

HIGH COURT OF MADHYA PRADESH : JABALPUR**M.P.No. 821/2019***M/s Sujit Tractors and Motors and others**-Versus-**Bank of Baroda and another*

CORAM :**Hon'ble Shri Justice S.K.Seth, Chief Justice.****Hon'ble Shri Justice Vijay Kumar Shukla, Judge.**

Shri Umesh Shrivastava, Advocate for the petitioners.

O R D E R**(Jabalpur dt.: 20.02.2019)****Per : V.K. Shukla, J.-**

The petitioners have challenged the notice issued by the respondent/Bank on 11-01-2019 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the Act, 2002) for recovery of loan (credit facility worth Rs.16.00 lakhs) with interest. It is not in dispute that the respondent no.1, Proprietor Firm has taken cash credit limit facility from the respondent/Bank worth Rs.16.00 lakhs. Petitioner no.2 was a guarantor and the guarantor has mortgaged his land. As per the impugned notice, the borrower has committed default in payment of his liabilities and consequently his account was classified as non-performing asset(NPA). Since the borrower has committed default, therefore, a notice under Section 13(2) of the Act, 2002 was issued to the borrower and also to the guarantor. By the said notice, they were

asked to pay the outstanding amount of loan aggregating Rs.7,12,858.25/- + interest within 60 days from the date of notice.

2. The argument of the learned counsel for the petitioners is that the respondent/Bank had filed an application under Section 14 of the Act, 2002 before the Collector for possession of the mortgaged property . The said application was dismissed by order dated 10-09-2018, therefore, the respondents are estopped from initiating proceedings under Section 13 of the Act,2002. It is also argued that the Bank had already accepted his proposal for settlement and therefore, the impugned notice dated 11-01-2019 under Section 13(2) of the Act, 2002 is illegal and arbitrary.

3. To appreciate the aforesaid submissions of the counsel for the petitioners, it is apposite to refer the relevant provisions of Sections 13 .

The relevant provisions of the Act are reproduced hereunder:

“ 13.Enforcement of security interest.--

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and -his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to

discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under subsection (4).

[Provided that --

- (i) The requirement of classification of secured debt as non-performing asset under this subsection shall not apply to a borrower who has raised funds through issue of debt securities; and
 - (ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee;]
- (3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

[(3A) If, on receipt of the notice under sub-section (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 non-acceptance 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.".]

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(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 the money as is sufficient to pay the secured debt.

4. Upon perusal of the record, we do not find any merit in the contention of the learned counsel for the petitioners. The petitioners could not produce any order passed by the Bank accepting the proposal of the petitioner. Further the Collector had dismissed the application

under Section 14 of the Act, 2002, as the Bank had not filed any document relating to service of notice under Section 13(2) of the Act, 2002. The impugned notice is under Section 13(2) of the Act, 2002. As per provisions of Sub-section 3 of Section 13 of the Act, 2002, the petitioners can submit representation to the impugned notice which is required to be considered by the Bank under Sub-section (3-A) of Section 13 before resorting to the provisions of Sub-section-4 of Section 13 of the Act, 2002.

5. Against the action under Sub Section 4 of Section 13, Section 17 of the Act, 2002 provides an appeal to the Debts Recovery Tribunal. Thus, an alternative and efficacious remedy is available to the petitioners. In the case of **Mardia Chemicals Ltd. and others Vs. Union of India and others (2004)4 SCC 311**, the Apex Court held that against an action under Sub Section 4 of Section 13 of the Act,2002, there is alternative and efficacious remedy available to the borrower and guarantor under Section 17 of the Act, 2002. In the case of **Union Bank of India and another Vs. Panchanan Subudhi (2010)15 SCC 552**, the Apex Court held that the High Court ought not to have interfered against a notice under Section 13(2) and against under Section 13(4) of the Act, 2002 when the statutory remedy was available under Section 17 of the Act, 2002. In the case of **Kanaiyalal Lalchand Sachdev and others Vs. State of Maharashtra and others (2011)2 SCC 782**, the Apex Court held that the High Court rightly dismissed the petition on

the ground that efficacious and alternative remedy was available to the borrower/ guarantor under Section 17 of the Act, 2002. It is well settled that ordinarily, relief under Article 226/227 of the Constitution of India is not available, if efficacious and alternative remedy is available to an aggrieved person.

6. The Division Bench of this court in the case of **Sunil Garg Vs. Bank of Baroda & others, W.P.No.19028/2017, decided on 16-04-2018** examined the validity of the order passed by the Debt Recovery Tribunal in the proceedings under Section 17 of the SARFAESI Act, whereby the application was dismissed on the ground that the same is not maintainable till the actual possession is taken. The Division Bench referring the various judgments of the Apex Court held that the appeal under section 17 of the SARFAESI Act would be maintainable against the order passed under Section 14 of the of the SARFAESI Act and declined to entertain writ petition when statutory remedy of appeal is available.

7. In a recent judgment passed by the Supreme Court in the case of **Authorized Officer, State Bank of Travancore and another Vs. Mathew K.C. (2018)3 SCC 85**, considering a case under SARFAESI Act, held that discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in given facts of a case and in accordance with law. Normally a writ petition under Article 226 ought not to be entertained if alternative statutory remedies are available,

except in cases falling within the well-defined exceptions. Relevant para-16 is reproduced below:

“16. The writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum. The opinion of the Division Bench that the counter-affidavit having subsequently been filed, stay/modification could be sought of the interim order cannot be considered sufficient jurisdiction to have declined interference.”

8. In view of the aforesaid enunciation of law, the present petition is not maintainable as alternative and efficacious remedy is available.

9. Accordingly, the petition is dismissed.

(S.K.SETH)
CHIEF JUSTICE

(VIJAY KUMAR SHUKLA)
JUDGE

hsp.