IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 320 of 2024

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JAGDISHKUMAR JAYANTILAL PARMAR
Versus
AAVAS FINANCIERS LIMITED & ORS.

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Appearance:
MEHUL A SURATI(7870) for the Petitioner(s) No. 1
MR ANKUR Y OZA(2821) for the Respondent(s) No. 1
MR VIRENDRA M GOHIL(3244) for the Respondent(s) No. 6
NOTICE UNSERVED for the Respondent(s) No. 2,3,4,5

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CORAM:**HONOURABLE MR. JUSTICE HEMANT M. PRACHCHHAK**

Date : 06/05/2024

COMMON ORAL ORDER

1. By way of present petitions, the petitioners have prayed for the following reliefs :

> *"A) Be pleased to quash and set aside impugned Notice dated 19.12.2023 and 23.11.2023, passed by the respondent No.1 bank and;*
>
> *B) Be pleased to quash and set aside all the measures initiated by the respondent no.1 under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in connection with the mortgaged property;*
>
> *C) Pending admission, hearing and final disposal of this petition be pleased to direct the respondents to maintain status quo of the residential property which is in physical possession of the*

petitioners;

D) Ex-parte Ad-interim relief in terms of Para 7 (C);

E) Costs of this petition are awarded;

F) Any other relief, order or direction which may be just, fit, proper and equitable in the fact and circumstances of the Petition."

2. Heard learned advocate Mr.Mehul Surati, appearing on behalf of the petitioners, learned advocate Mr.Ankur Oza, appearing on behalf of the respondent No.1 and learned advocate Mr.Virendra Gohil, appearing on behalf of the respondent No.6.

2.1 The original borrower, co-borrower and guarantor, who have also received notice of the order passed by the competent authority, have chosen not to remain present before the Court and thus, the order is passed in the absence of the concerned respondents.

3. Learned advocate Mr.Surati has submitted that the petitioner is the bonafide purchaser of the property by way of sale-deed. He has not received any notice from the competent authority while passing the impugned order under Section 14 of the SARFAESI Act. He has referred and relied upon the decision of the Hon'ble Apex Court rendered in Civil Appeal No.5393 of 2010 in case of M/s Godrej Sara Lee Ltd. Vs. The Excise and Taxation Officer-Cum-Assessing Authority & Ors. and submitted that his case falls under the exception carved out by the Hon'ble Apex Court and therefore, the petitioners are entitled to seek relief before this Court by exercising

jurisdiction under Article 226 & 227 of the Constitution of India. He has also referred and relied upon two other judgments of the Hon'ble Apex Court in case of ***PHR Invent Educational Society Vs. UCO Bank and Others***; and in case of ***M/s. South Indian Bank Ltd. & Ors. Vs. Naveen Mathew Philip & Anr. Etc. Etc.***, and submitted that the petitioners are entitled to get relief as prayed for in the present petitions while exercising jurisdiction by this Court under Article 226 & 227 of the Constitution of India. Learned advocate Mr.Surati has further submitted that since the petitioners are the third party, they have not borrowed money from the respondents and therefore, the order passed by the respondent authorities is absolutely illegal, unjust and arbitrary and therefore, the petitioners have filed the present petitions with the aforesaid prayers challenging the impugned notice based upon the order passed by the respondent authority under Section 14 of the SARFAESI Act.

4. Learned advocate Mr.Oza, appearing on behalf of the respondent No.1, has submitted that no affidavit-in-reply is filed on behalf of respondent No.1, however, he has orally raised preliminary objection with regard to maintainability of the present petitions.

5. Learned advocate Mr.Gohil, appearing on behalf of the respondent No.6, has supported the case of the present petitioners and referred to the averments made in affidavit-in-reply filed on behalf of the respondent No.6.

6. I have heard the learned advocates appearing for the

respective parties and perused the material placed on record. So far as the averments raised by the learned advocate Mr.Surati that the petitioners have not received any notice qua the order passed by the respondent authority and has not issued any notice, infact this averment is already considered by the Hon'ble Apex Court in case of ***Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others, reported in [2011] 2 SCC 782***, wherein, the Hon'ble Apex Court has deprecated the practice of entertaining the petition by the High Court on the ground of non-service of notice and observed and held as under :

> *"15. Having bestowed our anxious consideration to the facts at hand, we are of the opinion that the appeals are utterly misconceived. 1 (2008) 1 SCC 125 2 (2004) 4 SCC 311*
>
> *16. Section 13 of the Act deals with enforcement of security interest, providing that notwithstanding anything contained in Sections 69 or 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 Act was 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;*
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> *(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.*"
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> *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 14 of the Act.

17. Section 17 of 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 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:*
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> *Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.*
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> *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 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder."*

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.

21. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to

the appellants under Section 17 of the Act. It is well-settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See: Sadhana Lodh Vs. National Insurance Co. Ltd. & Anr.5; Surya Dev Rai Vs. Ram Chander Rai & Ors.6; State Bank of India Vs. Allied Chemical Laboratories & Anr.7). In City and Industrial Development Corporation Vs. Dosu Aardeshir Bhiwandiwala & Ors.8, this Court had observed that:

> "*The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:*
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> *(a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;*
>
> *(b) the petition reveals all material facts;*
>
> *(c) the petitioner has any alternative or effective remedy for the resolution of the dispute;*
>
> *(d) person invoking the jurisdiction is guilty of unexplained delay and laches;*
>
> *(e) ex facie barred by any laws of limitation;*
>
> *(f) grant of relief is against public policy or barred by any valid law; and host of other factors.*"

22. In the instant case, apart from the fact that admittedly certain disputed questions of fact viz. non-receipt of notice under Section 13(2) of the Act, non-communication of the order of the Chief Judicial Magistrate etc. are involved, an efficacious statutory remedy of appeal under Section 17 of the Act was available to the appellants, who ultimately availed of the same. Therefore, having regard to the facts obtaining in the case, the High Court was fully justified in declining to exercise its jurisdiction under Articles 226 and 227 of the Constitution."

6.1 So far as the contention raised by the learned advocate Mr.Surati that the petitioners are not the borrowers but they are the bonafide purchasers of the property and therefore, the

petitions are maintainable at the behest of the subsequent purchasers. This submission is also considered by the Hon'ble Apex Court in case of ***M/S. South Indian Bank Ltd. & Ors. Vs. Naveen Mathew Philip & Anr. Etc. Etc., reported in [2023] LiveLaw (SC) 320***, wherein, it has been observed and held in paragraph 16 and 18 as under :

> *"16. Approaching the High Court for the consideration of an offer by the borrower is also frowned upon by this Court. A writ of mandamus is a prerogative writ. In the absence of any legal right, the Court cannot exercise the said power. More circumspection is required in a financial transaction, particularly when one of the parties would not come within the purview of Article 12 of the Constitution of India. When a statute prescribes a particular mode, an attempt to circumvent shall not be encouraged by a writ court. A litigant cannot avoid the non-compliance of approaching the Tribunal which requires the prescription of fees and use the constitutional remedy as an alternative. We wish to quote with profit a recent decision of this Court in Radha Krishan Industries v. State of H.P., (2021) 6 SCC 771,*
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> > *"25. In this background, it becomes necessary for this Court, to dwell on the "rule of alternate remedy" and its judicial exposition. In Whirlpool Corpn. v. Registrar of Trade Marks (1998) 8 SCC 1, a two-Judge Bench of this Court after reviewing the case law on this point, noted: (SCC pp. 9-10, paras 14-15)*
> >
> > *"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".*
> >
> > *15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is*

available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field".

(emphasis supplied)

26. Following the dictum of this Court in Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1], in Harbanslal Sahnia v. Indian Oil Corpn. Ltd. [(2003) 2 SCC 107], this Court noted that: (Harbanslal Sahnia case, SCC p. 110, para 7) "7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1].) The present case attracts applicability of the first two contingencies. Moreover, as noted, the appellants' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings." (emphasis supplied)

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."

18. While doing so, we are conscious of the fact that 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."

6.2 At this stage, it would also be appropriate to refer to the

decision of the Hon'ble Apex Court in case of ***Phoenix Arc Private Limited Vs. Vishwa Bharati Vidya Madir, reported in [2022] 5 SCC 345***, wherein, it has been observed and held in paragraphs 13 and 14 that when specific machinery is provided under the statute, the High Court cannot exercise extraordinary jurisdiction vested in it under Article 226 & 227 of the Constitution of India. Even the judgment referred and relied upon by the petitioner in case of ***PHR Invent Educational Society Vs. UCO Bank and Others, passed in Civil Appeal No.4845 of 2024 on 10.04.2024,*** wherein, the Hon'ble Apex Court has observed in paragraphs 14 and 33 as under :

> *"14. The law with regard to entertaining a petition under Article 226 of the Constitution in case of availability of alternative remedy is well settled. In the case of Satyawati 12 Tondon (supra), this Court observed thus:*
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> > *"43. Unfortunately, the High Court overlooked the settled law that 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.*
> >
> > *44. While expressing the aforesaid view, we are conscious*

that the powers conferred upon the High Court under Article 226 of 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- mposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. 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 226 of 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."

33. While dismissing the writ petition, we will have to remind the High Courts of the following words of this Court in the case of Satyawati Tondon (supra) since we have come across various matters wherein the High Courts have been entertaining petitions arising out of the DRT Act and the SARFAESI Act in spite of availability of an effective alternative remedy:

"55. 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 Act and the SARFAESI Act and exercise jurisdiction under Article 226 for 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."

7. In light of above referred decisions, I am of the opinion that when the alternative efficacious remedy is available to the petitioners under Section 17 of the SARFAESI Act, the DRT can enter into the merits of the matter and decide the issue which

is raised by the petitioners in the present petitions with regard to non-receipt of notice. Considering all these aspects, the present petitions being devoid of any merits, deserve to be dismissed and accordingly, all the petitions are hereby dismissed with cost of Rs.25,000/- qua each petition. Notice is discharged.

7.1 After passing the order awarding cost of Rs.25,000/-, learned advocate Mr.Surati has requested that the petitioners belong to very poor strata of society and therefore, the cost may not be awarded. Considering the request made by the learned advocate Mr.Surati no order is passed as to costs.

Direct service is permitted.

(HEMANT M. PRACHCHHAK,J)

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