

(2022) 09 CHH CK 0077
In the Chhattisgarh High Court
Case No : Writ Petition (C) No.4106 Of 2022

M/S A.S. Nutratch Private Ltd

APPELLANT

Vs

Central Bank Of India

RESPONDENT

Date of Decision : 26-09-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 226, 227
Security Interest (Enforcement) Rules, 2002 — Rule 8, 8(1), 8(6)
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13(2), 13(4), 17, 18

Citation : (2022) 09 CHH CK 0077

Hon'ble Judges : Arvind Singh Chandel, J

Bench : Single Bench

Advocate : Shailja Shukla, Anand Shukla

Final Decision : Dismissed

Judgement

1. The issue involved in the instant petition is as to its maintainability.
2. The instant writ petition has been moved under Article 226 of the Constitution of India with the following prayer:
 - (1) Set aside the impugned order dated 29.8.2022 (Annexure P1) passed by Respondent 1 and
 - (2) Direct the Respondents/authorities to settle the Non-Performing Asset (NPA) account of the Petitioner under the Scheme 2022-23.
3. Facts of the case, in brief, are that the Petitioner is a company duly registered under the Companies Act and is engaged in manufacturing of refined rice bran oil and vegetable oil having its factory at District Mahasamund. For the purposes of running the aforesaid plant/factory, loan facilities were sought from the Respondent 1/Bank and the same was sanctioned in terms of Cash Credit to the tune of Rupees Three Crores and Forty Lakhs and term loan to the tune of Rupees Ten Crores. Along with these loans, assets including the lands of the

company/Petitioner were also mortgaged with Respondent 1/Bank. Both the above loan accounts were declared as Non-Performing Asset (NPA) by the Respondent/Bank on 31.3.2018. The Respondent/Bank initiated proceeding under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (henceforth 'the Act of 2002') and issued a notice under Section 13(2) of the Act of 2002 to the Petitioner on 10.4.2018 and also took symbolic possession of the secured assets of the company/Petitioner on 4.7.2018. In the year 2021, a scheme was floated by the Respondent/Bank, whereby the Non-Performing Assets valued till Rupees Ten Crores of the Bank throughout the country were sought to be settled after sacrificing certain percentage of the outstanding amount. Since the outstanding amount of the company/Petitioner was more than Rupees Ten Crores, it was asked to reduce the same and bring it to Rupees Ten Crores so that the benefit of the scheme could be availed by the Petitioner. In furtherance thereof, the Petitioner deposited a sum of Rupees One Crore. Thereafter, One Time Settlement (OTS) plan was submitted by the Petitioner to the Bank on 15.11.2021. As directed by the Bank, the offer was revised by the Petitioner vide Annexure P6, but this was not accepted by the Bank and was rejected vide Annexure P7. Thereafter, on 6.7.2022, a new scheme was floated by the Respondent/Bank titled as "Special One Time Settlement Scheme, 2022-23" (henceforth 'the scheme 2022-23'). As contained in the instant petition, the Petitioner is eligible for this scheme and, therefore, the Petitioner applied under this new scheme vide Annexure P9. The OTS proposal of the Petitioner was rejected vide the impugned letter dated 29.8.2022 (Annexure P1). Hence, this petition.

4. At this juncture, it would be appropriate to mention the fact that in paragraph 8.16 of the petition the Petitioner has pleaded that the Respondent/Bank has issued an auction notice on 5.9.2022 for sale of two properties mortgaged with the Petitioner and the auction is to take place on 27.9.2022. It is further pleaded therein that as contained in Rule 8(6) and proviso to Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 (henceforth 'the Rules of 2002'), the authorised officer shall serve a notice of 30 days to the borrower for sale of immovable assets, but, the notice has been issued on 5.9.2022 and the auction is to take place on 27.9.2022 and, therefore, Rule 8(6) and proviso thereto of the Rules of 2002 have also not been complied with. At this juncture, it would also be appropriate to mention here that along with this writ petition the Petitioner has filed I.A. 1/2022 praying for stay of the effect and operation of the impugned auction notice dated 5.9.2022, but, in this regard, the Petitioner has not made any prayer in the relief clause of the writ petition.

5. Learned Counsel appearing for Respondents 2 and 3 submitted that as admitted by the Petitioner himself, a notice under Section 13(2) of the Act of 2002 has been issued against him on 10.4.2018 and symbolic possession of the secured assets of the Petitioner/company has also been taken by the Bank on 4.7.2018. Referring to Annexure P11, Learned Counsel further submitted that the sale notice for sale of immovable properties has also been issued to the

Petitioner as contained in Rule 8(6) of the Rules of 2002. Thus, it is clear that the proceedings are initiated under the Act of 2002. Therefore, the Petitioner has only remedy available to approach the Debts Recovery Tribunal (DRT) as contained in Section 17 of the Act of 2002. Therefore, the instant petition is not maintainable and deserves to be dismissed as not maintainable. Reliance was placed on (2018) 3 SCC 85 (Authorized Officer, State Bank of Travancore v. Mathew K.C.), 2021 SCC OnLine SC 1255 (Bijnor Urban Cooperative Bank Limited, Bijnor v. Meenal Agarwal) and (2022) 5 SCC 345 (Phoenix ARC Private Limited v. Vishwa Bharati Vidya Mandir).

6. In counter, Learned Counsel appearing for the Petitioner submitted that the Petitioner has not approached this Court challenging the proceedings of recovery so drawn under the Act of 2002, but the instant petition has been filed being aggrieved by the illegal and arbitrary action of the Respondent/Bank in not giving the benefit of the scheme of 2022-23 to the Petitioner, which is violative of the fundamental rights of equity as guaranteed under Article 14 of the Constitution of India. The Debts Recovery Tribunal does not have jurisdiction to grant the relief as prayed for by the Petitioner in the present petition. Therefore, there is no alternative remedy available to the Petitioner to go to the DRT. Thus, this petition is well maintainable before this Court under Article 226 of the Constitution of India.

7. I have heard Learned Counsel appearing for the parties and perused the entire petition and the documents annexed thereto with due care.

8. When a proceeding is already drawn under Section 13(4) of the Act of 2002, whether a remedy is available to the Petitioner/company under Article 226 of the Constitution of India, the Supreme Court dealing with this issue in Authorized Officer case (supra) observed as under:

"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. These developments were not brought on record or placed before the Court when the impugned interim order came to be passed on 24.4.2015. The writ petition was clearly not instituted bona fide, but patently to stall further action for recovery. There is no pleading why the remedy available under Section 17 of the Act before the Debts 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.

10. In United Bank of India v. Satyawati Tondon, (2010) 8 SCC 110 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: (SCC pp. 123 & 128, paras 43 & 55)

"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."

11. In *Union Bank of India v. 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: (SCC pp. 553-54, para 7)

"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."

12. The same view was reiterated in *Kanaiyalal Lalchand Sachdev v. State of Maharashtra*, 2009 SCC OnLine Bom 2388, observing: (SCC p. 789, para 23)

"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."

9. With regard to refusal of grant of benefit of One Time Settlement Scheme, in

Bijnor Urban case (supra), it was observed by the Supreme Court as under:

"28. Even otherwise, as observed hereinabove, no borrower can, as a matter of right, pray for grant of benefit of One Time Settlement Scheme. In a given case, it may happen that a person would borrow a huge amount, for example Rs.100 Crores. After availing the loan, he may deliberately not pay any amount towards installments, though able to make the payment. He would wait for the OTS Scheme and then pray for grant of benefit under the OTS Scheme under which, always a lesser amount than the amount due and payable under the loan account will have to be paid. This, despite there being all possibility for recovery of the entire loan amount which can be realised by selling the mortgaged/secured properties. If it is held that the borrower can still, as a matter of right, pray for benefit under the OTS Scheme, in that case, it would be giving a premium to a dishonest borrower, who, despite the fact that he is able to make the payment and the fact that the bank is able to recover the entire loan amount even by selling the mortgaged/secured properties, either from the borrower and/or guarantor. This is because under the OTS Scheme a debtor has to pay a lesser amount than the actual amount due and payable under the loan account. Such cannot be the intention of the bank while offering OTS Scheme and that cannot be purpose of the Scheme which may encourage such a dishonesty.

30. The sum and substance of the aforesaid discussion would be that no writ of mandamus can be issued by the High Court in exercise of powers under Article 226 of the Constitution of India, directing a financial institution/bank to positively grant the benefit of OTS to a borrower. The grant of benefit under the OTS is always subject to the eligibility criteria mentioned under the OTS Scheme and the guidelines issued from time to time. If the bank/financial institution is of the opinion that the loanee has the capacity to make the payment and/or that the bank/financial institution is able to recover the entire loan amount even by auctioning the mortgaged property/secured property, either from the loanee and/or guarantor, the bank would be justified in refusing to grant the benefit under the OTS Scheme. Ultimately, such a decision should be left to the commercial wisdom of the bank whose amount is involved and it is always to be presumed that the financial institution/bank shall take a prudent decision whether to grant the benefit or not under the OTS Scheme, having regard to the public interest involved and having regard to the factors which are narrated hereinabove.

31. In view of the aforesaid discussion and for the reasons stated above, we are of the firm opinion that the High Court, in the present case, has materially erred and has exceeded in its jurisdiction in issuing a writ of mandamus in exercise of its powers under Article 226 of the Constitution of India by directing the appellant-Bank to positively consider/grant the benefit of OTS to the original writ petitioner. The impugned judgment and order passed by the High Court is hence unsustainable and deserves to be quashed and set aside and is accordingly quashed and set aside."

10. In Phoenix ARC case (supra), it was observed by the Supreme Court as

under:

"16. Assuming that the communication dated 13.8.2015 can be said to be a notice under Section 13(4) of the SARFAESI Act, in that case also, in view of the statutory remedy available under Section 17 of the SARFAESI Act and in view of the law laid down by this Court in the cases referred to hereinabove, the writ petitions against the notice under Section 13(4) of the SARFAESI Act was not required to be entertained by the High Court. Therefore, the High Court has erred in entertaining the writ petitions against the communication dated 13.8.2015 and also passing the ex parte ad interim orders directing to maintain the status quo with respect to possession of secured properties on the condition directing the borrowers to pay Rs.1 Crore only (in all Rs.3 crores in view of the subsequent orders passed by the High Court extending the ex parte ad interim order dated 26.8.2015) against the total dues of approximate Rs.117 crores. Even the High Court ought to have considered and disposed of the application for vacating the ex parte ad interim relief, which was filed in the year 2016 at the earliest considering the fact that a large sum of Rs.117 crores was involved.

18. Even otherwise, it is required to be noted that a writ petition against the private financial institution – ARC – the 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 *Praga Tools Corpn. v. C.A. Imanul*, (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.

21. Applying the law laid down by this Court in *State Bank of Travancore v. Mathew K.C.*, (2018) 3 SCC 85 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.
.....”

11. On examination of the facts of the instant case in the light of above observations of the Supreme Court, it is clear that the Petitioner/company borrowed loan from the Respondent/Bank. Both the loan accounts of the Petitioner were declared as Non-Performing Assets. Notice under Section 13(2) of the Act of 2002 has also been served on the Petitioner on 10.4.2018. Symbolic possession of the premises of the Petitioner/company has also been taken by the Respondent/Bank as contained in Rule 8(1) of the Rules of 2002. In compliance of Rule 8(6) of the Rules of 2002, sale notice for the sale of immovable properties has also been served on the Petitioner. Thus, it is well established that the proceeding under the Act of 2002 has already been drawn against the Petitioner. Though the Petitioner has not challenged in the instant petition any of the proceedings pending under the Act of 2002, the fact remains that the proceedings have already been drawn against the Petitioner under the Act of 2002. Therefore, as observed by the Supreme Court in the above cited cases, the Petitioner/company has the only remedy available to approach the Debts Recovery Tribunal (DRT) as contained in Section 17 of the Act of 2002. Thus, it is held that the instant writ petition filed under Article 226 of the Constitution of India is not maintainable before this Court.

12. Consequently, with the aforesaid observations, the instant writ petition is dismissed as not maintainable.