

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MR.JUSTICE ANIL K.NARENDRAN

FRIDAY, THE 1ST DAY OF SEPTEMBER 2023 / 10TH BHADRA, 1945

W.A.NO.1411 OF 2023

AGAINST THE JUDGMENT DAED 21.07.2023 IN WP(C)NO.23832 OF 2023
OF THE LEARNED SINGLE JUDGE

APPELLANT/PETITIONER IN W.P.(C):

SANIL KUMAR.V, AGED 50 YEARS,
S/O.VAMADEVAN, TC 41/2505, KOCHUKARIMPADAM,
THOTTAM, MANACADU P.O., THIRUVANANTHAPURAM,
PINCODE - 695009.

BY ADV SUBI K.

RESPONDENT/RESPONDENT IN W.P.(C):-

THE AUTHORISED OFFICER, INDIAN OVERSEAS BANK,
ERNAKULAM BRANCH, THEKKEKARA MANSION,
OPP. KAVITHA THEATRE, M.G. ROAD, ERNAKULAM,
PINCODE - 682035.

BY ADVS.SUNIL SHANKAR A
VIDYA GANGADHARAN(K/000424/2020)
JERIN GEORGE(K/863/2023)
SANDHRA.S(K/001610/2021)

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON
01.09.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Anil K. Narendran, J.

The appellant, who availed financial assistance to the tune of Rs.1,14,50,000/- from Ernakulam Branch of Indian Overseas Bank, along with his wife Rekha S., had approached this Court in W.P.(C)No.23832 of 2023 seeking a writ of certiorari to quash Ext.P2 sale notice dated 22.06.2023 issued by its Authorised Officer, the respondent herein, regarding the sale of mortgaged property having an extent of 2.22 Ares with 6,000 sq.ft. residential building in Re.Sy.No.985/165 of Cheranalloor Village. The petitioner has sought for a writ of mandamus commanding the respondent to grant him time to repay the entire loan amount due, by selling a portion of his property and to keep in abeyance all further proceedings pursuant to Ext.P2 sale notice dated 22.06.2023; and appropriate writ, order or direction granting permission to sell a portion of the property mortgaged with the Bank for closing the account.

2. The petitioner along with his wife had approached this Court in W.P.(C)No.8920 of 2023 seeking permission to pay off the amounts due to the respondent Bank, in respect of the very same financial assistance availed from the respondent Bank, in easy installments. In that writ petition, the notice dated 13.02.2023

issued by the respondent Bank under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'SARFAESI Act') was marked as Ext.P1. That writ petition was disposed of by Ext.P1 judgment dated 22.03.2023, whereby the petitioner and his wife were permitted to pay off the overdue amount of Rs.7,60,000/- in 12 equal monthly installments, the first installment falling due on or before 22.04.2023 and the subsequent installments falling due on or before the 22nd day of the succeeding months. Along with the installments towards the overdue amount, they shall also pay the regular monthly installments. In Ext.P1 judgment, this Court made it clear that, if the petitioner and his wife make any single default in payment of installments, the respondent Bank is at liberty to proceed with the coercive steps for recovery. The respondent Bank was directed to keep in abeyance the coercive steps initiated for recovery, to facilitate the payment of installments by the petitioner and his wife. The averments in paragraph 3 of W.P.(C)No.23832 of 2023 would show that the petitioner and his wife did not avail the benefit of Ext.P1 judgment in W.P.(C)No.8920 of 2023. On account of default, the Authorised Officer of the respondent Bank issued Ext.P2 sale notice dated 22.06.2023 under the proviso to Rule 8(6) of the Security Interest (Enforcement) Rules, 2002.

3. By the judgment dated 21.07.2023, the learned Single Judge dismissed W.P.(C)No.23832 of 2023, relying on the law laid down by the Apex Court in **South Indian Bank Ltd. v. Naveen Mathew Philip [(2023) SCC online (SC) 435]**. Paragraphs 4 to 6 and the last paragraph of the judgment in W.P.(C)No.23832 of 2023 read thus;

“4. The Hon'ble Supreme Court in **South Indian Bank Ltd v. Naveen Mathew Philip [2023 LiveLaw (SC) 320]**, after adverting to a myriad of earlier judicial pronouncements rendered under the Act, has categorically declared that High Courts shall not, unless in extraordinary circumstances, interfere with proceedings initiated under the Act, in writ proceedings under Article 226 of the Constitution of India.

6. Having considered the pleadings and materials on record and taking note of the act that this Court has already exercised its discretionary powers by passing Ext.P1 judgment in favour of the petitioner, which he has not availed off, I do not find any extraordinary circumstances to entertain the present writ petition under Article 226 of the Constitution of India. Nonetheless, it will be up to the petitioner to work out his statutory remedies, in accordance with law.

Resultantly, the writ petition is dismissed without prejudice to the right of the petitioner to workout his statutory remedies, in accordance with law.”

4. Feeling aggrieved by the judgment of the learned Single Judge, the appellant is before us in this writ appeal, invoking the provisions under Section 5 of the Kerala High Court Act, 1958. Along

with the writ appeal, the appellant has placed on record Annexure-1 pay-in-slip regarding the payment of Rs.1,50,000/- made on 27.07.2023, towards his liability in the financial assistance availed from the respondent Bank.

5. Heard the learned counsel for the appellant-writ petitioner.

6. The learned counsel for the appellant-writ petitioner would rely on the payment of Rs.1,50,000/- made by the appellant on 27.07.2023, as evidenced by Annexure-1 pay-in-slip, towards his liability in the financial assistance availed from the respondent Bank. The learned counsel would submit that the learned Single Judge went wrong in dismissing the writ petition without considering the financial difficulty faced by the appellant.

7. In **Naveen Mathew Philip [(2023) SCC online (SC) 435]**, in the context of the challenge made against the notices issued under Section 13(4) of the SARFAESI Act, the Apex Court reiterated the settled position of law on the interference of the High Court invoking Article 226 of the Constitution of India in commercial matters, where an effective and efficacious alternative forum has been constituted through a statute. In the said decision, the Apex Court took judicial notice of the fact that certain High Courts continue to interfere in such matters, leading to a regular supply of

cases before the Apex Court. The Apex Court reiterated that a writ of certiorari is to be issued over a decision when the court finds that the process does not conform to the law or the statute. In other words, courts are not expected to substitute themselves with the decision-making authority while finding fault with the process along with the reasons assigned. Such a writ is not expected to be issued to remedy all violations. When a Tribunal is constituted, it is expected to go into the issues of fact and law, including a statutory violation. A question as to whether such a violation would be over a mandatory prescription as against a discretionary one is primarily within the domain of the Tribunal. The issues governing waiver, acquiescence and estoppel are also primarily within the domain of the Tribunal. The object and reasons behind the SARFAESI Act are very clear as observed in **Mardia Chemicals Ltd. v. Union of India [(2004) 4 SCC 311]**. While it facilitates a faster and smoother mode of recovery *sans* any interference from the court, it does provide a fair mechanism in the form of the Tribunal being manned by a legally trained mind. The Tribunal is clothed with a wide range of powers to set aside an illegal order, and thereafter, grant consequential reliefs, including repossession and payment of compensation and costs. Section 17(1) of the SARFAESI Act gives an expansive meaning to the expression 'any person', who could

approach the Tribunal.

8. In **Naveen Mathew Philip [(2023) SCC online (SC) 435]** the Apex Court noticed that, in matters under the SARFAESI Act, approaching the High Court for the consideration of an offer by the borrower is also frowned upon by the Apex Court. A writ of mandamus is a prerogative writ. The court cannot exercise the said power in the absence of any legal right. More circumspection is required in a financial transaction, particularly when one of the parties would not come within the purview of Article 12 of the Constitution of India. When a statute prescribes a particular mode, an attempt to circumvent that mode shall not be encouraged by a writ court. A litigant cannot avoid the non-compliance of approaching the Tribunal, which requires the prescription of fees, and use the constitutional remedy as an alternative. In paragraph 17 of the decision, the Apex Court reiterated the position of law regarding the interference of the High Courts in matters pertaining to the SARFAESI Act by quoting its earlier decisions in **Federal Bank Ltd. v. Sagar Thomas [(2003) 10 SCC 733]**, **United Bank of India v. Satyawati Tondon [(2010) 8 SCC 110]**, **State Bank of Travancore v. Mathew K.C. [(2018) 3 SCC 85]**, **Phoenix ARC (P) Ltd. v. Vishwa Bharati Vidya Mandir [(2022) 5 SCC 345]** and **Varimadugu Obi Reddy v. B. Sreenivasulu [(2023) 2 SCC**

168] wherein the said practice has been deprecated while requesting the High Courts not to entertain such cases. In paragraph 18 of the said decision, the Apex Court observed that 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.

9. In the instant case, the appellant along with his wife had approached this Court in W.P.(C)No.8920 of 2023 seeking permission to pay off the amounts due to the respondent Bank, in respect of the very same financial assistance, in easy installments. That writ petition was disposed of by Ext.P1 judgment dated 22.03.2023, whereby the appellant and his wife were permitted to pay off the overdue amount of Rs.7,60,000/- in 12 equal monthly installments, the first installment falling due on or before 22.04.2023, along with the regular monthly installments. The appellant and his wife did not avail the benefit of Ext.P1 judgment in W.P.(C)No.8920 of 2023, as evident from the averments in paragraph 3 of W.P.(C)No.23832 of 2023.

10. Thereafter, the appellant filed W.P.(C)No.23832 of 2023,

invoking the extraordinary jurisdiction of this Court under Article 226 of the constitution of India, mainly seeking a writ of certiorari to quash Ext.P2 sale notice dated 22.06.2023 issued by the Authorised Officer of the respondent Bank under the proviso to Rule 8(6) of the Security Interest (Enforcement) Rules, 2002. In ground No.3 of the writ petition, the appellant has stated that he is ready to settle the entire loan amount within three months.

11. The law is well settled that a writ of certiorari can be issued if an error of law is apparent on the face of the record. In **Central Council for Research in Ayurvedic Sciences v. Bikartan Das [2023 SCC OnLine SC 996 : 2023 (5) KHC SN 8]** the Apex Court reiterated that a writ of certiorari, being a high prerogative writ, should not be issued on mere asking. For the issue of a writ of certiorari, the party concerned has to make out a definite case for the same and is not a matter of course.

12. In W.P.(C)No.23832 of 2023, the appellant failed to make out a definite case for the issuance of a writ of certiorari to quash Ext.P2 sale notice dated 22.06.2023 issued by the Authorised Officer of the respondent Bank. None of the grounds raised in the writ petition is sufficient to make out a case of an error of law apparent on the face of Ext.P2 sale notice dated 22.06.2023 issued under the proviso to Rule 8(6) of the Security Interest (Enforcement) Rules,

2002. When the tribunal constituted under the SARFAESI Act is expected to go into the issues of fact and law, including a statutory violation, the attempt made by the appellant to circumvent the particular mode prescribed under the statute shall not be encouraged by the writ court.

13. The further reliefs sought for in W.P.(C)No.23832 of 2023 are a writ of mandamus commanding the respondent to grant the appellant time to repay the entire loan amount due, by selling a portion of his property and to keep in abeyance all further proceedings pursuant to Ext.P2 sale notice dated 22.06.2023; and an appropriate writ, order or direction granting permission to the appellant sell a portion of the property mortgaged with the Bank for closing the account.

14. A writ of mandamus is a prerogative writ. The court cannot exercise the said power in the absence of any legal right. In **Bhaskara Rao A.B. v. CBI [(2011) 10 SCC 259]** the Apex Court reiterated that, generally, no court has the competence to issue a direction contrary to law nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass orders or directions that are contrary to what has been injected by law.

15. As already noticed, the appellant did not avail the benefit

of Ext.P1 judgment of this Court in W.P.(C)No.8920 of 2023. The appellant, who failed to make out a definite case for the issuance of a writ of certiorari to quash Ext.P2 sale notice dated 22.06.2023 issued by the Authorised Officer of the respondent Bank, cannot seek a writ of mandamus in W.P.(C)No.23832 of 2023 praying for time to repay the entire loan amount due, by selling a portion of his property.

16. In the above circumstances, we find no reason to interfere with the impugned judgment of the learned Single Judge declining the appellant the reliefs sought for in W.P.(C)No.23832 of 2023. In the impugned judgment, the learned Single Judge declined reliefs to the appellant, relying on the law laid down by the Apex Court in **Naveen Mathew Philip [(2023) SCC online (SC) 435]**. In the said decision, the Apex Court reiterated the position of law regarding the interference of the High Courts in matters pertaining to the SARFAESI Act by quoting its earlier decisions, wherein the said practice has been deprecated while requesting the High Courts not to entertain such cases.

17. One of the grounds raised in this writ appeal is that the learned Single Judge went wrong in dismissing the writ petition without considering the financial difficulty faced by the appellant. In view of the provisions under Article 141 of the Constitution of India,

the law declared by the Apex Court shall be binding on all courts within the territory of India. Having considered the grounds raised by the appellant, we find that this writ appeal is nothing but an abuse of process of the court, which is liable to be dismissed.

In the result, this writ appeal fails and the same is accordingly dismissed.

Sd/-

A. MUHAMED MUSTAQUE, JUDGE

Sd/-

ANIL K. NARENDRAN, JUDGE

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APPENDIX OF WA No.1411 OF 2023

APPELLANT'S ANNEXURES:-

ANNEXURE- 1 TRUE COPY OF THE COUNTERFOIL OF PAY-IN-SLIP FOR RS.1,50,000/-, REMITTED BY THE APPELLANT, ISSUED BY THE RESPONDENT BANK, DATED 27.07.2023.