



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

TUESDAY, THE 22ND DAY OF AUGUST 2023 / 31ST SRAVANA, 1945

OP(CRL.) NO. 288 OF 2023

CMP 1337/2022 OF CHIEF JUDICIAL MAGISTRATE, MANJERI

PETITIONER/ RESPONDENT IN CMA :

N.P ABDUL NAZER,
GED 48 YEARS, S/O.LATE MR. MOHAMMED KUTTY,
PROPRIETOR, PANAKKAD AGENCIES,
RESIDING AT NANNAMPATTA HOUSE,
PUZHAYORAM VILLAS, ANAKKAYAM (PO), MANJERI,
MALAPPURAM DISTRICT, PIN - 676 528

BY ADVS.

Maria Nedumpara

GENS GEORGE ELAVINAMANNIL(K/670/2008)

RESPONDENTS/ PETITIONERS IN CMA :

- 1 UNION BANK OF INDIA (ERSTWHILE CORPORATION BANK),
MALAPPURAM BRANCH, REPRESENTED BY IT'S
AUTHORISED OFFICER, ASHOK KUMAR, AGED 58 YEARS,
SON OF GOVINDA SHRIYAN, CHIEF MANGER,
UNION BANK OF INDIA, FEROKE PETTA BRANCH,
KOZHIKODE DISTRICT, PIN - 673 631

- 2 STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM DISTRICT,
PIN - 682031
BY ADV.ASP.KURUP
Maria Nedumpara
SADCHITH.P.KURUP(K/1419/2002)
C.P.ANIL RAJ(K/872/2007)
SIVA SURESH(K/2688/2022)
BY SRI.C.N.PRABHAKARAN, PUBLIC PROSECUTOR

THIS OP (CRIMINAL) HAVING COME UP FOR ADMISSION
ON 14.08.2023, THE COURT ON 22.08.2023 DELIVERED THE FOLLOWING:

**"C.R."****BECHU KURIAN THOMAS, J.**

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O.P.(Cri.) No.288 of 2023

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Dated this the 22nd day of August, 2023**JUDGMENT**

The original petitioner is a borrower from the erstwhile Corporation Bank, which has now merged with the Union Bank. An overdraft cash credit facility taken in the year 2011, the quantum of which was subsequently enhanced, was defaulted by the borrower. Proceedings were initiated by the bank under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the SARFAESI Act'). By the impugned order dated 16.05.2022, the Chief Judicial Magistrate appointed an Advocate Commissioner to take possession of the secured asset under Section 14(1) of the SARFAESI Act.

2. This writ petition was filed only on 28.03.2023, challenging Ext.P3 order dtd. 16.05.2022. After the hearing was completed, it was noticed that petitioner had filed an amendment petition, which was



not brought to the notice of the court, though arguments were addressed entirely on that basis. The case was therefore posted again, and the amendment petition was allowed. All the learned counsel were again heard. In the amended writ petition, eleven new reliefs were sought. A few of the reliefs sought in the amended writ petition are as follows:-

a. *Declare that the petitioner's enterprise is an MSME within the meaning of the MSMED Act of 2006 and the notification S.O.1432 (E) dated 29.05.2015 issued by the Central Government under Section 9 thereof, as also the circulars and guidelines issued by the Reserve Bank of India under Section 10 thereof, which provides for a mechanism of resolution of stress and that no proceedings for recovery under the SARFAESI Act, RDB Act or the IBC will lie, 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;*

d. *Declare that the very Application, C.M.P.No.1337/2022 before the Ld. CJM, Manjeri, is vitiated by misrepresentation and fraud, and thus void ab initio and still born in the eyes of law and is liable to be rejected summarily in as much as the affidavit of the 1st respondent bank, is nothing but falsehood on oath, misrepresentation and wilful concealment of facts and a gross violation of the requirements to be stated by the*



Authorized Officer on oath as contemplated in Section 14(1) of the SARFAESI Act;

e. 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 be declared as a wilful defaulter except by authority of an act of Parliament or statutory instrument having the force of law;

h. Grant a perpetual mandatory and prohibitory injunction restraining and prohibiting defendant No.1 to 4, 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 Ext.P3, or in any manner interfere with the petitioner's peaceful possession and enjoyment of the said properties;

i. Issue a writ of Certiorari calling for the records leading to the passing of Ext.P3/ Order, and the SARFAESI proceedings leading to it, and quash Ext.P3/ Order and the SARFAESI proceedings leading to it, as illegal;

j. Issue a writ of prohibition against respondents 1, 3 and 4, their agents, servants, officers, representatives and/ or anyone, restraining them from proceeding against the petitioner, under the SARFAESI Act, 2002, RDB Act, 1993 or any other law, and from classifying the petitioner's account as an NPA, or the petitioner as a wilful defaulter, and from downgrading the credit worthiness of the petitioner."

3. The facts necessary for the disposal of this writ petition are as follows: Petitioner alleges that he is conducting a partnership business by the name 'Panakkad Agencies' and had availed an overdraft in the year 2011, which was periodically enhanced. Subsequently, the account was declared as a non-performing asset (NPA) on 27-12-2019, pursuant to which a notice dated 03.01.2020



was issued under Section 13(2) of the SARFAESI Act. Since no reply was submitted, the bank proceeded with the steps contemplated under law. O.A.No.410/2020 was filed before the Debts Recovery Tribunal, Ernakulam, under the Recovery of Debts and Bankruptcy Act 1993 (for short the RDB Act). Later, on 11.04.2022, an application was filed under Section 14(1) of the SARFAESI Act before the Chief Judicial Magistrate, Manjeri, consequent to which the impugned order Ext.P3 dated 16.05.2022 was issued. Instead of approaching the Tribunal constituted under law, petitioner has preferred this original petition after around ten months, that too, initially under Article 227 and later incorporating Article 226 of the Constitution of India, also through the amendment.

4. The pleadings in the original petition reveal that pursuant to the impugned order dated 16.05.2022, the Advocate Commissioner took possession of some of the properties. When this original petition came up for admission on 09.05.2023, a learned Single Judge of this Court (P.Gopinath, J.) questioned the maintainability of this original petition itself. Therefore the matter was posted for consideration on the question of maintainability. Later, the respondents filed a counter affidavit, and the petitioner filed a reply affidavit as well and in the meantime, the amendment petition was also filed.

5. I have heard Sri.Mathews J.Nedumpara, the learned counsel



for the original petitioner, Sri.Sachith P.Kurup, the learned counsel for the first respondent bank as well as Sri.Noushad K.A., the learned Government Pleader, on behalf of the 2nd respondent.

6. Sri. Mathews J.Nedumpara, the learned counsel, submitted that petitioner's establishment is registered under the Micro, Small & Medium Enterprises Development Act, 2006 (for short, 'the MSME Act') and that by virtue of a notification dated 29-05-2015 as SRO 1432(E), the bank could have classified the account of the petitioner as an NPA only after following the procedure contemplated under the said notification and therefore the very basis of the proceedings under SARFAESI Act is a non-est. He submitted that the purpose of the MSME Act would be rendered redundant if the Banks ignore the notification of 2015. According to the learned counsel, the proceeding which resulted in Ext.P3 order is without authority and, therefore, liable to be quashed.

7. Sri. Sachith P.Kurup, the learned counsel for the first respondent, on the other hand, submitted that the original petition itself is not maintainable as the petitioner had a remedy before the Debts Recovery Tribunal where he could have challenged the proceedings initiated under Section 14(1) of the SARFAESI Act which is only a step in the enforcement of security interest. The learned counsel also pointed out that even the contentions under the MSME



Act, which were not even pleaded in the original petition initially, have no bearing at all since the registration of the petitioner as an MSME, as evident from Ext.P7, was only on 02.04.2023 which is even after the filing of the original petition itself. The learned counsel relied upon the decision in **South Indian Bank Ltd. and Others v. Naveen Mathew Philip and Another [2023 SCC Online SC 435]**. The decision in **Kotak Mahindra Bank Limited v. Girnar Corrugators Private Limited and Others [(2023) 3 SCC 210]** and also the decision of the Telangana High Court in **M/s. RKI Builders Private Limited v. Union of India and Others [(2022) 6 ALT 439]** were relied upon to assert that the MSME Act cannot prevail over the provisions of the SARFAESI Act. It was also argued that the petitioner is indulging in forum shopping as he has preferred similar petitions before different courts.

8. I have considered the rival contentions. The two issues that need reconciliation are dealt with as under:-

(i) Challenge against Ext.P3 order of the Chief Judicial Magistrate issued under Section 14 of the SARFAESI Act.

9. The loan availed by the firm 'Panakkad Agencies' was declared as a non-performing asset on 27-12-2019, and notice under Section 13(2) of the SARFAESI Act was issued on 03-01-2020. No reply to the said notice was given by the petitioner. On 10.08.2020, an



application was filed by the Bank under the RDB Act before the Debts Recovery Tribunal, Ernakulam, seeking to recover an amount of Rs.3,34,97,808/- from the borrowers, including the petitioner. Thereafter the application under Section 14(1) of the SARFAESI Act was filed by the first respondent on 11.04.2022, and the impugned Ext.P3 order appointing an Advocate Commissioner to take over the secured assets was ordered by the Chief Judicial Magistrate on 16.05.2022. This writ petition is filed only on 28-03-2023 after more than ten months from the date of the impugned order.

10. On a perusal of the various grounds raised in the original petition, it is evident that at the time of filing the original petition, petitioner had no contention based on the MSME Act. The amount for which proceedings have been initiated has swelled up to Rs.3,80,84,591.90 as of 19.04.2022, as evident from Ext.P3. Petitioner has not paid any amount to the respondent bank pursuant to Ext.P3 order.

11. As against Ext.P3, petitioner had a remedy before the Debts Recovery Tribunal. In the decision in **South Indian Bank Ltd. and Others v. Naveen Mathew Philip and Another [2023 SCC Online SC 435]**, the Supreme Court had, in unambiguous terms, observed that, despite the wide powers under Article 226 of the Constitution of India, the practice of entertaining writ petitions pertaining to



SARFAESI Act is to be deprecated. After noticing the various decisions, including the decision in **Authorized Officer, State Bank of Travancore and Another v. Mathew K.C. [(2018) 3 SCC 85]**, it was observed that filing of 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.

12. Viewed in the light of the decisions of the Supreme Court mentioned above, this original petition has to be held as not maintainable in view of the alternative remedy that was available to the original petitioner before the Debts Recovery Tribunal. Further, no exceptional circumstances have been pointed to invoke the jurisdiction of this Court either under Article 227 or under Article 226 of the Constitution of India. Therefore the challenge against Ext.P3 fails on that sole ground itself.

(ii) Challenge on the basis of the MSME Act.

13. The MSME Act was enacted in 2006 to facilitate the development and regulation of Micro, Small and Medium enterprises and to create an industry friendly atmosphere and for formulating suitable policies for the development of such industries. The object of the MSME Act is to protect the development of Micro, Small and Medium Enterprises and to extend support to them, to enable them to grow and achieve higher levels and higher productivity and to remain



competitive.

14. Section 8 of the MSME Act enables a person setting up a Micro, Small or Medium Enterprise to file, at its discretion, the memorandum of that enterprise with the authority specified by the Government. Therefore, registration for an enterprise as an MSME is not a mandatory requirement but only an option. However, the benefits of an MSME under the Act will accrue only when the enterprise is registered. The registration as an MSME under the Act is referred to as 'Udyam Registration'.

15. Petitioner has produced Ext.P7 Udyam registration certificate. The certificate is issued in favour of M/s.Panakkad Agencies and it shows that the registration was only on 02.04.2023. Therefore, if at all any rights accrue to the firm Panakkad Agencies as an MSME under the Act, it can only be with effect from April 2023 and not earlier. The date of registration of the petitioner's firm under the MSME Act lends credence to the contention of the respondent that the claim raised under the MSME Act is only an afterthought.

16. Notwithstanding the above, the contention advanced by the petitioner on the basis of the MSME Act is considered hereunder. By a Notification dated 29-05-2015 issued under Section 9 of the MSME Act, the Central Government notified instructions referred to as the 'Framework for Revival and Rehabilitation of Micro, Small and Medium



Enterprises' (for short, 'the Framework'). The notification provided that, before declaring the account of an entity registered as an MSME under the Act as an NPA, it may be subjected to a certain procedure provided therein. For the purpose of reference, the relevant portion of the notification is extracted as below:

1. Identification of incipient stress

(1) Identification by Banks or creditors – Before a loan account of a Micro, Small and Medium Enterprise turns into a Non-Performing Asset (NPA), banks or creditors are required to identify incipient stress in the account by creating three sub-categories under the Special Mention Account (SMA) category as given in the Table below :

Special Mention Account Sub-categories	Basis for classification
<i>(1)</i>	<i>-2</i>
<i>SMA-0</i>	<i>Principal or interest payment not overdue for more than 30 days but account showing signs of incipient stress</i>
<i>SMA-1</i>	<i>Principal or interest payment overdue between 31-60 days</i>
<i>SMA-2</i>	<i>Principal or interest payment overdue between 61-90 days</i>

(2) Identification by the Enterprise – Any Micro, Small or Medium Enterprise may voluntarily initiate proceedings under this Framework if enterprise reasonably apprehends failure of its business or its inability or likely inability to pay debts and before the accumulated losses of the enterprise equals to half or more of its entire net worth.

(3) The application for initiation of the proceedings under this Framework shall be verified by an affidavit of authorised person.

(4) When such a request is received by lender, the account should be processed as SMA-0 and the Committee under this Framework should be formed immediately."



17. Obviously, the procedure stipulated in the notification applies only before declaring an account as an NPA and not after. The date of registration as an MSME assumes significance in this context. Concededly, there is no retrospective validation for the registration, and petitioner has not produced any other certificate of registration other than Ext.P7. As registration of M/s.Panakkad Agencies as an MSME was only on 02.04.2023 i.e. after the filing of the original petition itself, the benefit, if any, under the Framework can be claimed, if at all eligible, only thereafter and not before.

18. The benefit, if at all any, that flows from the Framework provided under the notification of 2015 cannot, therefore, be applicable or claimed by the firm or by the petitioner since the account was declared as an NPA as early as 27-12-2019.

19. Apart from the above, on a reading of clause 1 of the Framework issued under the MSME Act, it can be seen that it is only an optional framework available to the bank and the borrower. The said framework in the notification cannot prevail over the statutory provisions of the SARFAESI Act in the matter of recovery of loans. As per Section 24 of the MSME Act, only the provisions of Sections 15 to 23 are given precedence over other laws. Section 9 of the notifications issued thereunder cannot prevail over the statutory provisions of the SARFAESI Act. In the decision in **Kotak Mahindra**



Bank Limited v. Girnar Corrugators Private Limited and Others [(2023) 3 SCC 210], it has been held that the SARFAESI Act will prevail over the MSME Act.

20. Even if a harmonious construction is to be adopted, as argued finally by the learned counsel, failure to abide by the terms of the notification of 2015 cannot render the declaration of the account as NPA void or bad in law. The words in the notification do not provide for a mandatory procedural requirement. No consequence is provided for non-compliance with the Framework. The notification only gives an opportunity for the Bank to identify incipient stress accounts and provide means to MSME's also to apply before its inability to pay debts or the accumulated losses of the enterprise equals to half or more of its entire net worth. The Framework does not, under any circumstances whatsoever, give it a mandatory character. The nature of the Framework is all the more glaring since even the enterprises have been given an opportunity to voluntarily initiate the procedure under the Framework by applying for it. Hence the failure of the Banks to abide by the terms of the Framework cannot be condemned as fatal. The terms of the Framework do not convey a meaning that it was intended to transform that procedure into a dominant desideratum.

21. In this context, it is relevant to refer to the decision of the



Supreme Court in **State of U.P v. Manbodhan Lal Srivastava** (AIR 1957 SC 912) where the Constitution Bench of the Supreme Court, while interpreting Article 320 of the Constitution held that word 'shall' appearing in that provision was not mandatory. Viewed in that perspective also, even if it is assumed that the petitioner's firm was an MSME registered under the Act even prior to the declaration of the account as an NPA, still the recovery proceedings initiated against the firm under the SARFAESI Act cannot be scuttled for not following the Framework laid down in the notification of 2015.

22. As I have already held that neither on law nor on facts is this original petition maintainable, the contention regarding forum shopping is not considered at this juncture. However, it is appropriate to mention that the benefit of MSME registration is available to the enterprise and not to the individual. The registered entity being M/s. Panakkad Agencies, each individual partner cannot seek the benefit of the MSME Act separately.

In view of the above discussion, I find no merit in this original petition and the same is dismissed.

Sd/-

BECHU KURIAN THOMAS, JUDGE

RKM

APPENDIX OF OP (CRL.) 288/2023PETITIONER'S EXHIBITS :

- Exhibit P1 A TRUE COPY OF THE ORIGINAL APPLICATION NO. 410 OF 2020 DATED 10TH AUGUST 2020
- Exhibit P2 COPY OF THE CRIMINAL MISCELLANEOUS PETITION NO. 1337 OF 2022 ON THE FILES OF THE CHIEF JUDICIAL MAGISTRATE, MANJERI
- Exhibit P3 COPY OF THE ORDER DATED 16TH MAY 2022 IN CRIMINAL MISCELLANEOUS PETITION NO.1337 OF 2022 ON THE FILES OF THE CHIEF JUDICIAL MAGISTRATE, MANJERI
- Exhibit P4 COPY OF THE DEMAND PROMISSORY NOTE DATED 26TH OCTOBER 2015 PRODUCED ALONG WITH EXHIBIT P1 ORIGINAL APPLICATION
- Exhibit P5 COPY OF THE AFFIDAVIT DATED 11TH APRIL 2022 FILED BY MR.ASHOK KUMAR, THE CHIEF MANAGER AND AUTHORISED OFFICER IS IN CRIMINAL MISCELLANEOUS PETITION NO. 1337 OF 2022 ON THE FILES OF THE CHIEF JUDICIAL MAGISTRATE, MANJERI
- Exhibit P6 TRUE COPY OF THE ONE TIME SETTLEMENT APPLICATION DATED 29/03/2023 SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT BANK (PRODUCED ALONG WITH IA 1/2023 ON 30.06.2023)
- Exhibit P7 TRUE COPY OF THE MSME REGISTRATION CERTIFICATE UDYAM-KL-09-0027985 DATED 02-04-2023, ISSUED BY THE MSME MINISTRY, GOVERNMENT OF INDIA, TO PANAKKAD AGENCIES, UNDER THE PETITIONER'S PROPRIETORSHIP
- Exhibit P8 TRUE COPY OF THE NOTIFICATION S.O. 1432(E) DATED 29-05-2015, ISSUED BY THE MINISTRY OF MICRO SMALL & MEDIUM ENTERPRISES
- Exhibit P9 TRUE COPY OF THE POLICY ON FRAMEWORK FOR REVIVAL AND REHABILITATION OF MICRO, SMALL AND MEDIUM ENTERPRISES (MSMES), DATED NIL, SHARED IN THE ONLINE WEBSITE OF THE 1ST RESPONDENT



- Exhibit P10 TRUE COPY OF THE CIRCULAR FIDD.MSME & NFS.BC.NO.21/06.02.31/2015-16, DATED, 17-03-2016, ISSUED BY THE RESERVE BANK OF INDIA (RBI)
- Exhibit P11 TRUE COPY OF THE CIRCULAR NO. RBI/2019-20/160 DOR NO.BP.BC.34/21.04.048/2019-2020, DATED 11-02-2020, ISSUED BY THE RBI
- Exhibit P12 TRUE COPY OF THE CIRCULAR NO. RBI/2020-21/17 DOR NO. BP.BC.4/21.04.048/2020-2021 DATED 06-08-2020, ISSUED BY THE RBI
- Exhibit P13 TRUE COPY OF THE RBI CIRCULAR RBI/2021-22/31/ DOR. STR.REC.11/21.04.048/2021-2022 DATED 05-05-2021
- Exhibit P14 A true copy of the Statement of Account of the vehicle-loan account of the petitioner, of the respondent-bank's predecessor for the period from 01-01-2016 to 31-12-2016
- Exhibit P15 A true copy of the Amended agreement to rephrase the payment schedule, allegedly executed by the petitioner and some of the guarantors, dated 28-11-2018
- Exhibit P16 A true typed copy of the demand notice dated 03-01-2020, issued by the predecessor of the respondent-bank,
- Exhibit P17 A true copy of the relevant page of Common Deed of Hypothecation of Moveables/Assets/Debts, dated 26-10-2015
- Exhibit P18 A true typed copy of the Letter of continuity, dated 23-10-2019 allegedly executed by some of the former guarantors of the petitioner
- Exhibit P19 A true typed copy of the Letter of continuity, dated 23-10-2019 allegedly executed by some of the former guarantors of the petitioner
- Exhibit P20 A true typed copy of the Letter of continuity, dated 23-10-2019 allegedly executed by some of the former guarantors of the petitioner



Exhibit P21 A true typed copy of the Letter of continuity, dated 07-11-2019, allegedly executed by some of the former guarantors of the petitioner

RESPONDENTS' EXHIBITS :

Exhibit R1 A A true copy of an inventory dated 27/3/23 of the articles maintained in the property prepared by the adv commissioner

Exhibit R1 B A true copy of the complaint dated 29.3.2023 given to the Kottakkal Police Station

Exhibit R1 C A TRUE COPY OF INJUCTION PETITION IA NO 4/2023 IN OS 280/2023 OF MUNSIFFS COURT MANJERI

Exhibit R1 D A TRUE COPY OF THE CASE STATUS AS OBTAINED FROM THE E-COURTS PORTAL IN O.S.NO. 280/2023 ON THE FILES OF MUNSIFF S COURT MANJERI

Exhibit R1 E A TRUE COPY OF THE NOTICE ALONG WITH THE INJUNCTION APPLICATION RECEIVED BY THE BANK IN O.S. NO. 120/2023 ON THE FILES OF MUNSIFF S COURT TIRUR

Exhibit R1 F A TRUE COPY OF THE CASE STATUS AS OBTAINED FROM THE ECOURTS PORTAL IN O.S. NO. 120/2023 ON THE FILES OF MUNSIFF S COURT TIRUR

Exhibit R1 G A TRUE COPY OF SUIT ST NO 5416/2023 OF THE BOMBAY CITY CIVIL COURT