

(2022) 08 SHI CK 0016

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 2199 Of 2019

M/S Malhotra Clinics Pvt. Ltd And Others

APPELLANT

Vs

Deputy General Manager (Hqrs.), Punjab & Sind Bank And Others

RESPONDENT

Date of Decision : 03-08-2022

Acts Referred:

Constitution Of India, 1950 — Article 136, 226, 227
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13(2), 13(3A), 13(4), 14, 17
Indian Contract Act, 1872 — Section 62

Citation : (2022) 08 SHI CK 0016

Hon'ble Judges : Tarlok Singh Chauhan, J;Chander Bhusan Barowalia, J

Bench : Division Bench

Advocate : Sanjeev Bhushan, Virender Thakur, Gaurav Sharma, Ashok Sharma, Vinod Thakur, Yudhbir Thakur

Final Decision : Dismissed

Judgement

Tarlok Singh Chauhan, J

1. The instant petition has been filed for the grant of following substantive reliefs:-

i. Issue a Writ in the nature of certiorari quashing possession notice issued under Section 13(4) of the SARFAESI Act, 2002 dated 05.02.2018 (Annexure P-5 (Colly) and the second possession notice under Section 13(4) dated 12.06.2018 (Annexure P-8 (Colly) issued under the SARFAESI Act, 2002 without deciding the objection/reply dated 27.09.2017 filed under Section 13(3- A) of the SARFAESI Act, 2002, in response to the demand notice issued under Section 13(2) dated 03.08.2017 of the SARFAESI Act, 2002 (Annexure P-1) and also without deciding objection/rely dated 12.01.2018 filed under Section 13(3-A) of the SARFAESI Act, 2002 to the demand notice dated 16.11.2017 under Section 13(2) of the SARFAESI Act, 2002 contrary to the law laid down by the Hon'ble Supreme Court

of India in a case titled as 'ITC Limited V/s Blue Coast Hotels Ltd. & others' reported in 2018 AIR (SC) 3063, where the Hon'ble Apex Court held in Para 29 and 30 that Section 13(3-A) is a mandatory one and the Authorized Officer has to decide the objection/reply filed by the borrower/quarantor to the demand notice i.e. Notice under Section 13 (2) of the SARFAESI Act, 2002 issued by the Authorized Officer with reasoned order and if the same is not decided as per the provisions of the SARFAESI Act and also in view of the law laid down in Mardia Chemical Case and in this case the Authorized Officer cannot proceed further under the SARFAESI Act, 2002 and if the proceedings under the SARFAESI Act are initiated without deciding the objection/reply under Section 13(3-A), in the interest of justice, equity and fair play.

ii. Set aside the proceedings initiated by the respondent Bank under Section 14 of the SARFAESI Act, 2002 by letter dated 23.01.2019 by intimation to the petitioners vide which the respondent Bank filed the Petition, for taking possession of the secured assets and also for police assistance and the respondent No. 4 is adamant LO Issue order for taking possession without affording any opportunity of hearing to the petitioners in view of the amended provisions of Section 14 of the SARFAESI Act, 2002 and also to stay further proceedings initiated by the respondent Bank under Section 13 (4) of the SARFAESI Act, 2002 without deciding the objections filed by the petitioners under Section 13(3-A) of the SARFAESI Act, 2002. So in view of this law the notice under section 13(4) and the subsequent proceedings are void - ab-initio and the same are liable to be set aside, being illegal and violative of the provisions of the SARFAESI Act, 2002.

iii. That appropriate writ order or direction may very kindly be issued directing respondent Nos. 1 to 3 to deal with the case of the petitioners strictly in accordance with the Instructions issued by the respondent No. 5 with respect to one time settlement, by further directing respondent No. 5 to produce its latest Instructions with respect to one time settlement, since the petitioners are ready and willing to settle the matter on the basis of latest Instructions of RBI for one time settlement, in the interest of law and justice.

2. As regards the first two reliefs, the same are clearly not maintainable in view of the various judgments delivered by the Hon'ble Supreme Court, wherein, it has been held that a proceeding 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 bank, borrower has to avail the remedy under the SARFAESI Act and no writ petition would lie and/or is maintainable and/or entertainable.

3. Reference in this regard can be made to one of the latest judgment of the Hon'ble Supreme Court in Phoenix Arc Private Limited vs. Vishwa Bharati Vidya Mandi and others (2022) 5 SCC 345. It shall be profitable to extract the relevant observations, as contained in paras 8 to 21, which read as under:-

8. It is the case on behalf of the appellant that the writ petitions against the

communication dated 13.08.2015 proposing to take further action under Section 13(4) of the SARFAESI Act and that too against a private Assets Reconstructing Company (ARC) shall not be maintainable. It is also the case on behalf of the appellant that assuming that the communication dated 13.08.2015 can be said to be a notice under Section 13(4) of the SARFAESI Act, in view of the alternative statutory remedy available by way of appeal under Section 17 of the SARFAESI Act, the High Court ought not to have entertained the writ petitions.

9. While considering the issue regarding the maintainability of and/or entertainability of the writ petitions by the High Court in the instant case, a few decisions of this Court relied upon by the learned Senior Advocate appearing on behalf of the appellant – ARC are required to be referred to.

10. In the case of Satyawati Tondon & Ors. (supra), it was observed and held by this Court that the remedies available to an aggrieved person against the action taken under section 13(4) or Section 14 of the SARFAESI Act, by way of appeal under Section 17, can be said to be both expeditious and effective. On maintainability of or entertainability of a writ petition under Article 226 of the Constitution of India, in a case where the effective remedy is available to the aggrieved person, it is observed and held in the said decision in paragraphs 43 to 46 as under:-

"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.

44. 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.

45. 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.

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. Antarim Zila Parishad* [AIR 1969 SC 556], *Whirlpool Corpn. v. Registrar of Trade Marks* [(1998) 8 SCC 1] and *Harbanslal Sahnia v. Indian Oil Corpn. Ltd.* [(2003) 2 SCC 107] and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order.” 7

11. In the case of *City and Industrial Development Corpn. Vs. Dosu Aardeshir Bhiwandiwalla*, (2009) 1 SCC 168, it was observed by this Court in paragraph 30 that the Court while exercising its jurisdiction under Article 226 is duty bound to consider whether(c) the petitioner has any alternative or effective remedy for the resolution of the dispute.

12. In the case of *Kanaiyalal Lalchand Sachdev and Ors. (supra)* after referring to the earlier decisions of this Court in the cases of *Sadhana Lodh Vs. National Insurance Co. Ltd. and Anr.*, (2003) 3 SCC 524; *Surya Dev Rai Vs. Ram Chander Rai and Ors.*, (2003) 6 SCC 675 and *State Bank of India Vs. Allied Chemical Laboratories and Anr.*, (2006) 9 SCC 252 while upholding the order passed by the High Court dismissing the writ petition on the ground that an efficacious remedy is available under Section 17 of the SARFAESI Act, it was observed 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.

13. Similar view has been expressed by this Court in subsequent decisions in the case of *General Manager, Sri Siddeshwara Cooperative Bank Limited & Anr. (supra)* as well as in the case of *Agarwal Tracom Private Limited (supra)*.

14. Applying the law laid down by this court in the aforesaid decisions, it is required to be considered whether, in the facts and circumstances of the case, the High Court is justified in entertaining the writ petitions against the

communication dated 13.08.2015 and to pass the ex-parte ad interim order virtually stalling/restricting the proceedings under the SARFAESI Act by the creditor.

15. It is required to be noted that it is the case on behalf of the appellant that as such the communication dated 13.08.2015 cannot be said to be a notice under Section 13(4) of the SARFAESI Act at all. According to the appellant, after the notice under Section 13(2) of the SARFAESI Act was issued in the year 2013 and thereafter despite the Letter of Acceptance dated 27.02.2015, no further amount was paid, the appellant called upon the borrowers to make the payment within two weeks failing which a further proceeding under Section 13(4) of the SARFAESI Act was proposed. Thus, according to the appellant, it was a proposed action. Therefore, the writ petitions filed against the proposed action under Section 13(4) of the SARFAESI Act was not maintainable and/or entertainable at all.

16. Assuming that the communication dated 13.08.2015 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 13.08.2015 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 26.08.2015) 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.

17. Now, in so far as the reliance placed upon the decision of this Court in the case of J. Rajiv Subramaniyan and Anr. (supra) by the learned senior counsel appearing on behalf of the borrowers in support of his submission that writ petition would be maintainable, it is to be noted that in the aforesaid case, the learned counsel appearing on behalf of the Bank did not press the maintainability and/or entertainability of the writ petition under Article 226 and therefore, this Court had no occasion to consider the entertainability and/or maintainability of the writ petition. Therefore, the aforesaid decision is not of any assistance to the respondents – borrowers.

18. 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 (*supra*) and Ramesh Ahluwalia (*supra*) relied upon by the learned counsel appearing on behalf of the borrowers are not of any assistance to the borrowers.

19. Now, so far as the submission on behalf of the borrowers that in exercise of the powers under Article 226 of the Constitution, this Court may not interfere with the interim / interlocutory orders is concerned, the decision of this Court in the case of Mathew K.C. (*supra*) is required to be referred to.

20. In the case of Mathew K.C. (*supra*) after referring to and/or considering the decision of this Court in the case of Chhabil Dass Agarwal (*supra*), it was observed and held in paragraph 5 as under:-

"5. We have considered the submissions on behalf of the parties. Normally this Court in exercise of jurisdiction under Article 136 of the Constitution is loath 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 *CIT v. Chhabil Dass Agarwal* [*CIT v. Chhabil Dass Agarwal*, (2014) 1 SCC 603], as follows: (SCC p. 611, para 15)

"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 [*Thansingh Nathmal v. Supt. of Taxes*, AIR 1964 SC 1419] , *Titaghur Paper Mills* case [*Titaghur Paper Mills Co. Ltd. v. State of Orissa*, (1983) 2 SCC 433] 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."

11. Applying the law laid down by this Court in the case of Mathew K.C. (supra) 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 13.08.2015 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. Even the impugned orders passed by the High Court directing to maintain the status quo with respect to the possession of the secured properties on payment of Rs.1 crore only (in all Rs.3 crores) is absolutely unjustifiable. The dues are to the extent of approximately Rs.117 crores. The ad-interim relief has been continued since 2015 and the secured creditor is deprived of proceeding further with the action under the SARFAESI Act. Filing of the writ petition by the borrowers before the High Court is nothing but an abuse of process of Court. It appears that the High Court has initially granted an ex-parte ad-interim order mechanically and without assigning any reasons. The High Court ought to have appreciated that by passing such an interim order, the rights of the secured creditor to recover the amount due and payable have been seriously prejudiced. The secured creditor and/or its assignor have a right to recover the amount due and payable to it from the borrowers. The stay granted by the High Court would have serious adverse impact on the financial health of the secured creditor/assignor. Therefore, the High Court should have been extremely careful and circumspect in exercising its discretion while granting stay in such matters. In these circumstances, the proceedings before the High Court deserve to be dismissed.

4. As regards the third prayer, the proposal of the petitioner for OTS has been rejected by the Bank on 18.04.2022 and the Minutes of the Settlement Advisory Committee in the Account of M/s Malhotra Clinic Pvt. Limited., Branch Baddi, FGMO, Chandigarh, read as under:-

Minutes of the Settlement Advisory Committee in the account of M/s Malhotra Clinic Pvt Ltd, Branch Baddi, FGMO Chandigarh Committee perused the contents of H.O. L&R Department Note dated 18-04-2022. The department has informed that The OTS offer for Rs.720.00 Lakh in the captioned group accounts is less than the Benchmark of Rs.1205.11 Lakh and less than the Book Outstanding of Rs.842.44 Lakh. OTS proposal in the captioned account is not in consonance with the Bank's Recovery Management Policy. In the present OTS proposal, Rebate of Rs.122.44 lakh & notional Concession of Rs.505.22 lakh is involved.

After Deliberation and keeping in view the facts of the matter and recommendation of the BM/ FGM and the Department, it has been resolved by the Committee to Decline the Settlement offer of Rs. 720.00 Lakh in the account of M/s Malhotra Clinic Pvt Ltd, Branch Baddi, FGMO Chandigarh.

Further, we may advise the FGM Office Chandigarh for following action points:-

- 1) To send a suitable reply to the party with regard to decline of OTS proposal.
- 2) To put properties on E-auction at the earliest on as is where is basis.

5. Even though this communication has not been addressed to the petitioner or even reached it, however, it would be noticed that despite the pendency of this petition from August, 2019, the petitioner has made no endeavour to obtain a copy of decision. This assumes importance because an amicable settlement or OTS is drawn up to achieve win-win situation for both the creditor and debtor. The former has every right to recover the amount in most simplified manner and then use the same in its commercial sites to pump more liquidity and resultant revenues.

6. On the other hand, the later is able to settle loan dispute so as to take its attention to more productive field rather than involved in a litigative sphere. It is in this situation, borrower has to deposit substantial amount and prove its bonafide and willingness to clear the remaining amount in a reasonable period and compensate the creditor with interest for the delayed period, should be considered with some flexibility to achieve the ultimate aim of such settlement. It is with this perspective that extension can be considered and granted by the Court in deserving cases.

7. However, in the instant case, the petitioner has not been able to show its bonafide and as against the outstanding amount, which is running into several crores, the petitioner has barely deposited a sum of Rs. 36 lacs over the last three years, as per the statement given by the counsel, which has not been agreed to or conceded to by the learned counsel for the respondent.

8. In such circumstances, this Court cannot concede to the request of the petitioner for OTS, after all, grant of loan is under the terms of Contract Act and grant of OTS or rescheduling of loan is modification of such contract, which can only be done with the mutual consent of both the parties by virtue of Section 62 of the Contract Act.

9. The High Court in exercise of jurisdiction under Article 226 of the Constitution of India would not direct parties to enter into an OTS to the advantage of the borrower without the borrower proving its bonafide.

10. That apart, no writ or mandamus can be issued by the High Court under Article 226 of the Constitution of India by directing the bank to grant benefit of OTS to the borrower.

11. In taking this view, we are duly fortified by another latest judgment of the

Hon'ble Supreme Court in *Bijnor Urban Cooperative Bank Limited and others vs. Meenal Agarwal and others* AIR 2022 SC 56, more particularly, the observations made in paragraphs 9 to 12, which read as under:-

9. 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.

10. If a prayer is entertained on the part of the defaulting unit/person to compel or direct the financial corporation/bank to enter into a one-time settlement on the terms proposed by it/him, then every defaulting unit/person which/who is capable of paying its/his dues as per the terms of the agreement entered into by it/him would like to get one time settlement in its/his favour. Who would not like to get his liability reduced and pay lesser amount than the amount he/she is liable to pay under the loan account? In the present case, it is noted that the original writ petitioner and her husband are making the payments regularly in two other loan accounts and those accounts are regularised. Meaning thereby, they have the capacity to make the payment even with respect to the present loan account and despite the said fact, not a single amount/installment has been paid in the present loan account for which original petitioner is praying for the benefit under the OTS Scheme.

11. 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.

12. 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.

12. In view of the aforesaid discussion and for the reasons stated above, we find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.