

HIGH COURT OF MADHYA PRADESHBENCH AT INDOREJUSTICE SUJOY PAUL.**Writ Petition No. 8229/2015**

M/s Sri Ambika Solvex Ltd.

Vs.

State Bank of India
and others

Shri Arpit Oswal, Advocate for the petitioner.
Shri R.C.Sinhal, Advocate for the respondent No.1.
Shri S.K.Sharma, Advocate for the respondent No.2.

ORDER
(16/ 12 /2015)

This petition is filed under Article 226/227 of the Constitution, in which it is prayed that the proceedings before the District Magistrate and orders passed in said proceedings under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, the "SARFAESI Act") be set aside. It is further prayed that auction notice dated 7.11.2015 and 16.11.2015 (Annexure P/8) be also set aside. A writ of mandamus is prayed for to set aside the entire action initiated by the Bank with further prayer for a direction to the Bank for not proceeding without adjudicating objection/representation of the petitioner filed under Section 13(3)(A) of the SARFAESI Act. Lastly, it is prayed that the respondents be directed to decide the objection of the petitioner dated 19.1.2015 (Annexure P/22).

2. Shri Oswal, learned counsel for the petitioner advanced two fold submissions. He submits that as mandated in Section 13(3)(A) of the SARFAESI Act, the petitioner has preferred a representation/objection and secured creditor is obliged to consider and decide that objection by reasoned order. The outcome of such objection needs to be communicated to the petitioner within a stipulated time. In

the present case, the respondents have not decided the said objection and, hence, the entire proceedings including notice under section 13(2) and further action taken under section 13(4) is vitiated.

3. The second submission of Shri Oswal is that a proviso is inserted in Section 14(1) of the SARFAESI Act w.e.f. 15th January, 2013. As per this proviso, the application of secured creditor must be accompanied by an affidavit duly affirmed by authorised officer. The said affidavit should contain certain specific declaration. In the present case, the affidavits are not in conformity with the requirement of said proviso. To elaborate, it is urged that the application filed by the Bank under section 14 must be pregnant with an affidavit and such affidavit must contain specific information as per proviso to section 14(1). The District Magistrate is required to be satisfied on the contents of affidavit and pass suitable order. It is urged that in the present case this requirement is not fulfilled.

4. *Per Contra*, Shri Sinhal, learned counsel for the respondents contended that the petitioner has already filed Second Appeal No. 182/2013 before the Debt Recovery Tribunal. In the said second appeal, the petitioner has assailed notice under section 13(2) and the action taken under section 13(4) of the Act. The petitioner has also taken grounds relating to violation of section 13(3) (A) of the Act, which is also taken in the present case. It is urged that the interim application of the petitioner is rejected by the Tribunal on 25.3.2015 (Annexure R/1/7). Shri Sinhal submits that the petitioner has not challenged the order dated 25.3.2015 before appropriate forum. He has deliberately done it in order to save the money which is required to be deposited in preferring appeal against the rejection order dated 25.3.2015. Since the petitioner did not challenge this order in any proceeding, hence, it has attained finality. For the same set of grievance, this parallel petition under Article

226 is not maintainable. Shri Sinhal submits that the order passed under section 14 of the SARFAESI Act is also appealable under section 17 of the SARFAESI Act. He placed reliance on the judgment of Supreme Court in *Kanhaiyalal Lalchand Sachdev vs. State of Maharashtra*, (2011) 2 SCC 782, and recent judgment of Supreme Court in 2014 (1) MPLJ 306 (*Standard Chartered Bank vs. V. Noble Kumar*). He also relied on a Single Bench judgment of this Court passed in Writ Petition No. 3732/2014 dated 1.9.2014. To elaborate, it is urged that the action under section 14 constitutes an action taken after the stage of Section 13(4). Thus, it would fall within the ambit of section 17(1) of the SARFAESI Act. He also relied on the judgment of Supreme Court in (2010) 8 SCC 110 (*United Bank of India vs. Satyawati Tondon and others*). By placing reliance on a Division Bench judgment in *M/s VolocityLtd. vs. State Bank of India* (Writ Appeal No. 296/2010) (Annexure R/1/4), it is urged that non-compliance of Section 13(3)(A) of the SARFAESI Act will not give any cause of action to file a writ petition. Lastly, he relied on the judgment of Delhi High Court in *Onil Sadh vs. Federal Bank Ltd. and others* (WP (C) 7344/2015, decided on 6.11.2015). On the strength of this judgment, it is urged that the petitioner has a statutory efficacious remedy to prefer appeal against the orders passed by District Magistrates Damoh and Shajapur under Section 14 of the SARFAESI Act.

5. Shri S.K.Sharma, learned counsel for the respondent No.2 has borrowed the arguments of Shri Sinhal, learned counsel for the respondent No.1.

5. Shri Arpit Oswal, learned counsel for the petitioner relied on (2014) 6 SCC 1 (*Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Ltd.*). It is urged that in view of this judgment, the petitioner does not have any remedy against the order passed under section 14 of the SARFAESI Act by the District Magistrate. He placed reliance on sub-section (3) of section 14 of the SARFAESI Act.

6. Shri Oswal also relied on the judgments of Gujrat and

Madras High Court in *Special Civil Application No. 10556/2012 (Manjudevi R. Somani vs. Union of India)* and *W.P.No. 13091/2012 (Hemalatha Ranganathan vs. The Authorised Officer, Indian Bank)*, respectively, in support of his contention that if section 13(3) (A) of the SARFAESI Act is violated, a writ petition at this stage would lie. Shri Oswal urged that even if a part of relief claimed in this petition is subject matter of challenge in Second Appeal No.182/2013 before Debt Recovery Tribunal, this petition cannot be said to be not maintainable. When statutory provisions are violated, fundamental rights flowing from Article 300-A of the Constitution are infringed and orders are without jurisdiction, writ petition is very much maintainable. He submits that constitutional remedy is not bar and such public law remedy is available to the petitioner even if his second appeal is pending before the Tribunal. He placed reliance on the judgment of Delhi High Court passed in *Jindal Steel Ltd. vs. Union of India (WP (C) 8531/2008, decided on 19.12.2011)*. Learned counsel for the petitioner also relied on the judgment of Supreme Court in *AIR 2004 SC 2371 (Mardia Chemicals Ltd. etc.etc. vs. Union of India and others)* and the judgment of Supreme Court reported in *AIR 2007 SC 712 (M/s Transcore vs. Union of India)*. In support of his submission that parallel proceedings are maintainable, he relied on *(2014) 5 SCC 660 (Vasu P. Shetty vs. Hotel Vandana Palace and others)*,

7. No other point is pressed by learned counsel for the parties.

8. I have heard learned counsel for the parties and perused the record.

9. On the strength of language of Section 13(3) (A) and judgments of Gujrat and Madras High Courts in *Manjudevi R. Somani* and *Hemalatha Ranganathan (supra)*, Shri Oswal contended that the cause of action has arisen and entire action of respondents therefrom has rendered illegal. The core issue is whether any violation of section 13 (3)(A) will give any right to the petitioner to file this petition. Although

during the course of argument there was a dispute between the parties as to whether petitioner has actually preferred any representation/objection as mandated in section 13(3) (A), I am not inclined to deal with that disputed fact in the present petition. I do not find any reason to interfere on this aspect because of the direct Division Bench judgment of this Court in *M/s. Velocity Ltd. (supra)*. The Division Bench after considering relevant Supreme Court judgments has opined as under in para 14 :-

“14. On a close scrutiny of the provisions of the Act of 2002 and the law laid down by the Supreme Court in the case of Mardia Chemicals, in the case of Punjab National Bank and in the case of United Bank of India vs. Satyawati Tondon and others, we find that it is not justifiable to entertain a writ petition against the notice under Section 13(2) of the Act of 2002 and also against the communication of reason by the secured creditor to the borrower about non-acceptability or untenability of the representation or objection. Such communication is not an order/action causing harm to the borrower but is a step before taking recourse to one or more of the measures provided under Section 13(4). It is only when such measure under Section 13(4) is taken it can be said that the borrower is aggrieved and only on taking of such measure the borrower can take recourse to the provision of appeal provided under Section 17 of the Act of 2002. Keeping in view the scheme of the Act of 2002 the object behind making amendment by way of introducing Section 13 (3A) and the observations made by the Supreme Court in the case of Mardia Chemicals Limited in our considered view the communication of reasons is only for the purpose of information/ knowledge of the borrower, and the same being not an action to cause harm to the borrower, at that stage it cannot be assailed. Having regard to the scope of provisions of Section 17 of the Act of 2002, the reasons so communicated can be well assailed in case measures referred to in sub-Section (4) of Section 13 are taken by the secured creditor. This being the scheme of the Act of 2002, any interference by this Court in a writ petition under Article 226 of the Constitution of India at the stage of notice under Section 13 (2) and at the stage of communication of rejection of representation/ objection under Section 13 (3A) of the Act of 2002 would hamper the process of recovery, defeating the very purpose of enactment of the Act of 2002 and the purpose of introducing Section 13 (3A) in the Act of 2002.”

(Emphasis Supplied)

10. I am bound by the Division Bench judgment of this

Court in *M/s Velocity Ltd. (supra)*. As per the said judgment, violation of section 13(3)(A) will not give any right to the borrower to file a petition. He can take recourse of Section 17 of the SARFAESI Act only when measures under section 13(4) are taken. Admittedly, in the present case, the petitioner has already filed Second Appeal No.182/2013 after such steps were taken by the bank. A plain reading of rejection order by the Debt Recovery Tribunal dated 25.3.2015 shows that the contentions of the petitioner based on Sections 13(3)(A) are not accepted by the Tribunal. In my view, if two remedies are available and petitioner has already chosen one forum, i.e., Debt Recovery Tribunal, the parallel petition under Article 226 of the Constitution for the same cause is not maintainable. Shri Oswal has relied on the judgment of Supreme Court in *Vasu P. Shetty (supra)*. However, the opening para of said judgment shows that the borrower earlier approached the Debt Recovery Tribunal. His application was dismissed. The borrower filed a writ petition before the High Court against the order of the Tribunal. Thus, the said judgment does not help the petitioner in any manner. In the present case, the petitioner's second appeal is already pending. He did not challenge the rejection order dated 25.3.2015 any further. The Apex Court in *(2000) 3 SCC 640 (Bank of India vs. Lekhimoni Das and others)* opined that "as a general principle where two remedies are available under law, one of them should not be taken as operating in derogation of the other. It is further held that if a party has elected to pursue one remedy, he is bound by it and cannot on his failing therein proceed under another provision. In *(2005) 8 SCC 242 (Sanjana M. Wig (Ms.) vs. Hindustan Petroleum Corpn. Ltd.)*, it was held that "however, access to justice by way of public law remedy would not be denied when a lis involves public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief." The judgment of Delhi High Court in *Jindal Steel (supra)*

is based on a different factual scenario. I am unable to hold that the petitioner can parallelly pursue two legal remedies, one before the Debt Recovery Tribunal and another before this Court under Article 226 of the Constitution. If this argument is accepted, this will lead to uncertainty and possibility of issuance of conflicting/contradictory orders. Since the petitioner has already chosen to assail the action of the Bank for alleged violation of section 13(2) and 13(3)(A) of the SARFAESI Act and his second appeal is pending before the Tribunal, I am not inclined to entertain this petition so far allegations relating to violation of section 13(3)(A) are concerned.

11. Thus, first contention of the petitioner is rejected.

12. Before dealing with the second contention raised by the parties, I deem it apposite to quote Section 14(3) of the SARFAESI Act, which reads as under:-

“(3) No act of the Chief Metropolitan Magistrate or the District Magistrate (any officer authorised by the Chief Metropolitan Magistrate or District Magistrate) done in pursuance of this section shall be called in question in any court or before any authority.”

13. No doubt, in *Kanhaiyalal Lalchand and Standard Chartered Bank (supra)*, the Apex Court opined that in certain cases, the appeal would lie against orders/actions taken under section 13(2), 13(4) and 17 of the SARFAESI Act. However, in aforesaid two judgments, the Apex Court has not specifically dealt with Section 14(3) of the SARFAESI Act. This section is specifically dealt with by Supreme Court in *Harshad Govardhan Sondagar (supra)*. In para 29, the Apex Court opined as under:-

“29. Sub-section (3) of Section 14 of the SARFAESI Act provides that no act of the Chief Metropolitan Magistrate or the District Magistrate or any officer authorised by the Chief Metropolitan Magistrate or District Magistrate done in pursuance of Section 14 shall be called in question in any court or before any authority. The SARFAESI Act, therefore, attaches finality to the decision of the Chief Metropolitan Magistrate or the District Magistrate and this decision cannot be challenged before any court or any authority. But this Court has repeatedly held that statutory provisions attaching finality to the decision of an

authority excluding the power of any other authority or Court to examine such a decision will not be a bar for the High Court or this Court to exercise jurisdiction vested by the Constitution because a statutory provision cannot take away a power vested by the Constitution. To quote, the observations of this Court in Columbia Sportswear Company v. Director of Income Tax, Bangalore [(2012) 11 SCC 224]:

“17. Considering the settled position of law that the powers of this Court under Article 136 of the Constitution and the powers of the High Court under Articles 226 and 227 of the Constitution could not be affected by the provisions made in a statute by the Legislature making the decision of the tribunal final or conclusive, we hold that sub-section (1) of Section 245S of the Act, insofar as, it makes the advance ruling of the Authority binding on the applicant, in respect of the transaction and on the Commissioner and income-tax authorities subordinate to him, does not bar the jurisdiction of this Court under Article 136 of the Constitution or the jurisdiction of the High Court under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling of the Authority.”

In our view, therefore, the decision of the Chief Metropolitan Magistrate or the District Magistrate can be challenged before the High Court under Articles 226 and 227 of the Constitution by any aggrieved party and if such a challenge is made, the High Court can examine the decision of the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, in accordance with the settled principles of law.”

14. A plain reading of this para makes it clear that the Apex Court opined that statutory finality attached to a decision of an authority does not exclude the power of this Court under Article 226 of the Constitution. In *M/s Transcore (supra)*, the Apex Court in para 12 opined that when the word “court” is referred, it includes Debt Recovery Tribunal. Thus, as per sub-section (3) of section 14 read with the judgment of *Harshad Govardhan Sondagar (supra)*, in my view, the order of District Magistrate passed under section 14 of the SARFAESI Act cannot be challenged by the petitioner before the Tribunal.

15. In view of the aforesaid analysis, in my view, this petition is entertainable against the order passed under

Section 14 of the SARFAESI Act by the District Magistrate.

16. Now the pivotal question is whether the orders passed by the District Magistrate are liable to be interfered with by this Court ?

17. As noticed, these orders are called in question on the singular ground that the Bank has not followed the proviso to Section 14(1) of the SARFAESI Act.

18. I have perused the record. It is seen that the Bank before both the District Magistrates (Damoh and Shajapur) have filed the affidavits in which they have furnished necessary information as per said proviso. The said affidavits are already placed on record. The petitioner has nowhere pleaded in his petition as to what is the infirmity in the application/affidavit filed by the Bank under section 14 of the SARFAESI Act. A bald statement is made that the necessary informations as required in the proviso have not been furnished. The petitioner is unable to establish that said proviso is violated. If there was any such violation, it should have been pleaded with accuracy and precision. The petitioner has also not shown as to what prejudice is caused to him if any such violation has taken place. Thus, I am unable to hold that the Bank have failed to file proper affidavit in consonance with the provisions of Section 14(1) of the SARFAESI Act. The orders of District Magistrates further show that despite giving ample opportunity to the petitioner, he did not cooperate and participate in the proceedings. Only when adverse orders are passed, he filed this petition after a considerable long time. Thus, no fault can be found in the impugned orders of District Magistrate passed under Section 14 of the SARFAESI Act.

19. On the basis of foregoing analysis, I find no reason to interfere in this petition. Petition sans substance and is hereby dismissed. No cost.

(yog)

(Sujoy Paul)
Judge