IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

THURSDAY, THE 12TH DAY OF OCTOBER 2023 / 20TH ASWINA, 1945

WP(C) NO. 30346 OF 2023

PETITIONER:

THARA PHILIP,
AGED 65 YEARS,

BY ADVS.
MADHU RADHAKRISHNAN
NELSON JOSEPH
M.D.JOSEPH
DEEPAK ASHOK KUMAR
NEVIL NOBLE

RESPONDENTS

1 FEDERAL BANK LTD,
KANNETH BUSINESS CENTRE, SULTHAN BATHERY,
THALOR ROAD, SULTHAN BATHERY, WAYANAD,
KERALA, PIN – 635592 REP, BY ITS MANAGER.

2 THE AUTHORISED OFFICER,
LOAN COLLECTION & RECOVERY DEPARTMENT,
KOZHIKODE DIVISION, FEDERAL BANK LTD.
IST FLOOR, FEDERAL TOWERS, MAVOOR ROAD,
ARAYIDATHUPALAM KOZHIKODE, KERALA, PIN - 673004

BY ADVS.
MOHAN JACOB GEORGE, STANDING COUNSEL
P.V.PARVATHY (P-41)(K/000036/1991)
REENA THOMAS(R-364)
NIGI GEORGE(K/1169/2012)
ANANTHU V.LAL(K/001233/2022)

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 12.10.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.BABU, J.

W.P(C) No.30346 of 2023

Dated this the 12th day of October, 2023

JUDGMENT

The petitioner challenges the proceedings initiated against her by the respondent, the Federal Bank Ltd., Sultan Bathery branch, under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFEASI Act).

2. The relevant facts are extracted below:

2.1. M/s. Thara Coffee Pvt. Ltd., a partnership firm, availed a credit facility from the respondent-Bank. The petitioner stood as guarantor for the said credit facility availed by the firm. An extent of 3 acres of land in Resurvey No.549/2 along with a processing unit owned by the petitioner and another extent of 5.90 cents of land with a residential building in Resurvey No.214/15 and a further extent of 36 cents of land with a residential building in Resurvey No.240/4 of Sultan Bathery village were mortgaged for availing the credit facility.

2.2. The partnership firm availed a credit facility of Rs.1,95,40,000/- from the bank.

2.3. The borrowers defaulted in repaying the loan availed. On 14.06.2022, the bank classified the account of the borrowers as Non-Performing Asset (NPA). The bank initiated the proceedings under the SARFAESI Act. A demand notice under Section 13(2) of the SARFAESI Act was served on the petitioner on 13.7.2022. The bank obtained symbolic possession of the properties as per proceedings dated 11.11.2022. After that, the bank filed a petition before the Chief Judicial Magistrate Court, Kalpetta, seeking assistance for taking physical possession of the properties. The Court appointed an Advocate Commissioner who issued notice for taking possession of the properties. The borrowers challenged the same in a proceeding in S.A No.137/23 before the Debts Recovery Tribunal, Ernakulam. The bank proceeded to sell the mortgaged properties. The entire proceedings initiated under the SARFAESI Act are under challenge in this writ petition.

3. The challenge of the petitioner is essentially on the ground that the properties sought to be auctioned are agricultural lands and, therefore, the same is protected under Section 31 (i) of the

SARFAESI Act.

4. Heard Sri.Madhu Radhakrishnan, the learned counsel appearing for the petitioner and Sri.Mohan Jacob George, the learned Standing Counsel for the respondent-bank.

5. The learned counsel for the petitioner contended that the materials placed before this Court would reveal that the properties sought to be sold are agricultural lands as defined in Section 31 (i) of the SARFAESI Act.

6. The learned Standing Counsel for the bank submitted that a Writ Petition under Article 226 of the Constitution of India is not maintainable to challenge the present proceedings and that no writ is maintainable against the bank, a private scheduled bank.

7. The foundation of the challenge raised by the petitioner in the writ petition is the pleading that the properties in question are agricultural lands. This plea is resisted by the Bank, contending that the security interest was created in respect of several parcels of land meant to be a single unit and the parties did not treat any of them as agricultural land at the time of mortgage.

8. These are questions of facts to be adjudicated in a proceeding before the statutory Tribunal.

9. The foremost challenge of the bank is that the writ petition is not maintainable. This challenge is based on the rule of alternative remedy.

10. The SARFAESI Act was enacted in 2002 to overcome the poor working of the Recovery of Debts Due to Banks and Financial Institutions Act 1993. The intention of the Statute is to give an impetus to the financial sector, which remained at a slow pace in the then-existing legal framework relating to commercial transactions, and to meet with the change in the commercial practices and financial sector in force. The slow pace of recovery of defaulting loans and mounting levels of Non-Performing Assets of the bank and financial institutions resulting from the inadequate legal framework, was sought to be revamped on the recommendation of Narasimham Committee and Andhyarujina Committee.

11. The SARFAESI Act was intended to enable the banks and financial institutions to realise long term assets, manage problems of liquidity, asset liability and mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce Non-Performing Assets by adopting measures for recovery

or reconstruction. The major enforcing provision of the SARFAESI Act is Section 13 in Chapter III.

12. On the object of the SARFAESI Act in **Mardia Chemicals Ltd. v. Union of India [(2004) 4 SCC 311],** the Apex Court observed thus:

> "81. In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debts Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of the economy of the country and welfare of the people in general which would subserve the public interest."

13. The SARFAESI Act is a self-contained code. Though the bank and financial institutions would no longer have to wait for a tribunal judgment to take direct action against the debtors by taking possession of secured assets and selling them, the statute provides an effective remedy to challenge the proceedings by an aggrieved person in Section 17 of the SARFAESI Act.

14. Section 17 of the SARFAESI Act reads thus:

> **"17. Application against measures to recover secured debts.-**(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken 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 this sub-section.

(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction—

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.]

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—

(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 1 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under

sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(4A) Where—

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,—

(a) has expired or stood determined; or

(b) is contrary to section 65A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.]

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided 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).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder."

15. Sub-section (3) of Section 17 of the SARFAESI Act gives ample power to the Tribunal to interfere with the measures taken by the banks and financial institutions under Section 13. Provision for an appeal to challenge the orders passed by the Debts Recovery Tribunal is also provided under Section 18 of the SARFAESI Act. Therefore, the SARFAESI Act is a complete code providing effective and efficacious remedy to any person aggrieved by the proceedings initiated under Section 13.

16. The maintainability of the writ petition is to be considered in the light of the efficacious remedy provided by the statute.

17. A survey of the judicial precedents is useful. The Apex Court has considered the scope of interference by the High Courts under Article 226 of the Constitution of India in a series of pronouncements.

18. In **United Bank of India v. Satyawathi Tondon [(2010) 8 SCC 110]** the Apex Court observed thus:

> "**43.** .....the High Court will ordinarily not entertain a petition under Article 226 of 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 a 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, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."

19. In **State of Bank of Travancore v. Mathew K.C. [(2018) 3 SCC 85]**, the Supreme Court held that the discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are

available, except in cases falling within the well-defined exceptions. In **State of Bank of Travancore** (supra) the Apex Court further observed thus:

> "15.....Loans by financial institutions are granted from public money generated at the taxpayer's expense. Such loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same."

20. In **Varimadugu Obi Reddy v. B Sreenivasulu [(2023) 2 SCC 168],** the Supreme Court deprecated the practice of entertaining writ applications challenging the proceedings under the SARFAESI Act by the High Court in exercise of jurisdiction under Article 226 of the Constitution without exhausting the alternative statutory remedy available under the law.

21. In **South Indian Bank Ltd. v. Naveen Mathew Philip (2023 SCC OnLine SC 435) = [2023 (4) KLT 29 (SC)]** the Supreme Court, relying on the above referred precedents, observed thus:

"16.....

> *27. The principles of law which emerge are that::*
>
> *27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.*

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

27.3. Exceptions to the rule of alternate remedy arise where : (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

22. In **South Indian Bank Ltd.** (supra) the Apex Court further held thus:

> "18.....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."

23. In **Celir LLP v. Bafna Motors (Mumbai) Pvt. Ltd., [2023 (5)**

KLT 599 (SC)] the Supreme Court held as follows:

> "96. More than a decade back, this Court had expressed serious concern despite its repeated pronouncements in regard to the High Courts ignoring the availability of statutory remedies under the RDBFI Act and the SARFAESI Act and exercise of jurisdiction under Article 226 of the Constitution. Even after, the decision of this Court in Satyawati Tondon (supra), it appears that the High Courts have continued to exercise its writ jurisdiction under Article 226 ignoring the statutory remedies under the RDBFI Act and the SARFAESI Act."

24. The facts of the present case are to be analysed on the touchstone of the above-mentioned principles. The learned counsel for the petitioner relied on **Mohammed Basheer, K.P v. Deputy General Manager and Others [2010 (2) KLJ 225] and J. Rajiv Subramaniyan v. Pandiyas [(2014) 5 SCC 651]** in support of his contentions. In **Mohammed Basheer,** a Division Bench of this Court, had considered whether a rubber plantation would come under the statutory definition of agricultural land as provided in Section 31 (i) of the SARFAESI Act.

25. In **Indian Bank v. K. Pappireddiyar [(2018) 18 SCC 252]** the Apex Court held thus:

> "9.....Whether a parcel of land is agricultural must be deduced as a matter of fact from the nature of the land, the use to which it was being put on the date of the creation of the security interest and the purpose for which it was set apart."

26. In **K. Sreedhar v. Raus Constructions (P) Ltd. [(2023) SCC OnLine SC 13]** the Apex Court observed thus:

> "31.....When it was the case on behalf of the borrowers that in view of Section 31(i) of the SARFAESI Act, the properties were agricultural lands, the same were being exempted from the provisions of the SARFAESI Act, the burden was upon the borrower to prove that the secured properties were agricultural lands and actually being used as agricultural lands and/or agricultural activities were going on."

27. I have already stated above that the question of whether the property mortgaged would come under the definition of agricultural land coming under Section 31 (i) of the SARFAESI Act is a disputed question of fact which is to be adjudicated by the Debts Recovery Tribunal having jurisdiction in the matter. The order passed by the Debts Recovery Tribunal is appealable before the DRAT, which is the final fact-finding authority. In **Mohammed Basheer** (supra), the question of maintainability of the writ petition based on the rule of alternative remedy was not under consideration, and therefore, the said decision will not be of assistance to the petitioner.

28. The learned Standing Counsel for the bank relied on **Green Valley Farms, Attapady and Another v. Syndicate Bank, Palakkad [2020 (1) KLJ 420]** to contend that the question of whether

the property with respect to which the security interest was created is an agricultural land is a jurisdictional issue which requires adjudication and decision by the Tribunal and not by a writ court.

29. In **South Indian Bank Ltd.** (supra), the Apex Court held that where there are disputed questions of facts, the High Court may decide to decline jurisdiction in a writ petition unless the Court is of the view that the nature of the controversy requires the exercise of its jurisdiction. In the present case, the writ petition has not been filed to enforce a fundamental right protected by Part III of the Constitution. There are no materials to show that there has been a violation of the principles of natural justice, and the vires of the legislation is not under challenge. Therefore, this writ petition is not maintainable.

30. The maintainability of the writ petition is challenged on another ground. It is submitted that the respondent-bank being a private company carrying banking business as a scheduled bank cannot be termed as an institution or company carrying on a statutory or public duty, and therefore, the writ petition is not maintainable in that sense also.

31. The learned Standing Counsel for the bank relied on **Federal Bank Ltd v. Sagar Thomas [(2003) 10 SCC 733]** and **Phoenix ARC (P) Ltd. v. Vishwa Bharati Vidya Mandir [(2022) 5 SCC 345]** in support of his contentions.

32. In the decisions relied on by the learned Standing Counsel for the respondent-bank the Supreme Court held that private companies like the respondent-bank would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution of India.

Resultantly, the writ petition is dismissed in limine. Pending Interlocutory Applications, if any, stand closed.

K.BABU,
JUDGE

KAS

APPENDIX OF WP(C) 30346/2023

PETITIONER EXHIBITS

EXHIBIT P1	TRUE COPY OF THE DEMAND NOTICE UNDER SECTION 13(2) OF SARFAESI ACT ISSUED BY THE RESPONDENTS DATED 13/7/2022
EXHIBIT P2	TRUE COPY OF THE POSSESSION NOTICE DATED 11/11/2022 ISSUED BY THE RESPONDENTS
EXHIBIT P3	TRUE COPY OF THE SALE NOTICE DATED 7/8/2023 ISSUED BY THE RESPONDENTS
EXHIBIT P4	TRUE COPY OF THE POSSESSION CERTIFICATE DATED 25/07/2023 BEARING NO. 1027/2023
EXHIBIT P5	TRUE COPY OF THE LETTER ISSUED BY COFFEE BOARD ALONG WITH THE FEASIBILITY REPORT DATED 27/7/2023
EXHIBIT P6	TRUE COPY OF THE LETTER ISSUED BY THE AGRICULTURAL OFFICER DATED 24/7/2023
EXHIBIT P7	TRUE COPY OF THE LETTER ISSUED BY THE MUNICIPAL OFFICE OF SULTHAN BATHERY DATED 19/07/2021 TO THE PETITIONER
EXHIBIT P8	TRUE COPY OF THE VALUATION REPORT OF THE VALUER OF THE RESPONDENT BANK DATED 20/11/2018
EXHIBIT P9	CERTIFICATE DATED 1/9/2023 ISSUED BY THE AGRICULTURAL OFFICER OF AGRICULTURAL OFFICE OF THE SUTHAN BATHERY MUNCIPALITY CONFIRMING SUBSIDIES BEING GIVEN FOR THE CULTIVATION OF CROPS
EXHIBIT P10	TRUE COPY OF THE ACCOUNT STATEMENTS OF THE ACCOUNT OF THE PETITIONER MAINTAINED WITH SULTHAN BATHERY SERVICE CO-OPERATIVE SOCIETY BANK AND STATE BANK OF INDIA BRANCH AT SULTHAN BATHERY