

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF MAY, 2020

BEFORE

THE HON'BLE MR.JUSTICE R DEVDAS

WRIT PETITION NO.51184 OF 2017 (GM-RES)

BETWEEN

- 1 . ARSHAD ISPAT
PARTNERSHIP FIRM,
II CROSS, KHAN BUILDING,
VIJAYANAGAR COLLEGE ROAD,
HOSPET-583201, BY ITS PARTNER,
MOHAMED ASGHAR KHAN,
- 2 . MOHAMED ASGHAR KHAN
SON OF SRI AKTHAR KHAN,
AGED ABOUT 43 YEARS,
II CROSS,KHAN BUILDING,
COLLEGE ROAD,
VIJAYANAGAR COLLEGE ROAD,
HOSPET-583201.
- 3 . SMT RUKSANA KHAN
WIFE OF SRI K MOHAMED ASGHAR KHAN,
AGED ABOUT 35 YEARS,
II CROSS, KHAN BUILDING,
VIJAYANAGAR COLLEGE ROAD,
HOSPET-583201,

...PETITIONERS

(BY SRI X M JOSEPH, ADVOCATE)

AND

- 1 . UNION OF INDIA
MINISTRY OF LAW & JUSTICE,
LEGISLATIVE DEPARTMENT,
SHASTRI BHAVAN, 4TH FLOOR,
DR.RAJENDRA PRASAD ROAD,
NEW DELHI-110001.
BY ITS SECRETARY.

- 2 . STATE OF KARNATAKA
BY ITS CHIEF SECRETARY,
VIDHANA SOUDHA,
BANGALORE-560001.
- 3 . THE DISTRICT MAGISTRATE
OFFICE OF THE DEPUTY COMMISSIONER,
BELLARI DISTRICT,
BELLARI-583101.
- 4 . CORPORATION BANK
CORPORATE OFFICE,
MANGALADEVI TEMPLE ROAD,
PANDESHWAR, MANGALORE-575001.
BY ITS MANAGING DIRECTOR.
- 5 . THE MANAGER & AUTHORISED OFFICER
CORPORATION BANK,
SRI SAI DHAM COMPLEX,
1ST FLOOR, NEAR MAHADESHWARA
TEMPLE, DAM ROAD,
HOSPET-583201.
- 6 . SMT SUNITHA SINGH
WIFE OF LATE MURALIDHAR SINGH,
AGED ABOUT 45 YEARS,
NO.366, BASAVESHWARA BADAVANE,
HOSPET-583201,
ALSO AT BEHIND HOYSALA HOTEL,
SHESHADRI PURAM,
BANGALORE-560002.

...RESPONDENTS

(BY SRI Y H VIJAYA KUMAR, GOVT.ADV. FOR R2 & R3
SMT ANUPAMA HEGDE, ADVOCATE FOR R1
SRI V R VINAY KUMAR & SRI V B RAVISHANKAR,
ADVOCATES FOR R4 & R5
SRI PRABHUGOUDA V B, ADVOCATE FOR R6)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226
OF THE CONSTITUTION OF INDIA PRAYING TO QUASH
ANNEX-E IN REF. DTD.16.10.2017 ISSUED BY R-3 DISTRICT
MAGISTRATE SUBSEQUENT TO SALE AND DELIVERY OF
POSSESSION OF SCHEDULE PROPERTY TO R-6 VIDE
ANNEX-C DTD.24.8.2016, AS ILLEGAL AND WITHOUT
JURISDICTION AND ETC.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED ON 13.03.2020 AND COMING ON FOR PRONOUNCEMENT OF ORDERS, THIS DAY, THIS COURT MADE THE FOLLOWING:

ORDER

The petitioners are a partnership firm and its partners engaged in the business of manufacture and trade in sponge iron. The petitioners approached the fourth respondent-Bank seeking financial assistance for the project estimated at about Rs.27 crores. By a sanction letter dated 14.10.2009, the fourth respondent-Bank sanctioned a term loan of Rs.12 crores and thereafter under a sanctioned letter dated 05.03.2011, Rs.3 crores were sanctioned under hypothecation of stock-in-trade, book debts and mortgage of immovable properties by deposit of title deeds.

2. The fourth respondent-Bank issued notice dated 06.01.2012 under Section 13(2) of the The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002,

(hereinafter referred to as the 'SARFAESI Act' for short), calling upon the petitioners to pay a sum of Rs.14,85,16,757/-, the outstanding loan amount along with accrued interest thereon. It is the case of the fourth respondent-Bank that since the petitioners failed to comply with the terms of the demand notice, symbolic possession of the immovable property was taken vide possession notice dated 04.07.2012 issued under Section 13(4) of the SARFAESI Act. Although several immovable properties were taken as secured assets, these writ petitions concern a residential apartment built on land measuring 3990 sq. ft. situated at No.39, Ward No.11, Assessment No.39, Opposite Municipal School Ground, College Road Area, Hospet, Ballari District.

3. The property in question was put for sale by e-auction under sale notice dated 29.12.2016, fixing the date of auction sale on 30.01.2016. The sixth respondent was declared the successful bidder. At that juncture, the petitioners challenged the sale proceedings before the Debts Recovery Tribunal at

Bengaluru, in Appeal I.R.No.652/2016. An interim order was granted by the Tribunal directing the petitioners to deposit a sum of Rs.25,00,000/- on or before 25.02.2016. Admittedly, the petitioners deposited a sum of Rs.10,00,000/- in part compliance of the order of the Tribunal. Thereafter, an application was made by the petitioners seeking extension of time to comply with the orders. Consequently, the Tribunal directed the petitioners to deposit a sum of Rs.1 crore on or before 30.03.2016. Since the petitioners were unable to comply with the terms of the interim order, the ad-interim order passed initially was vacated and subsequently the appeal was dismissed.

4. The fourth respondent-Bank moved the District Magistrate with an application under Section 14 of the SARFAESI Act, seeking assistance in taking physical possession of the property in question. By order dated 16.10.2017, the District Magistrate directed the Tahsildar, Hospet to take possession of the immovable property and handover the same to

the fourth respondent-Bank. It is at this stage, that the present writ petition was filed challenging the order dated 16.10.2017 passed by the District Magistrate. The petitioners have also sought a declaration that Section 6(c) of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012, as arbitrary, running contrary to Section 13(2) read with Section 2(1)(o) of SARFAESI Act, 2002. A few days before this matter was heard finally, another application was filed by the petitioners seeking additional prayer to declare that the classification of the petitioners' account/asset as non-performing asset (NPA) by the fifth respondent-Manager and Authorised Officer of the fourth respondent-Bank vide his letter dated 06.01.2012 as contrary to Section 2(1)(o) of the SARFAESI Act, 2002.

5. Sri X.M.Joseph, learned Counsel appearing for the petitioners submits that the declaration of the account/asset of the petitioners as NPA is in total defiance of the RBI Master Circular which have

statutory effect and contrary to the decisions of the Apex Court in the case of ***Transcore Vs. Union of India and Another* (2008) 1 SCC 125** and ***Keshavlal Khemchand and Sons Private Limited and Others Vs. Union of India and Others* (2015) 4 SCC 770**. The learned Counsel further submits that the fourth respondent-Bank having sold the property in question to the sixth respondent, was incompetent to invoke the provision of Section 14 of SARFAESI Act, to request the Chief Metropolitan Magistrate or the District Magistrate to seek aid to take physical possession of the secured property. It is further submitted that the designated authority under Section 14 of SARFAESI Act, is not required to either issue notice or adjudicate the correctness of the claim for possession made by the secured creditor as the designated authority is performing only an executive work and not a judicial work and it is for this reason that since the designated authority is not conferred with jurisdiction either to form subjective satisfaction about the claim of the secured creditor or to

adjudicate the bonafides, correctness or otherwise of either the classification of asset as NPA by any secured creditor for securitization purposes or request made for assistance to take physical possession, and since the element of principles of natural justice similar to Section 32G of the State Financial Corporations Act, 1951, is not inbuilt, the prayer for declaring Section 6(c) of the Enforcement of Security Interest and Recovery of Debt Laws (Amendment) Act, 2012, is made by the petitioners.

6. Per contra, Sri V.B.Ravishankar, learned Counsel for the fourth respondent-Bank, while taking this Court through the statement of objections filed by the Bank submits that the petitioners are making a desperate attempt by seeking a declaration that Section 14 of the SARFAESI Act or Section 6(c) of the Enforcement of Security Interest and Recovery of Debt Laws (Amendment) Act, 2012, as arbitrary and running contrary to Section 13(2) read with Section 2(1)(o) of the SARFAESI Act, and to declare that the classification of the petitioners' account/asset as NPA

is contrary to the provisions of the SARFAESI Act as well as the RBI Circulars. In this regard, the learned Counsel, in fact draws the attention of this Court to the decision in ***Keshavlal Khemchand's*** case which was relied upon by the learned Counsel for the petitioners to submit that the Apex Court has indeed declared that the borrower cannot be heard to complain that the defining of the conditions subject to which the creditor could classify the account as NPA, is part of the essential legislative function. It was held that Parliament is only stipulating that the expression 'NPA' must be understood by all the creditors in the same sense in which such expression is understood by the expert body i.e., RBI or other regulators which are in turn subject to the supervision of the RBI. Therefore, the submission that the amendment of the definition of the expression 'Non-performing asset' under Section 2(1)(o) is bad on account of excessive delegation of essential legislative function, was held to be untenable and was consequently rejected. Moreover,

it is submitted that the petitioners are estopped from seeking a declaration that the assets of the petitioners which were declared as NPA is contrary to Section 2(1)(o) of the SARFAESI Act, having failed to raise such a question at the earliest point of time i.e., in Writ Petition Nos.9687-89/2017, which were disposed of on 20.02.2019. The learned Counsel further submits that this Court while deciding Writ Petition Nos.9687-9689/2017 filed by the petitioners against the very same respondents has dealt with all the questions, including the question of one time settlement, correctness of the account/asset of the petitioners being declared NPA, etc.

7. Learned Counsel Sri V.B.Ravishankar, further draws the attention of this Court to a decision of the Apex Court in the case of ***ITC Limited Vs. Blue Coast Hotels Ltd. And Others (2018) 1 SCC 99***, to submit that the question as to whether the creditor could invoke the provisions of Section 14 of the SARFAESI Act, having already sold and parted with the secured asset to a third party purchaser, has

been considered and answered in favour of the creditor.

8. Learned Counsel Sri Prabhugouda V.B., appearing for respondent No.6, purchaser, submits, while taking this Court to the statement of objections that the sale proceedings having already been challenged before the DRT and thereafter before this Court in W.P.Nos.9687-89/2017 which were disposed of on 20.02.2019, the petitioners should not be permitted to re-agitate the same issue by raising some other grounds. The learned Counsel further submits that while issuing notice to the respondents, this Court passed an ad-interim order taking note of the contention put forth on behalf of the petitioners that the power under Section 14 was invoked subsequent to the sale being made and the sale certificate being issued in favour of the auction purchaser, directing maintenance of status-quo relating to the possession existing as on the date of the order. The learned Counsel submits that since the Apex Court has held in the case of **ITC Ltd., Vs.**

Blue Coast Hotels (supra) that an application under Section 14 could be maintained by the creditor even after the secured asset being sold in favour of an auction purchaser, this petition is required to be dismissed by imposing heavy costs keeping in view that the fruits of the auction purchase has been denied to the sixth respondent for nearly four years.

9. Heard the learned Counsels and perused the petition papers.

10. One of the questions raised by the petitioners insofar as the invocation of Section 14 by the fourth respondent-Bank subsequent to the auction sale in favour of the sixth respondent, has been answered by the Apex Court in the case of **ITC Limited Vs. Blue Coast Hotels** (supra). It has been held “that even though the entire right, title and interest were purported to have been transferred, all the rights, transfer and interest could not be said to have been transferred since the possession of the property was not transferred to creditor. The possession was retained by the debtor who continued

to do business and receive rent from the rooms on the property and has in fact continued to do so till date. There is no doubt that after taking over the property from debtor, the creditor also acquired the right to receive the usufruct of the property i.e., the rent in this case. However, this was an interest in the property which was not at any point of time transferred to the auction purchaser.” It was noticed that in that case the creditor did not have actual possession of the secured asset but only a constructive or symbolic possession. It was therefore held that the transfer of the secured asset by the creditor therefore cannot be construed to be a complete transfer as contemplated by Section 8 of the Transfer of Property Act. The creditor nevertheless had a right to take actual possession of the secured asset and must therefore be held to be a secured creditor even after the limited transfer to the auction purchaser under the agreement. Thus, the entire interest in the property not having been passed to the creditor in the first place, the creditor in turn could

not pass on the entire interest to the auction purchaser and thus remained a secured creditor in the Act.

11. Insofar as the other limb of the argument of the learned Counsel for the petitioners that the declaration made by the fifth respondent declaring the account/assets of the petitioners NPA, the Apex Court in the case of **Keshavlal Khemchand** (supra) has clearly opined that the borrower cannot be heard to complain that defining of the conditions subject to which the creditor could classify the account as NPA, is part of the essential legislative function. The argument regarding excessive delegation was rejected as untenable. Moreover, the petitioners having failed to raise the issue when it could have done so in its previous writ petition i.e., W.P.Nos.9687-89/2017, the petitioners are estopped from raising such an issue subsequently. In this regard, the law is well settled that the provisions of Order II Rule 2 of CPC is applicable to writ proceedings also and when a party could have raised an issue and having failed to raise

such an issue, cannot be permitted to raise such an issue subsequently in another proceeding. It is to be noticed that in W.P.Nos.9687-89/2017, the petitioners questioned the sale proceedings initiated by the fourth respondent-Bank. Obviously the account/assets of the petitioners were declared NPA and thereafter the Bank has proceeded in accordance with law and the sale proceedings having been challenged by the petitioners in the year 2016-2017, this issue could have been raised, but, the petitioners have failed to do so. Even in these proceedings, it is only at the last moment that an application for additional prayer was made by the petitioners regarding the correctness of the classification of petitioners account/asset as NPA. Therefore, the petitioners are not entitled for any such relief.

12. Insofar as the prayer for declaring Section 6(c) of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 is concerned, this Court is of the opinion that the petitioners have not made out any ground for such a

declaration. In submitting that the provision lacks an inbuilt safe guard, inasmuch as, the designated authority cannot go into the question as to whether the declaration of NPA is in accordance with the master circulars issued by RBI etc., and is therefore violative of Article 14 of the Constitution of India, cannot form a basis for declaring the provision unconstitutional. Somewhat similar argument was made in the case of ***ITC Ltd. Vs. Blue Coast Hotels Ltd.***, (supra) that while action is initiated under Sections 13(2) and 13(4) of the SARFAESI Act, when default is committed by the debtor and a notice under Section 13(2) is issued by the creditor and on a representation being made by the debtor, it is mandatory on the part of the authorized Officer to consider the representation given by the debtor and supply reasons for non-acceptance of the representation or objection within 15 days as contemplated in sub-section (3A) of Section 13. While answering the said question in affirmative, however, Their Lordships have held that the Act

makes provision for enforcement of security and recovery without adjudication. The Debts Recovery Tribunal is empowered to go into the question whether the provisions of the Act are followed by the secured creditor. The provision mandates a reply to be caused by the authorized officer, but it will not empower the debtor to raise a challenge to the declaration made by the authorized officer at that point of time unless his right to approach the Debts Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub-section (4) of Section 13 of the Act. Therefore, it is suffice to hold that the Act has made provision in the form of Debts Recovery Tribunal and an Appellate Tribunal to go into the question as to whether the provision of the Act has been followed by the secured creditor and the machinery created thereunder. Merely because the designated authority under Section 14 cannot consider the correctness of the declaration of NPA made by the authorized officer, the provision itself cannot be struck down. It is

sufficient if a forum created under the statute is empowered to go into all such questions.

13. For the foregoing reasons, this Court is of the considered opinion that the petition is bereft of any merit. Consequently, the petition fails, therefore, the petition is ***dismissed***.

In view of the disposal of the writ petition, pending I.As. stand disposed of.

**Sd/-
JUDGE**

JT/-