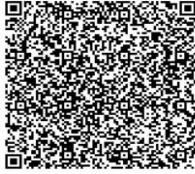




GUARANTOR UNDER SARFAESI ACT

Secured Creditor may initiate Recovery Proceedings against Guarantor. Hon'ble Bombay High Court in the recent judgement held that even if defaulter is placed under Moratorium, Guarantor can be sued by the secured creditor under the SARFAESI Act.

2023:BHC-OS:6939-DB



WPL 9116 of 23.odt

IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) No. 9116 OF 2023
WITH
INTERIM APPLICATION (L) No. 12380 OF 2023
WITH
WRIT PETITION (L) 9116 OF 2023

VAISHALI
ANIL
TIKAM

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by VAISHALI
ANIL TIKAM
Date: 2023.07.20
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Mr. Latif Yusuf Manikkoth)
First Floor, Waghbakriwala Bldg.,)
Pitha Street, Fort, Mumbai – 400 001) ...Petitioner/Applicant

Versus

1. The Board of Directors of the)
Bank of Baroda represented by its)
Chairman and Managing Director,)
(Originally Dena Bank merged with)
Bank of Baroda),)
Kala Ghoda, Fort, Mumbai – 400 001)
2. The Authorized Officer & Chief)
Manager, Bank of Baroda)
(Originally Dena Bank merged with)
Bank of Baroda),)
Vashi Sector 19 Branch, K-34, APMC)
Market, I, Phase -II, Turbhe,)
Navi Mumbai – 400 703)
3. Bank of Baroda (Originally Dena)
Bank)
Merged with Bank of Baroda))
Zonal Stressed Asset Recovery)
Branch,)
Meher Chamber, Ground Floor,)
Dr. Sunderlal Behl Marg, Ballard)
Estate, Mumbai – 400 001)
4. Kiwi International)
99, Behind Mahajan Wadi, Ground)
floor, Office No.6, Next to Prakash)
Enterprises, Chinch Bunder,)
Mumbai – 400 009)



5. Chief Metropolitan Magistrate,)
Chhatrapati Shivaji Terminus Area,)
Nagar Chowk, Fort, Mumbai -400 001)
6. The Asst. Registrar (Cash))
Esplanade Center of Courts)
Esplanade, Fort, Mumbai – 400 001)
7. The Registrar,)
NCLT Mumbai Bench)
4th Floor, MTNL Exchange Bldg.,)
G.D. Somani Marg, Mumbai- 400 005)
8. The Learned Presiding Officer)
Debt Recovery Tribunal -1,)
Telephone Exchange Building,)
Off. Shaheed Bhagat Singh Road,)
Colaba, Mumbai – 400 005)
9. Preeti Vimal Agarwal,)
Interim resolution Professional of,)
Alaska Creations Private Limited,)
Appointed b y NCLT, Mumbai Bench,))
Office No.511, Corporate Ave Bldg,)
Sonawala Road, Goregaon East,)
Mumbai – 400 063)
10. Sr. Police Inspector,)
M.R.A. Road Police Station, Fort,)
Mumbai – 400 001)
11. Union of India)
Represented by the Secretary)
In the Ministry of Micro Small)
& Medium Enterprises,)
Government of India, New Delhi)
110 001)
12. Reserve Bank of India)
New Central Building)
Shahid Bhagat Singh Road, Fort,)
Mumbai – 400 001)
13. State of Maharashtra)
Through Government Pleader)
Bombay High Court, Mumbai-400 001)



14. Export Credit Guarantee)
Corporation Ltd.)
The Metropolitan, 7th Floor,)
Plot No.C-26 / 27, E Block)
Bandra-Kurla Complex,)
Bandra (East), Mumbai – 400 051)

...Respondents

Mr. M.J.Nedumpara a/w. Ms.Hemali Kurne, Ms.Neha Mishra i/b. Nedumpara & Nedumpara for Petitioner

Ms. Akshaya Putharan i/b. Mr.S.K. Singhi & Partners for Respondent Nos. 1 to 3

Mr. Himanshu Takke, AGP a/w. Mr. Sukanta Karmakar, AGP for Respondent Nos. 10 & 13.

**CORAM : G.S. KULKARNI &
RAJESH S. PATIL, JJ.**

**RESERVED ON 12th JUNE, 2023
PRONOUNCED ON 20 JULY, 2023**

Judgment [per Rajesh S. Patil, J.]

1. Heard. Rule. Respondents waive service. Heard finally.
2. This Petition is filed under Article 226 of the Constitution of India, by a Guarantor to loan taken by the Borrower Company. The Petitioner has prayed for the following reliefs:-

(a) declare that the Plaintiff is an MSME within the meaning of the MSMED Act of 2006 and the notification S.O. 1432(E) dated 29.5.2015 issued by the Central Government under Section 9 thereof, as also the circulars and guidelines issued by the Reserve Bank of India under Section 10 thereof, which provides for a mechanism of resolution of stress and that no proceedings for recovery under the SARFAESI Act, RDB Act or the IBC will lie, as much as the MSMED Act being a special law qua the aforesaid Acts, and a later law in relation to the RDB Act and the SARFAESI Act, its provisions will prevail over the aforesaid enactments;

V.A. Tikam

3/18



(b) declare that the respondent Bank is vested of no enforceable cause of action, right or remedies as against the Petitioner/Principal Borrower since the loss and injury caused to the Principal is far in excess of the claim of the Respondent Bank as against the Principal Borrower/ Petitioner Guarantor, in other words, the Petitioner/ Principal Borrower owe no amounts to the respondent Bank, the claim of the Bank being set-off/adjusted against the claim of the petitioner for damages and compensation;

(c) To grant a writ in the nature of mandamus in favour of Applicant restraining and preventing the Respondent Bank their agents, servants, officers, representatives and/or anyone else purportedly acting on their behalf from taking any action whatsoever under the SARFAESI Act or any other law for the recovery of the amounts which the Respondent Nos. 1 to 2 falsely claim to be due;

(d) To declare that the declaration of a Borrower as willful defaulter results in his civil death and that the Respondent NBFC is vested with no jurisdiction to declare the Applicant as a willful defaulter in as much as there is no law empowering the Reserve Bank or the Respondent Bank/NBFCs and financial institutions to declare a Borrower as a wilful defaulter and the guidelines of the Reserve NBFC of India empowering NBFCs and financial institutions to do so is without the authority of law, utterly illegal, ultra-vires the constitution of laws of the land, illegal and void and quash and set aside all such notifications and guidelines;

(e) To issue a Writ in the nature of Certiorari calling for the entire records, minutes and proceedings leading to the classification of the Applicant's account as NPA, so too under Section 13(2), 13(3A), 13(4) & 14 of the SARFAESI Act and the Security Interest (Enforcement) Rules, and to quash and set is aside;

(f) Without prejudice to above prayers to direct the Respondent No.1 to 4 Bank to take steps to recover the bad debts suffered by the Principal Borrower from the Respondent No.14 ECGC under the Whole Turn Over Packing Credit Guarantee and other incentives extended by the ECCG to the Respondent No.1 Bank.

(g) To declare that Section 14 of the SARFAESI Act, 2002 is unconstitutional and void in as much as it does not expressly mandate that the powers under the said section ought to be exercised in compliance with the principles of natural justice namely by affording a due opportunity to the borrower/tenant/any other person who has a legal or an equitable right in respect of the property of which the possession is sought to be taken is heard.



(A) Factual Matrix

3. It is the Petitioner's case that the Petitioner who is a Guarantor is the owner of the building known as "Waghbakriwala Building", situated at Pitha Street, Fort, Mumbai – 400 001 (for short "the Secured Asset").

3.1. One Alaska Creations Pvt. Ltd. being the borrower was a Company engaged in the business of export of readymade garments and footwear (for short "the said Company"). The Respondent No.4 (Kiwi International) was a supplier of footwear to the said Borrower Company. As per Respondent No. 4, inspite of reminders, payments were not made, therefore on 25 September, 2018 they invoked proceedings under the Insolvency and Bankruptcy Code against the said Borrower Company, claiming an amount of Rs.97,10,749/- along with interest @ 18% p.a. as dues, claiming to be an Operational Creditor under Section 9 of the Code for initiation of Corporate Insolvency Resolution Process (CIRP).

3.2 The National Company Law Tribunal (NCLT) by its order dated 11 September, 2019 admitted petition filed under section 9 by Respondent No.4 and declared a moratorium in terms of Section 14 of the Code. The NCLT also appointed Respondent No.9 as Interim Resolution Professional (IRP).

3.3. In the meanwhile, as the account of Borrower Company was declared as N.P.A., Respondent No.3/ Bank filed a Securitisation Application No.117/SA/2020 before the Chief Metropolitan Magistrate. The Respondent No.5/Chief Metropolitan Magistrate passed an order on 19 April, 2022, in Securitisation Application No.117/SA/2020, appointing Respondent No.6, the Assistant Registrar, Chief Metropolitan Magistrate as Court Commissioner to take possession of the Secured Asset.



3.4. Petitioner and Borrower filed a Civil Suit being S.C. Suit No. 338 of 2021 before the Bombay City Civil Court, impugning the action of the Respondent No.4/Operational Creditor (for sake of convenience referred as “*the First Proceedings*”). So also the Petitioner and the Borrower Company filed Writ Petition (L) No. 2001/2021 impugning notices issued under section 13(2) and 13(4) of SARFAESI Act (for sake of convenience referred as “*the Second Proceedings*”).

3.5. The Assistant Registrar, Esplanade Court, pursuant to the order of Chief Metropolitan Magistrate issued a notice dated 27 June, 2022 to the Senior Inspector of Police, MRA Marg Police Station, Mumbai to provide security for taking forceful possession of the Secured Assets from the Petitioner.

3.6. The Order dated 19 April, 2020 of the Chief Metropolitan Magistrate under Section 14 of the SARFAESI Act was challenged by the Petitioner and Borrower Company by filing Securitisation Application SA/92/2022 before Debt Recording Tribunal (for short “DRT”)(for sake of convenience referred as “*the Third Proceedings*”). So also an Interim Application being IA/835/2022 for interim relief was filed in SA/92/2022.

3.7. By an order dated 15 July, 2022, the DRT disposed of the IA/835/2022. The Securitisation Application being SA/92/2022 is still pending in the file of DRT. Petitioner/Borrower thereafter filed WP/644/2023 seeking various reliefs (for sake of convenience referred as “*the Fourth Proceedings*”). The said Writ Petition was disposed by the division bench of this court by an order dated 13 February 2023. Subsequently, petitioner filed IA/982/2023 in the disposed of petition seeking extension of relief granted. The said Interim Application No. 982 of 2023 was disposed by Order dated 23 February, 2023.



3.8 In the meantime, DRT heard SA/92/2022 and the matter is closed for orders. The present Writ Petition (L) No.9116 of 2023 has been filed by the Petitioner/ Guarantor seeking same reliefs as sought in Writ Petition No.644/2023 (for sake of convenience referred as “***the Fifth Proceedings***”). The petitioner has prayed for the following reliefs in Writ Petition No.644 of 2023:-

“(a) To declare that the MSME Act, being a special law and a later law vis-a-vis SARFAESI Act, the MSME Act will prevail over the SARFAESI Act and that the Principal Borrower being an MSME is not covered by the SARFAESI Act and is entitled to the protection of the MSME Act and in particular the Notification S.O.1432(E) dated 29.5.2015 which provides for a scheme of resolution of stress akin to IBC, nay, far more benevolent than IBC and therefore the action of the Respondent Bank under section 13(2), 13(4), and 14 of the SARFAESI Act, 2002 is null and void ab initio;

(b) declare that the respondent Bank is vested of no enforceable cause of action, right or remedies as against the Petitioner/Principal Borrower since the loss and injury caused to the Principal is far in excess of the claim of the Respondent Bank as against the Principal Borrower/ Petitioner Guarantor, in other words, the Petitioner/ Principal Borrower owe no amounts to the respondent Bank, the claim of the Bank being set-off/adjusted against the claim of the petitioner for damages and compensation;

(c) To grant a writ in the nature of mandamus in favour of Applicant restraining and preventing the Respondent Bank their agents, servants, officers, representatives and/or anyone else purportedly acting on their behalf from taking any action whatsoever under the SARFAESI Act or any other law for the recovery of the amounts which the Respondent Nos. 1 to 2 falsely claim to be due;

(d) To declare that the declaration of a Borrower as willful defaulter results in his civil death and that the Respondent NBFC is vested with no jurisdiction to declare the Applicant as a willful defaulter in as much as there is no law empowering the Reserve Bank or the Respondent Bank/NBFCs and financial institutions to declare a Borrower as a wilful defaulter and the guidelines of the Reserve NBFC of India empowering NBFCs and financial institutions to do so is without the authority of law, utterly illegal,



ultra-vires the constitution of laws of the land, illegal and void and quash and set aside all such notifications and guidelines;

(e) To issue a Writ in the nature of Certiorari calling for the entire records, minutes and proceedings leading to the classification of the Applicant's account as NPA, so too under Section 13(2), 13(3A), 13(4) & 14 of the SARFAESI Act and the Security Interest (Enforcement) Rules, and to quash and set is aside;

(f) Without prejudice to above prayers to direct the Respondent No.1 to 4 Bank to take steps to recover the bad debts suffered by the Principal Borrower from the Respondent No.14 ECGC under the Whole Turn Over Packing Credit Guarantee and other incentives extended by the ECGC to the Respondent No.1 Bank.

(g) To declare that Section 14 of the SARFAESI Act, 2002 is unconstitutional and void in as much as it does not expressly mandate that the powers under the said section ought to be exercised in compliance with the principles of natural justice namely by affording a due opportunity to the borrower/tenant/any other person who has a legal or an equitable right in respect of the property of which the possession is sought to be taken is heard.

(B) Submissions of Parties

4. Mr. Nedumpara, learned counsel for the Petitioner submitted that the Borrower being an MSME should be taken care of by the Government and Special Mention Accounts and rectification, restructuring and if both the options do not work, then recovery option as last option should be used. In the present case, the Respondent No.1 Bank did not extend any opportunity of restructuring of the Principal Borrower Company and to its directors/ guarantors. He further submitted that after the introduction of GST and due to demonetization, the Borrower Company was severely hampered in its business. He further submitted that there was a gross breach of the contract, culpable negligence and malicious and tortious action the most important of which being the denial of the benefits which the Principal Borrower was entitled to in terms of the MSMED Act and the



various notifications issued by the Government and by the Reserve Bank of India. He further submitted that due to pandemic, the Borrower and the Guarantor suffered a lot. He submitted that the Borrower had sought one time restructuring of the credit facilities from the respondent Bank. He further submitted that the financial difficulties faced were mainly due to micro economical factor which were beyond the control of Borrower and/or the Guarantor. He further submitted that even if the provisions of SARFAESI Act is to be applied with regard to the loan account of the Borrower, the relationship between the Borrower and the Bank would be governed by the provisions of MSMED Act being the later law and the last legislation, would override the earlier law in respect of adjudicating upon the relationship between the Borrower and the Bank.

4.1. He further submitted that the SARFAESI Act being lop sided only favours the interest of Bank/Financial Institutions. The MSMED Act has been enacted as a means of reviving and supporting MSME entities to expand to grow and to contribute to the economy. He further submitted that the Petitioner had earlier filed Writ Petition No. 644 of 2023. The said Writ Petition was disposed of vide order dated 13 February, 2023, by recording the fact that the Petitioner has sought to challenge the action of the Secured Creditor on various grounds including that MSMED Act overrides the SARFAESI Act.

5. Mr.Singhi, the Respondent Bank's counsel, opposed the present Writ Petition and pointed out that the petition has no merits and in spite of Securitisation Application being pending before the DRT, the present Writ Petition has been filed.

5.1. He submitted that Petitioner has suppressed material facts and have approached this court with unclean hands. By letter of Guarantor dated 2/7/2010 and 1/2/2013, the Petitioner has guaranteed the due payment of



the Credit Facility sanctioned to Borrower. As the Borrower defaulted his account was declared as N.P.A. The Petitioner and Borrower have filed multiple proceedings on same cause of action. To buttress his submissions, the Respondent relied upon the following authorities:

- (i) **M/s. Innoventive Industries Ltd. Vs. ICICI Bank**¹
(Para No. 11)
- (ii) **Authorized Officer, State Bank of Travancore Vs. Mathew K.C.**²
(Para Nos. 4, 11)
- (iii) **Phoenix ARC Private Ltd. Vs. Vishwa Bharati Vidhya Mandir**³
(Para Nos. 7, 8, 9 & 13.2)
- (iv) **Surinder Kumar Verma Vs. Union of India**⁴
(Para No. 7)
- (v) **State of Bank India Vs. Ramakrishnan**⁵
(Para Nos. 5.8)
- (vi) **Kotak Mahindra Bank Vs. Girnar Corrugators Pvt. Ltd.**⁶
(Para Nos. 5, 6, 7, 8, 9, 10, 11, 12)

5.2. He therefore submitted that Writ Petition requires to be dismissed with exemplary cost.

C. Analysis and Conclusions

6. We have heard counsels for both the parties. We have also gone through the records.

7. So far Petitioner had filed the following five proceedings challenging the action taken by Bank for recovering the Loan amount viz.

1 Civil Appeal No. 8337- 8338 of 2017.
2 (2018) 3 SCC 85.
3 Civil Appeal Nos. 257-259/2022.
4 C.W.P. No.6418 of 2019
5 (2018) 17 SCC 394
6 Civil Appeal No. 6662 of 2022



- (i) S.C.Suit No.338 of 2021 filed by Petitioner along with Borrower, pending in City Civil Court at Bombay for hearing.
- (ii) Writ Petition (L) no.2001 of 2021 filed by Petitioner along with Borrower, pending in this Court for Admission.
- (iii) Securitisation Application No.92 of 2022 filed by Petitioner along with Borrower, pending in D.R.T. at Bombay for Orders.
- (iv) Writ Petition No.644 of 2023 filed by Petitioner, in this Court which was disposed of by Order dated 13 February 2023.
- (v) Present Writ Petition (L) no.9116 of 2023 filed by Petitioner, in this Court.

8. The Borrower Company defaulted in repaying the Loan Amount due to Respondent No.3 Bank, as such, the Respondent No. 3 declared the Loan Account of Borrower Company as Non-Performing Asset (“NPA”) on 31 March 2019. The Respondent No. 3 Bank, recalled the entire Loan Amount vide a Demand Notice dated 25.04.2019 under S.13(2) of the (“SARFAESI”).

9. Respondent No.3 Bank, through Respondent No. 5, took symbolic possession of the Secured Asset, vide Possession Notice dated 23.09.2019 under S.13(4) of the SARFAESI. As peaceful and vacant possession of the Secured Asset was not handed over, the Respondent No.3 approached the Chief Metropolitan Magistrate, under S.14 of the SARFAESI. CMM passed an Order on 5.11.2020 in Case No.117/SA/2020.

10. Petitioner along with Borrower thereafter filed **First Proceeding**, being a short cause suit before the Bombay City Civil Court viz. SC Suit No. 338 of 2021, impugning the action of Operational Creditor. The prayer in plaint reads as under:

(a) declare that Defendant No.5, who claims to be a operational creditor and thus entitled to invoke Section 9 of the Insolvency and



Bankruptcy Code, 2016 title “initiation of corporate insolvency process by a operational creditor”, was not competent to invoke the said Section because no amount is due to it so far as the Plaintiffs are concerned.

(b) declare that the respondent Bank is vested of no endecare that the National Company Law Tribunal, Mumbai, is a coram non iudice and the order dated 11th September, 2019 (Exhibit “A” hereto) passed by it is void ab initio inasmuch as a Court of Tribunal of a limited jurisdiction cannot by an erroneous order as to its own jurisdiction confer a jurisdiction upon it and bind the parties, sometimes even third parties, to it and such an order which never ever existed in the eye of law, is stillborn and a nullity, otherwise known as the Anisminic concept.

(c) declare that the Plaintiffs are not liable to be proceeded against before multiple forums based on the very same cause of action between the very same parties in terms of Sections 34,38 and 41 of the Specific Relief Act, 1963 and grant an injunction in terms of Sections 38 and 41 thereof.

(d) declare that no amount is due from the Plaintiffs to any of the Defendants inasmuch as the loss and damage suffered by them on account of the gross breach of contract, culpable negligence, customer unfriendly attitude and malicious actions at the hands of the said Defendants is far in excess of the credit facilities availed of by the Plaintiffs;

(e) to grant an order of ad-interim mandatory and/or prohibitory injunction in favour of the Plaintiffs and against the Respondents restraining the Respondents, its agents, assignees, servants and privies from in any manner interfering with the peaceful possession and enjoyment of the purported secured assets/Plaintiffs / guarantor’s property which the Respondent bank falsely claim to be secured assets at its hands and in particular proceeding any further pursuant to the notice purportedly under Sections 13(2) and 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act,2002, as null and void, being in violation of the principles of natural justice, and further to restrain and prohibit the respondent Bank from taking physical possession of the property of the plaintiffs, under section 14 of the SARFAESI Act, 2002 vide the ex-part order to be issued by the Learned Chief Metropolitan Magistrate, Esplanade Court, Mumbai.

(f) To grant an order of ad-interim mandatory and /or prohibitory injunction in favour of the Plaintiffs and against Respondent Nos.5, 7 and 8, from proceeding in furtherance of the order dated 11th September, 2019 (Exhibit “A”) passed by the Hon’ble NCLT.



(g) Pass such further and other orders as the nature and circumstances of the case may require.

11. In the Suit, Petitioner also filed Notice of Motion for urgent reliefs. As per records, none of the reliefs sought were passed in the Notice of Motion and the suit. The Notice of Motion and Complaint are pending for hearing before the City Civil Court at Bombay.

12. Petitioner and Borrower also preferred **Second Proceeding** by filing in this Court Writ Petition (L) 2001 of 2021, impugning notices issued under Section 13(2) and 13(4) of SARFAESI. No reliefs were granted to the petitioner and Borrower Company in this Petition.

13. The Petitioner / Guarantor along with Borrower Company thereafter filed **Third Proceeding** in the form of Securitisation Application numbered as SA/92/2022 before the DRT challenging Order of C.M.M. passed under Section 14 of SARFAESI. Interim Application No.835/2022, was also preferred in the Securitisation Application seeking interim reliefs. IA/835/2022, was disposed of by Order dated 15 July 2022, granting no reliefs to the Petitioners.

14. On 13.02.2023, the Petitioner's **Fourth Proceedings**, W.P 644 of 2023 for staying the physical possession as fixed by the Bank, was dismissed with direction to Petitioner to move an Application before the DRT/DRAT for appropriate relief and deferred the taking over of possession of Secured Asset till 27.02.2023.

15. The Petitioner on 23 February 2023, moved IA/982/2023 in a disposed off Writ Petition W.P. 644 of 2023 to stop the taking over of physical possession of the Secured Assets. The said IA/982/2023 was rejected by this Court.



16. Petitioner preferred I.A./343/2023, before the D.R.T. in S.A./92/2022, seeking ad-interim injunction, restraining the Respondents from proceeding in furtherance of action initiated under SARFAESI. On 31.03.2023 the DRT dismissed the I.A/ 343/2023 filed by the Petitioner in the SA/92/2022.

17. On 19.04.2023 the Petitioner filed the present petition being the **Fifth Proceedings** seeking the same reliefs as were prayed in **Fourth Proceedings** (WP/644/2023), which was disposed of by Order dated 13 February 2023. The prayer in Writ Petition No. 644 of 2023 and the present Writ Petition are identical. According to us, the present Writ Petition on identical prayers is not maintainable.

18. During the pendency of this Writ Petition, D.R.T. Mumbai, on 8 May 2023, heard the parties and following order was passed by D.R.T.-1 Mumbai.

“1. Heard both sides on the I.A. No.489/2023, I.A.No.481/2023 and I.A. No.484/2023 for more than 4 hours.

2. The main issue which are raised in the S.A., are already addressed during the hearing of the I.A.s thus, both sides are hereby directed to file the Written argument on the I.A.s as well as the S.A. finally within 15 days with advance copy to the other side.

3. List this matter for order on 09/06/2023.

4. The date of 07/06/2023 is hereby cancelled.”

19. Petitioner himself has filed a Securitisation Application under S.17 of the SARFAESI before the Debts Recovery Tribunal -1, Mumbai, being S.A./92/2022. On 08.05.2023 hearing was held before DRT and the matter is posted for orders on all I.As and the S.A. 92 of 2022.



20. The Petitioner has not disputed Borrower having availed the Loan Amount or charge being created over the Secured Assets, but the Petitioner has challenged the Legal Steps taken by the Respondent Bank under the provision of the SARFAESI.

21. Supreme Court in the matter of **Authorized Officer, State Bank of Travancore and Ors. Vs. Matthew K.C. (30.01.2018): (2018) 3 SCC 85** held that if statutory remedies under the DRT Act and the SARFAESI Act is available, High Court should not exercise its jurisdiction under Article 226 for passing orders.

Paragraph Nos. 4 and 55 of the judgment reads as under:

“4. The SARFAESI Act is a complete code by itself, providing for expeditious recovery for dues arising out of loans granted by financial institutions, the remedy of appeal by the aggrieved under section 17 before the Debt Recovery Tribunal, followed by a right to appeal before the Appellate Tribunal Under Section 18. The High Court ought not to have entertained the writ petition in view of the adequate alternate statutory remedies available to the Respondent. The interim order was passed on the very first date, without an opportunity to the Appellant to file a reply. Reliance was placed on United Bank of India v. Satyawati Tandon and Ors. MANU/SC/0541/2010: 2010 (8) SCC 110, and General Manager, Sri Siddeshwara Cooperative Bank Limited and Anr. v. Ikkal and Ors. MANU/SC/0856/2013: 2013 (10) SCC 83. The writ petition ought to have been dismissed at the threshold on the ground of maintainability. The Division Bench erred in declining to interfere with the same.

55. 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 the 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.”



22. In the case of **Phoenix ARC Private Limited v. Vishwa Bharti Vidhya Mandir & Ors**, Civil Appeal Nos. 257-259/2022, it was held that High Court should not entertain Petition when a remedy under SARFAESI Act is available. Paragraph No.7 and 13.2 of the judgment reads as under:

7. At the outset, it is required to be noted that in the present case, the respondents - borrowers whose accounts have been declared as NPA in the year 2013 have filed the writ petitions before the High Court challenging the communication dated 13.08.2015 purporting it to be a notice under Section 13(4) of the SARFAESI Act. It is required to be noted that as per the appellant - assignor approximately Rs.117 crores is due and payable to the Bank. While passing the ex-parte interim order on 26.08.2015 and while entertaining the writ petitions against the communication dated 13.08.2015, the High Court has directed to maintain status quo with respect to the possession of the secured properties on condition that the borrowers deposit Rs. 1 crore only. Despite the fact that subsequently an application for vacating the ex-parte ad-interim order has been filed in the year 2016, the application for vacating the interim order has not been decided and disposed of. On the contrary, the High Court thereafter has further extended the ex-parte ad-interim order dated 26.08.2015 on condition that the borrowers should deposit a further sum of Rs. 1 crore. Thus, in all the borrowers are directed to deposit Rs. 3 crores only against the dues of approximately Rs.117 crores.

.....
13.2. *Applying the law laid down by this Court in Mathew K.C. [State Bank of Travancore v. Mathew K.C., (2018) 3 SCC 85 : (2018) 2 SCC (Civ) 41] 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 13-8-2015 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.

[Emphasis supplied]

23. Petitioner has already availed the benefits of Section 17, by preferring an exhaustive application by way of Securitisation Application no.92 of 2022 before the D.R.T. On 8 May 2023, liberty was granted to the parties to file Written submissions, and matter was closed for orders.

24. Respondent has pleaded that the Petitioner herein, since the initiation of the proceedings under SARFAESI by the respondent No.3, has neither objected to the Demand Notice dated 25.04.2019 nor has he and or Borrower approached the Respondent Bank, with a proposal to restructure or for the settlement of the due to the Borrower.

Moratorium as per S. 14 of the IBC.

25. By Order dated 11.09.2019, the NCLT has declared a moratorium against the action being taken against the Borrower, including the



SARFAESI proceedings. However, the Secured Asset is owned by the Petitioner/Guarantor. Therefore, according to us, as such, the Respondent No.3 /Bank can proceed against the Mortgaged Property of Personal Guarantor as per S.13(11) of the SARFAESI. The issue is already covered by the judgment of the Supreme Court in **State Bank of India v. V. Ramkrishan & Anr. (2018) 17 SCC 394**, which holds that S. 14 and S.31 of the IBC does not bar initiation and continuation of the SARFAESI proceedings against the Guarantor. As such, the bank has not violated the moratorium as ordered by the NCLT, in initiating SARFAESI Proceedings against Petitioner / Guarantor.

26. In view of our above observations, we are of the clear opinion that the present proceedings cannot be entertained including prayer clause (a) of Writ Petition. This, more particularly, for the reason that the adjudication on such prayer and that too at the behest of the petitioner, is wholly academic.

27. As a sequel to the above discussion, in our opinion there are no merits in the present Petition and hence the Petition is dismissed. No costs.

(RAJESH S. PATIL, J.)

(G.S. KULKARNI, J.)