HIGH COURT FOR THE STATE OF TELANGANA

****

WRIT PETITION NOs.24018 AND 24052 of 2019

W.P.No.24018 of 2019:

Between:

Gaurav Lubricants Private limited,
A Company registered under the Companies Act,
having its registered Office at Sy.No.15,
Balabhadrapuram Village, Biccavollu Mandal,
East Godavari, A.P., and having its Administrative
Office at 615, 6th Floor, Babukhan Estate,
Basheerbagh, Hyderabad, Telangna, Rep. by its
Director Mr. Niranjal Lal Agarwal,
S/o Sri Ramswaroop Agarwal, Aged 61 Years,
R/o. Hyderabad.

...Petitioner

and

Tamilnadu Mercantile Bank Limited
Siddembazar, Hyderabad, Rep. by Manager
and another.

....Respondents

JUDGMENT PRONOUNCED ON : 12.10.2022

HON'BLE SRI JUSTICE P.NAVEEN RAO
&
HON'BLE SRI JUSTICE J.SREENIVAS RAO

1.	Whether Reporters of Local Newspapers may be allowed to see the Judgments ?	: :	YES
2.	Whether the copies of judgment may be marked to Law Reporters/Journals	: :	YES
3.	Whether their Ladyship/Lordship wish to see fair Copy of the Judgment ?	: :	No

* **HON'BLE SRI JUSTICE P.NAVEEN RAO**
&
HON'BLE SRI JUSTICE J.SREENIVAS RAO

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!Counsel for the petitioner : Sri S.Ravi

Counsel for the Respondents : Sri G.Vidya Sagar

<Gist :

>Head Note:

? Cases referred:

(1982) 2 SCC 691
MANU/WB/0194/2021
MANU/KA/2455/2020
MANU/GJ/1417/2021
(2022) 5 SCC 345
(2004) 4 SCC 311

HON'BLE SRI JUSTICE P.NAVEEN RAO
&
HON'BLE SRI JUSTICE J.SREENIVAS RAO

WRIT PETITION NOs.24018 AND 24052 of 2019

COMMON ORDER: *(Per Hon'ble Sri Justice P.Naveen Rao)*

Heard learned senior counsel Sri S.Ravi for petitioners and learned senior counsel Sri G.Vidyasagar for respondents.

2. Petitioners are classified as small enterprises under the Micro, Small and Medium Enterprises (MSME) classification. They are engaged in the business of extraction of crude petroleum and natural gas. With an intention to set up units to be engaged in manufacture of reclamation of used and waste oil, petitioners obtained term loan of 5.37 crores and 2.76 crores respectively for construction of factory buildings and term loan of 4.98 crores and 4.56 crores respectively towards purchase of plant and machinery and a cash credit amount of 4.63 crores and 7.35 crores respectively at the rate of interest of 11.75 % per annum from first respondent bank. There appears to be correspondence on restructuring the loan accounts and charge of higher interest rate. Holding that consequent to default committed in repayment of principal debt and interest thereon, the loan accounts of petitioners were classified as Non Performing Assets (NPA) as on 31.7.2019, the first respondent bank issued notice dated 7.9.2019 calling upon the petitioners to discharge the liabilities in full. Questioning the decisions to classify petitioners' loan accounts as NPAs and issuing Section 13(2) notices, these writ

petitions are filed. This Court by orders dated 5.11.2019 made in I.A.No.3 of 2019 in W.P.No.24018 of 2019 and in I.A.No.2 of 2019 in W.P.No.24052 of 2019 granted interim directions as prayed for.

3. Extensive submissions are made by learned senior counsel for petitioners and learned senior counsel for respondent bank touching upon various aspects of reliefs sought in the writ petitions. However, as reliefs sought in the writ petitions are against classifying petitioners' accounts as NPA and notices under Section 13(2), the submissions of learned senior counsel are considered on the aspect of maintainability of the writ petitions.

4. Learned senior counsel for petitioners vehemently contended that the respondent bank erroneously classified the petitioners' accounts as NPAs. They are small enterprises. Having regard to spread of Covid-19 virus impacting over all business and development activity, petitioners' business also affected. He would submit that Reserve Bank of India (RBI) guidelines required the respondent bank to restructure the accounts of small enterprises like petitioners but illegally the benefits of restructure was not extended to them. He would submit that as per RBI guidelines, he has a right to seek enforcement of these measures and if these measures were properly applied the petitioners' accounts could not have been declared as NPAs. He would submit that issue of declaring petitioners' accounts as NPA cannot be adjudicated by the Debts Recovery Tribunal and therefore petitioners have no other efficacious remedy except to invoke

the extra ordinary jurisdiction of this Court. He would submit that under Section 17 of the Act, 2002, the Tribunal can only go into the aspect whether the bank/financial institution has complied with the mandatory requirements of the Act, 2002 and therefore cannot go into the decision to declare the petitioners' accounts as NPAs.

4.2. According to learned senior counsel appearing for petitioners, a writ under Article 226 of the Constitution of India is maintainable against private entities when petitioners are seeking enforcement of RBI guidelines.

4.3. Learned senior counsel relied on **Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and others Vs V.R.Rudani and others**[1]**; Pearson Drums & Barrels Pvt. Ltd., Vs The General Manager, Consumer Education & Protection Cell of Reserve Bank of India and others**[2]**; Velankani Information Systems Limited Vs Secretary, Ministry of Home Affairs, Government of India and others**[3]**;** and **Bharat Navnitlal Shah Vs Punjab National Bank**[4]**.**

5.1. *Per contra*, according to learned senior counsel for respondent bank writ petitions are not maintainable for two reasons. Firstly, first respondent is a private mercantile bank and was not discharging any statutory duty while extending loans and taking measures to recover the amounts due. It was only enforcing the terms of contract. By relying on judgment in **Phoenix ARC (P) Ltd Vs Vishwa Bharati Vidya**

[1] (1982) 2 SCC 691
[2] MANU/WB/0194/2021
[3] MANU/KA/2455/2020
[4] MANU/GJ/1417/2021

Mandir[5], he submitted that writ petitions are not maintainable against private banks/financial institutions. Secondly, what is challenged is only declaring the petitioners' accounts as NPAs and such an issue cannot be raised in a writ petition. If further steps are taken by the respondent bank under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'Act, 2002'), the aggrieved person has to avail the remedy provided by Section 17 of the Act, 2002 and therefore writ remedy is not available.

5.2. Learned senior counsel for first respondent bank further contended that petitioners never made correspondence with the RBI to bring to its notice the alleged violation of the guidelines. He would contend that petitioners have filed complaint before the RBI Ombudsman but those complaints were rejected. He would submit that in view of the opinion expressed by two Division Benches of this Court holding that classifying a loan account as NPA and issuing demand notice under Section 13 (2) of the Act, 2002 does not give rise to a cause of action, these Writ Petitions are not maintainable.

6. Issue for consideration is whether petitioners should be relegated to avail remedy under Section 17 of the Act, 2002?

7. In the following decisions, the scope and object of the Act, 2002 and remedies provided under the Act, 2002 were considered:

[5] (2022) 5 SCC 345

7.1. In **Mardia Chemicals Ltd and others Vs Union of India and others**[6], validity of the SARFAESI Act, 2002 was challenged. Hon'ble Supreme Court held as under:

> "45. In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. ***The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non-compliance with notice within 60 days.*** The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfilment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly, we must make it clear unequivocally that communication of the reasons for not accepting the objections taken by the secured borrower may not be taken to give occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor 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.
>
> **.....**
>
> 50. It has also been submitted that an appeal is entertainable before the Debts Recovery Tribunal only after such measures as provided in sub-

[6] (2004) 4 SCC 311

section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr Salve, one of the counsel for the respondents that there would be no bar to approach the civil court. Therefore, it cannot be said that no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of Section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debts Recovery Tribunal or an Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say, the prohibition covers even matters which can be taken cognizance of by the Debts Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. ***The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.***

68. The main thrust of the petitioners as indicated in the earlier part of this judgment to challenge the validity of the impugned enactment is that no adjudicatory mechanism is available to the borrower to ventilate his grievance through an independent adjudicatory authority. Access to justice, it is submitted, is the hallmark of our system…….

…….

76. In regard to the submission made by the parties as indicated in the preceding paragraphs, we would like to make it clear that issue of a notice to the debtor by the creditor does not attract the application of the principles of natural justice. It is always open to tell the debtor what he owes to repay. No hearing can be demanded from the creditor at this stage. So far as the provision of appeal is concerned, we have already discussed in the earlier part of the judgment that proceedings under Section 17 of the Act have been wrongly described as appeal before the Debts Recovery Tribunal. It is in fact a forum where proceedings are originally initiated in case of any grievance against the creditor in respect of any measure taken under sub-section (4) of Section 13 of the Act. Hence, the decisions on the point as to whether provision for an appeal is essential or not are not of any assistance in the facts of the present case.

77. ***It is also true that till the stage of making of the demand and notice under Section 13(2) of the Act, no hearing can be claimed for by the borrower……***

……

80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debts Recovery Tribunal. The abovenoted provisions are for the purpose of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows:

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."

(Emphasis supplied)

7.2. In **Transcore Vs Union of India**[7] Hon'ble Supreme Court analyzed in-depth the object behind bringing Debts Recovery Tribunal Act, 1993 (Act, 1993) and SARFAESI Act, 2002, scope and application of the enactments. The Hon'ble Supreme Court held as under:

"Reasons for enactment of the NPA Act, 2002

12**.** The NPA Act, 2002 is enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith. The NPA Act enables the banks and FIs to realise long-term assets, manage problems of liquidity, *asset-liability mismatch* and to improve recovery of debts by exercising powers to take possession of securities, sell them and thereby reduce non-performing assets by adopting measures for recovery and reconstruction. The NPA Act further provides for setting up of asset reconstruction companies which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale. The said Act also empowers the said asset reconstruction companies to take over the management of the business of the borrower.....

.....

14**.** There is one more reason for enacting the NPA Act, 2002. When the civil courts failed to expeditiously decide suits filed by the banks/FIs, Parliament enacted the DRT Act, 1993. However, DRT did not provide for assignment of debts to securitisation companies. The secured assets also could not be liquidated in time. In order to empower banks or FIs to liquidate the assets and the secured interest, the NPA Act was enacted in 2002. The enactment of the NPA Act is, therefore, not in derogation of the DRT Act. The NPA Act removes the fetters which were in existence on the rights of the secured creditors. ***The NPA Act is inspired by the provisions of the State Financial Corporations Act, 1951 ("the SFC Act"), in particular Sections 29 and 31 thereof. The NPA Act proceeds on the basis that the liability of the borrower to repay has crystallised; that the debt has become due and that on account of delay the account of the borrower has become substandard and non-performing. The object of the DRT Act as well as the NPA Act is recovery of debt by non-adjudicatory process. These two enactments provide for cumulative remedies to the secured creditors. By removing all fetters on the rights of the secured creditor, he is given a right to choose one or more of the cumulative remedies. The object behind Section 13 of the NPA Act and Section 17 r/w Section 19 of the DRT Act is the same, namely, recovery of debt. Conceptually, there is no inherent or implied inconsistency between the two remedies. Therefore, as stated above, the object behind the enactment of the NPA Act is to accelerate the process of recovery of debt and to remove deficiencies/obstacles in the way of realisation of debt under the DRT Act by the enactment of the NPA Act, 2002. ....."***

(emphasis supplied)

[7] (2008) 1 SCC 125

8. According to Section 2(o), Non Performing Asset (NPA) means an asset or account of borrower classified by bank/financial institution as substandard, doubtful or loss asset. Account of the borrower in the books of the bank/Financial Institution is classified as substandard, doubtful or a loss and the debt has become due (***Transcore*** case).

9. According to RBI Guidelines dated 30.8.2001 a credit facility becomes an NPA where interest and/or instalment of principal remain overdue for a period of more than 180 days in respect of term loan. It mandates the banks to establish appropriate internal systems to eliminate the tendency to delay or postpone the identification of NPA.

10. In **Mardia Chemicals** (supra), Hon'ble Supreme Court considered the issue of classification of asset as NPA. It was contended that on the whims and fancies of the financial institutions, the assets are classified as NPAs. The Hon'ble Supreme Court negatived said contention. It has looked into the policy notified by RBI known as "*RBI's Prudential Norms On Income Recognition, Asset Classification and Provisioning-Pertaining To Advances"* and rejected the contention that there are no guidelines for treating the debt as NPA.

11. On NPA, in **Transcore** (supra), Hon'ble Supreme Court noted as under:

> **"**13**.** Non-performing assets (NPA) are a cost to the economy. When the Act was enacted in 2002, the NPA stood at Rs 1.10 lakh crores. This was a drag on the economy. Basically, NPA is an account which becomes non-viable and non-performing in terms of the guidelines given by RBI. ***As stated in the Statement of Objects and Reasons, NPA arises on account of mismatch between asset and liability. The NPA account is an asset in the hands of the bank or FI. It represents an amount receivable and realisable by the banks or FIs. In that sense, it is an asset in the hands of the secured creditor.*** Therefore, the NPA Act,

2002 was primarily enacted to reduce the non-performing assets by adopting measures not only for recovery but also for reconstruction. Therefore, the Act provides for setting up of asset reconstruction companies, special purpose vehicles, asset management companies, etc. which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale. It also provides for realisation of the secured assets. It also provides for takeover of the management of the borrower company."

23. ..... On reading Section 13(2) it is clear that the said sub-section proceeds on the basis that the borrower is already under a liability and further that, his account in the books of the bank or FI is classified as substandard, doubtful or a loss. The NPA Act comes into force only when both these conditions are satisfied. Section 13(2) proceeds on the basis that the debt has become due. It proceeds on the basis that the account of the borrower in the books of bank/FI, which is an asset of the bank/FI, has become non-performing. Therefore, there is no scope of any dispute regarding the liability. There is a difference between accrual of liability, determination of liability and liquidation of liability. Section 13(2) deals with liquidation of liability.

24. ..... After classification of an account as NPA, a last opportunity is given to the borrower of sixty days to repay the debt. Section 13(3-A) was inserted by amending Act 30 of 2004 after the judgment of this Court in *Mardia Chemicals* [(2004) 4 SCC 311] whereby the borrower is permitted to make representation/objection to the secured creditor against classification of his account as NPA. He can also object to the amount due if so advised. Under Section 13(3-A), if the bank/FI comes to the conclusion that such objection is not acceptable, it shall communicate within one week the reasons for non-acceptance of the representation/objection. A proviso is added to Section 13(3-A) which states that the reasons so communicated shall not confer any right upon the borrower to file an application to DRT under Section 17. The scheme of sub-sections (2), (3) and (3-A) of Section 13 of the NPA Act shows that the notice under Section 13(2) is not merely a show-cause notice, it is a notice of demand. That notice of demand is based on the footing that the debtor is under a liability and that his account in respect of such liability has become substandard, doubtful or a loss. The identification of debt and the classification of the account as NPA is done in accordance with the guidelines issued by RBI. Such notice of demand, therefore, constitutes an action taken under the provisions of the NPA Act and such notice of demand cannot be compared to a show-cause notice. In fact, because it is a notice of demand which constitutes an action, Section 13(3-A) provides for an opportunity to the borrower to make representation to the secured creditor. Section 13(2) is a condition precedent to the invocation of Section 13(4) of the NPA Act by the bank/FI. Once the two conditions under Section 13(2) are fulfilled, the next step which the bank or FI is entitled to take is either to take possession of the secured assets of the borrower or to take over management of the business of the borrower or to appoint any manager to manage the secured assets or require any person, who has acquired any of the secured assets from the borrower, to pay the secured creditor towards liquidation of the secured debt."

(emphasis supplied)

12. From the discussion on relevant statutory provisions and opinion expressed by Hon'ble Supreme Court in **Mardia Chemicals,** and **Transcore,** it is clear as crystal that once a loan account becomes substandard, doubtful or loss asset, in the book of a bank/financial institution it is classified as NPA. The RBI Guidelines clearly specify when a loan account reaches that stage to be classified as NPA. The steps taken leading to classifying a loan account as NPA is an internal matter within the bank/financial institution. The Bank/financial institution notifies the same in Section 13 (2) of the Act, 2002 notice and calls upon the borrower to clear the loan within sixty days. At that stage, it is open to borrower to respond and place before the bank/ financial institution his point of view. He can also oppose declaring his account as NPA. He can rely on RBI Guidelines on various aspects. The Bank/Financial institution is required to consider the objections objectively and to take a decision. It is also required to communicate the decision to the borrower.

13. As analyzed by Hon'ble Supreme Court in **Mardia Chemicals** and **Transcore,** there is a statutorily prescribed restraint in taking legal course by a borrower before Section 13 (4) of the Act, 2002 stage. Statute prescribed this course having regard to accumulation of debts to banks stifling the banking/financial sector. It is in public interest to fast track the recovery of dues by banks/financial institutions. Thus, in **Mardia Chemicals,** Hon'ble Supreme Court held that scheme of SARFAESI Act, 2002 does not envisage any remedy till Section 13(4)

stage is reached. It has gone to the extent of saying that borrower has no right of hearing at the stage of Section 13(2) and he can only file objections under Section 13(3-A) of the Act, 2002. Therefore, upto Section 13(4) no remedy is provided to a borrower/guarantor. It is the statutory scheme that must be respected by all, more so when the scheme stood the test of judicial scrutiny.

14. After Section 13(4) notice, it is open to borrower to approach Debts Recovery Tribunal under Section 17 of the Act, 2002. The Debts Recovery Tribunal is competent to go into all aspects leading to bank/ financial institution taking recourse under Section 13(4) of the Act, 2002. Perforce, when the Debts Recovery Tribunal examines the claim of borrower/guarantor/person aggrieved opposing measures taken under Section 13(4) of the Act, 2002 such as taking symbolic possession, notice of sale of secured asset, taking physical possession etc, the borrower/guarantor/person aggrieved can plead before the Debts Recovery Tribunal his defence against such action including alleged violation of RBI Guidelines leading to illegally classifying his account as NPA.

15. Further, classifying loan account as NPA can be challenged before RBI alleging that its guidelines are violated. A complaint can be filed before the Ombudsman. In fact petitioners have filed complaints before the Ombudsman. Therefore, taking recourse to writ remedy before reaching Section 13(4) of the Act, 2002 stage defeats the statutory scheme and scuttles the very object in creating special

dispensation to recover the debts by banks/financial institutions. The object and purpose of these two Acts have to be kept in mind while considering a writ petition filed against classifying an account as NPA. It is not for no reason the legal remedy is differed till Section 13(4) of the Act, 2002 stage is reached. Till this stage, as consistently held by Hon'ble Supreme Court, no cause of action arises to the borrower/ guarantor to seek legal remedy. He has to wait till further steps are taken under Section 13(4) of the Act, 2002.

16. Time and again, the Constitutional Courts are repelling the resort to writ remedy against classifying a loan account as NPA and various measures taken by Banks/Financial Institutions under SARFAESI Act and relegating parties to avail remedy under Section 17 of the Act, 2002.

17. Few of the decisions, availing writ remedy against declaring loan account as NPA and scope of remedy under Section 17 of the Act, 2002 are noted hereunder:

17.1. In **Dr.Yashwant Singh vs. Indian Bank**[8]**,** the Division Bench of Delhi High Court reviewed the decisions of other High Courts on the issue. The learned Division Bench held as under:

> **"(Y)** We draw strength for the aforesaid proposition from Section 2(o) of the SARFAESI Act which vests the secured creditor with the power to classify an account as an NPA. The authority of the secured creditor in this regard cannot be questioned. Such authority of the secured creditor to classify the account of a borrower as an NPA has been recognized in ***Mardia Chemicals Ltd***. and in ***Transcore* v. *Union of India*** (2008) 1 SCC 125. All that was observed in *Mardia Chemicals Ltd.* was that there must exist a specified internal channel which should settle the doubts in

[8] 2015 SCC Online Del 9625

> asset classification. The introduction of Section 13(3A) has fulfilled the said requirement also. We find a Single Judge of the Calcutta High Court in ***Core Ceramics Ltd.* v. *Union of India*** AIR 2008 Cal 88 also to have taken a view that once the bank authorities have classified an account as NPA, the writ Court would have little or no role to play in deciding such an issue in view of the complete autonomy of the Banks and financial institutions in asset classification under the SARFAESI Act and upheld in ***Mardia Chemicals Ltd.*** *and* ***Transcore***. Similarly, a Division Bench of Madras High Court in ***Gain-N-Nature Food Products* v. *Union of India*** has held that if a Bank or financial institution forms an opinion that an account of a borrower has become an NPA, such opinion is not justiciable in a Court exercising jurisdiction under Article 226 of the Constitution because Section 13(2) does not use the expression "and his account in respect of such debt has become a Non Performing Asset" but uses the expression "and his account in respect of such debt is classified by the secured creditor as Non Performing Asset".

17.2. In **Devi Ispat Limited vs. SBI[9],** on 18.1.2013 the bank informed **Devi Ispat** that the loan account was classified as NPA on 16.1.2013 and requested to regularize the account. This was contested by **Devi Ispat**. But bank proceeded to issue notice under Section 13(2) of the Act, 2002. **Devi Ispat** filed writ petition challenging the decision of the bank classifying its account as NPA and also the letters issued by the bank. Holding that petitioner has alternative statutory remedy under Section 13(3A) learned single Judge dismissed the writ petition. Appeal preferred thereon also dismissed. **Devi Ispat** then filed SLP before the Hon'ble Supreme Court. Hon'ble Supreme Court held that since **Devi Ispat** had an alternative remedy to make representation to the bank under Section 13 (3A) there was no reason to by-pass the statutory mechanism.

17.3. In **N.A.K.G Cotfibres Private Ltd Vs The Zonal Manager, UCO Bank and another**, the petitioner was aggrieved by classifying his account as NPA and filed writ petition challenging Section 13(2) of Act

[9] (2014) 5 SCC 762

2002 notice dated 9.5.2011. It was contended that classification of their account as NPA was unreasonable in as much as 90 lakhs was paid on 31.3.2011 and such classification was not in accordance with guidelines issued by RBI. It was also contended that even though explanation was filed in response to Section 13(2) notice no reply was given. The learned Division Bench of madras High Court held:

> "14. In the present case, admittedly, no notice under Section 13(4) of the Act was issued by the respondents bank. The only grievance of the petitioner is without giving a reply as required under Section 13(3)(A) of the Act, the bank cannot proceed further by issuing notices either under Section 13(4) of the Act or under Section 14 of the Act. Thus, it is clear that the petitioner, by preempting the action of the bank, had filed the present writ petition. Such a course is not open to the petitioner especially under the writ jurisdiction. Even assuming that there is a violation in respect of the procedures contemplated under Section 13(2), 13(3)(A) by the bank, the only remedy available to the petitioner is to approach the Debt Recovery Tribunal as contemplated under Section 17 of the Act. Therefore, we hold that this writ petition is not maintainable and the petitioner ought to have approached the Debt Recovery Tribunal for relief instead of filing the present writ petition. As mentioned above, the petitioner has filed the present writ petition premature and therefore also the writ petition is not maintainable and it cannot be entertained by us."

17.4. In **M/s Tandra Impax Pvt Ltd** Vs **Punjab National Bank**[10], the petitioner prayed to declare the action of respondent bank declaring the petitioner account as NPA without following RBI guidelines and guidelines issued in Aatmanirbhar Bharat Scheme dated 13.5.2020 as arbitrary, illegal and against SARFAESI Act, 2002 and to set aside the classification of account as NPA on 31.3.2020 and the Demand Notice dated 31.7.2020. The learned Division Bench relied on earlier decision in W.P.Nos.23643 of 2020 and 20046 of 2021, dated 9.2.2022 to hold that petitioner ought to avail remedy under Section 17 of the Act, 2002.

[10] WP No. 23268 of 2020 dt 3.3.2022

17.5. In common judgment in **M/s.NECX Private Limited vs. Union Bank of India and another** (W.P.No.23643 of 2020 and W.P.No.20046 of 2021, dated 09.02.2022), learned Division Bench held as under:

> "30. Thus, on a careful consideration of the statutory language employed in the proviso to Sub-Section (3A) of Section 13 of the SARFAESI Act read with the Explanation to Sub-Section (1) of Section 17 of the SARFAESI Act, it is crystal clear that a notice under Section 13 (2) of the SARFAESI Act or the rejection of the objection raised to it including the reasons in support thereof would not give rise to a cause of action for instituting an action in law. To that extent, we find sufficient force in the contention advanced by the respondents that the writ petition filed is premature. The statute does not contemplate any intervention at this preliminary stage. Only when the process ripens into a definitive action taken by the secured creditor under Sub Section (4) of Section 13 of the SARFAESI Act, the aggrieved person can avail the statutory remedy under Section 17 of the SARFAESI Act by filing securitization application before the jurisdictional Debts Recovery Tribunal.
>
> 31. This aspect was highlighted by the Supreme Court in **Punjab National Bank Vs. Imperial Gift House[11].** In that case, the High Court had interfered with the notice issued under Section 13 (2) of the SARFAESI Act and quashed the proceedings initiated by the Bank. Setting aside the order of the High Court, Supreme Court held that the High Court was not justified in entertaining the writ petition before any further action could be taken by the Bank under Section 13 (4) of the SARFAESI Act."

17.6. In **M/s. Tandra Impex Pvt Ltd.**, (supra), Division Bench of this Court further held:

> "14. We have already noticed above that classification of loan account by the secured creditor is at a stage prior to issuance of the demand notice under Section 13(2) of the SARFAESI Act. If at the stage of issuance of demand notice, interference by the Court and Tribunal is not to be made, we fail to understand as to how such intervention can be made at a stage prior to issuance of demand notice under Section 13(2) of the SARFAESI Act."

17.7. The Madras High Court in **Gain N-Nature Food Products and others Vs Union of India**[12] and the Madhya Pradesh High Court in **Samarath Infrabuild (I) Pvt Ltd Vs Bank of India[13],** have held that

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[11] (2013) 14 SCC 622
[12] MANU/TN/0555/2008
[13] 2016 SCC OnLine MP 9024

once an account is classified as NPA by the bank/financial institution such classification is not justiciable by the writ Court exercising jurisdiction under Article 226 of the Constitution of India. The Division Bench of Madras High Court in **Gain-N-Nature Food Products** held as under:

> "11**.** But as seen from the definition of the expression "Non Performing Asset", extracted above, it includes within its fold, either an asset or an account of the borrower. If a Bank or financial institution, forms an opinion that a particular asset or account of a borrower has **become a "Non Performing Asset", such opinion may not be justiciable, especially in a Court exercising jurisdiction under Article 226 of the Constitution. It may not be open to this Court to conduct a roving enquiry to find out if an account or asset of a borrower could be classified as a "Non Performing Asset", with reference to the guidelines issued by the Reserve Bank of India.** Section 13(2) is carefully worded. It does not use the expression "and his account in respect of such debt has become a "Non Performing Asset". Instead, the Section uses the expression "and his account in respect of such debt is classified by the secured creditor as "Non Performing Asset". Section 13(2) reads as follows:
>
> > "Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under Sub-section (4)."
>
> 12. Therefore, the stress under Section 13(2) is basically on the classification of the account as a "Non Performing Asset" by the secured creditor and not on whether the account has actually become a "Non Performing Asset" or not. In other words, the Section does not leave any scope for a court to adjudicate as to whether an account has become a "Non Performing Asset" or not, with reference to the guidelines issued by the Reserve Bank of India. Therefore, the first objection taken by the petitioners is not sustainable in law." (emphasis supplied)

17.8. In **Samarath Infrabuild (I) Pvt. Ltd.,** (supra)**,** the Madhya Pradesh High Court following the decision of Madras High Court referred to above and held as under:

> "14. On due consideration of the aforesaid, we are of the view that law on the subject is well settled by the Apex Court in the case of Mardia Chemicals Ltd. V/s. Union of India &Ors. (Supra), as well as by the Delhi High Court in the case of Dr. Yashwant Singh &Anr. V/s. Indian Bank &Anr. (Supra) and Madras High Court in the case of Gain-N-Nature Food

> Product V/s. Union of India (Supra). **The classification of NPA is not subject to judicial review. Once the Bank authorities have classified account as NPA, the writ court would have no role to play in deciding such any issue/suit. The proper course of the appellant is to challenge the action by filing a statutory appeal as directed under Section 17 of SARFAESI Act, 2002.**
>
> 15. For the above mentioned reasons, we hold that once the bank authorities have classified an account as NPA, the writ court would have little or no role to play in deciding such an issue in view of the complete autonomy of the Banks and financial institutions in asset classification under the SARFAESI Act and upheld in Mardia Chemicals Ltd. V/s. Union of India &Ors. reported as MANU/SC/0323/2004 : 2004 (4) SCC 311. Similarly, a Division Bench of Delhi High Court and Madras High Court have held that if a Bank or financial institution forms an opinion that an account of a borrower has become an NPA, such opinion is not justiciable in a Court exercising jurisdiction under Article 226 of the Constitution. Further the question whether the account has been correctly classified as a NPA or not is a factual dispute and appellant has an alternative efficacious remedy of appeal available under Section 17 of the SARFAESI Act, we do not find any merit in this appeal. W.A.No.575/2015, has no merit and is, accordingly, dismissed"
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> (emphasis supplied)

18. In **Union Bank of India Vs Satyawati Tandon[14],** Hon'ble Supreme Court cautioned High Courts from entertaining writ petitions when statute prescribes detailed mechanism. It has also cautioned against passing interim orders. Hon'ble Supreme Court said as under:

> **"**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.***
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> **.....**
>
> 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

[14] (2010) 8 SCC 110

> 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.
>
> 46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (*sic* will) ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in *Baburam Prakash Chandra Maheshwari* v. *Antarim Zila Parishad* [AIR 1969 SC 556] , *Whirlpool Corpn.* v. *Registrar of Trade Marks* [(1998) 8 SCC 1] and *Harbanslal Sahnia* v. *Indian Oil Corpn. Ltd.* [(2003) 2 SCC 107] and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order."
>
> (emphasis supplied)

19. From the statutory scheme and precedent decisions noted above it is clear that this Court can not go into the decision of respondent bank in classifying the petitioners' accounts as NPAs. If the respondent bank proceeds further and reaches Section 13(4) of the Act, 2002 stage, the aggrieved person can file application under Section 17 of the Act. The Debts Recovery Tribunal can go into the aspect of classifying the accounts as NPAs and also whether RBI guidelines are violated on any aspect leading to declaring the accounts as NPAs and taking recourse under the Act. On the contrary, as consistently opined by Constitutional courts, the aspect of classifying an account as NPA is not justiable in exercise of power of judicial review under Article 226 of the Constitution. We are therefore of the opinion that these writ petitions are not maintainable.

20. One other aspect is maintainability of writ petition against private bank/financial institution on matters concerning the declaring a loan account as NPA and taking measures under the SARFAESI Act. This aspect was considered by the Hon'ble Supreme Court in **Phoenix ARC (P) Ltd.**, (supra).

20.1. In **Phoenix ARC (P) Ltd** (supra), the Hon'ble Supreme Court held as under:

> "18. Even otherwise, it is required to be noted that a writ petition against the private financial institution — ARC — the appellant herein under Article 226 of the Constitution of India against the proposed action/actions under Section 13(4) of the SARFAESI Act can be said to be not maintainable. In the present case, the ARC proposed to take action/actions under the SARFAESI Act to recover the borrowed amount as a secured creditor. The ARC as such cannot be said to be performing public functions which are normally expected to be performed by the State authorities. ***During the course of a commercial transaction and under the contract, the bank/ARC lent the money to the borrowers herein and therefore the said activity of the bank/ARC cannot be said to be as performing a public function which is normally expected to be performed by the State authorities. If proceedings are initiated under the SARFAESI Act and/or any proposed action is to be taken and the borrower is aggrieved by any of the actions of the private bank/bank/ARC, borrower has to avail the remedy under the SARFAESI Act and no writ petition would lie and/or is maintainable and/or entertainable.*** Therefore, decisions of this Court in *Praga Tools Corpn.* [*Praga Tools Corpn.* v. *C.A. Imanual*, (1969) 1 SCC 585] and *Ramesh Ahluwalia* [*Ramesh Ahluwalia* v. *State of Punjab*, (2012) 12 SCC 331 : (2013) 3 SCC (L&S) 456 : 4 SCEC 715] relied upon by the learned counsel appearing on behalf of the borrowers are not of any assistance to the borrowers.
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> .....
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> 21. Applying the law laid down by this Court in *Mathew K.C.* [*State Bank of Travancore* v. *Mathew K.C.*, (2018) 3 SCC 85 : (2018) 2 SCC (Civ) 41] to the facts on hand, ***we are of the opinion that filing of the writ petitions by the borrowers before the High Court under Article 226 of the Constitution of India is an abuse of process of the court.*** The writ petitions have been filed against the proposed action to be taken under Section 13(4). As observed hereinabove, even assuming that the communication dated 13-8-2015 was a notice under Section 13(4), in that case also, in view of the statutory, efficacious remedy available by way of appeal under Section 17 of the SARFAESI Act, the High Court ought not to have entertained the writ petitions. Even the impugned orders passed by the High Court directing to maintain the status quo with respect to the possession of the secured properties on payment of Rs 1 crore only (in all Rs 3 crores) is absolutely unjustifiable. The dues are to the extent of approximately Rs 117 crores.

> The ad interim relief has been continued since 2015 and the secured creditor is deprived of proceeding further with the action under the SARFAESI Act. Filing of the writ petition by the borrowers before the High Court is nothing but an abuse of process of court. It appears that the High Court has initially granted an ex parte ad interim order mechanically and without assigning any reasons. The High Court ought to have appreciated that by passing such an interim order, the rights of the secured creditor to recover the amount due and payable have been seriously prejudiced. The secured creditor and/or its assignor have a right to recover the amount due and payable to it from the borrowers. The stay granted by the High Court would have serious adverse impact on the financial health of the secured creditor/assignor. Therefore, the High Court should have been extremely careful and circumspect in exercising its discretion while granting stay in such matters. In these circumstances, the proceedings before the High Court deserve to be dismissed."
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> (emphasis supplied)

21. The first respondent-Bank is a private mercantile bank. It was not discharging any public duty while sanctioning the money and in dealing with loan accounts. In view of the law laid down in **Phoenix ARC (P) Ltd** case, writ petitions against first respondent bank are not maintainable.

22. The remedy under Article 226 of the Constitution of India is extraordinary and knows no bounds. Wherever injustice is caused to a person writ Court extends its long arm of justice and reaches out to a person in need. Though, Article 226 is very wide, the constitutional Courts have imposed self-imposed restraint on exercising its extraordinary jurisdiction. Statutes and Administrative orders dealing with a particular aspect do provide mechanism to redress grievances arising out of a statute or administrative order. Some times, more than one remedy is provided, like Original Authority, Appellate Authority and Revisional Authority. They also create statutory Tribunals with layers of redressal mechanism. Such forums are effective and efficacious to dress the grievance of a person. Whenever

the Court notices that the grievance ventilated before the Court can be addressed by a duly constituted administrative authority/quasi-judicial body, it relegates the person to avail the said remedy before knocking its doors. In the following decisions, Hon'ble Supreme Court succinctly stated the need to avail statutorily engrafted remedy before availing the remedy under Article 226 of the Constitution of India.

22.1. In **Union Bank of India Vs Satyawati Tandon**[15] Hon'ble Supreme Court cautioned High Courts from entertaining writ petitions when statute prescribes detailed mechanism. It has also cautioned against passing interim orders. Hon'ble Supreme Court said as under:

> "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.***
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> **.....**
>
> 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.
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> 46**.** It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (*sic* will) ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in *Baburam Prakash Chandra Maheshwari* v. *Antarim Zila*

[15] (2010) 8 SCC 110

> *Parishad* [AIR 1969 SC 556] , *Whirlpool Corpn.* v. *Registrar of Trade Marks* [(1998) 8 SCC 1] and *Harbanslal Sahnia* v. *Indian Oil Corpn. Ltd.* [(2003) 2 SCC 107] and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order."
>
> (emphasis supplied)

23. As held by Hon'ble Supreme Court in **L.Chandra Kumar Vs Union of India**[16], the Debts Recovery Tribunal is a duly constituted Tribunal vesting jurisdiction on matters arising out of SARFAESI Act, 2002 and is the Court of first instance. When a person has a statutorily engrafted remedy available to redress his grievance, the writ Court does not entertain the writ petition and relegates him to avail the said remedy. Thus, even otherwise writ petitioners have to avail remedy under the Act, 2002.

24. The Writ Petitions are accordingly dismissed, leaving open to petitioners to avail the remedy under Section 17 of the Act, 2002 as and when Section 13(4) of Act, 2002 is invoked by the first respondent bank. It is made clear that there is no expression of opinion on merits and all issues are left open to be urged before the Debts Recovery Tribunal. Pending miscellaneous applications, if any, shall stand dismissed.

P.NAVEEN RAO,J

J.SREENIVAS RAO,J

Date: 12.10.2022
Tvk/kkm

[16] (1997) 3 SCC 261

HON'BLE SRI JUSTICE P.NAVEEN RAO
&
HON'BLE SRI JUSTICE J.SREENIVAS RAO

WRIT PETITION NOs.24018 & 24052 of 2019

Date : 12.10.2022

Tvk/kkm