisition of rights or interest in financial assets by Asset Reconstruction Company, which reads as follows :

"5.Acquisition of rights or interest in financial assets.—(1) *Notwithstanding anything contained in any agreement or any other law for the time being in force, any asset reconstruction company may acquire financial assets of any bank or financial institution—*

(a) by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or

(b) by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.

(1A) Any document executed by any bank or financial institution under sub-section (1) in favour of the asset reconstruction company acquiring financial assets for the purposes of asset reconstruction or securitisation shall be exempted from stamp duty in accordance with the provisions of section 8F of the Indian Stamp Act, 1899 (2 of 1899):

Provided that the provisions of this sub-section shall not apply where the acquisition of the financial assets by the asset reconstruction company is for the purposes other than asset reconstruction or securitisation.

***(2)** If the bank or financial institution is a lender in relation to any financial assets acquired under sub-section (1) by the asset reconstruction company, such asset reconstruction company shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets.*

(2A) If the bank or financial institution is holding any right, title or interest upon any tangible asset or intangible asset to secure payment of any unpaid portion of the purchase price of such asset or an obligation incurred or credit

otherwise provided to enable the borrower to acquire the tangible asset or assignment or licence of intangible asset, such right, title or interest shall vest in the asset reconstruction company on acquisition of such assets under sub-section (1).

***(3)** Unless otherwise expressly provided by this Act, all contracts, deeds, bonds, agreements, powersof-attorney, grants of legal representation, permissions, approvals, consents or no-objections under any law or otherwise and other instruments of whatever nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset under sub-section (1) and to which the concerned bank or financial institution is a party or which are in favour of such bank or financial institution shall, after the acquisition of the financial assets, be of as full force and effect against or in favour of the asset reconstruction company, as the case may be, and may be enforced or acted upon as fully and effectually as if, in the place of the said bank or financial institution, asset reconstruction company, as the case may be, had been a party thereto or as if they had been issued in favour of asset reconstruction company, as the case may be.*

(4) *If, on the date of acquisition of financial asset under sub-section (1), any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to sub-section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the asset reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the asset reconstruction company, as the case may be.*

(5) *On acquisition of financial assets under sub-section (1), the asset reconstruction company, may with the consent of the originator, file an application before the Debts Recovery Tribunal or the Appellate Tribunal or any court or other Authority for the purpose of substitution of its name in any pending suit, appeal or other proceedings and on receipt of such application, such Debts Recovery Tribunal or the Appellate Tribunal or court or Authority shall pass orders for the substitution of the asset reconstruction company in such* *pending suit, appeal or other proceedings.”*

11.Under Section 5(2-A), any right, title or interest upon any tangible asset or intangible asset to secure payment of interest upon transfer of assignment, vest with Asset Reconstruction Company. Under Section 5(2-A), upon acquisition or assignment of financial assets of any Bank or any financial institution, the Asset Reconstruction Company gets the absolute right, title or interest upon the assets.

12.Under Section 5(5) of SARFAESI Act, the Asset Reconstruction Company steps into the shoes of any financial institution from whom the Asset Reconstruction Company had acquired security interest.

13.Section 13(1) of the SARFAESI Act reads as follows :

“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 court or tribunal, by such creditor in accordance with the provisions of this Act.”*

14.Under Section 13 of SARFAESI Act, any security interest created in favour of any Secured Creditor may be enforced without the intervention of Court or Tribunal by such Creditor in accordance with the provisions of the Act. The term “security interest” according to Section 2(zf) means right, title or interest of any kind upon property created in favour of any Secured Creditor. A “Secured Creditor” means any Bank or financial institution or an Asset Reconstruction Company for the securitisation or reconstruction as the case may be.

15.The “Asset Reconstruction Company” as defined under Section 2(ba) of the Act satisfies the definition of “Secured Creditor” as well the definition of a “financial institution” when it acts for the purpose of securitisation or asset reconstruction. The term “asset reconstruction” means acquisition by any Asset Reconstruction Company of any right or interest of any Bank or financial institution in any financial assistance for the purpose of realisation of such financial assistance. “financial assistance” is also defined under Section 2(k) to mean any loan or advance granted.

16.From the provisions relating to the definition of "Asset Reconstruction Company", this Court is able to see that the statutory provisions have been carefully drafted to recognise the Asset Reconstruction Company as a financial institution or a Secured Creditor only for the purpose of securitisation or reconstruction. Any security interest created in favour of Secured Creditor or any financial institution can be enforced by Asset Reconstruction Company under the provisions of SARFAESI Act. However, from the analysis and on the literal interpretation of the provisions of SARFAESI Act, this Court finds that the Asset Reconstruction Company has no power to deal with any other property, for which they have obtained mortgage independently, by initiating proceeding under the provisions of SARFAESI Act. An Asset Reconstruction Company is not an independent financial institution which exists as a Bank within the meaning of Section 2(c) of the Act. Since Section 13 gives power to the Asset Reconstruction Company only in respect of security interest created in favour of any Secured Creditor either for the purpose of realisation of financial assistance or asset reconstruction, this Court finds merit in the submissions of the learned counsel for the petitioner that the 2nd respondent/Asset Reconstruction Company has no independent right under SARFAESI Act to proceed against the assets covered by subsequent mortgage, they have obtained by deposit of title deeds, long after the assignment of security interest by State Bank of India in their favour. Therefore, this Court finds that the petitioner is entitled to the relief of declaration.

17.Accordingly, this writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

(S.S.S.R., J.) **(N.S., J.)**
31.07.2024

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Index : Yes / No
Neutral Citation : Yes / No

S.S. SUNDAR, J.
and
N. SENTHILKUMAR, J.

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To

The Chief General Manager-in-Charge,
Department of Supervision,
Reserve Bank of India,
Centre I, World Trade Centre,
Mumbai – 400 005.

W.P.No.188 of 2024

31.07.2024