2024:PHHC:019965-DB

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.12093 of 2022 (O&M)
Date of Decision:08.02.2024

Abdul Subhan

......Petitioner

Versus

District Magistrate, Ludhiana and others

...... Respondents

CORAM:- HON'BLE MRS.JUSTICE LISA GILL
HON’BLE MS. JUSTICE AMARJOT BHATTI

Present: Mr. Rohit Suri, Advocate
for the petitioner.

Mr. Sandeep Jain, Addl.AG., Punjab.

Mr. Vipul Dharmani, Advocate
for respondents no. 4 to 6.

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LISA GILL, J(Oral).

1. Prayer in this writ petition is for setting aside proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short ‘SARFAESI Act’) initiated against petitioner by respondent-Financial Institution, including notice(s) under Sections 13(2), 13(4) of SARFAESI Act and order dated 24.03.2022, under Section 14 of SARFAESI Act passed by the Additional District Magistrate, Ludhiana. It is further prayed that status quo regarding physical possession of non mortgaged property of petitioner be ordered to be maintained during pendency of writ petition and that in view of prolonged lockdowns, curfews and special situations which have arisen due to outbreak of Pandemic COVID-19, punitive action by respondent should be quashed and period from August 2020 to March 2022, should be considered as moratorium under Section 56 of the Indian Contract Act under the Doctrine of Frustration.

2. Learned counsel for petitioner submits that petitioner is sole proprietor of one Subhan Hotel situated at Ludhiana. Loan facility of Rs.1,26,46,913/- was availed of by petitioner from respondent no.5 i.e., M/s HDB Financial Services Limited under loan against property (LAP) Scheme on 11.08.2016. Equitable mortgage over 204.5 sq.yards of property out of 238.94 sq. yards was created. Extension of the hotel structure was carried out by constructing two more floors out of funds arranged by petitioner from private resources. It is submitted that account of petitioner was incorrectly classified Non Performing Asset (NPA) on 03.11.2020 in view of order passed by Hon'ble the Supreme Court in **Writ Petition (Civil) No. 476 of 2020, dated 23.03.2021, titled Small Scale Industrial Manufactures Vs. Union of India**. It is to be noticed at this stage that this plea has not been raised in the writ petition.

3. Learned counsel for petitioner vehemently argued that proceedings under SARFAESI Act initiated by respondent-Financial Institution are in complete and total violation of applicable provisions of law. Breach of Section 13(3A) is alleged. Notice under Section 13(4) as well as order passed under Section 14 of SARFAESI Act are claimed to be absolutely illegal, arbitrary and unreasonable. It is submitted that respondent no.4 with an intent to take possession of whole building of Subhan Hotel including non-mortgaged areas had filed a misleading and incomplete application before District Magistrate, Ludhiana, which was allowed in an arbitrary manner without any opportunity to occupants of the building and its owners.

4. Respondent-Financial Institution, it is further submitted is trying to take possession of non-secured properties in the garb of execution of order dated 24.03.2022 by District Magistrate, Ludhiana. It is further urged that due to outbreak of Pandemic COVID-19, situation beyond the control of petitioner had arisen, therefore petitioner deserves relief under Section 56 of the Indian Contract Act under the Doctrine of Frustration. It is thus prayed that this writ petition be allowed.

5. Learned counsel for respondent-Financial Institution has opposed this writ petition while firstly raising a preliminary objection qua entertainability of this writ petition itself. It is submitted that apart from petitioner having efficacious alternate remedy under SARFAESI Act itself for redressal of grievances as raised, this writ petition is not entertainable in view of respondents no. 4 to 6 being a Private Non Banking Financial Institution.

6. Learned counsel for respondent-Financial Institution further submits that there is huge outstanding of Rs.1,58,38,277.02/- as on 15.04.2023 from the petitioner and present writ petition is only a method of delaying recovery proceedings. Petitioner has not deposited any amount towards loan facility since long and is in-fact a chronic defaulter. All actions taken under SARFAESI Act, it is submitted are in accordance with provisions of law. While referring to written statement filed on its behalf, learned counsel for respondent-Financial Institution submits that there is a categoric denial of submission of any objections (pursuant to issuance of notice under Section 13(2) of SARFAESI Act) and that petitioner be put to strict proof of service of such objections. Receipt of objections dated 24.06.2021, Annexure P-5, are categorically denied. It is further submitted that respondent-Financial Institution seeks to enforce its security interest

only *qua* the mortgaged property measuring 204.05 sq. yards alone and has no concern with property measuring 37.5 sq. yards which is not mortgaged with the respondent. Learned counsel for respondent while referring to photograph attached as Annexure R4/6 submits that it is possession of only that portion of Photograph Annexure 4/6, marked as area B which would be taken by respondent-Financial Institution as this is the area so mortgaged with it. In respect to incorrect declaration of loan account of petitioner as NPA on 03.11.2020, it is submitted that though it is mentioned in notice dated 10.06.2021 that petitioner's account was classified NPA on 03.11.2020, it is treated to be so only on 31.03.2021. Moreover, such ground has not even been raised by petitioner in the writ petition. It is thus prayed that this writ petition be dismissed.

7. We have heard learned counsel for the parties at length and have perused the file with their able assistance.

8. Availing of financial credit by petitioner from respondent-Financial Institution, subsequent financial indiscipline for reasons as may be and initiation of SARFAESI proceedings against petitioner are a matter of record. Learned counsel for petitioner is unable to deny that in view of judgments of Hon'ble the Supreme Court in **Union Bank of India Vs. Satyawati Tandon and others, 2010(8) SCC 110, M/s South Indian Bank Limited and others Vs. Naveen Mathew Philip and another, 2023(1) RCR (Civil) 771,** present writ petition is not entertainable. Interference by High Court in exercise of jusridiction under Article 226 of the Constitution of India, has to be minimal in such like cases and is to be actuated only in exceptional or extraordinary circumstances. Hon'ble the Supreme Court in **Satyawati Tandon's** case (supra) has held as under:-

"17. ……*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. 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 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, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.*

18. 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. 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. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad AIR 1969 SC 556, Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1 and Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order."*

9. Hon'ble the Supreme Court in **M/s South Indian Bank Limited and others Vs. Naveen Mathew Philip and another (supra),** while reiterating its earlier decisions held as under:-

"13……. We may, however, reiterate the settled position of law on the interference of the High Court invoking Article 226 of the Constitution of India in commercial matters, where an effective and efficacious alternative forum has been constituted through a statute.

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> 14. A writ of certiorari is to be issued over a decision when the Court finds that the process does not conform to the law or statute. In other words, courts are not expected to substitute themselves with the decision-making authority while finding fault with the process along with the reasons assigned. Such a writ is not expected to be issued to remedy all violations. When a Tribunal is constituted, it is expected to go into the issues of fact and law, including a statutory violation.
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> 15. The object and reasons behind the Act 54 of 2002 are very clear as observed by this Court in Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311. While it facilitates a faster and smoother mode of recovery sans any interference from the Court, it does provide a fair mechanism in the form of the Tribunal being manned by a legally trained mind. The Tribunal is clothed with a wide range of powers to set aside an illegal order, and thereafter, grant consequential reliefs, including re-possession and payment of compensation and costs. Section 17(1) of the SARFAESI Act gives an expansive meaning to the expression "any person", who could approach the Tribunal.
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> 18. While doing so, we are conscious of the fact that the powers 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."

10. Learned counsel for petitioner is unable to point out any exceptional or extra ordinary circumstance which calls for interference in this case. In-fact disputed questions regarding submission or otherwise of objections have also arisen. All pleas and arguments as raised before us including the one regarding incorrect classification of petitioner's account

NPA are very well within the realm of consideration by the Appropriate Forum/ Tribunal. We deliberately refrain from expressing any opinion on merits of the matter, lest prejudice be caused to any party.

11. It is to be noticed that it was directed vide order dated 16.08.2022 passed in this writ petition that in case a sum of Rs. 10,00,000/- is deposited by petitioner within one week, his dispossession would remain stayed till the next date of hearing in the application and subject to further orders. Said amount of Rs.10,00,000/- admittedly was not deposited. It was clarified in subsequent order dated 24.08.2022 passed in this writ petition that there was no subsisting interim order in favour of petitioner. Writ petition was thereafter adjourned to 12.02.2024 for arguments. CM-2135-CWP of 2024 was filed by petitioner as notice dated 29.01.2024, Annexure P-14, was issued by Naib Tehsildar-cum-Duty Magistrate, Ludhiana, for taking over possession of the property on 07.02.2024. It was further prayed that period for deposit of Rs. 10,00,000/- in terms of order dated 16.08.2022 be extended. It is in this application that petitioner has raised question of incorrect declaration of its account NPA on 03.11.2020. It was agreed between learned counsel for the parties that arguments in the writ petition should be heard. Accordingly, hearing of writ petition was preponed from 12.02.2024 for today i.e., 08.04.2024 vide order dated 07.02.2024 in CM-2135-CWP of 2024.

12. In the given factual matrix, we also do not find any merit in the argument raised by learned counsel for petitioner that period for deposit of Rs.10,00,000/- should be extended.

13. Apart from the fact that petitioner has efficacious remedy under SARFAESI Act itself, relief claimed in this writ petition is *qua* a Non Banking Financial Institution. This writ petition in any case is not

entertainable. Gainful reference can be made to judgment of Hon'ble the Supreme Court in **Phoenix ARC Private Limited vs. Vishwa Bharti Vidya Mandir and others, 2022 (1) RCR (Civil) 888,** wherein it has been held as under:-

> "Even otherwise, it is required to be noted that a writ petition against the private financial institution - ARC - appellant herein under Article 226 of the Constitution of India against the proposed action/actions under Section 13(4) of the SARFAESI Act can be said to be not maintainable. In the present case, the ARC proposed to take action/actions under the SARFAESI Act to recover the borrowed amount as a secured creditor. The ARC as such cannot be said to be performing public functions which are normally expected to be performed by the State authorities. During the course of a commercial transaction and under the contract, the bank/ARC lent the money to the borrowers herein and therefore the said activity of the bank/ARC cannot be said to be as performing a public function which is normally expected to be performed by the State authorities. If proceedings are initiated under the SARFAESI Act and/or any proposed action is to be taken and the borrower is aggrieved by any of the actions of the private bank/bank/ARC, borrower has to avail the remedy under the SARFAESI Act and no writ petition would lie and/or is maintainable and/or entertainable. Therefore, decisions of this Court in the cases of **Praga Tools Corporation v. Shri C.A. Imanual, (1969) 1 SCC 585** and **Ramesh Ahluwalia v. State of Punjab, (2012) 12 SCC 331** relied upon by the learned counsel appearing on behalf of the borrowers are not of any assistance to the borrowers."

14. Keeping in view the facts and circumstances as above, this writ petition is dismissed with liberty to petitioner to avail the remedy(ies) available to him in accordance with law while taking up all available pleas.

There is no expression of opinion on the merits of the matter. Pending application (s), if any, stand(s) disposed of accordingly.

(LISA GILL)
JUDGE

(AMARJOT BHATTI)
JUDGE

February 08, 2024.
s.khan

Whether speaking/reasoned : Yes/No.
Whether reportable : Yes/No.