IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 14092 of 2022

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M/S. MAHEE COTEX
Versus
CENTRAL BANK OF INDIA, AUTHORISED OFFICER

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Appearance:
MR SS PANESAR(560) for the Petitioner(s) No. 1,2,3,4,5
for the Respondent(s) No. 1

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CORAM:HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI

Date : 25/07/2022

ORAL ORDER

1.0. Heard Mr. SS Panesar, learned advocate for the petitioners and Mr. R.S. Sanajanwala, learned Senior Advocate with Mr. Niraj Vasu, learned advocate for the respondent on caveat.

2.0. The writ- petitioner by way of present petition has sought for following reliefs:

> "A.*To issue a writ of mandamus or any other appropriate writ, order or direction in the nature of mandamus or any other writ to quash and set aside impugned order dated 18.07.2022 passed by the learned DRT-2, Ahmedabad and impugned notice dated 07.07.2022 (Annexure A) issued by the Mamlatdar Babra for threatening to forcibly dispossess the Petitioners of properties in question until the SA No.315 of 2019 is finally heard and decided expeditiously;*
> *B.Be pleased to allow proponment application IA No. 2321 of 2022 and to direct the learned DRT-2, Ahmedabad to take up the final hearing and disposal of SA No.315 of 2019 expeditiously and to stay the enforcement and execution of impugned notice dated 07.07.2022 (Annexure A) issued by Mamlatdar Babra for threatening to forcible*

dispossess the Petitioner out of properties in question till SA No.315 of 2019 is finally heard and decided:

C.Pending admission hearing and final disposal of this petition be pleased to stay the operation, implementation and execution of impugned notice dated 07.07.2022 (Annexure A) issued by the Mamlatdar Babra for threatening to forcibly dispossess the Petitioners of properties in question until the SA No.315 of 2019 is finally heard and decided expeditiously:"

3.0. Mr. Panesar, learned advocate for the petitioners submitted that the writ petitioners are aggrieved by the impugned order dated 18.07.2022 passed by the Debt Recovery Tribunal-2, Ahmedabad refusing to prepone the SA No.315 of 2019 for final hearing notwithstanding the fact that the petitioners on 16.07.2022 received the impugned notice dated 07.07.2022 issued by the respondent Bank from the Mamlatdar to dispossess the petitioners and their families out of residential house and property on 27.07.2022 with the help of the police. The petitioners, therefore, constrained to approach this Court being aggrieved by the impugned order passed by the Debt Recovery Tribunal dated 18.07.2022. It appears that pursuant to the order dated 20.06.2019 under Section 14 of the SARFAESI Act, notice came to be issued by the Mamlatdar on 07.07.2022 to take possession of the said premises on 27.07.2022. The said notice is duly produced at page 13 of the petition. It appears that the writ petitioners approached the respondent authority

seeking preponment of SA No.315 of 2019 vide application dated 18.07.2021 and same is duly produced at page 12 of the petition. The Tribunal by order dated 18.07.2022 passed the following order:

> *"1. Ld. Counsel for the Applicants has filed the present application for preponement of hearing. It is stated by the Applicants that the present SA is listed for hearing on 16/09/2022. But, since Ld. Mamlatdar and Executive Magistrate, Babra, Dist : Amreli has issued notice to take physical possession of the property in question on 27/07/2022. Hence, matter may be preponed for hearing on interim relief.*
> *2. Perusal of the record reveals that the question of interim relief qua the property in question has already been decided, after hearing Ld. Counsel for the respective parties, vide order dated 01/12/2021 passed by this Tribunal. Moreover, this Tribunal has been assigned additional charge of DRT-I, Ahmedabad from 11/07/2022 and the Tribunal is also taking up "Pre-2015" matters as well as Original Applications involving high stake of Banks and Financial Institutions on priority basis.*
> *3. Looking to the fact that the aspect of interim relief has already been decided by this Tribunal in the present case and due to paucity of time on account of dual charge of DRT-I and II, I do not find any urgency for taking up the present matter either for interim relief or for final hearing at this stage.*
> *4. In view of above, the present application for preponement is hereby rejected and let the matter be posted for hearing on its regular dated, i.e., 16/09/2022."*

3.1. The Tribunal while passing the order dated 18.07.2022 appears to have relied upon the order dated 1.12.2021 passed by the Tribunal wherein interim relief qua property in question was decided. In view thereof, the Tribunal rejected the proponement application and has posted the matter for hearing on regular

date i.e. 16.09.2022.

4.0. Mr. Sanjanwala, learned Senior Advocate with Mr. Niraj Vasu, learned advocate for the respondent on caveat has placed on record the order dated 1.12.2021. The order dated 1.12.2021 is a reasoned order which is passed by the Tribunal after hearing both the parties wherein in para 20 to 25, the Tribunal has observed thus:

> *"20. In view of the aforesaid observations of the Hon ble Supreme Court, the objections raised by the Applicants are of no avail at this stage and the same do not show any substantial prejudice being caused to the Applicants. I am therefore of the view that proceedings initiated under the SARFAESI Act by the Secured Creditors cannot be nullified merely on the ground of technical defects and procedural lapses, This Tribunal cannot lose sight of the fact that the Bank is a Trustee of Public Funds. It cannot compromise the public interest for benefitting private individuals. Those who take loan and avail financial assistance from the bank are duty bound to repay the amount strictly in accordance with the terms of the contract.*
> *21. In view of the aforesaid discussion, the Applicants have not been able to make out any prima facie case in their favour at this stage to restrain the Respondent from taking physical possession of the properties in question.*
> *22.Moreover, the balance of convenience tilts in favour of the Respondent-Bank. The Respondent has to recover its legitimate dues to the extent of an aggregate outstanding amount of Rs,4,59,12,939/- vide demand notice dated 04/09/2018 issued under Section 13(2) of the SARFAESI Act by enforcing security interest created in its favour. It is also required to be noted that this Tribunal is empowered to restore possession of the property in question under Section 17(3) (b) of the SARFAESI Act in the event of the Applicant succeeding in the present SA on its logical conclusion.*
> *23. At this stage, it must be remembered that stay against an action initiated by the Respondent-Bank for*

> *recovery of its outstanding dues, which are public money, disables it from discharging its constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of Banks, Financial Institutions and Secured Creditors, granting of stay would have serious adverse impact on the financial health of such Body / Institution, which would ultimately prove detrimental to the economy of the nation.*
> *24. In view of the above, the prayer for interim relief is hereby declined. The Respondent-Bank is directed to proceed in accordance with the provisions of the SARFAESI Act and Rules framed thereunder.*
> *25. However, the Applicants are at liberty to seek restoration of their property by approaching the Respondent bank in view of section 13(8) of SARFAESI Act to tender the amount of dues of the secured creditor with cost and expenses incurred by them before the date of publication of notice for auction sale."*

Mr. Sanjanwala, learned Senior Advocate for the respondent has relied upon decision of the Hon'ble Supreme Court in the case of United Bank of India vs. Satyawati Tondon and Ors reported in AIR 2010 SC 3413 as well as in the case of Kanaiyalal Lalchand Sachdev and Ors vs. State of Maharashtra and Ors reported in (2011) 2 SCC 782.

5.0. The writ petitioners have accepted the order dated 1.12.2021 and has not been subject matter of challenge. In view of above decision, the aforesaid issue is no longer res-integra. The writ petitioners could have availed statutory remedy by way of filing an appeal before the DRAT under the provisions of the Section 18 of the SARFAESI Act, which reads thus:

> *18. Appeal to Appellate Tribunal.*
> *1. Any person aggrieved, by any order made by the Debts Recovery Tribunal 1[under section 17, may prefer an appeal along with such fee, as may be prescribed] to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.—(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal 2[under section 17, may prefer an appeal along with such fee, as may be prescribed] to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal." 2[Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:] 3[Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less: Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty five per cent. of debt referred to in the second proviso.*
> *2.Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder. "*

5.0. This Court deems it apposite to refer to the law laid down by the Hon'ble Supreme Court in the following decisions:

5.1. United Bank of India vs. Satyawati Tondon and Ors reported in AIR 2010 SC 3413, wherein, the Hon'ble Supreme Court in para 17, 18 and 27 has observed thus:

> "17. There is another reason why the impugned order should be set aside. If respondent No.1 had any tangible grievance against the notice issued under Section 13(4)or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression `any person' used in Section 17(1)is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under

Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17and18and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Actare both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226of 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 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, High Court must insist that before availing remedy under Article 226of the Constitution, a person must exhaust the remedies available under the relevant statute.

18. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226of the Constitution. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance. It must be remembered that stay of an action initiated by the State and/or its

> agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out inBaburam Prakash Chandra Maheshwari v. Antarim Zila ParishadAIR 1969 SC 556,Whirlpool Corporation v. Registrar of Trade Marks, Mumbai(1998) 8 SCC 1 andHarbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others(2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order.
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> 27. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT ActandSARFAESI Actand exercise jurisdiction under Article 226for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

5.2. Kanaiyalal Lalchand Sachdev and Ors vs. State of Maharashtra and Ors reported in (2011) 2 SCC 782 wherein the Hon'ble Supreme in para 16, 17 and 20 has observed thus:

> *16.Section 13 of the Act deals with enforcement of security interest, providing that notwithstanding anything contained in Sections 69or 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the court's intervention, by such creditor in accordance*

with the provisions of the Act. Section 13(2)of the Act provides that when a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt, and his account in respect of such debt is classified as non- performing asset, then the secured creditor may require the borrower, by notice in writing, to discharge his liabilities within sixty days from the date of the notice, failing which the secured creditor shall be entitled to exercise all or any of the rights given in Section 13(4)of the Act. Section 13(3)of the Act provides that the notice under Section 13(2)of the Act shall give details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank. Section 13(3-A) of the Actwas inserted by Act 30 of 2004 after the decision of this Court in Mardia Chemicals (supra), and provides for a last opportunity for the borrower to make a representation to the secured creditor against the classification of his account as a non-performing asset. The secured creditor is required to consider the representation of the borrowers, and if the secured creditor comes to the conclusion that the representation is not tenable or acceptable, then he must communicate, within one week of the receipt of the communication by the borrower, the reasons for rejecting the same. Section 13(4)of the Act provides that if the borrower fails to discharge his liability within the period specified in Section 13(2), then the secured creditor, may take recourse to any of the following actions, to recover his debt, namely-

"(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

Section 14 of the Act provides that the secured creditor can file an application before the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction, the secured asset or other documents relating thereto are found for taking possession thereof. If any such request is made, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor. (See: United Bank of India Vs. Satyawati Tondon & Ors.3). Therefore, it follows that a secured creditor may, in order to enforce his rights under Section 13(4), in particular Section 13(4)(a), may take recourse to Section 14of the Act.

17.Section 17of the Act which provides for an appeal to the DRT, reads as follows:

"17. Right to appeal.--(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of Section 13taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation.--For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of Section 17.

> *(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of Section 13taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder."*
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> *20.We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1)of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4)of the Act, by providing for an appeal before the DRT.*

5.3. In the case of Phoenix ARC Private Limited vs. Vishwa Bharati Vidya Mandir & Ors rendered in Civil Appeal No. 257-259 of 2022 wherein, the Hon'ble Supreme Court in para 12 has observed thus:

> *"12. 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."

6.0. In view of the aforesaid ratio laid down by the Hon'ble Supreme Court, it is open for the writ petitioners to avail the statutory alternative remedy available under the Act. This Court has otherwise not opined on merits of the matter. This Court is not inclined to exercise the powers under Article 226 of the Constitution of India, for the reasons stated above. Present petition stands disposed of.

sd/-
(VAIBHAVI D. NANAVATI,J)

KAUSHIK J. RATHOD