

IN THE HIGH COURT OF MADHYA PRADESH**AT INDORE****BEFORE****HON'BLE SHRI JUSTICE SUSHRUT ARVIND
DHARMADHIKARI****&****HON'BLE SHRI JUSTICE GAJENDRA SINGH
ON THE 31st JULY, 2024****WRIT PETITION No. 14010 of 2024*****SMT KUSUM JAGDISHCHANDRA SINGH******Versus******LIC HOUSING FINANCE LIMITED AND OTHERS*****Appearance:*****Shri Satish Agrawal, learned counsel for the petitioner******Shri Kapil Duggal, learned counsel for the respondent (Caveat)
through V.C.******Ms Laksmi Godhariya, learned counsel for the respondent(Caveat)*****Reserved on : 22.05.2024****Pronounced on : 31.07.2024****ORDER*****Per: Justice Sushrut Arvind Dharmadhikari*****Heard finally with the consent of parties.****The present petition under Article 226/227 of the Constitution of India has been filed assailing the order dated 16.05.2023 passed by learned**

Presiding Officer, Debt Recovery Tribunal, Jabalpur in S.A. No. 36/2024 (I.A. No. 196/2024) by which application for condonation of delay and consequently the securitization application itself has been dismissed on the ground of limitation.

2. The petitioner has prayed for the following reliefs:-

“(i) *Call for the records of SA No. 36/2024 and set aside the order dated 16/05/2024 passed in I A No. 196/2024 and further allow IA 1345/2024 for application for stay,*

(ii) *Pass an order to allow the application for condonation of delay in filing the S A No. 36/2024 under section 17 of SARFAESI Act, 2002,*

(iii) *Direct the DRT, Jabalpur to treat the S A No. 36/2024 having been filed within limitation and further direct to decide the SA No. 36/2024 on merits in accordance with law,*

(iv) *To allow the cost of this petition with any other appropriate relief(s) may kindly be granted to the petitioner and,*

(v) *To pass any other or further order(s) deemed fit and necessary in the facts and circumstances of the matter.”*

2. Shorn of unnecessary details, in 2017 M/s Greater Kailash Hospital Pvt. Ltd. had applied for financial assistance from the Respondent No. 1. The petitioner's husband namely Late Shri Jagdishchandra Singh had established the hospital and was managed by a partnership firm to begin with and thereafter by a Private Limited company later on. The financial assistance of Rs. 40,00,00,000/- was sanctioned by the Respondent No.1 to M/s Greater Kailash Hospital Pvt. Ltd. The Respondent No.3 Smt. Radhika Bandi had delivered the title papers of Plots 1, 2 PWD Road and 11-A Old Palasia, Indore to the Respondent No. 1. On 14.03.2017 “*Declaration of Equitable Mortgage*” was recorded/ registered on going through the mortgage deed the following important points are revealed.

(1) Mortgage was created by M/s Greater Kailash Hospital Pvt. Ltd.

(2) Mortgage was created by the director of M/s Greater Kailash

Hospital Pvt. Ltd.

- (3) The present petitioner claimed to be a director acting through her Power of Attorney Respondent No. 3 Smt. Radhika Bandi.
- (4) It is clear from the mortgage deed that the petitioner never created mortgage of the aforesaid properties in her personal capacity or personally.
- (5) The petitioner never created/ executed any document to change the ownership of the aforesaid properties.
- (6) The petitioner had never signed personal guarantee in favor of the Respondent No. 1 for the loan allegedly availed by the Respondent No.1 company, therefore, the petitioner is not liable personally for the alleged liability of the Respondent No.2 company.

3. Since the loan account became NPA, the secured creditor initiated action on 29.12.2023 by issuing auction notice in the newspaper which was brought to the notice of the petitioner on 30.12.2023. Upon having knowledge regarding auction of the properties owned by the petitioner, she enquired and it came to surface that the Respondent No. 1 has initiated action under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act, 2002"). Earlier, a recall notice dated 26.05.2018 as well as demand notice dated 19.12.2020 issued by the Respondent No. 1 under Section 13(2) of SARFAESI Act, 2002 was never received by the petitioner as the notices were not sent on her residential address even the demand notice dated 17.07.2021 was not received, thereafter, an application under Section 14 of SARFAESI Act was issued on 08.03.2022 for taking physical possession of the alleged mortgaged property. On receipt of the statement of account, it revealed that penal

interest has been levied and capitalized in the loan account.

4. On 29.12.2023, the Respondent No. 2 again issued an advertisement for public auction of the alleged mortgaged property scheduling the date on 02.02.2024. Being aggrieved, the petitioner challenged the action of the respondents by filing application under Section 17 of the SARFAESI Act, 2002 alongwith application for condonation of delay on 09.01.2024. The reply to the application for condonation of delay was filed by the respondent bank on 16.03.2024. No bid was reported by respondent No.1 in the auction advertised on 29.12.2023. The respondent bank even filed a reply to the securitization application on 02.04.2024. The respondent No.1 again advertised the auction notice dated 18.02.2024 and scheduled the properties for auction sale on 22.03.2024. Again being aggrieved by the subsequent action of the respondent No.1, the petitioner filed application for amendment and stay on 26.02.2024, however, no reply was filed by the Bank to the stay application. The application for stay came up for hearing before the learned DRT on 19.03.2024 and the learned DRT was pleased to grant stay in favor of the petitioner. On 16.04.2024, the matter was heard finally on application for condonation of delay and reserved for orders till then interim relief was granted in favor of the petitioner. Vide the final order passed on 16.04.2024 in S.A. No. 36/2024, the securitization application was dismissed on the ground as the same is barred by limitation. By invoking the liberty the M/s Greater Kailash Hospital Pvt. Ltd. filed another S.A bearing No. 397/2024 wherein the present petitioner is Respondent No.2 while giving an undertaking that “no proceedings on the same subject matter has been previously instituted in any Court, authority or tribunal by the present petitioner personally by the present petitioner”.

5. At this stage, learned counsel for Respondent No.1 has filed I.A. No. 4298/2024 an application for dismissal of the writ petition under Order 7 Rule 11 of CPC on the ground of alternative remedy as available under Section 18 before the DRAT, Allahabad.

6. Learned counsel for the petitioner contended that since pure question of law is involved, there is no need to file an appeal under Section 18 of the SARFAESI Act, 2002. In fact, the learned DRT acted completely in disobedience of the law laid down by the Apex Court which falls within the exceptional category wherein it is not necessary to avail the alternative remedy of appeal since the same is very cumbersome and not even efficacious. This has triggered the filing of the present writ petition.

7. Issue for resolution at the heart of this matter is whether the learned DRT vide order dated 16.05.2024 on I.A. No. 196/2024 in S.A. No. 36/2024 was right in dismissing the securitization application considering the same to have rendered infructuous in view of auction proceedings dated 02.02.2024 being unsuccessful in the absence of bids. Although securitization application has been filed within time from the date of last action under Section 13(4) of the SARFAESI Act, 2002, but the same is barred by limitation to challenge the continuous cause of action which arose subsequently under Section 13(4) of the SARFAESI Act, 2002.

8. Before, moving ahead, it would be apt to refer to Sub-section (1) of Section 13 and Section 17 of the SARFAESI Act, 2002 to resolve the issue at hand:

17. *[Application against measures to recover secured debts.] [Substituted 'Right to appeal' by Act No. 44 of 2016.]*

(1) Any person (including borrower), aggrieved by any

of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter; [may make an application alongwith such fee, as may be prescribed,] [Substituted by the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 ([30 of 2004](#)), Section 10, for "may prefer an appeal" (w.r.e.f. 21.6.2002).] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

Section 13(4)

In Sub-section (4) of Section 13, four measures which may be taken by a secured creditor, if the borrower fails to discharge his liability in full within the period specified in sub-section (2) of Section 13 are mentioned which are as follows:

- (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;*
- (b) Take over the management of the business of the borrower;*
- (c) Appoint any person to manage the secured assets, the possession of which has been taken by the secured creditor; and*
- (d) Require at any time by notice in writing, any person who has acquired any of the secured assets from the*

borrower and from whom any money is due or may become due to the borrower; to pay the secured creditor; so much of money as is sufficient to pay the secured debt.

9. In the present case, public auction was advertised on 29.12.2023 and auction was scheduled for 02.02.2024, however, it was unsuccessful due to non availability of bidders. Again an auction notice was published and auction was scheduled for 22.03.2024. Challenging the said auction petitioner filed application for amendment and stay. The learned Tribunal on 19.03.2024 has granted stay. On 03.04.2024, respondent/Bank informed the DRT that bid has been received in the auction and highest bidder wants to deposit the entire money for grant of sale confirmation letter in his favour. The DRT granted liberty to the respondent/bank to receive earnest money but interim protection granted to the petitioner has not been vacated. On 16.05.2024, the DRT has dismissed the securitization application having rendered infructuous by holding that the cause raised therein i.e. the auction proceeding dated 02.02.2024 has become unsuccessful thereby rendering the securitization application as infructuous and the same cannot be adjudicated furthermore to seek any other relief and deserves to be dismissed at that stage only. The DRT further held that the subsequent auction proceeding dated 22.03.2024 was challenged by the petitioner by way of amendment in the securitization application, but the same cannot be adjudicated in view of the securitization application having rendered infructuous and granted ten days time to the petitioner to challenge the subsequent auction proceedings, which is completely contrary to the provisions of Section 13 of the SARFASI Act, 2002 as it is considered to subsequent cause of

action for the petitioner which was duly incorporated in the petition by way of amendment application and, therefore, the same can be adjudicated by the learned DRT as the amendment application was filed by the petitioner well in time and this fact that been mentioned in the order itself by the DRT.

10. It is an admitted position that the series of steps that could be taken by an authorized officer under Section 13(4) of the Act are generally termed as 'measures'. It is the right of a person against whom one or more of the measures are taken under Section 13(4) of the Act to challenge those measures under Section 17 of the Act; and when an auction notice is challenged, it is even open to the borrower to challenge the series of steps from the date of issueance of Notice u/S Section 13(2) of the SARFAESI Act, upto the auction notice which has been done by the petitioner. However, learned DRT has dismissed the securitization application itself instead of adjudicating the challenge made to second auction notice.

11. Cause of action is nothing but a bundle of facts; Court fee does not become payable on every single cause of action and Court fee before the DRAT is not paid on the basis of valuation of everyone of the prayers made before the Tribunal; and the Tribunal cannot ask the parties to pay Court fee afresh on prayers added by way of amendment and such power is not traceable to the statute or the rules.

12. In this regard, the judgment rendered in the case of Indian **Overseas Bank Vs. G.S. Rajshekaran** reported in **2008 SCC Online Mad 1995** is worthy of reference wherein it has been held that action of taking possession of the secured assets, though started on 13.11.2007, the cause of action continued till the notice dated 26.12.2007 was issued for auction sale of the secured asset under Section 13(4) of the Act, under Section

13(4) , the cause of action takes place as and when one or the other such measure mentioned in the Clauses (a) to (d) of Section 13(4) to recover the secured debt is taken by the secured creditor; the first cause of action started when the possession was taken, followed by the subsequent cause of action which took place when notice of auction was published by the secured creditor and there being a continuous cause of action having lastly been taken on 26.12.2007.

13. So far as the availability of alternative remedy of an appeal before the Appellate Tribunal is concerned, in the case of **M/s Godrej Sara Lee Ltd. Vs. The Excise and Taxation Officer-cum-Assessing Authority & Ors.** reported in **2023 LiveLaw (SC) 70**, the Apex Court has held that dismissal of a writ petition by a high Court on the ground that the petitioner has not availed the alternative remedy without examining whether an exceptional case has been made out for such entertainment would not be proper. Mere availability of an alternative remedy of appeal or revision which the party invoking the jurisdiction of the High Court under Article 226 has not pursued would not oust the jurisdiction of the high Court and render a writ petition not maintainable. Hence, this Court is in consonance with the counsel for petitioner has made out an exceptional case and pure question of law is involved which has to be rejudicated by the DRT.

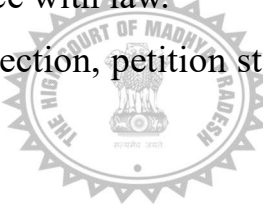
14. In the present case, petitioner has carved out an exceptional case in as much as the learned DRT has not properly followed the provision of SARFAESI Act and relegated the petitioner to file another securitization application despite the securitization application as well as the amendment application being within limitation was pending. Further auction scheduled on 22.03.2024 gives a continuous cause of action. However,

since the DRT itself has given liberty to file another securitization application for deciding the issue of second auction notice which in itself is unwarranted giving rise to another round of litigation reiterating the same issues, though it being a continuous cause of action.

15. Since the DRT has failed to deal with the question regarding cause of action , we deem it appropriate to remand the matter back to DRT to decide the S.A. No 36/2024 afresh in terms of provisions of Section 13 of the SARFAESI Act as well as taking into consideration the judgment passed by the Apex Court in the case of Indian Overseas Bank (supra).

16. Accordingly, the order dated 16.05.2024 passed in S.A. No. 36/2024 is hereby set aside and the matter is remanded back to the DRT to decide the same afresh in accordance with law.

17. With the aforesaid direction, petition stands disposed off finally. No order as to cost.



(S.A. Dharmadhikari)
Judge

(Gajendra Singh)
Judge