Serial No. 21
Regular Causelist

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CM No. 1683/2023 in
WP(C) No. 407/2023

M/S Shaf Sons through Gowhar Ahmad Mir & Another.

….. Appellant/Petitioner(s)

Through: Mr. S. A. Makroo, Sr. Advocate with
Mr. Basharat Ahmad Wani, Advocate.

V/s

Jammu & Kashmir Bank Ltd. & Ors.

…..Respondent(s)

Through: Mr. Adil Asimi, Advocate.

CORAM:

HON'BLE MR. JUSTICE ATUL SREEDHARAN, JUDGE.
HON'BLE JUSTICE MOHAN LAL, JUDGE

ORDER
22.05.2023

Heard the learned counsel for the parties. The brief facts essential to decide the present petition are as follows: The petitioner M/s. Shaf Sons is a partnership firm (hereinafter referred to as the "Firm") trading in Kashmiri Handicrafts. Loan by way of Cash Credit limit was advanced to the Firm by the Respondent bank and they have been their customers from more than twenty years, as stated by the learned counsel appearing on behalf of the petitioner. On 08.08.2019, a fire accident destroyed the Firm's establishment. The intimation to the Police is on page 24 of the petition as Annexure-3. Our attention has been drawn to an intimation dated 19.02.2019, addressed by the Deputy Director of Fire Services, Kashmir, to the Branch Manager of New India Assurance about the fire and the loss of material.

2. Learned counsel appearing for the petitioner further submits that the process was on between the Insurance Company and the Firm for payment of the insured amount which is altogether another set of facts and not relevant for the present case. Attention was also drawn to page no. 30 which reveals that the Bank was approached by the Firm for a one-time settlement (hereinafter referred to as "ots"). In response to the said letter by the Firm, the Bank replied (page no. 32) that the ots proposed by the writ petitioner was rejected.

However, the petitioner was asked to give a fresh offer which could be considered as per the Bank's approved policy.

3. The Bank replied to the fresh proposal of the Firm vide by letter dated 18.07.2022 (page no. 38) and rejected the same once again. The Firm had proposed the payment of Rupees 1.35/- Crores as ots which was not acceptable to the Bank, and it was once again called upon to improve its proposal. Thereafter, the Firm vide its letter dated 10.02.2023 (page 40), offered an ots of Rupees1.40/- Crore within one year. Learned counsel for the petitioner submits that the process for arriving at a feasible ots was in progress between the Firm and respondent-Bank and at no point of time did the Bank finally repudiate the proposal put forth by the Firm, but instead gave it repeated opportunities which gave a reasonable cause for the Firm to believe that the Bank was still amenable for a one time settlement with it. Thereafter, the impugned notice was issued by the respondent dated 07.02.2003, under Section 13(4) of the Sarfaesi Act 2022. It is this notice that has been put to challenge in the present writ petition.

4. Learned counsel for the petitioner submits that the petitioner is aggrieved by the fact that no reasonable opportunity was ever given by the respondent-Bank whereby the petitioner could settle the debt on the basis of a specific amount quantified by the Bank within a period of time, fixed by the Bank. In other words, learned counsel for the petitioner has submitted that the Bank, while keeping the petitioner under the impression that the issue was still open for an out of Court settlement has unlawfully issued the notice under Section 13(4) which deserved to be quashed.

5. Learned counsel for the Firm, upon being queried by this Court as to why the Firm cannot raise all these issues before the DRT which has been specifically constituted to deal with the matters relating to recoveries initiated by Banks and financial institutions, has replied that it is no longer *res integra* that the existence of an alternate remedy does not bar this court from exercising its jurisdiction under article 226. He has further stated that there has been violation of natural justice as notice under Section 13(2) of the Sarfaesi Act was never issued to the petitioner whereby his liability was set out before him and the period within which he had to discharge that liability. He has also referred to one judgment of the Hon'ble Supreme Court and one judgement

of the Hon'ble Punjab and Haryana High Court, which shall be referred to elsewhere in this order.

6. Learned counsel for the respondents on the other hand has argued that the submissions put forth by the learned counsel for the Firm is factually incorrect and that the learned Senior Counsel has not been instructed correctly on facts. In this regard, he has referred to the objections filed by the respondent with specific preference to annexure-1 which is a notice dated 04.08.2021, dispatched by registered AD to the borrowers and the guarantors asking the Firm to make good the outstanding amount due to the Bank which was Rupees 2,12,13,532/- from the total debt of 2,43,00000/-. Thus, learned counsel for the respondent has also drawn attention to page no. 14 of his objections which shows the dispatch of the said notice through speed post. Thus, the case of the respondent is that the notice under Section13(2) was dispatched to the petitioner and only thereafter was the notice of the possession under Section 13(4) of the Sarfaesi Act issued.

7. The learned counsel appearing for the respondent has also challenged the very maintainability of the instant writ petition on the ground that when a suitable alternate remedy is available to the Firm, it could not have approached this court invoking its jurisdiction under article 226. He further submits that though the law is well settled that the existence of an alternate remedy does not bar a person from approaching the high court under article 226 of the Constitution, but before that, it is required of such a petitioner to give reasonable grounds as to why the alternate remedy was not equally efficacious and it is only after the petitioner has placed the same before the Court that the Bar to entertain such a petition under Article 226 would be removed.

8. Heard the learned counsel for the parties perused the documents filed along with the writ petition.

9. The contention of the learned counsel for the petitioner that the said notice under Section 32 was never received by him on account of proof filed on page 14 of the objections not bearing the signatures of the petitioners and therefore, it cannot be presumed by this court that the notice under Section 13(2) of the Act was received by the petitioner. This court has also taken into consideration the submission of learned counsel for the petitioner that merely disputing a fact in the writ petition does not oust the jurisdiction of the writ court on the grounds of disputed questions of fact. I am afraid that the said contention must

be rejected as once the opposite party has shown, which in this case is a public sector Bank, that the notice under Section 13(2) was duly dispatched to the petitioners and has annexed by way of proof, the photo copy of the said notice along with copy of the proof of dispatch, this Court must assume prima facie that the said notice was regularly dispatched to the petitioner in the ordinary course of business of the Bank. In this regard, Section 114(e) of the Evidence Act raises a presumption that the judicial and official acts have been regularly performed. Dispatching of the notice by the Bank under Section 13(2) of the Sarfaesi Act is an official Act performed by it in the discharge of its functions. The copy of the said notice therefore, raises a presumption in favour of the Bank that a notice was issued to the petitioners and the contentions of the petitioners that they have not received the said notice on account of the absence of the signatures of the petitioners or an endorsement by the postal department that the petitioner had either refused to receive the same or that the petitioner was not living in the said premises, raises a strong disputed question of fact which can only be decided by the DRT after adducing evidence. One of the grounds on which the writ petition can be dismissed is where it involves disputed question of fact along with the reason that the cause raised by the Firm can be tried by the DRT.

10. Before this Court, that the petitioner has not made out a special circumstance or a case as to why, despite the existence of an alternate remedy under the Sarfaesi Act, the same is not equally efficacious. In other words, the petitioner has not established, either by way of pleadings or by arguments how it would be prejudiced if it had approached the DRT for the same relief.

11. The learned counsel for the Firm has relied upon the judgment of the Supreme Court in "*Whirlpool Corporation Vs. Registrar Trademark Mumbai & Others (1998)8 SCC (1)"* which is a landmark judgment on alternate remedy qua jurisdiction of the High Court under Article 226. Learned counsel for the petitioner has referred to para 15 of the said judgment where the Supreme Court has held that the High Court under Article 226 of the constitution of India, having regard to the facts of a particular case, has the discretion to entertain or reject a writ petition but it cannot impose upon itself a restriction that the availability of an alternate remedy would oust the writ jurisdiction of the high court. The proposition is no longer *res integra* and is well settled. However, as stated earlier hereinabove, the petitioner before doing so has to

disclose to this court the special circumstances on the basis of which the petitioner feels that the alternate remedy is not equally efficacious.

12. Thus, we hold that there was no violation of natural justice as prima facie material on record goes to show that the notice was issued to petitioner under Section 13(2) on 04.08.2021, to which the petitioner has given no reply though was accorded an adequate opportunity. Therefore, there is no violation of the principles of natural justice.

13. The second judgment that has been referred to by the learned counsel for the petitioner is "*Gobinder Kour and Others Vs. Punjab National Bank and Others 2014 AIR (*PIH 8*)".* Learned counsel for the petitioner has referred to para 11 of the said judgment. Upon reading the same we are of the opinion that the factual aspects that stood undisputed before the Hon'ble High Court of Punjab and Haryana in that case was that there were parleys between the Bank and the debtor, and the proposal of the debtor was accepted by the Bank which stood concluded and thereafter the Bank apparently had withdrawn from the same, against which the petitioner approached the Hon'ble Court of Punjab and Haryana. The said factual aspect of that case is at variance with the facts and the circumstances of the present case before us. The facts herein reveal that there was never a final conclusion to the parleys between the respondent and the petitioner. No document has been placed on record to show that there was ever an acceptance by the respondent Bank of any one-time settlement put forth by the petitioners. If that had been so, the judgment of Hon'ble High Court of Punjab and Haryana may have been applicable.

14. Under the circumstances, in view of what has been held by us, the instant petition is devoid of merits and is accordingly dismissed. However, the observations made by this Court while passing this judgment are not to be taken into consideration by the learned DRT or be influenced by the same as they have only been passed in the course of deciding this petition.

15. ***Dismissed as above.***

(Mohan Lal) **(Atul Sreedharan)**
Judge **Judge**

SRINAGAR:
22.05.202
"Shaista"