

HIGH COURT OF KERALA

BENCH : THE HONOURABLE MR. JUSTICE K. BABU

Date of Decision: 19th April 2024

Case No.: OP (DRT) NO. 351 OF 2023

**M/S JIS INTERNATIONAL EXPORTS PVT. LTD., AND
OTHERS ...PETITIONER(S)**

VERSUS

**DEBT RECOVERY TRIBUNAL-1 ERNAKULAM, INDIAN
OVERSEAS BANK, AND OTHERS ...RESPONDENT(S)**

Legislation and Rules:

Sections 14, 17, 26B, 26D of the Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act)

Rule 12 of the Debts Recovery Tribunal (Procedure) Rules, 1993

Article 226 and 227 of the Constitution of India

Subject:

Challenge against the order dated 18.08.2023 by Debt Recovery Tribunal-I, Ernakulam concerning measures taken under the SARFAESI Act, including prohibitory orders and physical possession of properties, based on alleged loan repayment defaults by the petitioner.

Headnotes:

Petitioners, engaged in marine exports, faced SARFAESI actions from Indian Overseas Bank due to alleged defaults on substantial loan amounts; faced symbolic and physical possession notices on various properties, impacting business operations - [Paras 2-5].

Jurisdiction of Debts Recovery Tribunal under SARFAESI Act – Interpretation – Jurisdiction exercised in accordance with law and prior judgments of High Court – Tribunal found compliant with High Court directives, no significant procedural deviations observed – Petitioners' claims of Tribunal's non-adherence to court directions unfounded. [Paras 7, 8, 16-18]

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) – Implementation and Compliance – Analysis of Tribunal's application of Section 14 – Tribunal considered and upheld the legality of steps taken under SARFAESI Act for possession of assets, refuting petitioners' claims of procedural lapses and legal errors. [Paras 10, 20-21]

Procedural and Mandatory Requirements under SARFAESI Act – Discussion – Tribunal properly applied statutory requirements, no infirmity in orders granting physical possession of secured assets – Challenge on basis of non-compliance with SARFAESI Act dismissed based on factual findings by Tribunal. [Paras 19, 20]

Decision – Dismissal of Petition – High Court finds no merit in petitioners' arguments against orders of Debts Recovery Tribunal – Tribunal's decisions upheld, emphasizing adequacy of statutory mechanisms in SARFAESI Act for

redressal – High Court dismisses petition, affirming the applicability of alternative statutory remedies. [Para 26, 27]

Referred Cases:

- New India Assurance Company Ltd. v. Hilli Multipurpose Cold Storage Private Ltd [(2020) 5 SCC 757]
- Goverdhan Prasad Atal v. Assam Gramin Vikash Bank and Others [2021 KHC 2202]
- Varghese A.P. v. Chief Manager, Vijaya Bank and others [2019 (4) KLJ 956]
- Sama Rubbers v. South Indian Bank Ltd [2023 (4) KLJ 692]
- South Indian Bank Ltd vs. Naveen Mathew Philip (2023 LiveLaw (SC) 320)

Representing Advocates:

For the petitioner: George Poonthottam (Sr.), C.S. Ullas

For the respondents: Sunil Shanker, Vidya Gangadharan, Jerin George Sandhra S.

JUDGMENT

The challenge in this Original Petition is to the order dated 18.08.2023 in I.A.No.868/2022 in S.A.No.224/2021

passed by the Debts Recovery Tribunal-I, Ernakulam. Petitioner No.1 is a company doing marine exports. Petitioner No.2 is the Managing Director of petitioner No.1 company. Petitioner No.3, one among the Directors of the Company, is the wife of petitioner No.2. Petitioner No.4 is a company managed by petitioners 2 and 3.

2. The petitioner company availed a cash

credit of Rs.500 Lakhs and working capital term loan of 930 Lakhs from the Indian Overseas Bank, Ernakulam Main Branch (respondent No.3). Alleging default in repayment of the loan, the Bank initiated proceedings against the petitioners under the Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the SARFAESI Act'). The Bank issued possession notice dated 27.10.2021 intimating symbolic possession of various properties owned by the petitioners. The Bank also issued prohibitory order dated 30.10.2021 to the registered tenant of the petitioner company in respect of the plant and machinery at Aroor in Alappuzha District leading to the tenant ceased to pay monthly rent amounting to Rs. 11,70,000/- to the petitioners.

3. Challenging the measures taken by the Bank under the SARFAESI Act and the prohibitory order issued against the tenant of the petitioner company, the petitioners filed S.A.No.224/2021 before the Debt Recovery Tribunal-I, Ernakulam (respondent No.1). After the institution of S.A.No.224/2021, the Bank approached the Chief Judicial Magistrate Courts at Alappuzha and Ernakulam seeking assistance to take physical possession of the properties owned and possessed by the petitioners.

4. As there was no regular sitting in the Tribunal, the petitioners approached this Court by filing O.P.(DRT) No.1 of 2022 seeking the relief to keep in abeyance the coercive steps taken against the petitioners until the disposal of S.A.No.224/2021.

This Court granted a stay of coercive measures on condition of payment of Rs.50 Lakhs.

5.The petitioners complied the order after obtaining extension of time from this Court. O.P.(DRT) No.1/2022 was disposed of by granting stay till 23.04.2022 so as to enable the petitioners to approach and obtain necessary orders from the Tribunal. Thereafter, the petitioners made an application seeking amendment in S.A.No.224 of 2021 for the purpose of incorporating additional pleadings and grounds to challenge the proceedings under Section 14 of the SARFAESI Act initiated before the Chief Judicial Magistrate Courts. The petitioners filed I.A.No.868/2022 in S.A.No.224 of 2021 seeking stay of taking physical possession of the properties under the SARFAESI Act. On 07.07.2022, the Tribunal granted a conditional stay on payment of Rs. 5,37,82,000/-, in two equal monthly instalments. It was also stipulated that in the event of failure in paying the instalments, I.A.No.868/2022 would stand closed.

6. The petitioners preferred a review petition as R.P.No.2/2022, seeking review of the order dated 07.07.2022 in I.A.No.868/2022. The Tribunal dismissed the review petition. Challenging the orders in I.A.No.868/2022 and R.P.No.2/2022, the petitioners filed W.P.(C) No.31891/2022 under Article 226 of the Constitution of India before this Court. This Court by way of judgment dated 24.05.2023 set aside the order in I.A.No.868/2022 and directed the Tribunal to consider the I.A. afresh within two months of the date of receipt of

the copy of the judgment, in accordance with law, after adverting to the contentions taken in the S.A.. The Tribunal passed Ext.P21 order pursuant to the directions of this Court in the judgment in W.P.(C) No.31891 of 2022. The said order is under challenge in this Original Petition.

7. Heard the learned Senior Counsel Sri. George Poonthottam and Sri. Sunil Shankar A., the learned counsel appearing for the Bank.

8. The learned Senior Counsel Sri. George Poonthottam made the following submissions:-

(1) The Tribunal has not considered the directions of this Court in letter and spirit in the sense that the order does not reflect what was sought to be considered by this Court.

(2) The Tribunal lost sight of the fact that the intention of the legislature was to dispose of the applications within a time frame as provided in sub-section (5) of Section 17 of the SARFAESI Act with intent to protect the borrowers also.

(3) The Tribunal has not taken into account the non-compliance of Section 26B of the SARFAESI Act.

9. The learned counsel for the respondent Bank Sri. Sunil Shankar made the following submissions:

(1) The order under challenge is appealable under Section 18 of the SARFAESI Act.

(2) The petitioners have not established any tenable grounds to invoke the jurisdiction under Article 227 of the Constitution of India. The learned Senior Counsel submitted that the order of the

Tribunal is not alive to the contentions raised by the petitioners in the securitization application. The learned Senior Counsel submitted that this Court while disposing W.P.(C) No.31891 of 2022 observed that the Tribunal has to consider the merits of the contentions taken by both sides applying the well settled principles governing the grant of interim relief namely (i) strong prima facie case; (ii) balance of convenience; and (iii) irreparable injury. The submission of the learned Senior Counsel is that the Tribunal has not applied its mind to the principles discussed above while disposing of the application seeking stay of the proceedings under the SARFAESI Act against the petitioners.

10. Relying on Section 17(5) of the SARFAESI Act and Rule 12 of the Debts Recovery Tribunal (Procedure) Rules, 1993, and the declaration of law by the Supreme Court in ***New India Assurance Company Ltd. v. Hilli Multipurpose Cold Storage Private Ltd*** [(2020) 5 SCC 757], the learned Senior Counsel submitted that the Debts Recovery Tribunals shall dispose of applications within 60 days from the date of presentation of the same and the limitation period of 30 days prescribed in Rule 12 of the DRT Rules, for filing written statement is mandatory and only in exceptional cases and in special circumstances, the said period can be extended by a period not exceeding 15 days. The learned Senior Counsel submitted that the intention of the legislature is to protect the debtors also which is very evident from the statutory limitations.

11. The learned Senior Counsel further submitted that in the present case, there is no substantial compliance of Section 26D of the SARFAESI Act which prevents the creditor bank from exercising the rights of enforcement of securities under Chapter III of the Act. The learned Senior Counsel relied on **Goverdhan Prasad Atal v. Assam Gramin Vikash Bank and Others** [2021 KHC 2202] in support of his contentions.

12. The learned counsel for the respondent Bank Sri. Sunil Shankar submitted that the order impugned is appealable under Section 18 of the SARFAESI Act and the petitioners have not placed before the Court anything that warrants interference of this Court under Article 227 of the Constitution of India. The learned Counsel for the Bank further submitted that the Tribunal has considered all the relevant contentions raised by both sides while disposing of the interlocutory application.

13. The learned Counsel relied on **Varghese A.P. v. Chief Manager, Vijaya Bank and others** [2019 (4) KLJ 956] and **Sama Rubbers v. South Indian Bank Ltd** [2023 (4) KLJ 692] in support of his contentions.

14. Any order made by the Debts Recovery Tribunal under Section 17 of the SARFAESI Act is appealable under Section 18 of the Act. In **Varghese A.P.**, a Division Bench of this Court held that an order passed in an interim application also falls within the ambit of Section 18 of the SARFAESI Act. A Single Bench of this Court in

Sama Rubber following ***Varghese A.P*** reiterated that an order passed in an interim application is appealable under Section 18 of the SARFAESI Act.

15. The essential challenge raised by the learned Senior Counsel is that the order of the Tribunal is not alive to the contentions raised in the Securitisation Application. The learned Senior Counsel would submit that the Tribunal has not complied with the directions issued by this Court in W.P.(C) No.31891 of 2022.

16. While disposing of W.P.(C) No.31891 of 2022, this Court observed thus:-

“12.....Whether any amount is to be deposited or the extent of amount to be deposited will depend on the prima facie appreciation by the Tribunal on the merits of the contentions taken by both sides and on the application of the well settled principles governing the grant of interim relief namely (i) strong prima facie case; (ii) balance of convenience; and (iii) irreparable injury. While it may not be necessary to the Tribunal to write a detailed order touching upon merits of each and every contention taken before the Tribunal as well as the response by the banks/financial institutions to such contentions, the order of the Tribunal must, on a reading, indicate that it was alive to the contentions raised in the Securitisation Application.”

17. The operative portion of the judgment in W.P.(C) No.31891 of 2022 reads thus:-

(ii) Ext.P6 order in W.P (C) No. 31891 of 2022 is quashed.

I.A No.868 of 2022 in S.A No.224 of 2021 will stand restored to the file of the DRT-I, Ernakulam. The Tribunal shall reconsider I.A No.868 of 2022 in S.A No.224 of 2021 afresh, and in accordance with the law and after affording an opportunity of hearing to the parties. Status quo as on today shall be maintained till fresh orders are passed as directed above. The tribunal shall endeavor to pass fresh

orders after adverting to the contentions taken and having regard to the observations in this judgment, within a period of two months from the date of receipt of a certified copy of this Judgment.

18. The contentions raised by the petitioners while moving I.A.No.868 of 2022, contained in paragraphs 4,5 and 6 of the affidavit filed in support of the application, are extracted below.

“4. It is submitted that the stay was in operation for the period covering from 05.01.2022 to 02.03.2022 but the defendant bank suppressing the above fact that the stay granted by the Hon'ble High Court of Kerala was in operation, filed a petition under Section 14 of the SARFAESI Act before the Hon'ble Additional Chief Judicial Magistrate (Special Court for the trial of criminal cases against sitting and former MP's/ MLA's of the state) as M.C Nc. 451/2022 seeking assistance of the court to take physical possession of the secured asset. The Hon'ble Addl. Chief Judicial Magistrate Court, Ernakulam as per Annexure-A9 order dated 22.02.2022 appointed

an Advocate Commissioner to take physical possession of the property within 14 days and directed to file a report on or before 04.04.2022.

5. Similarly the defendant bank had preferred application under Section 14 before Hon'ble Chief Judicial Magistrate, Thodupuzha as M.C No. 20/2022 seeking assistance of the court to take physical possession of the secured asset. The Hon'ble Chief Judicial Magistrate, Thodupuzha, as per Annexure-A10 order dated 11.01.2022 appointed an Advocate Commissioner to take physical possession of the property and directed to file a report on or before 17.02.2022.

6. It is submitted that the act of the defendant bank moving Annexure A9 and A10 applications under Section 14 of the Act suppressing the operation of stay by the Hon'ble High Court of Kerala amounts to contempt and that the applicant is preferring a contempt petition raising the aforesaid illegality. As a matter of fact it is submitted that the Advocate commissioner appointed as per Annexure

A9 had issued Annexure-A11 notice dated 10.05.2022 stating that he will make a field visit on the scheduled property on 10.05.2022. The advocate commissioner visited the property on the very same day and informed that she will take possession of the property immediately. The act done by the defendant bank is illegal and that they are taking all hasty

steps for the illegal possession of the applicant's property.”

19. The challenge to the application on the side of the respondent-Bank is discernible from paragraph 3 of the impugned order which is extracted below:-

“3. The Counsel appearing for the respondents submitted that the petitioners after having availed cash credit facility of Rs.500 Lakhs and a sum of Rs.9,30,00,000/- as Working capital Term loan, committed default in repayment of the outstanding loan due and that therefore SARFAESI measures were initiated by the respondents and the respondents filed applications under Section 14 of the SARFAESI Act, 2002 before the Chief Judicial Magistrate, Ernakulam and before the Chief Judicial Magistrate, Thodupuzha for taking physical possession of the property and that the Hon'ble High Court of Kerala had directed in O.P. (DRT) No.1/2022 that the petitioners shall not be dispossessed pursuant to possession notice dated 27.10.2021 and that petitioners have not been dispossessed from the secured asset and that conditional order passed by the Hon'ble High Court of Kerala was only for a period of eight weeks subject to paymentment of Rs.50 Lakhs on or before 06.02.2022 and that the said condition was not complied with and that the petitioners presented the draft for Rs.50 Lakhs only on 17.3.2022 and that due to non-compliance of the direction, interim order was no longer in force and that

subsequent direction was given by the Hon'ble High Court of Kerala to deposit an amount of Rs.50 Lakhs on 24.3.2022 granting stay of dispossession for a period of one month so as to enable the petitioners to move this Tribunal for appropriate relief in the pending SA and that mandatory requirements has been complied with in respect of the measures initiated under Section 14 of the SARFAESI Act, 2002 and that petitioners have not established any prima facie case and that balance of convenience only in favour of the respondents and that therefore the petition may be dismissed with costs.”

20. In paragraphs 4 to 6 of the impugned order, the Tribunal has considered the rival contentions. The relevant portion of the impugned order is extracted below:-

“4. What has to be considered in this petition is as to whether SARFAESI measures were initiated by the respondents under Section 14 of the SARFAESI Act, 2002 during the subsistence of interim order granted by the Hon'ble High Court of Kerala in O.P (DRT) No.1/2022 and as to whether Annexure-A9 order dated 22.2.2022 passed in M.C. No.451/2022 on the file of the Additional Chief Judicial Magistrate, Ernakulam and Annexure – A10 order dated 11.01.2022 passed in M.C. No.20/2022 on the file of Chief Judicial Magistrate, Thodupuzha suffer from any infirmity or not.

5. It is seen from the perusal of the order of the Hon'ble High Court of Kerala dated 05.01.2022, which

is filed as document No.1 by the petitioners that there is a clear observation that the petitioners shall not be dispossessed pursuant to Ext.P4 for a period of eight weeks on condition that the petitioners deposit an amount of Rs.50 Lakhs and that they shall not be dispossessed until then. As rightly submitted by the counsel for the respondents, since the conditional order passed by the Hon'ble High Court of Kerala in O.P. (DRT) No.1/2022 for payment of Rs.50 Lakhs within the stipulated period was not complied with by the petitioners, the interim order was no longer in force. However, pursuant to the direction given by the Hon'ble High Court of Kerala on 23.2.2022 (copy of order is filed as document No.2 by the petitioners' side) as per order in I.A. No.4/2022 in O.P. (DRT) No.1/2022, the petitioners were permitted to deposit the aforesaid amount by way of cheque. It is observed in the aforesaid judgment that once the petitioners deposited an amount of Rs.50 Lakhs on 24.3.2022, the petitioners shall not be disposed from the property for a period of one month so as to enable the petitioners to move this Tribunal. Thus it is evident that the above order will be in force till the petitioners approached this Tribunal for appropriate relief in the SA. It is seen from the perusal of the orders, Annexure-A9 and A10 that order in M.C. No.451/2021 was passed on 22.2.2022 and that order in M.C. No.20/2022 was passed 11.01.2022 during which period the stay granted by the Hon'ble High Court of Kerala in O.P. (DRT) No.1/2022 was not in force.

6. Apart from the aforesaid contention, the

petitioners have not stated in their affidavit filed along with the petition as to whether the affidavit filed by the respondents in M.C. No.451/2021 on the file of the Additional Chief Judicial Magistrate Court, Ernakulam and in M.C. No.20/2022 on the file of the Chief Judicial Magistrate Court, Thodupuzha are not in compliance with the mandatory requirements stipulated under Section 14 (1)(i) to (ix) of the SARFAESI Act, 2002. There is also no specific averments in the affidavit of the petitioners that the orders passed in the aforesaid M.C. Nos.451/2021 and 20/2022 is not in consonance with the mandatory requirements stipulated under Section 14 (1)

(i) to (ix) of the SARFAESI Act, 2002. It is seen from the order, Annexure-A9 that the learned Additional Chief Judicial Magistrate Court, Ernakulam after having perused the affidavit and the documents filed by the respondents and having satisfied over the same, passed the order appointing Advocate Commissioner for taking physical possession of the secured asset. A perusal of Annexure-A10 order also shows that the learned Chief Judicial Magistrate Court, Thodupuzha after having perused the affidavit and the documents filed by the respondents and having satisfied over the same, passed

the order appointing Advocate Commissioner for taking physical possession of the secured asset. Therefore this Tribunal does not find any infirmity in the orders, Annexure – A9 and A10 passed. The petitioners have failed to make out a prima facie case so as to get the relief sought for in the petition.”

21. It cannot be held that the Tribunal has exercised its jurisdiction in a manner negating justice. It is difficult to hold that the approach adopted by the Tribunal has occasioned a failure of justice. It is also difficult to hold that the Tribunal failed to advert to the contentions taken and the directions of this Court in W.P.(C) No.31891 of 2022.

22. On the power of this Court while exercising Article 227 of the Constitution of India, this Court in ***The Kerala Plantations v. South Indian Bank Ltd*** [O.P. (DRT) No.306 of 2023] held thus:-

“14. In ***Waryam Singh and another vs. Amarnath and another [AIR 1954 SC 215]***, ***Shalini Shyam Shetty and another vs. Rajendra Shankar Patil [(2010) 8 SCC 329]***, ***M/s. Garment Craft vs. Prakash Chand Goel [(2022) 4 SCC 181]*** and a host of other judicial precedents the Hon’ble Supreme Court has delineated the powers of the High Courts under Article 227 of the Constitution of India. It is well settled that the said power is to be exercised only to keep the Courts of District Judiciary/ Tribunals within their bounds of authority and to see that they do their duty as expected of them in a legal manner. The power is restricted to the cases of serious dereliction of duty and flagrant violation of fundamental principles of law and justice, where if this Court does not interfere, a grave injustice will remain uncorrected. But, this does not mean that the said power is to be exercised indiscriminately, that too interfere with discretionary orders.

15. The Hon'ble Supreme Court in ***South Indian Bank Ltd vs. Naveen Mathew Philip (2023 LiveLaw (SC) 320***, after advertng to a myriad of earlier judicial pronouncements rendered under the Act, has categorically declared that High Courts shall not, unless in extra ordinary circumstances, interfere with proceedings initiated under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, in writ proceedings under Article 226 of the Constitution of India.”

23. The SARFAESI Act is a self contained Code.

The Statute provides an effective remedy to challenge the proceedings under the SARFAESI Act by an aggrieved person. In the light of the alternative statutory remedy available to the petitioners, I am not inclined to entertain the Original Petition exercising the power of superintendence of this Court under Article 227 of the Constitution of India.

24. Now coming to the contentions raised by the learned Senior Counsel relying on sub-section (5) of Section 17 of the SARFAESI Act and sub-rule (3) of Rule 12 of the Debts Recovery Tribunal (Procedure) Rules, 1993. As per sub-section (5) of Section 17 of the SARFAESI Act, any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within 60 days from the date of such application. Proviso to sub-section (5) of Section 17 says that the Debts Recovery

Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1). Sub-rule (1) of Rule 12 of the Debts Recovery Tribunal (Procedure) Rules, 1993, provides that the defendant may, within a period of thirty days from the date of service of summons, file two complete sets of written statement including claim for set off or counter claim, if any, along with documents in a paper book form. Sub-rule (3) of Rule 12 further provides that if the defendant fails to file the written statement of his defence, including claim for set-off or counter claim under sub-rule(1), if any, within the period of thirty days, the Presiding Officer may in exceptional cases and special circumstances to be recorded in writing, extend the period, by such further period not exceeding fifteen days. Sub-rule (3) makes it clear that only in exceptional cases and special circumstances, the time to file written statement by the defendant can be extended to a period not exceeding fifteen days.

25. The speedy disposal of the disputes between the creditor and debtor is the intention of the Statute as submitted by the learned Senior Counsel. The mandatory nature of the limitation period for filing reply/response/ written statement indicates that it is made for protecting the interest of the debtors also. The Debts Recovery Tribunals are required to follow the mandate provided in sub-section (5) of Section

17 of the Act and Rule 12 of the Debts Recovery Tribunal (Procedure) Rules, 1993, in the disposal of the applications.

26. The learned Senior Counsel further focussed on the mandate of Section 26D of the SARFAESI Act. As per section 26D of the Act, no secured creditor shall be entitled to exercise the rights of enforcement of securities under Chapter III unless the security interest created in its favour by the borrower has been registered with the Central Registry. The petitioners contend that there is no substantial compliance with Section 26D in the present case. The petitioners have the liberty to raise these contentions in the statutory Forums.

Having held that the petitioners have an alternative statutory remedy, the Original Petition stands dismissed without prejudice to their right to work out their remedies in accordance with law. It is made clear that I have not made any observations on the merit of the

contentions raised by the petitioners in
I.A.No.868/2022 in S.A.No.224/2021 (DRT) No.351 of
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