I. Case Reference

Case Citation	: (2023) ibclaw.in 853 HC
Case Name	: Jayaprakash A Vs. Union Bank of India
Appeal No.	: WP(C) No. 30803 of 2023
Judgment Date	: 19-Oct-23
Court/Bench	: High Court of Kerala
Present for Petitioner(s)	: By Advs. Maria Nedumpara, Gens George Elavinamannil
Present for Respondent(s)	: By Advs. ASP. Kurup, C.P. Anil Raj, Siva Suresh, Reshma Raj, Sadchith P Kurup,SC
Coram	: Mr. Justice K. Babu
Original Judgment	: Download

II. Brief about the decision

- Section 17 of the SARFAESI Act is a complete code providing remedies to any person aggrieved by the measures taken by the secured creditor under the provisions of Section 13 of the SARFAESI Act. By virtue of Section 17 of the SARFAESI Act, the Tribunal is clothed with a wide range of powers to interfere with any illegality. The Tribunal has the power to consider whether the measures referred to in Section 13 resorted to by the secured creditors for the enforcement of the security interests are in accordance with the provisions of the Act and the Rules made thereunder. It has the power to restore management or reservation of the possession of the secured assets of the borrower or any person aggrieved. The Tribunal has the jurisdiction to examine the claims of the tenancy or leasehold rights upon the leasehold assets. As per Sub-section (5) of Section 17, the statute mandates that any application made under Sub-section (1) of Section 17 shall be disposed of within sixty days from the date of such application. Section 18 of the Act provides the provision for appeal by any person aggrieved by an order of the Debts Recovery Tribunal under Section 17.**(p13)**
- Therefore, a person aggrieved by the course adopted by the secured creditor under Section 13 of the SARFAESI Act has an effective and efficacious remedy. When a Tribunal is constituted, it is expected to go into the issues of fact and law, including statutory violations. So, on the principle of alternative remedy, the writ petition is not maintainable.**(p24)**
- It is pertinent to note that the petitioner has already approached the Tribunal by filing S.A.No.288/2022. The petitioner has failed to establish any extraordinary circumstances warranting interference of this Court under Article 226 of the Constitution. The result of the above discussion is that the writ petition is not maintainable. Therefore, this writ petition stands dismissed in limine.**(p22-23)**

III. Full text of the judgment

J U D G M E N T

The petitioner challenges the proceedings initiated under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (‘the SARFAESI Act’) in this writ petition.

2. The facts leading to the institution of the writ petition are briefly narrated below:

The petitioner is the proprietor of M/s. Evercool Enterprises, Manjeri. The petitioner availed a credit facility from the first respondent Bank. The proprietorship enterprises of the petitioner obtained registration under the relevant provisions of the Micro, Small and Medium Enterprises Development Act, 2006 ('the MSMED Act'). The petitioner committed default in repaying the loan availed from the respondent Bank. The Bank proceeded under the provisions of the SARFAESI Act. The petitioner's loan account was classified as Non-Performing Asset (NPA) on 28.02.2021. The Bank issued notice under Section 13(2) of the SARFAESI Act on 29.04.2021, possession notice on 29.12.2021 and sale notice on 01.09.2023. The Bank filed C.M.P.No.2941/2022 before the Chief Judicial Magistrate's Court, Manjeri, which appointed an Advocate Commissioner to take the physical possession of the mortgaged property. The petitioner applied to the Bank on 18.09.2023 for the constitution of a Committee as provided under the MSMED Act and to seek the restructuring of the loan. The Bank, without considering the request submitted by the petitioner, proceeded under the provisions of the SARFAESI Act.

3. The petitioner has filed the writ petition seeking the following reliefs:

> *"(a) declare that the Petitioner is an MSME within the meaning of the MSMED Act of 2006 and Ext.P2/notification 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, in 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;*
>
> *(b) declare that the MSME Act in so far as it has not created a special forum/tribunals to enforce the inter-se rights and obligations/remedies, which it has created in addition to those rights/obligations/ remedies recognized by the common law, the jurisdiction of the Civil Court is not ousted, for it is impossible to oust the jurisdiction of the Civil Court without providing for an alternative forum/tribunal to adjudicate the inter se disputes between parties who are governed by the Act;*
>
> *(c) to declare that the entire proceedings at the hands of the Respondent no. 3, Authorised Officer of the Union Bank of India under Section 13(2), 13(4) and 14 of the SARFAESI and the Security Interest (Enforcement) Rules are illegal and void and to grant a consequential writ in the nature of certiorari or any other appropriate writ or order quashing and setting aside the same;*
>
> *(d) to issue a writ in the nature of mandamus, nay, certiorarified mandamus or any other appropriate writ or order directing Respondent no. 1, Board of directors of the Union Bank of India to constitute a committee for the resolution of the stress of the unit of the instant Petitioner, an MSME as contemplated in paragraph 2 of the notification dated 29.5.2015 issued under the MSMED Act, and further to direct the Committee to resolve the stress in accordance with the said notification and such other relevant notifications/regulations framed by the RBI;*
>
> *(e) in furtherance to prayer (d) above, to issue a writ in the nature of prohibition restraining and prohibiting the Respondent Bank from initiating or continuing any measures for recovery under any other law and in particular, the SARFAESI Act and the rules made thereunder, and*

the Recovery of Debts and Bankruptcy Act;

(f) declare that the Petitioner is entitled to be compensated by respondent Nos. 1 to 3 for the loss and injury, which it has suffered on account of the gross breach of trust, culpable negligence, and malicious and tortious action at the hands of the respondent-bank and its officers, which loss and injury far exceeds the very claim of the Bank as against the petitioner, and therefore, no amount is due to the Respondents 1 to 3 by the petitioner, and the Respondents 1 to 3 have no enforceable rights as against the petitioner;

(g) declare that the guidelines and notifications issued by the Reserve Bank of India from time to time empowering the bank and financial institutions to declare a borrower as a wilful defaulter is without authority of law and further that the Plaintiffs, nay a borrower is not liable to the declared as a wilful defaulter except by authority of an act of Parliament or statutory instrument having the force of law, and that the Petitioner is not liable to be declared as a willful defaulter and further that his previous credit rating is liable to be restored;

(h) grant a perpetual mandatory and prohibitory injunction restraining and prohibiting respondent Nos. 1 to 3, their agent, servants, officers, representatives and/or anyone from taking any action for recovery under any law whatsoever in respect of the properties referred to in the notice issued under Section 13(2) of the SARFAESI Act, or in any manner interfere with the Petitioner's peaceful possession and enjoyment of the said properties;

4. I have heard Sri.Mathews J. Nedumpara, the learned counsel appearing for the petitioner and Sri.Sadchith P.Kurup, the learned counsel appearing for the Bank.

5. Sri.Mathews J Nedumpara, the learned counsel for the petitioner made the following submissions:

5.1 The MSMED Act, a statute enacted to promote and protect Micro, Small and Medium Enterprises, is a beneficial legislation. Section 24 of the MSMED Act provides an overriding effect over other prevailing laws. The provisions concerning the recovery, as provided in the MSMED Act, will prevail over the recoveries under the SARFAESI Act. In exercise of the powers under the provisions of the MSMED Act, the Ministry of Micro, Small & Medium Enterprises has issued Notification No.S.O.1432(E) dated 29.05.2015, which provides for (a) framework for the resolution of Stressed Assets; (b) Formation of Committee(s) for stressed MSMEs for implementation of the said framework (c) Provision of a Corrective Action Plan for eligible MSMEs, and (d) Provision for Revival/Restructuring of the eligible MSME loan account; (e) and recovery measures if revival/restructuring is not feasible.

5.2. The provisions of Sections 15 to 23 of the MSMED Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Chapter V of the MSMED Act contains the entire scheme of provisions for dealing with delayed payments and recovery of amounts due. The Bank and other financial institutions cannot classify an account as NPA without resorting to the provisions of the MSMED Act. The MSMED Act being a subsequent legislation against the SARFAESI Act, the Parliament has purposefully and knowingly superseded all the recovery proceedings by virtue of the non-obstante clause contained in Section 24. The MSMED Act is an extension of the welfare policy of the State and, therefore, the same is to be considered in such a way as to balance the larger interest of the small and medium enterprises. The provisions of the MSMED Act, a socio-

economic legislation, are to be interpreted as broadly as possible.

6. The learned counsel relied on **Delhi Gymkhana Club Ltd. v. Employees State Insurance Corporation : (2015) 1 SCC 142, National Insurance Co.Ltd v. Swaran Singh and Ors : (2004) 3 SCC 297** and a series of decisions in support of his contentions.

7. Sri.Sadchith P.Kurup, the learned Standing counsel for the respondent Bank, made the following submissions:

Sections 15 to 23 of the MSMED Act only provide for special mechanism for adjudication of the dispute along with enforcing certain other contractual and business terms on the parties. Those provisions do not provide any priority for payments under the MSMED Act over the dues of secured creditors. The legislature has expressly and unambiguously provided for a legal framework exclusively on the issue of priority of payment of dues under the SARFAESI Act. Section 26-E of the SARFAESI Act being subsequently inserted as per the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 (44 of 2016), the non-obstante clause in Section 26-E shall prevail over the provisions of the MSMED Act.

8. The learned counsel for the respondent Bank placed reliance on **Kotak Mahindra Bank Limited v. Girnar Corrugators Pvt.Ltd : (2023) 3 SCC 210** and **Abdul Nazer v. Union Bank of India : 2023(5) KLT 301**.

9. In **Kotak Mahindra** (supra), the Apex Court, while considering the question whether the MSMED Act would prevail over the SARFAESI Act or whether recovery proceedings/recoveries under the MSMED Act would prevail over the recoveries made or recovery proceedings under the provisions of the SARFAESI Act, held thus:

> *"7. While appreciating the above submissions, it is required to be appreciated that Sections 15 to 23 of the MSMED Act only provide for special mechanism for adjudication of the dispute along with enforcing certain other contractual and business terms on the parties such as time limit for payments and interest in case of delayed payments. In the entire MSMED Act, there is no specific express provision giving 'priority' for payments under the MSMED Act over the dues of the secured creditors or over any taxes or cesses payable to Central Government or State Government or Local Authority as the case may be. In sharp contrast to this, Section 26E of the SARFAESI Act which has been inserted vide Amendment in 2016, it provides that notwithstanding anything inconsistent therewith contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in 'priority' over all other debts and all revenue taxes and cesses an other rates payable to the Central Government or State Government or Local Authority. However, the priority to secured creditors in payment of debt as per Section 26E of the SARFAESI Act shall be subject to the provisions of the IBC. Therefore, such dues vis-a-vis dues under the MSMED Act, as per the decree or order passed by the Facilitation Council debts due to the secured creditor shall have a priority in view of Section 26E of the SARFAESI Act which is later enactment in point of time than the MSMED Act. At this stage, it is required to be noted Section 26E of the SARFAESI Act which is inserted in 2016 is also having a non-obstante clause. Even as per the submission on behalf of respondent No.1, two enactments have competing non-obstante provision and nothing repugnant, then the non-obstante clause of the subsequent statute would prevail over the earlier enactments. As per the settle position of law,*

if the legislature confers the later enactment with a non-obstante clause, it means the legislature wanted the subsequent / later enactment to prevail. Thus, a 'priority' conferred / provided under Section 26E of the SARFAESI Act would prevail over the recovery mechanism of the MSMED Act. The aforesaid is to be considered along with the fact that under provisions of the MSMED Act, more particularly Sections 15 to 23, no 'priority' is provided with respect to the dues under the MSMED Act, like Section 26E of the SARFAESI Act.

8. As observed hereinabove, Sections 15 to 23 of the MSMED Act are providing a special mechanism for adjudication of the disputes and to adjudicate and resolve the disputes between the supplier and buyer – micro or small enterprise. At the cost of repetition, it is observed that MSMED Act does not provide any priority over the debt dues of the secured creditor akin to Section 26E of the SARFAESI Act. At the most, the decree / order / award passed by the Facilitation Council shall be executed as such and the micro or small enterprise in whose favour the award or decree has been passed by the Facilitation Council shall be entitled to execute the same like other debts / creditors. Therefore, considering the provisions of Sections 15 to 23 read with Section 24 of the MSMED Act and the provisions of the SARFAESI Act, as such, there is no repugnancy between two enactments viz. SARFAESI Act and MSMED Act. As such, there is no conflict between two schemes, i.e. MSMED Act and SARFAESI Act as far as the specific subject of 'priority' is concerned.

10. The Apex Court further held that recoveries under the SARFAESI Act with respect to the secured assets would prevail over the recoveries under the MSMED Act to recover the amount under the award/decree passed by the Facilitation Council.

11. Given the declaration of law by the Apex Court in **Kotak Mahindra** (supra), I am of the view that all the contentions raised by the petitioner on the foundation that the MSMED Act will prevail over the provisions of the SARFAESI Act fall to ground. This Court, following the principles laid down in **Kotak Mahindra** (supra) in Abdul Nazer (supra), held that the framework in the notification relied on by the petitioner and the other provisions of the MSMED Act cannot prevail over the statutory provisions of the SARFAESI Act in the matter of secured assets. The petitioner has also prayed for a perpetual mandatory and prohibitory injunction restraining and prohibiting the respondent Bank and other agents, servants, officers, etc, from taking any action for the recovery from the petitioner under the relevant provisions of the SARFAESI Act.

12. The relief of injunction prayed for by the petitioner has to be considered on the touchstone of the object and purpose of the SARFAESI Act. The SARFAESI Act has been enacted, for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. It is a special legislation for enforcement of security interest which is created in favour of the secured creditor. In **Mardia Chemicals v. Union of India : (2004) 4 SCC 311**, the Supreme Court considered this aspect. In **Mardia Chemicals** (supra), the Apex Court observed thus:

"81. In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debt Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better

availability of capital liquidity and resources to help in growth of economy of the country and welfare of the people in general which would subserve the public interest."

13. Section 17 of the SARFAESI Act is a complete code providing remedies to any person aggrieved by the measures taken by the secured creditor under the provisions of Section 13 of the SARFAESI Act. By virtue of Section 17 of the SARFAESI Act, the Tribunal is clothed with a wide range of powers to interfere with any illegality. The Tribunal has the power to consider whether the measures referred to in Section 13 resorted to by the secured creditors for the enforcement of the security interests are in accordance with the provisions of the Act and the Rules made thereunder. It has the power to restore management or reservation of the possession of the secured assets of the borrower or any person aggrieved. The Tribunal has the jurisdiction to examine the claims of the tenancy or leasehold rights upon the leasehold assets. As per Sub-section (5) of Section 17, the statute mandates that any application made under Sub-section (1) of Section 17 shall be disposed of within sixty days from the date of such application. Section 18 of the Act provides the provision for appeal by any person aggrieved by an order of the Debts Recovery Tribunal under Section 17.

14. Therefore, a person aggrieved by the course adopted by the secured creditor under Section 13 of the SARFAESI Act has an effective and efficacious remedy. When a Tribunal is constituted, it is expected to go into the issues of fact and law, including statutory violations. So, on the principle of alternative remedy, the writ petition is not maintainable.

15. A survey of the judicial precedents is useful. The Apex Court has considered the scope of interference by the High Courts under Article 226 of the Constitution of India in a series of pronouncements.

16. In **United Bank of India v. Satyawathi Tondon [(2010) 8 SCC 110]**, the Apex Court observed thus:

"43. ……..the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to 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."

17. In **State of Bank of Travancore v. Mathew K.C. [(2018) 3 SCC 85]**, the Supreme Court held that 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. In **State of Bank of Travancore** (supra) the Apex Court further observed thus:

"15……Loans by financial institutions are granted from public money generated at the

taxpayer's expense. Such loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same."

18. In **Varimadugu Obi Reddy v. B Sreenivasulu [(2023) 2 SCC 168]**, the Supreme Court deprecated the practice of entertaining writ applications challenging the proceedings under the SARFAESI Act by the High Court in exercise of jurisdiction under Article 226 of the Constitution without exhausting the alternative statutory remedy available under the law.

19. In **Radha Krishan Industries v. State of Himachal Pradesh and Others : (2021) 6 SCC 771** the Supreme Court observed thus:

27. The principles of law which emerge are that:

27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

27.3. Exceptions to the rule of alternate remedy arise where : (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

20. In **South Indian Bank Ltd. v. Naveen Mathew Philip (2023 SCC OnLine SC 435) = [2023 (4) KLT 29 (SC)]**, the Apex Court held thus:

"18.....the powers conferred under Article 226 of the Constitution of India are rather wide but are required to be exercised only in extraordinary circumstances in matters pertaining to proceedings and adjudicatory scheme qua a statute, more so in commercial matters involving a lender and a borrower, when the legislature has provided for a specific mechanism for

appropriate redressal."

21. In **Celir LLP v. Bafna Motors (Mumbai) Pvt. Ltd., [2023 (5) KLT 599 (SC)]** the Supreme Court held as follows:

> *"96. More than a decade back, this Court had expressed serious concern despite its repeated pronouncements in regard to the High Courts ignoring the availability of statutory remedies under the RDBFI Act and the SARFAESI Act and exercise of jurisdiction under Article 226 of the Constitution. Even after, the decision of this Court in Satyawati Tondon (supra), it appears that the High Courts have continued to exercise its writ jurisdiction under Article 226 ignoring the statutory remedies under the RDBFI Act and the SARFAESI Act."*

22. It is pertinent to note that the petitioner has already approached the Tribunal by filing S.A.No.288/2022.

23. The petitioner has failed to establish any extraordinary circumstances warranting interference of this Court under Article 226 of the Constitution.

The result of the above discussion is that the writ petition is not maintainable. Therefore, this writ petition stands dismissed in limine.

K.BABU, JUDGE

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