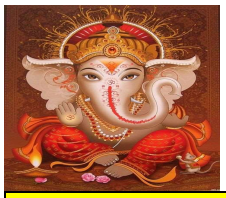

Phoenix ARC Private Limited v Vishwa Bharati Vidya Mandir,
Dated 12 January 2022,
Civil Appeal Nos. 257-259 of 2022.

THE SUPREME COURT OF INDIA *has clarified that borrowers aggrieved by proceedings initiated by banks or asset reconstruction companies (ARCs) under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act 2002 (the SARFAESI Act) have to avail remedy under the same law and a writ petition will not be maintainable.*

BRIEF FACTS

1. *Vishwa Bharati Vidya Mandir availed credit facilities of approximately Rs. 1,05 Cr. from the Saraswat Cooperative Bank by executing various loan/security documents as well as by mortgaging property in favour of the bank.*

2. *St Ann's Education Society also availed credit facilities of approximately Rs. 20 Cr. from the same bank.*

3. *In order to secure the repayment of the credit facilities, various loan documents, including personal guarantees, were issued in favour of the bank. Vishwa Bharati Vidya Mandir and St Ann's Education Society (the respondents) also created an equitable mortgage by depositing title deeds with respect to the mortgaged properties.*

4. *Subsequently, on account of non-payment of dues, the respondents' account was declared as a non-performing asset (NPA).*

5. *As the respondents failed to make payments, a notice under section 13(2) of the SARFAESI Act was issued to them.*

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6. *After about a month, the NPA account was assigned by the bank in favour of Phoenix ARC Private Limited (the appellant).*

7. *Pursuant to the assignment of debt, the borrowers approached the appellant for restructuring the repayment of the debt and, therefore, a letter of acceptance was executed between the parties by virtue of which the respondents promised to clear all their dues.*

8. *In spite of the notice served under section 13(2) of the SARFAESI Act and the letter of acceptance, the respondents continued to default on their payments. Therefore, the appellant sent a letter dated 13 August 2015 that informed the respondents of its intention to take possession of the mortgaged properties on the expiry of 15 days from the date of the letter.*

9. *Against the appellant's letter, the respondents filed a writ petition under article 226 of the Constitution before the High Court on the ground that the letter constituted a possession notice under section 13(4) of the SARFAESI Act and that this was in violation of rules 8(1) and (2) of the Security Interest Enforcement Rules 2002 (the 2002 Rules). Rules 8(1) and (2) of the 2002 Rules mandate that in a case of possession of immovable property, the possession notice must be served on the borrower and published in two leading newspapers.*

10. *The High Court passed an ex parte interim order dated 26 August 2015 directing a status quo to be maintained with respect to the possession of the mortgaged property subject to the respondents making a payment of 10 million rupees to the appellant.*

11. *The appellant opposed the writ petition, mainly, on the grounds that a writ petition was not maintainable against a private financial institution such as itself. The appellant also filed an application seeking a vacation of the ex parte ad interim order.*

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12. However, in an order on 28 February 2017, instead of deciding on such application, the High Court extended the interim order on the condition that the respondents deposit a further sum of 10 million rupees. In another order on 27 March 2018, the High Court further extended the ex parte order subject to another deposit of 10 million rupees.

13. Feeling aggrieved and dissatisfied with the orders of the High Court, the appellant filed an appeal before the Supreme Court.

SUBMISSIONS

Appellant's submissions

14. In the appeal before the Supreme Court, the appellant made the following submissions, among others:

- The communication dated 13 August 2018 was merely an intimation of a future action to be taken in case of non-repayment of debt and did not constitute a possession notice under section 13(4) of the SARFAESI Act.
- The High Court had been wholly unjustified in exercising its powers under article 226 as even if the communication dated 13 August 2018 was assumed to be a possession notice under section 13(4) of the SARFAESI Act, a writ petition would not have been maintainable against a private financial institution such as an ARC.
- The only remedy available to any person aggrieved by an action taken under the SARFAESI Act is that of an appeal under section 17 of the SARFAESI Act. This had been upheld in United Bank of India v Satyawati Tondon & Ors, Kanaiyalal Lalchand Sachdev & Ors v State of Maharashtra & Ors, and Authorized Officer, State Bank of Travancore & Anr v Mathew KC.

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Respondents' submissions

15. In defence, the respondents made the following submissions, among others:

- *The appellant's letter dated 13 August 2018 constituted a possession notice under section 13(4) of the SARFAESI Act and this was in violation of rule 8 of the 2002 Rules, which imposes a statutory duty upon the secured creditor to act fairly while dealing with the security so as to secure the interest of the borrower as well as the public at large.*
- *A writ petition is maintainable even against a purely private body performing public functions. This had been observed in Praga Tools Corporation v Shri CA Imanual and Ors and Ramesh Ahluwalia v State of Punjab and Ors.*
- *The presence of an alternate remedy cannot be a bar to filing a writ petition under article 226/227 of the Constitution.*

DECISION

16. The Court dwelled on the question of the maintainability of the writ petitions. It relied upon the judgments pronounced in City and Industrial Development Corpn v Dosu Aardeshir Bhiwandiwala, Satyawati Tondon and Kanaiyalal Lalchand Sachdev to conclude that Section 17 of the SARFAESI Act ,2002 constituted an effective and expeditious remedy and a writ under article 226 was not available to a person aggrieved by proceedings initiated under the SARFAESI Act,2002.

17. Applying this principle to the present case, the Court observed that even assuming that the communication dated 13 August 2015 was a notice under section 13(4) of the SARFAESI Act, in view of the statutory remedy available under section 17 of the same Act, the High Court was not required to entertain the writ petitions. Therefore, the High Court had erred in entertaining the writ petitions and passing the interim orders on the condition of depositing a total of 30 million rupees as against total dues of 1,170,000,000 rupees.

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18. ***Further, the Court also clarified that an action by way of a writ under article 226 was not maintainable against a private financial institution such as an ARC, and that such institutions cannot be said to be performing public functions, which are usually expected to be performed by state authorities.***

19. The Court reiterated that if proceedings are initiated and/or proposed action is to be taken under the SARFAESI Act and a borrower is aggrieved by such actions of a private bank, a bank or an ARC, then the borrower must avail the remedy under SARFAESI Act and no writ petition would be maintainable or entertainable.

20. Thus, applying these principles of law, the Court held that the letter dated 13 August 2018 did not constitute a possession notice under section 13(4) of the SARFAESI Act; it was merely a proposed action. Therefore, the writ was not maintainable.

21. The Court also observed that even if the letter was assumed to be a notice under section 13(4) of the SARFAESI Act, the writ was once again not maintainable as the appellant is a private financial institution and also because of the existence of an efficacious alternative remedy under section 17 of the SARFAESI Act.

22. Accordingly, the appeal was allowed.

CONCLUSION: *The Larger bench of Allahabad High Court on writ petition under Article 226 of the Constitution of India held that writ is maintainable - "The authority or the person should not only discharge public function or public duty but the action challenged therein should fall in the domain of public law." The writ petition would not be maintainable against an authority or person even if it is discharging public function/public duty, if the controversy pertains to the private law such as a dispute arising out of contract or under the common law."*

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A three-judge bench further clarified that the writ petition would not be maintainable against an authority or a person merely for the reason that it has been created under the statute or is governed by regulatory provisions. Also, stating that there is thin line between "public functions" and "private functions" discharged by a person or a private body/authority, Court said that if the writ petition refers to contractual obligation inter se between the parties, it would not be maintainable.

However, court added that even if a person or authority is discharging public function or public duty, the writ petition would be maintainable under Article 226 of the Constitution, if Court is satisfied that action under challenge falls in the domain of public law, as distinguished from private law.

But, "It would not (be so) even in a case where aid is received unless it is substantial in nature. The control of the State is another issue to hold a writ petition to be maintainable against an authority or a person," court held.

***Meghji Pethraj Shah Charitable Trust**, the Supreme Court not only held that a writ petition is not maintainable in a contractual matter, but also held that no relief under Article 226 of the Constitution is "available" in case of contracts which are not "statutory" in nature.*

***DISCLAIMER** the case law presented here is only for sharing information and knowledge with the readers. The views are personal and shall not be considered as professional advice. in case of necessity do consult with professionals.*

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2. ***Section 13 in The Securitisation And Reconstruction Of Financial Assets and Enforcement Of Security Interest Act, 2002***

13. Enforcement of security interest.-

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the int rvention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) 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 instalment thereof, and his account in respect of such debt is classified by the secured creditor as on- 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 e ercise all or any of the rights under sub- section (4).

(3) The notice referred to in sub- section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non- payment of secured debts by the borrower.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub- section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured 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 secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

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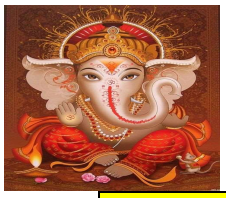

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(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.

(5) Any payment made by any person referred to in clause (d) of sub- section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub- section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in ischarge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secure asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to

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sub- section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three- fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that *in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):*

Provided further that *in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub- section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen' s dues with the liquidator in accordance with the provisions of section 529A of that Act:*

Provided also that *liquidator referred to in the second proviso shall intimate the secured creditor the workmen' s dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen' s dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimate dues with the liquidator:*

Provided also that *in case the secured creditor deposits the estimated amount of workmen' s dues, such creditor shall be liable to pay the balance of the workmen' s dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:*

Provided also that *the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen' s dues, if any.*

Explanation.- *For the purposes of this sub- section,-*

(a) " record date" means the date agreed upon by the secured creditors representing not less than three- fourth in value of the amount outstanding on such date;

(b) " amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

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(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measured specifies in clause (a) to (d) of sub- section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub- section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written con ent of the secured creditor.

3. ***Section 17 in The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002***

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(45) days from the date on which such measures had been taken:

Provided that *different fees may be prescribed for making the application by the borrower and the person other than the borrower.*

Explanation.*—For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17.*

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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.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the secured assets to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in-sub-section (4) of section 13 taken by the secured assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section l3 to recover his secured debt.

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

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Provided that *the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed* ***four months from the date of making of such application made under sub-section*** *(1).*

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

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

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