AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

WPC No. 5098 of 2022

Suresh Kumar Goyal S/o Lt. Kishori Lal Goyal Aged About 62 Years R/o House No. H - 29, Street No. 3, Kalimata Ward No. 28, Rajeev Nagar, Kalibadi, S.O, Raipur Chhattisgarh - 492001

---- Petitioner

Versus

1. Aditya Birla Housing Finance Limited Having Its Registered Office At Indian Rayon Compound, Veraval, Gujarat - 362266
2. Aditya Birla Housing Finance Limited Having Its Branch Office At G - Corp Tech Park, 5th Floor, Near Big Bazaar Mall, Thane (West) - 400601 Also At - One World Centre, Tower - 1, 18th Floor, 841, Jupiter Mill Compound, Senapati Bapat Marg, Elphinstone Road, Mumbai - 400013
3. Mr. M. Justin George Sole Arbitrator, Retired Civil Judge, Senior Division Having Office At B - 101 Sm Heights, New Sector 50 - E Plot 110/110 A, Seawoods, Nerul, Navi Mumbai - 400706

---- Respondents

For petitioner/s	:	Mr. Himanshu Pandey, Advocate
For Respondent/s	:	Mr. Ankit Pandey, Advocate

Hon'ble Mr. Justice P. Sam Koshy
Order on Board

16/01/2023

1. The instant writ petition has been filed seeking for following reliefs :-

> "A. Issue a writ of certiorari quashing and setting aside the notice dated 22.08.2022 issued by respondent no.3 whereby the commencement of arbitration was notified by the arbitrator and consequential arbitration proceedings arising there from.
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> B. Grant the cost of the petition to the petitioner.
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> C. Grant any other relief as deemed fit and proper in the facts and circumstances of the case."

2. The impugned order Annexure P-1 under challenge is a notice issued by the respondent no.3 the sole arbitrator appointed to arbitrate upon the dispute between the petitioner and respondent no.1 & 2.

3. Facts relevant for adjudication of the present dispute is that the petitioner had obtained certain loan for commercial transactions from the respondent no.1 & 2. The respondent no.1 & 2 in turn sanctioning to the petitioner the loan of Rs. 1,82,93,945(One crore, Eighty two lakhs, ninety three thousand, nine forty five Rupees) vide loan Account No.LNRAIHL-12180043625.

4. In pursuance to the sanctioning of loan, the petitioner entered into a law agreement with respondent No.1 & 2 and created a mortgage in respect of the properties measuring 4000 Sq.Feet at Khatiyan No.431 Plot No. H-29 situated at Bharat Gruh Nirman Samiti Maryadit, Rajiv Nagar, Kali Mata Ward No.30, PC. NO.109, RIC-Raipur, Chhattisgarh.

5. As a result of default on the part of the petitioner, in re-payment of loan, respondent no.1 & 2 initiated proceedings under Sarfaesi Act against the petitioner. It is also contended that respondent no.1 & 2 initiated proceedings under Payment and Settlement Systems Act, 2007. Lastly respondent no.1 & 2 resorted to invoke the arbitration clause and have appointed respondent no.3 as a sole arbitrator to resolve the dispute between the parties.

6. Mr. Ankit Pandey appearing for respondent no.1 & 2 raised a question of maintainability of the writ petition. The contention of the learned counsel for the respondents was that firstly respondent no.1 & 2 being a private financial institution the same would not fall within the ambit of State under Article 12 of the Constitution of India. Secondly, it was contended that the appointment of respondent no.3 as an arbitrator invoking the provision of arbitration Act also is not one which could be questioned by way of a writ petition under Article 226 as there is no legal bar for the two proceedings I.e the proceedings under Arbitration Act and one under the Sarfaesi Act from being proceeded simultaneously.

7. Learned counsel for the petitioner on the other hand in support of his contention relied upon the decision of the Supreme Court in the case of Phoenix Arc Private Limited Vs. Vishwa Bharati Vidya Mandir & Others, (2022) 5 SCC 345 and also the decision in the case of Vidya Droliya & Others Vs. Durga Trading

Corporation, (2021) 2 SCC 1 in support of this contention and also the judgment rendered in the case of Bhaven Construction, through Authorized Signatory Premjibhai K. Shah Vs. Executive Engineer, Sardar Sarovar Narmada Nigam Limited and Another, (2022) 1 SCC 75.

8. As regards the first contention of the learned counsel for the respondent that Writ would not be maintainable against private financial institution, it would be relevant at this juncture to take note of the judgment relied upon by the petitioner themselves i.e. in the case of Phoenix Arc Private Limited(Supra) wherein in paragraph 18, 20 & 21 it has been held as under :-

> 18. Even otherwise, it is required to be noted that a writ petition against the private financial institution – ARC – 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. 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 the cases of Praga Tools Corporation (supra) and Ramesh Ahluwalia (supra) relied upon by the learned counsel appearing on behalf of the borrowers are not of any assistance to the borrowers.
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> 20.In the case of Mathew K.C. (supra) after referring to and/or considering the decision of this Court in the case of Chhabil Dass Agarwal (supra), it was observed and held in paragraph 5 as under:-
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> > "5. We have considered the submissions on behalf of the parties. Normally this Court in exercise of jurisdiction under Article 136 of the Constitution is loath to interfere with an interim order passed in a pending proceeding before the High Court, except in special circumstances, to prevent manifest injustice or abuse of the process of the court. In the present case, the facts are not in dispute. The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well-defined exceptions as observed in CIT v. Chhabil Dass Agarwal [CIT v. Chhabil Dass Agarwal, (2014) 1 SCC 603], as follows: (SCC p. 611, para 15)
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> > > "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. Supt. of Taxes, AIR 1964 SC 1419] , Titaghur Paper Mills case [Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433] 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."

21.Applying the law laid down by this Court in the case of Mathew K.C. (supra) 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. 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."

9. Hon'ble Supreme Court earlier also in the case of Federal Bank Ltd. Vs. Sagar Tomas and others, (2003) 10 SCC 733 in paragraph 27 & 28 have held as under :-

27.Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may issue to such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment say Air (Prevention and Control of Pollution) Act, 1981 or Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance of those provisions. For instance, if a private employer dispense with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and have issued the writ to the private bodies and the companies in that regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.

28. The six factors which have been enumerated in the case of Ajay Hasia (supra) and approved in the later decisions in the case of Ramana (supra) and the seven Judges Bench in the case of Pradeep Kumar Biswas (supra) may be applied to the facts of the present case and see as to those tests apply to the appellant bank or not. As indicated earlier, share capital of the appellant bank is not held at all by the government nor any financial assistance is provided by the State, nothing to say which may meet almost the entire expenditure of the company. The third factor is also not answered since the appellant bank does not enjoy any monopoly status nor it can be said to be an institution having State protection. So far control over the affairs of the appellant bank is concerned, they are managed by the Board of Directors elected by its shareholders. No governmental agency or officer is connected with the affairs of the appellant bank nor anyone of them is a member of the Board of Directors. In the normal functioning of the private banking company there is no participation or interference of the State or its authorities. The statutes have been framed regulating the financial and commercial activities so that fiscal equilibrium may be kept maintained and not get disturbed by the mal-functioning of such companies or institutions involved in the business of banking. These are regulatory measures for the purposes of maintaining the healthy economic atmosphere in the country. Such regulatory measures are provided for other companies also as well as industries manufacturing goods of importance. Otherwise these are purely private commercial activities. It deserves to be noted that it hardly makes any difference that such supervisory vigilance is kept by the Reserve Bank of India under a Statute or the Central Government. Even if it was with the Central Government in place of the Reserve Bank of India it would not have made any

> difference, therefore, the argument based on the decision of All India Bank Employees' Association (supra) does not advance the case of the respondent. It is only in case of mal-functioning of the company that occasion to exercise such powers arises to protect the interest of the depositors, shareholders or the company itself or to help the company to be out of the woods. In the times of normal functioning such occasions do not arise except for routine inspections etc. with a view to see that things are moved smoothly in keeping with fiscal policies in general."

10. As regards second objection where the proceedings under the Arbitration Act would be sustainable in the teeth of proceedings under Sarfaesi Act initiated by the respondent Bank this issue again is no longer res-integra for the reason that Hon'ble Supreme Court in the case of M.D. Frozen Goods Exports Private Limited Vs. Hero Fincorp Limited, (2017) 16 SCC 741 in paragraph 11, 26, 27,28,29,33 & 34 have held as under :-

> 11. A perusal of the impugned order and the submissions made by learned counsel for the parties have thrown up the following legal issues for determination:
> 11.1. Whether the arbitration proceedings initiated by the respondent can be carried on along with the SARFAESI proceedings simultaneously?
> 11.2. Whether resort can be had to Section 13 of the SARFAESI Act in respect of debts which have arisen out of a loan agreement/mortgage created prior to the application of the SARFAESI Act to the respondent?
> 11.3. A linked question to question (ii), whether the lender can invoke the SARFAESI Act provision where its notification as financial institution under Section 2(1)(m) has been issued after the account became an NPA under Section 2(1)(o) of the said Act?
> 26. A claim by a bank or a financial institution, before the specified laws came into force, would ordinarily have been filed in the Civil Court having the pecuniary jurisdiction. The setting up of the Debt Recovery Tribunal under the RDDB Act resulted in this specialised Tribunal entertaining such claims by the banks and financial institutions. In fact, suits from the civil jurisdiction were transferred to the Debt Recovery Tribunal. The Tribunal was, thus, an alternative to a Civil Court recovery proceedings.
> 27. On the SARFAESI Act being brought into force seeking to recover debts against security interest, a question was raised whether parallel proceedings could go on under the RDDB Act and the SARFAESI Act. This issue was clearly answered in favour of such simultaneous proceedings in Transcore vs. Union of India & Anr.11. A later judgment in Mathew Varghese vs. M. Amritha Kumar12 also discussed this issue in the following terms:
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> > "45. A close reading of Section 37 shows that the provisions of the SARFAESI Act or the Rules framed thereunder will be in addition to the provisions of the RDDB Act. Section 35 of the SARFAESI Act states that the provisions of the SARFAESI Act will have overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force. Therefore, reading Sections 35 and 37 together, it will have to be held that in the event of any of the provisions of the RDDB Act not being inconsistent with the provisions of the SARFAESI Act, the application of both the Acts, namely, the SARFAESI Act and the RDDB Act, would be complementary to each other. In this context, reliance can be placed upon the decision in Transcore v. Union of India [(2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116] . In para 64 it is stated as under after referring to Section 37 of the SARFAESI Act: (SCC p. 162)
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> > > "64. … According to American Jurisprudence, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Principles of Equity (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and

inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application." (emphasis added)

46. A reading of Section 37 discloses that the application of the SARFAESI Act will be in addition to 11 (2008) 1 SCC 125 12 (2014) 5 SCC 610 and not in derogation of the provisions of the RDDB Act. In other words, it will not in any way nullify or annul or impair the effect of the provisions of the RDDB Act. We are also fortified by our above statement of law as the heading of the said section also makes the position clear that application of other laws are not barred. The effect of Section 37 would, therefore, be that in addition to the provisions contained under the SARFAESI Act, in respect of proceedings initiated under the said Act, it will be in order for a party to fall back upon the provisions of the other Acts mentioned in Section 37, namely, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, or any other law for the time being in force."

28. These observations, thus, leave no manner of doubt and the issue is no more res integra, especially keeping in mind the provisions of Sections 35 and 37 of the SARFAESI Act, which read as under:

"35. The provisions of this Act to override other laws. – The provisions of this Act 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." …. …. …. …. "

37. Application of other laws not barred. – The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force."

29. The aforesaid two Acts are, thus, complimentary to each other and it is not a case of election of remedy.

33. SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is an adjudicatory process. In the event that the secured assets are insufficient to satisfy the debts, the secured creditor can proceed against other assets in execution against the debtor, after determination of the pending outstanding amount by a competent forum.

34. We are, thus, unequivocally of the view that the judgments of the Full Bench of the Orissa High Court in Sarthak Builders Pvt. Ltd. vs. Orissa Rural Development Corporation Limited15, the Full Bench of the Delhi High Court in HDFC Bank Limited vs. Satpal Singh Bakshi (supra) and the Division Bench of the Allahabad High Court in Pradeep Kumar Gupta vs. State of U.P16 lay down the correct proposition of law and the view expressed by the Andhra Pradesh High Court in M/s. Deccan Chronicles Holdings Limited vs. Union of India17 following the overruled decision of the Orissa High Court in Subash Chandra Panda vs. State of Orissa18 does not set forth the correct position in law. SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand. "

11. A similar view has further been taken by the Delhi Highcourt recently in the case of Hero Fincorp. Limited Vs. Techno Trexim(I) Pvt. Ltd. And Others, 2022 SCC Online Del 3859 which was following the decision rendered in the case of M.D. Frozen Foods(Supra) whereby the Delhi High Court in paragraph 50 to 55 has held as under :-

50. Similarly in M.D. Frozen Foods Exports Pvt. Ltd. (supra), the Supreme Court was concerned with an issue whether proceedings under the SARFAESI Act can be initiated simultaneously when the parties are in the arbitration. The Supreme Court held in the affirmative by holding in paragraphs 32 to 34 as under:

"32. The aforesaid is not a case of election of remedies as was sought to be canvassed by the learned Senior Counsel for the appellants, since the

> alternatives are between a civil court, Arbitral Tribunal or a Debt Recovery Tribunal constituted under the RDDB Act. Insofar as that election is concerned, the mode of settlement of disputes to an Arbitral Tribunal has been elected. The provisions of the SARFAESI Act are thus, a remedy in addition to the provisions of the Arbitration Act. In Transcore v. Union of India it was clearly observed that the SARFAESI Act was enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith. Liquidation of secured interest through a more expeditious procedure is what has been envisaged under the SARFAESI Act and the two Acts are cumulative remedies to the secured creditors.
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> 33.SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is an adjudicatory process. In the event that the secured assets are insufficient to satisfy the debts, the secured creditor can proceed against other assets in execution against the debtor, after determination of the pending outstanding amount by a competent forum.
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> 34. We are, thus, unequivocally of the view that the judgments of the Full Bench of the Orissa High Court in Sarthak Builders (P) Ltd. v. Orissa Rural Dev. Corpn. Ltd., the Full Bench of the Delhi High Court in HDFC Bank Ltd. v. Satpal Singh Bakshi and the Division Bench of the Allahabad High Court in Pradeep Kumar Gupta v. State of U.P. lay down the correct proposition of law and the view expressed by the Andhra Pradesh High Court in Deccan Chronicles Holdings Ltd. v. Union of India following the overruled decision of the Orissa High Court in Subhash Chandra Panda v. State of Orissa does not set forth the correct position in law. SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand."

51. In Indiabulls Housing Finance Ltd. (supra), the Supreme Court after considering the judgments in Transcore (supra) and M.D. Frozen Foods Exports Pvt. Ltd. (supra) has observed as under:-

> 18. Insofar as Question (i) is concerned, the Court categorically held that merely because remedy under the Arbitration Act was invoked was no ground to debar the respondent from taking recourse to the SARFAESI Act".....

52. I find that even the Supreme Court in the case of Vidya Droliya (supra) in paragraph 35 while referring to M.D. Frozen Foods Exports Pvt. Ltd. (supra) and Indiabulls Housing Finance Ltd. (supra) held that even prior arbitration proceedings are not a bar to proceedings under the NPA Act (SARFAESI Act) as it sets out an expeditious procedural methodology enabling the financial institutions to take possession and sell acquired properties for non-payment of dues, as such powers obviously cannot be exercised through arbitral proceedings.

53. Having said that, the plea of the counsel for the respondent No.1 is that the value of the immoveable property is more than adequate to satisfy the alleged principal / outstanding amounts that are being claimed by the petitioner. This submission would not bar the initiation of arbitration proceedings for the simple reason that, if any recovery is made by the petitioner through the process of SARFAESI Act, surely the factum can be brought to the notice of the Arbitrator. This I say so, because there may be an eventuality where the complete amount as due and payable may not be recovered through process initiated under the SARFAESI Act.

54. The plea of learned counsel for the respondent No.1 that the respondents have a right to challenge the action taken by the petitioner under Section 13 (4) of the SARFAESI Act by filing a petition before the DRT under Section 17 of the Act and that under Section 34 of the SARFAESI Act, the jurisdiction of the Civil Court is barred in relation to matters in which DRT has jurisdiction. To answer this submission, I must reiterate it is the case of the petitioner that it is an NBFC and has not been notified by the Central Government under the RDB Act. In that sense, proceedings under the RDB Act cannot be initiated by the petitioner. The reference to DRT in the submission of the counsel for the respondent No.1 is with regard to the fact that SARFAESI Act under Section 17 provides DRT as a Forum. However the mandate of the DRT under Section 17 of the SARFAESI Act is limited to examining whether the action initiated by the petitioner is in accordance with Section 13 (4) of the Act and nothing more. So, in that sense, the proceedings are not under the RDB Act, but under SARFAESI Act.

55. Having said that, even if the petitioner intends to take action under Section 17 of the Act by filing a petition before DRT that would still not preclude the initiation of arbitration proceedings by the petitioner in accordance with law. “

12. Given the aforesaid legal position as it stands and authoritative decision rendered in this regard, this Court is of the opinion that writ petition under the

given circumstances would not be sustainable and on both the counts firstly the writ petition being not maintainable against the private financial institution and secondly the initiation of Sarfaesi Proceedings would not debar the financial institution from resorting to other statutory remedies available to them under law. The objection raised by the respondents stands sustained and the writ petition stands rejected.

Sd/-
(P. Sam Koshy)
Judge

Rohit