

**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Civil Writ Petition No. 1958 / 2018

1. Sh. Anil Kumar Sotwal, S/o Sh. Pukhraj Ji, Aged About 49 Years, Resident of Prem Niwas, Sardarpura, First B Road, Kumharon Ka Mandir, Jodhpur.

2. Smt. Kiran Sotwal, W/o Sh. Anil Sotwal, Aged About 40 Years, Resident of Prem Niwas, Sardarpura, First B Road, Kumharon Ka Mandir, Jodhpur.

3. M/s Image Point, a Proprietorship Firm Having Its Office, At A-19, Datta Khan Circle, Akhaliya Vikas Yojana, Jodhpur Through Its Proprietor Sh. Anil Kumar Sotwal.

-----Petitioners

Versus

1. The District Magistrate Cum District Collector, Collectorate, Pota Circle, Jodhpur.

2. Aditya Birla Housing Finance Ltd, 3rd Floor, UCO Bank Building, Parliament Street, New Delhi- 110001 Through Its Managing Director.

3. Authorized Officer, Aditya Birla Housing Finance Limited, 1st Floor, PRM Plaza, 947, 10th D Road, Sardarpura, Jodhpur.

-----Respondents

For Petitioner(s) : Mr Vishal J. Dave

Mr Falgun Buch

Mr Nipun Singhvi

HON'BLE MR. JUSTICE VIJAY BISHNOI

Judgment / Order

09/02/2018

This writ petition is filed by the petitioners praying for following reliefs:

"It is, therefore, most humbly and respectfully prayed that this writ petition may kindly be allowed and

- i. By an appropriate writ order or direction, the impugned order dated 08.11.2017 (Annex-8)

passed by the District Magistrate Jodhpur while exercising its power under Section 14 of Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act (hereinafter to be referred as 'the SARFAESI Act') may kindly be quashed and set aside, the respondent NBFC may kindly be directed to restore the possession of the petitioners on the property in question.



By an appropriate writ order or direction, the impugned notice dated 15.01.2018 (Annex-10) informing the petitioners about the auction proceedings proposed to be taken by the respondent NBFC and all further proceedings may kindly be quashed and set aside and the respondent NBFC may kindly be directed to accept the outstanding amount due on the part of petitioners and regularize/upgrade the loan account of the petitioners.

- iii. Any other appropriate, writ, direction or order which this Hon'ble Court may deem it just and proper in the facts and circumstances of the case, may kindly be issued.
- iv. Cost of this writ petition may kindly be awarded to the humble Petitioner."

Facts of the case, in a nutshell, are that the petitioners took a loan of Rs.2,47,00,000/- from respondent No.2 – Aditya Birla Housing Finance Ltd. by mortgaging a house - Prem Niwas situated at 1st B Road, Sardarpura, Kumharon-ka-Mandir, Jodhpur admeasuring 146.60 square yards (hereinafter to be referred 'as the property in question'), for which an agreement was executed between the petitioners and the respondent No.2 on 29.02.2016. The account of the petitioners was declared as Non Performing Asset (NPA) on 14.06.2017 and thereafter notice under Section

13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the SARFAESI Act' hereinafter) was issued on 08.07.2017 and another notice under under Section 13(4) of the SARFAESI Act was issued on 13.09.2017 and thereafter the respondent No.2 moved an application under Section 14 of the SARFAESI Act before the District Magistrate, Jodhpur on 16.10.2017.



The District Magistrate, Jodhpur while exercising powers under section 14 of the SARFAESI Act passed the order dated 08.11.2017 and the possession of the property in question was taken by the respondents on 26.12.2017 and vide letter dated 15.01.2018, the property in question is put to e-auction to be held on 22.02.2018.

This Court has raised a query why this writ petition be not dismissed in view of the alternate remedy available to the petitioners to file an appeal under Section 17 of the SARFAESI Act. In response to the said query, learned counsel for the petitioners has submitted that as a matter of fact the petitioners are challenging the order dated 08.11.2017 passed by the District Magistrate, Jodhpur while exercising powers under section 14 of the SARFAESI Act and the notice dated 15.01.2018 issued by the Authorized Officer for the respondent No.2 under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 (for short 'the Rules of 2002') and against the said order and notice, the petitioners cannot file appeal under section 17 of the SARFAESI Act and, therefore, this writ petition cannot be dismissed on the ground of availability of alternate remedy.

In support of the above contention, learned counsel for the petitioners has placed reliance on decisions of Hon'ble Supreme Court rendered in **Standard Chartered Bank vs. V. Noble Kumar and Ors., (2013) 9 SCC 620** and **Harshad Goverdhan Sondagar vs. International Assets Reconstruction Company Ltd. and Ors., (2014) 6 SCC 1**. He

has also placed reliance on a decision of Gujarat High Court dated 11.10.2012 rendered in **Consumer Protection and Analytic Committee vs. State of Gujarat & Ors. (Writ Petition (PIL) No.68/2012)**.



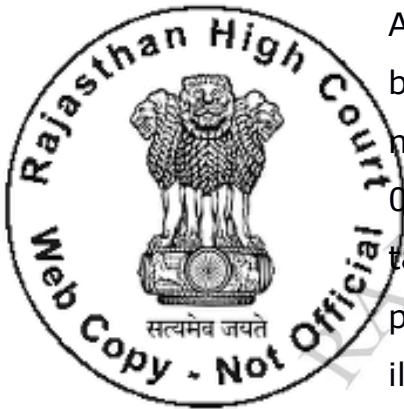
Upon careful perusal of the averments made in the writ petition, this Court is of the opinion that the petitioners very cleverly and deliberately not prayed for quashing the notice issued under section 13(2) of the SARFAESI Act on 08.07.2017 and the notice under section 13(4) of the SARFAESI Act dated 13.09.2017, both issued by respondent No.2, in the prayer clause of the writ petition, however, in para No.13 of the writ petition, the petitioners have specifically mentioned that they are filing this writ petition being aggrieved with the notice dated 08.07.2017 (issued under section 13(2)), notice dated 13.09.2017 (issued under section 13(4)) as well as the order dated 08.11.2017 passed by the District Magistrate, Jodhpur and the notice dated 15.01.2018 issued by the Authorized Officer of respondent No.2.

Even in the first ground of the writ petition, it is clearly averred that the notices dated 08.07.2017 and 13.09.2017 deserve to be quashed and set aside. For convenience, the relevant portions of the writ petition are reproduced hereunder:

"Being aggrieved of the entire chain of events more particularly the notice dated 08.07.2017, 13.09.2017, 08.11.2017, 15.01.2018 and the illegal action of taking forceful possession of the petitioner's property on 26.12.2017, the petitioners have preferred this instant writ petition on following amongst other grounds:

GROUND

A. That at the very outset, the actions initiated by the respondent NBFC including issuance of notice dated 08.07.2017, 13.09.2017, 08.11.2017, 15.01.2018 and the illegal action of taking forceful possession of the petitioner's property on 26.12.2017 suffers from manifest illegality and deserves to be quashed and set aside."



From the above noted facts, it is clear that the petitioners have challenged the action of the respondent No.2 of issuing notice under Section 13(4) of the SARFAESI Act in this petition.

Otherwise also, the action of the respondent No.2 of approaching the District Magistrate under Section 14 of the SARFAESI Act is only a measure taken by the secured creditor i.e. respondent No.2 for taking possession of the secured assets as per the provisions of Section 13(4) of the SARFAESI Act.

Section 17 of the SARFAESI Act provides that any person (including borrower) aggrieved by the measure referred to in sub-section 4 of Section 13 taken by the secured creditor may prefer an appeal before the Debts Recovery Tribunal. Hence, it cannot be said that the petitioners cannot avail the remedy of appeal under section 17 of the SARFAESI Act.

Hon'ble Supreme Court in **Standard Chartered Bank vs. V. Noble Kumar and Ors** (supra) has also held 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. The relevant para of the above referred judgment is reproduced hereunder:



"27. The "appeal" under section 17 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. Therefore, the borrower is always entitled to prefer an "appeal" under section 17 after the possession of the secured asset is handed 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.”

Recently, the Hon’ble Supreme Court in **Civil Appeal**

No.1281/2018, Authorized Officer, State Bank of Travancore and Anr. vs. Mathew K.C. decided on **30.01.2018**

has held as under:

“6. We have considered the submissions on behalf of the parties. Normally this Court in exercise of jurisdiction under Article 136 of the Constitution is loathe to interfere with an interim order passed in a pending proceeding before the High Court, except in special circumstances, to prevent manifest injustice or abuse of the process of the court. In the present case, the facts are not in dispute. The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well defined exceptions as observed in Commissioner of Income Tax and Others vs. Chhabil Dass Agarwal, 2014 (1) SCC 603, as follows:

“15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the



provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."



7. The pleadings in the writ petition are very bald and contain no statement that the grievances fell within any of the well defined exceptions. The allegation for violation of principles of natural justice is rhetorical, without any details and the prejudice caused thereby. It harps only on a desire for regularisation of the loan account, even while the Respondent acknowledges its own inability to service the loan account for reasons attributable to it alone. The writ petition was filed in undue haste in March 2015 immediately after disposal of objections under Section 13(3A). 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 the borrower) to make an application to the Debts Recovery Tribunal under this sub-section."

8. The Section 13(4) notice along with possession notice under Rule 8 was issued on 21.04.2015. The remedy under Section 17 of the SARFAESI Act was now available to the Respondent if aggrieved. These developments were not brought on record or placed before the Court when the impugned interim order

came to be passed on 24.04.2015. The writ petition was clearly not instituted bonafide, but patently to stall further action for recovery. There is no pleading why the remedy available under Section 17 of the Act before the Debt Recovery Tribunal was not efficacious and the compelling reasons for by-passing the same. Unfortunately, the High Court also did not dwell upon the same or record any special reasons for grant of interim relief by direction to deposit.



9. The statement of objects and reasons of the SARFAESI Act states that the banking and financial sector in the country was felt not to have a level playing field in comparison to other participants in the financial markets in the world. The financial institutions in India did not have the power to take possession of securities and sell them. The existing legal framework relating to commercial transactions had not kept pace with changing commercial practices and financial sector reforms resulting in tardy recovery of defaulting loans and mounting non-performing assets of banks and financial institutions. The Narasimhan Committee I and II as also the Andhyarujina Committee constituted by the Central Government Act had suggested enactment of new legislation for securitisation and empowering banks and financial institutions to take possession of securities and sell them without court intervention which would enable them to realise long term assets, manage problems of liquidity, asset liability mismatches and improve recovery. The proceedings under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, (hereinafter referred to as 'the DRT Act') with passage of time, had become synonymous with those before regular courts affecting expeditious adjudication. All these aspects have not been kept in mind and considered before passing the impugned order.

10. Even prior to the SARFAESI Act, considering the alternate remedy available under the DRT Act it was

held in Punjab National Bank vs. O.C. Krishnan and others, (2001) 6 SCC 569, that :-

"6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."



11. In **Satyawati Tandon** (supra), the High Court had restrained further proceedings under Section 13(4) of the Act. Upon a detailed consideration of the statutory scheme under the SARFAESI Act, the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding :-

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

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."



12. In **Union Bank of India and another vs. Panchanan Subudhi**, 2010 (15) SCC 552, further proceedings under Section 13(4) were stayed in the writ jurisdiction subject to deposit of Rs.10,00,000/- leading this Court to observe as follows :

"7. In our view, the approach adopted by the High Court was clearly erroneous. When the respondent failed to abide by the terms of one-time settlement, there was no justification for the High Court to entertain the writ petition and that too by ignoring the fact that a statutory alternative remedy was available to the respondent under Section 17 of the Act."

13. The same view was reiterated in **Kanaiyalal Lalchand Sachdev and others vs. State of Maharashtra and others**, 2011 (2) SCC 782 observing:

"23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See *Sadhana Lodh v. National Insurance Co. Ltd.*; *12 Surya Dev Rai v. Ram Chander Rai* and *SBI v. Allied Chemical Laboratories.*)"

14. In **Ikbal** (supra), it was observed that the action of the Bank under Section 13(4) of the 'SARFAESI Act' available to challenge by the aggrieved under Section 17 was an efficacious remedy and the institution directly under Article 226 was not sustainable, relying

upon **Satyawati Tandon** (Supra), observing :

"27. No doubt an alternative remedy is not an absolute bar to the exercise of extraordinary jurisdiction under Article 226 but by now it is well settled that where a statute provides efficacious and adequate remedy, the High Court will do well in not entertaining a petition under Article 226. On misplaced considerations, statutory procedures cannot be allowed to be circumvented.

28.....In our view, there was no justification whatsoever for the learned Single Judge to allow the borrower to bypass the efficacious remedy provided to him under Section 17 and invoke the extraordinary jurisdiction in his favour when he had disintitiled himself for such relief by his conduct. The Single Judge was clearly in error in invoking his extraordinary jurisdiction under Article 226 in light of the peculiar facts indicated above. The Division Bench also erred in affirming the erroneous order of the Single Judge."



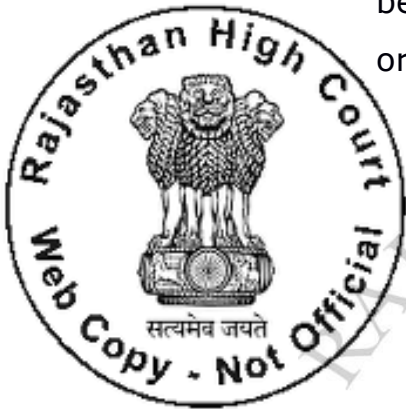
15. A similar view was taken in **Punjab National Bank and another vs. Imperial Gift House and others**, (2013) 14 SCC 622, observing:-

"3. Upon receipt of notice, the 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."

16. It is the solemn duty of the Court to apply the correct law without waiting for an objection to be raised by a party, especially when the law stands well settled. Any departure, if permissible, has to be for reasons discussed, of the case falling under a defined exception, duly discussed after noticing the relevant law. In financial matters grant of ex-parte interim orders can have a deleterious effect and it is not sufficient to say that the aggrieved has the remedy to move for vacating the interim order. Loans by financial institutions are granted from public money generated at the tax payers expense. Such loan does not become the property of

the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same. The caution required, as expressed in **Satyawati Tandon** (supra), has also not been kept in mind before passing the impugned interim order:-



"46. 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 (sic will) 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. Antaram Zila Parishad, Whirlpool Corpn. v. Registrar of Trade Marks and Harbanslal Sahnia v. Indian Oil Corpn. Ltd. and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order."

17. The writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the Appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum. The opinion of the Division Bench that the counter affidavit having subsequently been filed, stay/modification could be sought of the interim order cannot be considered sufficient justification to have declined interference.

18. We cannot help but disapprove the approach of the

High Court for reasons already noticed in ***Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd. and Another***, 1997 (6) SCC 450, observing :-



"32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

19. The impugned orders are therefore contrary to the law laid down by this Court under Article 141 of the Constitution and unsustainable. They are therefore set aside and the appeal is allowed.

20. All questions of law and fact remain open for consideration in any application by the aggrieved before the statutory forum under the SARFAESI Act."

Having heard learned counsel for the petitioners and having gone through the averments made in this writ petition and in view of the law laid down by the Hon'ble Supreme Court in ***Authorized Officer, State Bank of Travancore and Anr. vs. Mathew K.C.*** (supra), I have no hesitation in holding that the writ petition filed by the petitioners is liable to be dismissed on the ground of availability of alternate remedy of filing appeal under Section 17 of the SARFAESI Act.

In the writ petition, the petitioners have also questioned the action of the respondent No.2 of declaring their account as NPA but in view of availability of alternate remedy to the petitioners, I am not inclined to entertain the said plea of the

petitioners.

So far as the judgments on which the petitioners have placed reliance are concerned, I am of the opinion that the judgment rendered by Hon'ble Supreme Court in **Harshad Goverdhan Sondagar vs. International Assets Reconstruction Company Ltd. and Ors.** (supra) has no applicability in the present case as in that case, the Hon'ble Supreme Court has taken into consideration the right of a lessee to remain in possession of the secured asset during the period of lease. However, in the present case, this petition is by the borrowers themselves and not by a lessee.



So far as decision of Gujarat High Court rendered in **Consumer Protection and Analytic Committee vs. State of Gujarat & Ors.** (supra) is concerned, I am of the opinion that as per section 14 of the SARFAESI Act, there is no requirement of giving notice either to the borrower or to the third party while adjudicating the application preferred by the secured creditor.

As observed earlier, the Hon'ble Supreme Court in **Standard Chartered Bank vs. V. Noble Kumar and Ors.** (supra) has already held that a borrower has a remedy of filing an appeal under section 17 of the SARFAESI Act if he is aggrieved by any measure for taking possession of the secured asset. Hence, the above referred judgment is of no help to the petitioners.

In view of the above discussion, I do not find any case for interference, hence, this writ petition is dismissed on the ground of availability of alternate remedy. However, the petitioners are free to avail alternate remedy available to them.

Stay petition also stands dismissed.

(VIJAY BISHNOI)J.

m.asif/PS



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