

**(2017) 01 BOM CK 0099**  
**In the Bombay High Court**  
**Case No : Writ Petition No. 12769 of 2016**

|                                                 |            |
|-------------------------------------------------|------------|
| M/s. Utkarsh Cement Sales Pvt. Ltd,             | APPELLANT  |
| Vs                                              |            |
| Omprakash Deodha People's Cooperative Bank Ltd. | RESPONDENT |

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**Date of Decision :** 17-01-2017

**Acts Referred:**

Constitution of India, 1950 — Article 226  
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(3A)

**Citation :** (2017) 2 AIRBomR 122 : (2017) 3 BCR 38 : (2017) 3 MhLJ 796

**Hon'ble Judges :** V.M. Kanade and Sangitrao S.Patil, JJ.

**Bench :** Division Bench

**Advocate :** Shri Amit A. Mukhedkar, Advocate, for the Petitioners in Writ Petition No.12769 of 2016; Shri P.S. Agarwal, Advocate, for the Respondent in Writ Petition No.12769 of 2016; Shri Amit A. Mukhedkar, Advocate, for the Petitioners in Petition No.12768 of 2016; Shri P.S. Agarwal, Advocate, for the respondent in Petition No.12768 of 2016

**Final Decision :** Dismissed

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## Judgement

V.M. Kanade, J. (Oral) - Heard learned counsel for the parties.

2. Rule. Rule made returnable forthwith and with the consent of learned counsel for the parties, these petitions are taken for final disposal at this stage.

3. Both these petitions can be disposed of finally by a common judgment since arising out of a common cause.

4. A short but interesting question has been raised by the learned counsel appearing on behalf of the petitioners in both these petitions, viz.,

Whether for noncompliance of provisions of subsection (3A) of Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, a writ petition under Article 226 of the Constitution of India is maintainable ?

5. The petitioners in both these petitions are the borrowers. In one petition, the company has filed the petition and in the other matter, the directors have filed the petition. It is not in dispute that there were two accounts; one was for cash credit facility and second was for term loan facility. On account of default committed by the petitioners in even paying the interest for more than 90 days on the principal amount, the respondent bank issued two separate notices u/s 13(2) of the Act on 28.7.2016 in respect of the said two accounts. The petitioners raised an objection on 3.10.2016 u/s 13(3A) of the Act. In the said objection, what they have mentioned was that the said notice was not maintainable since the account had not become a nonperforming asset on the date of issuance of the said notice. Secondly, it was contended that they had regularly maintained the said cash credit account and, therefore, it has not become a nonperforming asset. Thirdly, it was mentioned in the said objections that it is not mentioned in the notice as to on which date the petitioners' accounts have become a nonperforming asset. It was contended, therefore, that no cause of action had arisen to take recourse to the said provision. It was then contended that the interest charged by the bank is not in accordance with the agreed rate of interest as well as guidelines issued by the Reserve Bank of India from time to time. It is contended that penal interest was charged and the account has become nonfunctional and due to business loss, the said account could not be properly maintained. It was then contended that the property, which was stated to be a "secured debt" was in fact a personal property of the directors. The petitioners, therefore, requested that the said notice may be withdrawn by the bank.

6. A detailed common reply was given by the respondent bank to both the objections, which were raised by the petitioners. In the said reply, it was stated that the petitioners had not repaid the interest within 90 days in the Cash Credit Account No.163 from the date 31.3.2016 and, therefore, as per the Reserve Bank of India guidelines, it had to be treated as nonperforming asset. Secondly, it was stated that due to group consideration, term loan sanctioned to the directors in their personal capacity also had become nonperforming asset. It is further stated that interest and other charges debited to the account are as per the agreed terms and the contention of the petitioners, therefore, was not acceptable.

7. A preliminary objection is raised by the learned counsel appearing on behalf of the respondent bank regarding maintainability of the writ petition under Article 226 of the Constitution of India. He submitted that in view of judgment of the Apex Court in the case of United Bank of India v. Satyawati Tondon & others (2010 (6) Mh.L.J. 721), these writ petitions are not maintainable since they have been filed at the premature stage and no cause of action has arisen for the petitioners to file these petitions.

8. Learned counsel for the petitioners vehemently urged that the said submission on behalf of the respondent bank is without any substance. He submitted that in

view of proviso to subsection (3A) of Section 13 of the Act, the petitioners had no remedy and could not file an appeal u/s 17(3) of the Act and, therefore, he had no other option but to challenge the said action of the bank under Article 226 of the Constitution of India. He relied on the judgment of Allahabad High Court in the case of *M/s Malhotra Tractors & another v. Chief Manager, State Bank of India, Faizabad & others* (AIR 2009 Allahabad 150). The Division Bench of Allahabad High Court observed that the provisions contained in Section 13(3A) of the Act are mandatory in nature and the authority has no right to proceed in violation of the provisions contained in subsection (3A) of Section 13 of the Act. It further observed that it was open to the authorities to proceed in accordance with the provisions contained in Section 13(4) of the Act only after the representation or objection filed by the borrower or guarantor was decided.

9. In our view, the ratio of the said judgment will not apply to the facts of the present case. Firstly, no objection was raised in the said petition to the maintainability of the writ petition and as such the said observation will not be of any assistance to the petitioners. Secondly, it appears that, in the said case, the bank authorities had proceeded u/s 13(4) of the Act without considering the mandatory provisions u/s 13(3A) of the Act. In the present case, it is an admitted position that the bank has not taken any measures u/s 13(4) of the Act. It is obvious that apart from the petition not being maintainable, it has been filed prematurely obviously to protract the proceedings by raising frivolous objections. The said judgment is not of any assistance to the petitioners.

10. Reliance is also placed on the Division Bench judgment of this Court in the case of *M.R. Gawai Enterprises v. Vidarbha Urban Cooperative Bank Ltd.* (2004 (4) Mh.L.J. 707). It is submitted that in the said case also, the Division Bench had entertained the writ petition. In our view, the said observation also will not be of any assistance to the petitioners since the said judgment was delivered in the year 2004 when the High Court did not have the assistance of the observations made by the Apex Court in the case of *United Bank of India v. Satyawati Tondon & others* (supra). The said judgment, therefore, also will not be of any assistance to the petitioners.

11. The Apex Court in the case of *United Bank of India v. Satyawati Tondon & others* (supra) has now laid down the law and has held that the High Court should not entertain a writ petition under Article 226 of the Constitution of India against any measures taken by the bank u/s 13(4) of the Act since an alternative remedy is available to the borrowers/guarantors of filing an appeal u/s 17 of the Act. The Apex Court has come down heavily on the High Court exercising its writ jurisdiction in such cases.

12. In the present case, the facts are much worse. The bank has not even proceeded u/s 13(4) of the Act. No measures are being taken u/s 13(4) by the bank as yet and still the petitioners have approached this Court under Article 226 of the Constitution of India purportedly because the provisions of Section 13(3A) are not followed. We, therefore, cannot accept the contention of the petitioners

that the writ petition is maintainable at this stage. We accept the submission made by the learned counsel on behalf of the respondent bank that the writ petition is not maintainable. The Apex Court in the case of *United Bank of India v. Satyawati Tondon & others* (supra) has observed in paragraph nos.18, 19, 20, 21 and 27 as under:

"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.

19. In *Thansingh Nathmal v. Superintendent of Taxes* (1964) 6 SCR 654, the Constitution Bench considered the question whether the High Court of Assam should have entertained the writ petition filed by the appellant under Article 226 of the Constitution questioning the order passed by the Commissioner of Taxes under the Assam Sales Tax Act, 1947. While dismissing the appeal, the Court observed as under:

"The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions

except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain selfimposed limitations. Resort that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

20. In *Titaghur Paper Mills Co. Ltd. v. State of Orissa* (1983) 2 SCC 433, a three Judge Bench considered the question whether a petition under Article 226 of the Constitution should be entertained in a matter involving challenge to the order of the assessment passed by the competent authority under the Central Sales Tax Act, 1956 and corresponding law enacted by the State legislature and answered the same in negative by making the following observations:

"Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the Prescribed Authority under subsection (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under subsection (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Waterworks Co. v. Hawkesford* (1859) 6 CBNS 336 in the following passage:

"There are three classes of cases in which a liability may be established founded upon statute. . . . But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and

particular remedy for enforcing it. . .the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspapers Ltd.* (1919 AC 368) and has been 23 reaffirmed by the Privy Council in *Attorney General of Trinidad and Tobago v. Gordon Grant & Co. Ltd.* (1935 AC 532) and *Secretary of State v. Mask & Co.*(AIR 1940 PC 105). It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

21. The views expressed in *Titaghur Paper Mills Co. Ltd. v. State of Orissa* (supra) were echoed in *Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. and others* (1985) 1 SCC 260 in the following words:

"Article 226 is not meant to short circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practise certainly needs to be strongly discouraged.

27. 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 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."

13. Coming to the merits of the case, it is necessary to go through the relevant provision namely Section 13(3A) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, which reads as under:

"13. Enforcement of security interest -

(1) to (3)... ..

(3A) If, on receipt of the notice under subsection (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within fifteen days of receipt of such representation or objection the reasons for nonacceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A."

14. After notice is issued under Subsection (2), the borrower can make a representation or raise any objection and the bank/secured creditor has to inform within 15 days the reasons for nonacceptance of the representation or objection to the borrower. In the present case, the petitioners had written two letters in two petitions dated 3.10.2016 raising their objections to the Section 13(2) notice. We have already reproduced the contents of this notice in aforesaid paragraphs. The bank has given a detailed reply and reasons for not accepting the said objections by its letter dated 10.10.2016. It was submitted by the learned counsel appearing on behalf of the petitioners during the course of arguments that the only reason given by the bank was that the account of the petitioners had become nonperforming asset. Perusal of the said letter given by the bank discloses that this is not correct. The bank has stated that the party had not paid interest within 90 days and as per the Reserve Bank of India guidelines, the bank had to treat the account as nonperforming asset. It has also given other reasons why the objection of the petitioners was not acceptable. In our view, therefore, there is a strict compliance of the mandate imposed u/s 13(3A) of the Act by the bank and these petitions are obviously without any substance.

15. Taking into consideration all these facts, we are of the view, firstly a writ petition is not maintainable under Article 226 of the Constitution of India and secondly even the contention of the petitioners is considered on merits, it is without any substance. Hence, both the petitions are dismissed. There shall be no order as to costs.