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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 8131/2020 & CM APPL. 26390/2020

SANJAY DHINGRA ..... Petitioner

Through: Mr. Rahul Tyagi, Ms. Pratiksha Dwivedi, Advocates (M:7697793293) Email: tyagi@dhirasociates.com

versus

IDBI BANK LIMITED & ORS. ..... Respondents

Through: Mr. Dayan Krishnan, Senior Counsel and Mr. Siddharth Barua, Advocate for IDBI Bank. Mob: 9899040660

CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA

J U D G M E N T
02.07.2024

MINI PUSHKARNA, J:

1. The petitioner in the instant writ petition is aggrieved by the steps initiated by the respondent no.1-IDBI Bank, New Delhi, under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("SARFAESI Act"), for the loan facilities granted by respondent no.2-IDBI, Dubai to respondent no.3-company.

2. The respondent no.3-company, which is based in Dubai and has its registered office in Delhi, availed the said loan facilities from the Dubai Branch of IDBI Bank. In this regard, a Facility Agreement dated 04th December, 2012 was entered between the respondent no.2-bank and respondent no.3-company situated in Dubai.

3. The terms of the amended Sanction Letter dated 14th November, 2016, also contemplated creation of Personal Guarantee by the petitioner in favour of respondent no.2-bank, situated in Dubai. Thus, the petitioner had mortgaged immovable property bearing Khasra No. 4072/243, 4071/243, 4070/243 & 4069/243 situated in Golden Park Colony on Rampura Road, Village Basai Darapur ("secured asset") as security for the aforesaid loan facilities vide Declaration and Undertaking dated 06th December, 2017. Pursuant to this mortgage, the original documents for the secured asset were also handed over to the New Delhi Branch of IDBI Bank on 07th December, 2017.

4. Since the respondent no.3-company defaulted on the debt, the respondent no.1-bank enforced its security interest against the mortgaged property/secured asset under Section 13 of the SARFAESI Act.

5. Thus, pursuant to the proceedings initiated by respondent no.1-bank under the SARFAESI Act, vide CC No. 47/4, the learned CMM (West), Tis Hazari Court, vide his order dated 12th March, 2020, appointed a Receiver for taking over physical possession of the secured asset. Subsequently, by order dated 24th September, 2020, the learned CMM (West), Tis Hazari Court, extended the time period for the Receiver to take possession of the secured asset.

6. Pursuant to the aforesaid, the Court Receiver issued Possession Notices dated 19th March, 2020 and 03rd October, 2020, pursuant to which, physical possession of the property in question/secured asset, was taken over by the respondent no.1-bank.

7. Thus, the present writ petition has been filed seeking to quash/set aside the said Possession Notices issued by the Court Receiver. There is

further prayer for setting aside the orders dated 12th March, 2020 and 24th September, 2020 passed by the learned CMM (West), Tis Hazari Court, pursuant to which the aforesaid Possession Notices, had been issued by the Court Receiver.

8. On behalf of the petitioner, the following submissions have been made:

8.1 The respondent no.2-bank, which has sanctioned and disbursed the financial facility to the respondent no.3-company, and against which security has been created by the petitioner in favour of respondent no.2-bank, are not situated in India. Accordingly, the provisions of the SARFAESI Act cannot be invoked by the respondent no.1-IDBI, New Delhi, on behalf of respondent no.2-IDBI, Dubai, as there is no debt due to the respondent no.2 under the Indian Law. Debt, if any, due to the respondent no.2, would be in terms of the laws of United Arab Emirates ("UAE").

8.2 In terms of Section 5(c) of the Banking Regulation Act, 1949, the respondent no.2 is not a banking company in India, as respondent no.2 is not having any business in India. Accordingly, the respondent no.1 cannot initiate provisions of the SARFAESI Act on behalf of respondent no.2-bank, against the property of the petitioner.

8.3 The financial facility was disbursed by the respondent no.2-bank, situated in Dubai to the respondent no.3-company, also situated in Dubai. Hence, no debt is due and outstanding against the petitioner in India. Thus, the proceedings initiated by the respondent-bank, are totally illegal and liable to be quashed.

8.4 A Supplemental Agreement dated 04th December, 2016 was also

entered between the petitioner, respondent no.2-bank and the respondent no.3-company. The said agreement explicitly stipulated that the said agreement shall be governed and construed in accordance with the law of the UAE. Thus, Indian laws do not govern the transaction, but the laws of UAE govern it. Therefore, the respondent-banks have no authority or jurisdiction to proceed under the provisions of the SARFAESI Act.

8.5 The guarantee of the petitioner is in favour of respondent no.2-bank, situated in Dubai, and not in favour of respondent no.1-bank, situated in India. There is no debt due to the respondent no.1-bank, as per Indian Law. Therefore, the respondent no.1-bank, cannot be treated as a secured creditor under the SARFAESI Act, and is not entitled to take any action under the said Act.

8.6 Hence, the impugned orders dated 12th March, 2020 and 24th September, 2020, passed by the learned CMM (West), Tis Hazari Court, and impugned Possession Notices dated 19th March, 2020 and 03rd October, 2020, issued by the Court Receiver are null and void, illegal and bad in law.

8.7 The personal insolvency proceedings under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 ("IBC"), has been initiated by the Union Bank of India against the petitioner herein, before National Company Law Tribunal ("NCLT"), New Delhi, which is registered as *Case No. IB-276/(ND)/2021*. Thus, in terms of Section 96(1) of IBC, 2016, proceedings pending in respect of any debt, shall be deemed to have been stayed.

8.8 No other alternative remedy is available with the petitioner, except for filing the present writ petition. The remedy available under Section 17(1) of the SARFAESI Act, is not an efficacious remedy, in the given facts and circumstances.

8.9 On behalf of the petitioner, the following judgments are relied upon:

I. ***Indian Overseas Bank V. RCM Infrastructure Ltd., (2002) 8 SCC 516***

II. ***Jaypee Infratech Ltd. Interim Resolution Professional V. Axis Bank Ltd., (2020) 8 SCC 401***

III. ***Encore Asset Reconstruction Company Pvt. Ltd. V. Charu Sandeep Desai, 2019 SCC OnLine NCLAT 284***

IV. ***Unigreen Global Private Limited V. Punjab National Bank, 2017 SCC OnLine NCLAT 566***

V. ***IFCI Limited V. Manoj Toshniwal, 2022 SCC OnLine National Company Law Tribunal 172***

VI. ***Axis Trustee Services Limited V. Brij Bhushan Singal and Another, 2022 SCC OnLine DEL 3634***

9. On behalf of the respondents-banks, the following submissions have been made:

9.1 The instant petition is not maintainable before this Court. The petitioner is challenging the orders passed by the learned MM under Section 14 of the SARFAESI Act and the consequent notices issued by the Court Receiver. Under the SARFAESI Act, where a debt becomes due, the bank is empowered to take steps to seek enforcement of their security interest under Section 13 of the SARFAESI Act.

9.2 In case the bank requires any assistance of a Court to take possession of a mortgaged asset, the bank is empowered to do so under Section 14 of the SARFAESI Act. Section 17 of the SARFAESI Act clearly provides that any person aggrieved by any action taken by a bank under Section 13 of the SARFAESI Act, shall be entitled to approach DRT to seek appropriate

remedies.

9.3 Where a remedy is available under Section 17 of the SARFAESI Act, this Court ought not to entertain writ petitions under Article 226 of the Constitution.

9.4 Even on merit, the case of the petitioner is not sustainable. The petitioner had approached this Court primarily on the ground that since the loan was issued from the Dubai Branch, proceedings under the SARFAESI Act would not be maintainable. In similar circumstances, Bombay High Court has already held that these issues ought to be properly agitated under Section 17 of the SARFAESI Act, before the Debt Recovery Tribunal ("DRT").

9.5 The moratorium would not apply in the instant case. When bank takes possession under Section 13(6) of the SARFAESI Act, the asset will vest in the bank, free from all encumbrances.

9.6 In the present case, the bank had invoked its right under Section 13(2) of the SARFAESI Act on 27th September, 2018, thereby putting the petitioner to notice that the bank reserves its right to proceed against the properties in question. The Notice of Possession under Section 13(4) of SARFAESI Act, was issued on 02nd July, 2019. Therefore, on 02nd July, 2019, in terms of the judgment of Supreme Court in the case of ***Transcore Versus Union of India, (2008) 1 SCC 125***, all rights vested in the bank.

9.7 The actual physical possession of the property has already been taken by the bank on 17th October, 2020. The proceedings under the IBC, 2016, against the petitioner, commenced only in June, 2021. Therefore, all the actions qua the property in question, have been taken, prior to the initiation of proceedings under the IBC, 2016. Thus, no debt is being enforced against

the petitioner, since the rights in the property, already stand transferred to the bank upon issuance of the notice under Section 13(4) of the SARFAESI Act.

9.8 Invocation of personal guarantee against the petitioner has nothing to do with the impugned orders, in which the bank has only proceeded in terms of the mortgage. Enforcement of security interest is not prohibited under Section 96 of IBC, 2016.

9.9 The Kerala High Court in the case of ***Jeny Thankachan Versus Union of India, 2023 KER 71553***, has held that personal insolvency of a guarantor would not come in the way of enforcement of rights under SARFAESI Act.

9.10 Even if there is a moratorium operating against the petitioner, the same can be urged before the National Company Law Tribunal ("NCLT") or before the Insolvency Resolution Professional ("IRP"). This Court under writ jurisdiction ought not to interfere or adjudicate the breach of any moratorium.

9.11 From perusal of Section 96(1)(b) of IBC, 2016, it is evident that the interim moratorium only restrains any ongoing or fresh legal action or proceeding in respect of any debt pertaining to personal guarantor, and not any security interest created by the personal guarantor.

9.12 There is no moratorium imposed on the respondent-bank from dealing with its security interest. Further, there is no restriction on the personal guarantor, i.e., the petitioner herein from approaching any appropriate forum to protect or preserve its assets. The appropriate forum in the present case is the DRT.

9.13 The following judgments have been relied upon by the respondents:

i. ***Sapna Agarwal versus Canara Bank & Anr., judgment dated 26.11.2020 in W.P. No. 3280/2019 passed by Hon'ble Bombay High Court***

ii. ***Sanjay Dhingra V. IDBI Bank Ltd. & Ors., order dated 16.10.2020 in W.P.(C) No. 8131/2020 passed by Hon'ble Delhi High Court***

iii. ***Sapna Agarwal V. Canara Bank & Anr., order dated 15.12.2020 in SLP No. 14986/2020 passed by Hon'ble Supreme Court***

iv. ***Kabidi Venku Sah V. Syed Abdul Hai & Anr., (1983) 4 SCC 570***

v. ***Transcore V. Union of India & Ors., (2008) 1 SCC 125***

vi. ***Kanaiyalal Lalchand Sachdev & Ors. V. State of Maharashtra & Ors., (2011) 2 SCC 782***

vii. ***United Bank of India V. Satyawati Tondon & Ors., (2010) 8 SCC 110***

viii. ***Agarwal Tracom Pvt. Ltd. V. PNB & Ors., judgment dated 11.05.2016 in LPA No. 699/2015 passed by Hon'ble Delhi High Court***

ix. ***R. Premlatha V. State Bank of India, 2018 SCC OnLine Mad 4169***

x. ***ICICI Bank V. Classic Diamonds (India) Ltd., 2015 SCC OnLine BOM 6555***

xi. ***M/s Classic Diamonds (I) Ltd. V. ICICI Bank Ltd., 2016 SCC OnLine Bom 15573***

xii. ***Authorized Officer, State Bank of Travancore & Anr. V. Mathew K.C., (2018) 3 SCC 85***

xiii. ***M.D. Frozen Foods Exports Pvt. Ltd. & Ors. V. Hero Fincorp***

Ltd., (2017) 16 SCC 741

xiv. Sanjay Dhingra V. IDBI Bank Ltd. & Ors., order dated 28.01.2021 in W.P.(C) 8131/2020 passed by Hon'ble Delhi High Court

xv. Spentex Industries Ltd. V. State Bank of India & Anr., judgment dated 04.05.2018 in W.P.(C) No. 3474/2018 passed by Hon'ble Delhi High Court (DB)

xvi. Hong Seng Energy Ltd. & Anr. V. The Authorised Officer, Canara Bank, judgment dated 29.10.2021, in S.A. No. 178/2021 and S.A. No. 203/2021, passed by Debts Recovery Tribunal-II, Chennai

10. I have heard learned counsels for the parties and have perused the record.

11. At the outset, this Court notes that Insolvency Proceedings have been initiated against the petitioner herein, in his capacity as a personal guarantor, under Section 95(1) of the IBC, 2016, by Union Bank of India, before NCLT, New Delhi. Thus, the interim moratorium in terms of Section 96 of the IBC, 2016, is in force. The order dated 21st December, 2023 passed by the NCLT, New Delhi in this regard, reads as under:

> *"**This application has been filed under Section 95(1) of IBC, 2016 seeking initiation of Insolvency Process against Mr. Sanjay Dhingra, Personal Guarantor with respect to the default for an amount of Rs. 406.16 Crores.** The Applicant suggested the name Mr. Nitin Narang having Registration No. IBBI/IPA-002/IP-N00828/2019-2020/12629 as the Resolution Professional. We, therefore, appoint Mr. Nitin Narang as the Resolution Professional and direct him to submit a report as envisaged under Section 99 of IBC.*
>
> ***It is needless to mention that interim moratorium has kicked in, in terms of Section 96 of IBC.***
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

12. At this stage, it is pertinent to refer to Section 95 and Section 96 of the IBC 2016, which are relevant, for the purposes of adjudication of the issues, raised in the present petition. Section 95 & 96 of the IBC, 2016 are extracted, herein below:

> *"**95. Application by creditor to initiate insolvency resolution process**.—(1) A creditor may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority for initiating an insolvency resolution process under this section by submitting an application.*
>
> *(2) A creditor may apply under sub-section (1) in relation to any partnership debt owed to him for initiating an insolvency resolution process against—*
>
> *(a) any one or more partners of the firm; or*
>
> *(b) the firm.*
>
> *(3) Where an application has been made against one partner in a firm, any other application against another partner in the same firm shall be presented in or transferred to the Adjudicating Authority in which the first mentioned application is pending for adjudication and such Adjudicating Authority may give such directions for consolidating the proceedings under the applications as it thinks just.*
>
> *(4) An application under sub-section (1) shall be accompanied with details and documents relating to—*
>
> *(a) the debts owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application;*
>
> *(b) the failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand; and*
>
> *(c) relevant evidence of such default or non-repayment of debt.*
>
> *(5) The creditor shall also provide a copy of the application made under sub-section (1) to the debtor.*
>
> *(6) The application referred to in sub-section (1) shall be in such form and manner and accompanied by such fee as may be prescribed.*
>
> *(7) The details and documents required to be submitted under sub-section (4) shall be such as may be specified.*
>
> ***96. Interim-moratorium**.—(1) When an application is filed under Section 94 or Section 95—*

> *(a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and*
> *(b) during the interim-moratorium period—*
> *(i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and*
> *(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.*
>
> *(2) Where the application has been made in relation to a firm, the interim-moratorium under sub-section (1) shall operate against all the partners of the firm as on the date of the application.*
> *(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator."*

13. The aforesaid Sections 95 and 96 are contained in Part III of IBC, 2016, which deals with the insolvency resolution and bankruptcy for individuals and partnership firms. Section 95(1) provides for filing of application by creditor for initiating insolvency resolution process.

14. Section 96(1) provides that when an application is filed under Section 95, interim moratorium shall commence on the date of the application in relation to all the debts. Section 96(1)(b) provides that during the interim moratorium period, any legal action or proceedings pending in respect of any debt, shall be deemed to have been stayed. It is pertinent to mention here that the word used in Section 96 of the IBC, 2016, is '*in relation to all the debts*', meaning thereby, that the interim moratorium shall apply to all the debts of the petitioner, including the mortgage of the property in question, that had been mortgaged by the petitioner with the respondent-bank, as a personal guarantor, which are subject matter of the SARFAESI proceedings initiated by the respondent-bank. Thus, in terms of the law of the land, any legal action or proceeding pending in respect of any debt of the petitioner, shall be deemed to have been stayed, upon commencement of the interim moratorium in terms of Section 96 of IBC, 2016.

15. Thus, holding that the interim moratorium under Section 96 of IBC, 2016, is intended to operate in respect of a debt, as opposed to a debtor and the purpose of interim moratorium is to restrain the initiation or continuation of legal action or proceedings against the debt, Supreme Court in the case of ***Dilip B. Jiwrajka Versus Union of India***[1], has held as follows:

> *"xxx xxx xxx*
>
> ***57.*** *Section 96, as its marginal note indicates, deals with an "interim-moratorium". In terms of section 96, the interim moratorium takes effect on the date of the application. In other words, the very submission of an application under section 94 or section 95 triggers the interim moratorium which then ceases to have effect on the date of the admission of the application (under section 100). The consequences which flow from an interim moratorium are specified in clause (b) of sub-section (1) of section 96.* ***The impact of the interim-moratorium under section 96 is that a legal action or proceeding pending in respect of any debt is deemed to have been stayed and the creditors or the debtors shall not initiate any legal action or proceedings in respect of any debt. The crucial words which are used both in clause (b)(i) and clause (b)(ii) of sub-section (1) of section 96 are "in respect of any debt". These words indicate that the interim-moratorium which is intended to operate by the Legislature is primarily in respect of a debt as opposed to a debtor. Clause (b) of sub-section (1) indicates that the purpose of the interim-moratorium is to restrain the initiation or the continuation of legal action or proceedings against the debt.***
>
> ***58.*** *This must be contra-distinguished from the provisions for moratorium which are contained in section 14 in relation to the corporate insolvency resolution process under Part II. Section 14(1)(a) provides that on the insolvency commencement date, the institution of suits or continuation of pending suits or proceedings against the corporate debtor, including proceedings in execution shall stand prohibited by an order of the Adjudicating Authority. Clause (b) of sub-section (1) of section 14 empowers the Adjudicating Authority to declare a moratorium restraining the transfer, encumbrance, alienation or disposal by the corporate debtor of any of its assets or any legal right or beneficial interest therein. Significantly, the moratorium under section 14 operates on the order passed by an Adjudicating Authority.* ***The purpose of the***

[1] ***2023 SCC OnLine SC 1530***

moratorium under section 96 is protective. The object of the moratorium is to insulate the corporate debtor from the institution of legal actions or the continuation of legal actions or proceedings in respect of the debt.

xxx xxx xxx"

(Emphasis Supplied)

16. Thus, in view of the aforesaid, it is manifest that the moratorium imposed under Section 96 of IBC, 2016, would apply to the security interest created by an individual, under the personal guarantee. Therefore, after commencement of the insolvency proceedings under the IBC, 2016, against the petitioner, in his capacity as a personal guarantor with respect to default of a loan account, the interim moratorium shall be applicable to all the debts, including the debt owed by the petitioner to the respondent-bank, in his capacity as a personal guarantor, for which property in question was mortgaged by the petitioner, against which SARFAESI proceedings have been initiated by the respondent-bank.

17. It is no longer *res integra* that IBC, 2016, is a complete code in itself and the provisions of the IBC, 2016, would prevail notwithstanding anything inconsistent therewith, contained in any other law for the time being in force. Further, mere fact that possession of the property in question has been taken over by the respondent-bank under SARFAESI proceedings, prior to the commencement of IBC proceedings against the petitioner, would have no effect on the interim moratorium that becomes applicable in terms of Section 96 of IBC, 2016. The applicability of interim moratorium under IBC, 2016, on the proceedings initiated by the respondent-bank under the SARFAESI Act, cannot be excluded merely because the bank has taken possession of the property in question prior to commencement of the proceedings under the IBC, 2016.

18. In the present case, after taking possession of the property in question, sale of the said property has still not taken place and the process under the SARFAESI Act, is still not complete. Therefore, in terms of Section 238 of the IBC, 2016, which has overriding effect over any other law, any further action by the bank, under the SARFAESI Act, is prohibited. Thus, the respondent-bank cannot continue the proceedings under the SARFAESI Act, once proceedings under the IBC, 2016, have commenced.

19. At this stage, reference may be made to the judgment of the Supreme Court in the case of ***Indian Overseas Bank Versus RCM Infrastructure Limited and Another***[2]**.** In the said case, sale proceedings had already been initiated by the bank under the provisions of the SARFAESI Act and part-payment had been received by the bank prior to the commencement of the proceedings under the IBC, 2016. Subsequently, after the commencement of the proceedings under the IBC, 2016, balance payment was also received by the bank. In the said case, the Supreme Court held in categorical terms that sale was not complete upon receipt of the part-payment, and the sale could be said to be completed only upon receipt of the balance payment, which was received after the commencement of the proceedings under the IBC, 2016. Thus, the Supreme Court held that after the moratorium had come into place, the bank could not have continued with the proceedings under the SARFAESI Act and could not have accepted the balance payment after the commencement of the moratorium. Therefore, even in a case where the bank had already commenced the sale process, prior to the commencement of the proceedings under the IBC, 2016, the Supreme Court categorically held that in the absence of completion of sale prior to the moratorium, the bank could

[2] ***2022 SCC OnLine SC 634***

not have continued any further proceedings under the terms of the SARFAESI Act.

20. In the present case, no sale process has commenced with respect to the property that had been mortgaged by the petitioner with the respondent-bank, as a personal guarantor. Therefore, in view of the law laid down by the Supreme Court, it is apparent that the bank cannot proceed any further under the SARFAESI Act, after the commencement of the moratorium in the present case.

21. Thus, in the aforesaid case of ***Indian Overseas Bank (supra),*** Supreme Court, has held as follows:

> *"xxx xxx xxx*
>
> ***26. It could thus be seen that the provisions of the IBC shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.***
>
> ***27. It has been consistently held by this Court that the IBC is a complete code in itself and in view of the provisions of Section 238 of the IBC, the provisions of the IBC would prevail notwithstanding anything inconsistent therewith contained in any other law for the time being in force****. A reference in this respect could be placed on the judgments of this Court in Innoventive Industries Ltd. v. ICICI Bank [Innoventive Industries Ltd. v. ICICI Bank, (2018) 1 SCC 407 : (2018) 1 SCC (Civ) 356] , CIT v. Monnet Ispat & Energy Ltd. [CIT v. Monnet Ispat & Energy Ltd., (2018) 18 SCC 786 : (2019) 3 SCC (Civ) 252] and Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd. [Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd., (2021) 9 SCC 657 : (2021) 4 SCC (Civ) 638]*
>
> *xxx xxx xxx*
>
> ***34. Undisputedly, in the present case, the balance amount has been accepted by the appellant Bank on 8-3-2019. The sale under the statutory scheme as contemplated under Rules 8 and 9 of the said Rules would stand completed only on 8-3-2019. Admittedly, this date falls much after 3-1-2019 i.e. on which date CIRP commenced and moratorium was ordered. As such, we are unable to accept the argument on behalf of the appellant Bank that the sale was***

complete upon receipt of the part-payment.

35. In view of the provisions of Section 14(1)(c) of the IBC, which have overriding effect over any other law, any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Sarfaesi Act is prohibited. We are of the view that the appellant Bank could not have continued the proceedings under the Sarfaesi Act once CIRP was initiated and the moratorium was ordered.

xxx xxx xxx"

(Emphasis Supplied)

22. In view of the aforesaid, it is clear that once the interim moratorium has come into play on account of the insolvency proceedings against the petitioner under the IBC, 2016, the respondent-bank cannot proceed any further in the proceedings under the SARFAESI Act with respect to the property mortgaged by the petitioner with the bank, in his capacity as a personal guarantor.

23. Considering the detailed discussion herein above, this Court rejects the contention of the respondent-bank that the Personal Insolvency Proceedings against the petitioner, who is a guarantor, would not come in the way of enforcement of rights under the SARFAESI Act. The judgment of Kerala High Court in the case of ***Jeny Thankachan (supra)***, relied upon by the respondent, was passed by relying upon the judgment in the case of ***State Bank of India Versus V. Ramakrishnan and Another***[3], which had stated that the moratorium under Section 14 of the IBC, 2016 cannot apply to a personal guarantor. The aforesaid judgment of the Kerala High Court, does not apply to the facts and circumstances of the present case, as the present case deals with interim moratorium in terms of Section 96 of IBC, 2016, pursuant to insolvency proceedings against the petitioner under

[3] ***(2018) 17 SCC 394***

Section 95 IBC, 2016.

24. Besides, it is to be noted that Supreme Court in the case of ***State Bank of India Versus V. Ramakrishnan and Another (supra),*** itself has stated that the moratorium under Section 96 IBC, 2016, under Part III of the said Act, is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III. Thus, Supreme Court has held as follows:

> "*xxx xxx xxx*
>
> ***26.*** *We are also of the opinion that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a personal guarantor.* ***When an application is filed under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due. First and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III. Secondly, the protection of the moratorium under these sections is far greater than that of Section 14 in that pending legal proceedings in respect of the debt and not the debtor are stayed. The difference in language between Sections 14 and 101 is for a reason.***
>
> ***26.1.*** *Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them.* ***However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor — often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor.***
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

25. Now, I shall deal with the other aspect of the matter, relating to the

contentions of the petitioner with respect to his objection that the provisions of the SARFAESI Act cannot be invoked by the respondent no.1-bank which is situated in New Delhi, on behalf of respondent no.2. It is the contention of the petitioner that it is respondent no.2-bank, which is situated in Dubai, which had sanctioned and disbursed loan to the respondent no.3-company. Therefore, the respondent no.1 cannot invoke provisions of the SARFAESI Act against the property of the petitioner, as there is no debt due to the respondent under Indian Law. Debt, if any, due to the respondent no.2, would be in terms of the laws of UAE. Whereas, the respondent-bank has controverted the said submissions raised by the petitioner.

26. Law in this regard is well settled that any person who has a grievance against any notice issued under Section 13(4) of the SARFAESI Act, or action taken under Section 14 of SARFAESI Act, can apply to the DRT under Section 17(1) of the said Act. The learned DRT is empowered to consider whether the measures, as referred in Section 13(4) of the SARFAESI Act, taken by the secured creditor to enforce security, are in accordance with the provisions of the SARFAESI Act, and the Rules made thereunder. Therefore, all the issues as raised by the petitioner, as regards the jurisdiction and power of the respondent-bank to initiate proceedings under the SARFAESI Act, can be decided by the learned DRT. The DRT has the requisite authority and power to decide all issues, including the issue of jurisdiction, as raised by the petitioner herein.

27. Thus, holding that High Courts should not entertain petition under Article 226 of the Constitution of India, if an effective remedy is available to the aggrieved person under the provisions of the SARFAESI Act, Supreme Court in the case of ***Celir LLP Versus Bafna Motors (Mumbai) Private***

Limited and Others[4], has held as follows:

> *"xxx xxx xxx*
>
> ***98.*** *In CIT v. Chhabil Dass Agarwal [CIT v. Chhabil Dass Agarwal, (2014) 1 SCC 603] , this Court in para 15 made the following observations : (SCC p. 611, para 15)*
>
> > *"15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case [Thansingh Nathmal v. Supdt. of Taxes, 1964 SCC OnLine SC 13] , Titaghur Paper Mills case [Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 : 1983 SCC (Tax) 131] and other similar judgments that* ***the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."***
>
> ***99.*** *In Phoenix ARC (P) Ltd. v. Vishwa Bharati Vidya Mandir [Phoenix ARC (P) Ltd. v. Vishwa Bharati Vidya Mandir, (2022) 5 SCC 345 : (2022) 3 SCC (Civ) 153] , it was observed as under : (SCC pp. 359-61, paras 18 & 21)*
>
> > *"18. Even otherwise, it is required to be noted that a writ petition against the private financial institution — ARC — the appellant herein under Article 226 of the Constitution of India against the proposed action/actions under Section 13(4) of the SARFAESI Act can be said to be not maintainable. In the present case, the ARC proposed to take action/actions under the SARFAESI Act to recover the borrowed amount as a secured creditor. The ARC as such cannot be said to be performing public functions which are normally expected to be performed by the State authorities.*

[4] ***2023 SCC OnLine SC 1209***

During the course of a commercial transaction and under the contract, the bank/ARC lent the money to the borrowers herein and therefore the said activity of the bank/ARC cannot be said to be as performing a public function which is normally expected to be performed by the State authorities. ***If proceedings are initiated under the SARFAESI Act and/or any proposed action is to be taken and the borrower is aggrieved by any of the actions of the private bank/bank/ARC, borrower has to avail the remedy under the SARFAESI Act and no writ petition would lie and/or is maintainable and/or entertainable.*** *Therefore, decisions of this Court in Praga Tools Corpn. [Praga Tools Corpn. v. C.A. Imanual, (1969) 1 SCC 585] and Ramesh Ahluwalia [Ramesh Ahluwalia v. State of Punjab, (2012) 12 SCC 331 : (2013) 3 SCC (L&S) 456 : 4 SCEC 715] relied upon by the learned counsel appearing on behalf of the borrowers are not of any assistance to the borrowers.*

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21. 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."

xxx xxx xxx"

(Emphasis Supplied)

28. Similarly, in the case of ***United Bank of India Versus Satyawati Tondon and Others***[5], Supreme Court, has held as follows:

"xxx xxx xxx

5. *An analysis of the provisions of the DRT Act shows that primary object of that Act was to facilitate creation of special machinery for speedy recovery of the dues of banks and financial institutions. This is the reason why the DRT Act not only provides for establishment of the Tribunals and the Appellate Tribunals with the jurisdiction, powers and authority to make summary adjudication of applications made by banks or financial institutions and specifies the modes of recovery of the amount determined by the Tribunal or the Appellate Tribunal but also bars the jurisdiction of all courts except the Supreme Court and the High Courts in relation to the matters specified in Section 17. The Tribunals and the Appellate Tribunals have also been freed from the shackles of procedure contained in the Code of Civil Procedure.*

6. To put it differently, the DRT Act has not only brought into existence special procedural mechanism for speedy recovery of the dues of banks and financial institutions, but also made provision for ensuring that defaulting borrowers are not able to invoke the jurisdiction of the civil courts for frustrating the proceedings initiated by the banks and other financial institutions.

xxx xxx xxx

43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to

[5] ***(2010) 8 SCC 110***

the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. *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.***

45. ***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.***

xxx xxx xxx

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.*
xxx xxx xxx"

(Emphasis Supplied)

29. Considering the law as discussed in the preceding paragraphs, it is no longer *res integra* that where a remedy is available under Section 17 of the SARFAESI Act, this Court ought not to entertain writ petitions under Article 226 of the Constitution of India.

30. This Court further notes that similar issues, as raised by the petitioner herein, came to be adjudicated by the ***Division Bench of Bombay High Court in the case of Sapna Agarwal Versus Canara Bank and Another***[6]. In the said case, the petitioner therein had raised the contention that the transaction was governed by the laws of Hong Kong. Since the contract was not governed by the Indian Laws, SARFAESI Act is not applicable. Dismissing the said writ petition as being not maintainable, on the ground that all the said issues will have to be decided by the Tribunal, the Division Bench of the Bombay High Court, held as follows:

> *"xxx xxx xxx*
>
> *12. There is a distinction between the jurisdiction and power of the financial institutions under the SARFAESI Act and the jurisdiction and power of the Debt Recovery Tribunal to entertain and decide claims under the SARFAESI Act.* ***The contention of the Petitioner is primarily against the jurisdiction and power of the Respondent Bank, a financial institution. On the power and jurisdiction of the Tribunal, a sole contention advanced is that since the contract in question is not governed by the Indian laws and since the SARFAESI Act is not applicable, the Tribunal being an Authority under the Indian laws cannot examine the actions of the Respondents and, therefore, the writ petition be entertained. Nowhere from reading this provision, the Tribunal is powerless to entertain and decide the claims raised by the Petitioner. Whatever may be the shades of the arguments of the Petitioner, the substance of the grievance is that the action of the Respondents is with no authority or jurisdiction under the Act. As laid down by the Supreme Court in Assistant Collector of Central Excise, Article 226 is not meant to short-circuit or circumvent statutory***

[6] ***judgment dated 26th November, 2020 passed in W.P. No. 3280/2019***

procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, 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 then recourse may be had to Article 226 of the Constitution. It is not pointed out by the Petitioner how the statutory remedy available is ill-suited, or there is any public wrong and public injury element mixed up.

13. The Respondents contend that the mortgaged property is in India, the mortgage deed is executed in India and that the contention of the Petitioner that this transaction is governed by the laws of Hong Kong and nothing has taken place in India is not an admitted position. ***These issues will have to be decided by the Tribunal. Furthermore, the Tribunal has the power to rule on its jurisdiction. If the Tribunal holds it has no jurisdiction, the Petitioner has remedies. The contentions of the Petitioner can be raised before the Tribunal. The Petitioner has filed an application in the Tribunal, which is pending. Therefore, on the ground of availability of an alternate efficacious remedy, we are not inclined to entertain the petition.***

14. ***Writ petition is rejected. All the contentions of the parties are kept open to be urged before the Tribunal.***

xxx xxx xxx"

(Emphasis Supplied)

31. Considering the detailed discussion as above, it is held as follows:

31.1 The respondent-bank cannot proceed further under the SARFAESI Act, in view of the interim moratorium, operating on account of the Insolvency Proceedings pending against the petitioner, the personal guarantor.

31.2 As and when the interim moratorium is lifted, and the respondent-bank proceeds under the SARFAESI Act, the petitioner shall be at liberty to approach the learned DRT and raise all issues, including issue regarding authority and jurisdiction of the respondent-bank to proceed under the SARFAESI Act, in view of the loan having been sanctioned and disbursed in Dubai, by the respondent no.-2 bank, which is also situated in Dubai.

31.3 It is clarified that this Court has not given any finding on the merits of the issues, as raised by the petitioner, which shall be raised before the learned DRT, and decided on its own merits. All the rights and contentions of both the parties are left open.

32. The present petition is disposed of, with the aforesaid directions, along with pending application.

(MINI PUSHKARNA)
JUDGE

JULY 2, 2024
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