

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Civil Writ Petition No. 6199/2022

1. Om Prakash Kumawat S/o Bhanwar Lal, Aged About 40 Years,
2. Rekha Kumawat W/o Shri Om Prakash Kumawat, Aged About 38 Years,
Both are Residents Of Plot No. 40, Morwal Bhawan, Shikharpur Road, Nolya Ki Dhani, Gular Ka Bandha, Sanganer, Jaipur Rajasthan - 302029 Also At Plot No. 37, Scheme No. 10, Srinath Nagar, Sanganer, Jaipur.

----Petitioners

Versus

Hero Housing Finance Ltd., Through Its Authorized Representative Having Its Office At 09, Community Centre, Basant Lok, Vasant Vihar, New Delhi - 110057.

----Respondent

For Petitioner(s) : Mr. Prahlad Sharma
For Respondent(s) : Mr. Pramod Kumar

HON'BLE MR. JUSTICE MAHENDAR KUMAR GOYAL

Order

11/05/2022

Although, the matter come up on an application No.1/2022 but, with the consent of learned counsels for the respective parties, the writ petition was heard on its merit at this stage.

This writ petition has been filed by the borrowers for quashing the order dated 15.03.2022 passed by the Chief Metropolitan Magistrate, Jaipur Metropolitan-I in Civil Miscellaneous Case No.164/2022 (CIS No.168/2022) under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity,

“SARFAESI Act”) with a further direction to the respondent to grant them benefit of moratorium.

With regard to maintainability of the writ petition despite availability of an efficacious and alternative remedy under the provisions of the SARFAESI Act, learned counsel for the petitioner, relying upon a judgment of Hon’ble Apex Court of India in case of **Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited and Others; (2014) 6 SCC 1**, submitted that remedy of appeal is not available to them against an order passed under Section 14. He submitted that in view of existence of an arbitration clause in the loan agreement and filing of an application under Section 9 of the Arbitration and Conciliation Act, 1996 (for brevity, “the Act of 1996”) by the respondent, the respondent could not have resorted to the provisions of Section 14 of the SARFAESI Act. In this regard, he placed reliance upon judgments of Hon’ble Apex Court of India in the cases of **SBP & Co. Vs. Patel Engineering Ltd. & Another; (2005) 8 SCC 618 & Vidya Drolia & Ors. Vs. Durga Trading Corporation; 2021 (1) WLC (SC) Civil 257**. He, therefore, prayed that the writ petition be allowed and the order impugned dated 15.03.2022 be quashed and set aside.

Per contra, learned counsel for the respondent submitted that the writ petition is not maintainable as the petitioners have an alternative and efficacious remedy under Section 17 of the SARFAESI Act. He submitted that a co-ordinate Bench of this Court has, vide its order dated 14.02.2022 passed in **S.B. Civil Writ Petition No.9054/2021; M/s Shree Balaji Enterprises Vs. Authorized Officer** & other connected matters involving identical controversy, dismissed the writ petitions on account of

availability of alternative and efficacious statutory remedy under the SARFAESI Act and the same was upheld by a Division Bench of this Court vide its order dated 21.02.2022 while dismissing the **D.B. Special Appeal Writ No.406/2022; M/s Shree Balaji Enterprises Vs. Authorized Officer**. He further submitted that in view of judgments of Hon'ble Supreme Court of India in the cases of **M.D. Frozen Foods Exports Pvt. Ltd. & Ors. Vs. Hero Fincorp Ltd.** in **Civil Appeal No.15147/2017** dated 21.09.2017 & **Indiabulls Housing Finance Limited Vs. M/s. Deccan Chronicle Holdings Limited & Ors.** in **Civil Appeal No.18/2018** dated 23.02.2018, objection of the petitioner as to maintainability of proceedings under SARFAESI Act in view of arbitration clause, is not sustainable. He, therefore, prayed for dismissal of the writ petition.

Heard. Considered.

In case of **M/s Balaji Enterprises** and other connected matters (supra) involving identical controversy, a co-ordinate Bench of this Court has dismissed the writ petitions on account of availability of remedy to the petitioners under the SARFAESI Act. It was held as under:

"These writ petitions filed by the petitioners deserves to be dismissed for the reasons; firstly, the petitioners are having alternative efficacious statutory remedy under the SARFAESI Act, 2002; secondly, the guidelines issued by the R.B.I. can be very much looked into by the Debts Recovery Tribunal as well as by the banks while examining the reply if submitted by the petitioners against the notices served upon them and lastly in the facts and circumstances in view of the judgment passed by the Hon'ble Supreme Court in the matter of I.C.I.C.I Bank Limited as well as the Pheonix India (both supra), I am not inclined to exercise the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

Hence, these writ petitions stand dismissed.”

The Division Bench of this Court, while dismissing the special appeal preferred thereagainst, vide its order dated 21.02.2022 in D.B. Special Appeal Writ No.406/2022, held as under:

“Learned Single Judge has dismissed the writ petition on the ground of availability of alternative remedy under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. We are in broad agreement with the view of the learned Single Judge. In view of availability of alternative remedy and in view of controversies required to be resolved, we are not inclined to entertain this appeal and consequently the writ petition filed by the appellant-petitioner.”

Thus, the issue of availability of an alternative statutory remedy is no more res integra and stands decided against the petitioner.

Reliance placed by learned counsel for the petitioners on the judgment of Hon’ble Apex Court of India in case of **Harshad Govardhan Sondagar** (supra) is of no help to him having been rendered in different facts and circumstances. In that case, the Hon’ble Apex Court of India was considering rights of the petitioner, a lessee, in the mortgaged property in the light of the provisions of Sections 105 & 111 of the Transfer of Property Act, 1882.

In a case where the question arose as to whether in view of an arbitration agreement between the parties, the creditor could resort to the provisions of the SARFAESI Act, the Hon’ble Apex Court of India in case of **M.D. Frozen Foods Exports Pvt. Ltd. & Ors.** (supra), held as under:

“32. The aforesaid is not a case of election of remedies was sought to be canvassed by

learned senior counsel for the appellants, since the alternatives are between a Civil Court, Arbitral Tribunal or a Debt Recovery Tribunal constituted under the RDDB Act. Insofar as that election is concerned, the mode of settlement of disputes to an arbitral tribunal has been elected. The provisions of the SARFAESI Act are thus, a remedy in addition to the provisions of the Arbitration Act. In *Transcore vs. Union of India & Anr.* (supra) it was clearly observed that the SARFAESI Act was enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith. Liquidation of secured interest through a more expeditious procedure is what has been envisaged under the SARFAESI Act and the two Acts 13 *HDFC Bank Limited V. Satpal Singh Bakshi* – 2013 (134) DRJ 566 (FB) 14 2013 (134) DRJ 566 (FB) are cumulative remedies to the secured creditors.

33. SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is an adjudicatory process. In the event that the secured assets are insufficient to satisfy the debts, the secured creditor can proceed against other assets in execution against the debtor, after determination of the pending outstanding amount by a competent forum.”

In case of **Indiabulls Housing Finance Limited** (supra) wherein, in an appeal preferred against the judgment of the Hon'ble High Court of Andhra Pradesh holding that where Section 9 of the Act of 1996 was invoked by the creditor, initiation of proceedings under the SARFAESI Act was impermissible, the Apex Court, after appreciating Sections 35 & 37 of the SARFAESI Act, held that arbitration proceedings and proceedings under the SARFAESI Act can be resorted to simultaneously and relied upon the judgment of **M.D. Frozen Foods Exports Pvt. Ltd.** (supra) in this regard.

In case of **SBP & Co.** (supra) as also in case of **Vidya Drolia** (supra), the Apex Court of India was dealing with remedy before a Civil Court vis-a-vis availability of arbitration clause and in none of

the cases provisions of the SARFAESI Act were involved. Therefore, the same have no applicability in the present case.

In the backdrop of aforesaid judgments of the Hon'ble Apex Court of India in the cases of **M.D. Frozen Foods Exports Pvt. Ltd.** (supra) and **Indiabulls Housing Finance Limited** (supra), the contention of learned counsel for the petitioners that in view of availability of arbitration clause and invocation of Section 9 of the Act of 1996, the proceedings under the SARFAESI Act could not have been resorted to, does not merit acceptance.

The upshot of the aforesaid discussion is that the writ petition is dismissed in view of availability of alternative remedy to the petitioners under the provisions of the SARFAESI Act.

The pending application stands disposed of accordingly.

(MAHENDAR KUMAR GOYAL),J

PRAGATI/s-147

