Reserved On : 24/07/2026
Pronounced On : 29/07/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION (QUASHING) NO.9922 of 2026

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE M. R. MENGDEY

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Approved for Reporting	Yes	No
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BHUT PRANAV DHIRUBHAI & ANR.
Versus
STATE OF GUJARAT & ORS.

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Appearance:
MS. K.M. SHAH, LEARNED ADVOCATE WITH MS. AASHVI P SHAH(17721) for the Applicant(s) No. 1,2
NANAVATI & CO.(7105) for the Respondent(s) No. 2
NOTICE SERVED BY DS for the Respondent(s) No. 3,4
MR. PRANAV DHAGAT, APP for the Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE M. R. MENGDEY**

CAV JUDGMENT

1. By filing the present petition under Article 226 of the Constitution of India and Section 528 of the BNSS, 2023, the petitioners have prayed for the following reliefs: -

> "A. Be pleased to quash and set aside impugned order dated 03.07.2026 passed below Criminal Misc. Application No.3077 of 2026 by the Ld. 15th Additional Chief Judicial Magistrate, Rajkot (Annexure-A);

B. Be pleased to quash and set aside the consequential notice dated 06.07.2026 issued by the Ld. Court Commissioner scheduling the taking of the physical possession qua the secured assets on 25.07.2026 (Annexure-B);

C. Pending, Admission, Hearing and final disposal of this Application, be pleased to stay impugned order dated 03.07.2026 passed below Criminal Misc. Application No. 3077 of 2026 by the Ld. 15th Additional Chief Judicial Magistrate, Rajkot (Annexure-A) and impugned notice dated 06.07.2026 issued by the Ld. Court Commissioner scheduling the taking of the physical possession qua the secured assets on 25.07.2026 (Annexure-B);

D. Pending, Admission, Hearing and final disposal of this Application, status quo qua the secured assets being - All that piece and parcel of the residential house constructed on land admeasuring 88.783 sq. mtrs. of Sub-Plot No. 69/3/A of "Shree New Gandhinagar Co-operative Housing Society Ltd." (Regn. No. GH-2433 dated 05.10.1965), of non-agricultural land for residential purpose, Revenue Survey No. 140, Village Mavdi, within the limits of the Rajkot Municipal Corporation, District Rajkot (as stipulated in Para 2.4);

E. Be pleased to grant ad-interim relief in terms of prayers 9C and 9D above;

F. Cost of the Application;

G. Any other relief, order or direction which Hon'ble Court may deem, just fit, proper, and equitable in the facts of the Application.”

2. The facts and circumstances giving rise to the filing of the present petition are such that the petitioners herein had availed the loan facilities from Respondent No.2 – Bank in the year 2024. In the month of March 2026, the account of the petitioners was classified as Non-performing Asset (NPA). On 11.03.2026, a Demand Notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as SARFASAI Act or Act) was issued by the Respondent Bank against the petitioners. The petitioners herein had submitted their objections to the said notice. However, on 14.05.2026, the respondent – bank issued a Possession Notice under Section 13(4) of the SARFASAI Act to

the petitioners. Thereafter, the respondent-bank submitted an application to learned Chief Judicial Magistrate, Rajkot under Section 14 of the SARFASAI Act. Vide impugned order, the learned Magistrate appointed an Assistant working in the Civil Court at Rajkot as Court Commissioner for taking over the possession of the scheduled property. Being aggrieved by the said order, the petitioners are before this Court by filing the present petition.

3. Heard learned Advocate Ms. K.M. Shah appearing for the petitioners. She submitted that as per the settled position of law, the petition under Article Section 226 of the Constitution of India is maintainable against the orders passed under Section 14 of the SARFASAI Act, though it is left to the discretion of this Court whether to entertain this petition or not. She further submitted that the learned Magistrate vide impugned order has appointed an Assistant working in the Civil Court at Rajkot as a Court Commissioner who as observed by the Hon'ble Apex Court in its judgment in case of **NKGSB Cooperative Bank Limited vs. Subir Chakravarty & Ors.** reported in **2022 10 SCC 286,** is not capable to be appointed as a Court Commissioner. Learned Advocate has relied upon Para-38 of the said judgment in support of her submissions. She further submitted that this Court vide various orders has granted interim relief against the order of similar nature to the respective petitioners and in some other cases this Court has also quashed such orders. Therefore, the propriety demands that this Court should apply the principle of parity in case of the present petition and should entertain the present petition. She, therefore, submitted to allow the present petition and quash and set aside the order impugned in the petition.

4. Learned Advocate Mr. Maulik Nanavati appearing for Respondent No.2 has opposed the present petition. He submitted that there is an alternative efficacious remedy available to the petitioners under Section 17 of the

SARFASAI Act, and therefore, the present petition should not be entertained on this ground alone. He further submitted that in the case of **NKGSB Cooperative Bank Limited (Supra)**, the issue before the Hon’ble Apex Court was as to whether an Advocate can be appointed as a Court Commissioner considering him to be a subordinate officer of the learned Magistrate or not. He had taken this Court through various observations of the Hon’ble Apex Court to contend that it is not impermissible for the learned Magistrate to appoint his own subordinate staff as a Court Commissioner. He further submitted that in view of the judgment of the full Bench of this Court in case of **Nitin Shantilal Bhagat Versus State of Gujarat** reported in **2011 (3) GLR 1972**, since the aspect of offence or punishment is not involved in the present case, the petitioners ought to have filed a special civil application instead of special criminal application. He, therefore, submitted to dismiss the present petition.

5. Learned APP appearing for the Respondent No.4 – State has also opposed the petition.

6. Since a preliminary objection has been raised by learned Advocate for the respondent about the maintainability of the present petition in view of an alternative remedy being available against the order impugned in the petition, the same is required to be dealt with at the outset.

7. What is challenged in the present petition is an order passed by learned Additional Chief Judicial Magistrate under Section 14 (1A) of the Act, whereby learned Magistrate has appointed an employee subordinate to him as a Court Commissioner and has authorized him for taking over possession of a secured asset belonging to the petitioner under Section 13 (4) of the SARFAESI Act. Section 13 (4) of the Act reads as under:

Section 13(4): -

(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;

8. Section 14 of the Act requires the secured creditor to approach the Chief Metropolitan Magistrate or the District Magistrate (hereinafter referred to as Magistrate) if the possession of the secured asset is to be taken within 30 days. The provision further empowers the Magistrate to take possession of the property. Sub Section 1A of Section 14 of the Act also empowers the Magistrate to authorise any officer subordinate to him to take possession of such asset. Therefore, the action taken by the Magistrate under Section 14 (1A) of the Act is essentially in continuation with Section 13 (4) of the Act. Section 17 of the Act provides for the remedy to any person including the borrower to challenge any of the measures taken under Section 13(4). The provision reads as under:

Section 17: Application against measures to recover secured debts.

17. *(1) Any person (including borrower), aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this Chapter, [may make an application along with such fee, as may be prescribed,] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:*

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

9. Thus, there is a remedy available to the borrower to challenge the order to challenge the order passed by the magistrate under Section 14(1A) of the Act. Not only this, a remedy of appeal also provided under Section 18 of the Act against the order passed by the Debts Recovery Tribunal under Section 17

of the Act. Thus, the Act provides for mechanism for an aggrieved person to ventilate his grievance. Section 17 and Section 18 of the Act provide for payment of a prescribed fee for approaching these forums. Learned Advocate appearing for the petitioners also does not dispute that there is an alternative remedy available to the petitioners against the order impugned in the petition. It is on the contrary contended that mere availability of an alternative remedy would not deprive the petitioners from invoking the extraordinary jurisdiction of this Court. By relying upon several judgments of the Hon’ble Apex Court and other High Courts, it is sought to be contended that a petition under Article 226 of the Constitution of India is maintainable against the order impugned in the petition. The law in this regard is well settled. Mere availability of an alternative remedy by itself would not bar this court from exercising extraordinary jurisdiction under Article 226 of the Constitution. Therefore, there is no question about maintainability of the petition. The question is as to whether this Court should exercise its extraordinary jurisdiction in light of the fact that there is an alternative remedy available to the petitioners against the impugned order. The law in this regard is also settled and allows this court to exercise its extraordinary powers in case there is gross violation of principles of natural justice or violation of statutory provisions governing the process of law or lack of jurisdiction. The Hon’ble Apex Court in its judgment in case of **Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai** reported in **1990 8 SCC 1**, in Para-15 has observed as under:

> *“Under Art. 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a Writ Petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been led for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order of proceedings is wholly without jurisdiction*

or the vires of an Act is challenged. There is a plethora of case-law on this point put to cut down this circle of forensic Whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

10. The said proposition of law has also been reiterated by the Division Bench of this Court in case of **Lanxess Belgium NV vs. Union of India** (Special Civil Application No. 8794 of 2026). It is not even the case of the petitioners that any of the exigencies as mentioned by the Hon'ble Apex Court in its judgment in case of **Whirlpool (supra)** exist in the present case. Therefore, though the petition under Article 226 of the Constitution of India may be maintainable against the impugned order, no case is made out for exercising the extraordinary jurisdiction by this Court in the present case.

11. It is also required to be noted that an alternative remedy provided under Section 17 of the Act requires a party approaching the forum to deposit requisite fee. Therefore, by filing the present petition under Article 226 of the Constitution of India, an attempt is made to bypass the said provision and avoid payment of any such fee. The Hon'ble Apex Court in its judgment in case of **M/S South Indian Bank Limited vs. Naveen Mathew Philip** reported in **2023 17 SCC 311** in Paragraph Nos.15 and 16, has observed as under:

"15. The object and reasons behind the Act 54 of 2002 are very clear as observed by this Court in Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311. While it facilitates a faster and smoother mode of recovery sans any interference from the Court, it does provide a fair mechanism in the form of the Tribunal being manned by a legally trained mind. The Tribunal is clothed with a wide range of powers to set aside an illegal order, and thereafter, grant consequential reliefs, including re-possession and payment of compensation and costs. Section 17(1) of the SARFAESI Act gives an expansive meaning to the expression "any person", who could approach the Tribunal.

16. Approaching the High Court for the consideration of an offer by the borrower is also frowned upon by this Court. A writ of mandamus is a prerogative writ. In the absence of any legal right, the Court cannot *exercise the said power. More circumspection is required in a financial transaction, particularly when one of the parties would not come within the purview of Article 12 of the Constitution of India. When a statute prescribes a particular mode, an attempt to circumvent shall not be encouraged by a writ court. A litigant cannot avoid the noncompliance of approaching the Tribunal which requires the prescription of fees and use the constitutional remedy as an alternative."*

12. This proposition of law is reemphasized by the Hon'ble Apex Court in its recent judgment in case of **PNB Housing Finance Ltd. Vs. Manoj Saha** reported in **AIR 2025 SC 3337**. Therefore, though the petition under Article 226 may be maintainable, the same cannot be entertained.

13. Learned Advocate appearing for the respondent has also contended that there being no criminality or no offence or no punishment being involved in the present case, the present petition in the form of Special Criminal Application would not be maintainable and it should have been Special Civil Application instead. Learned Advocate for the respondent has sought to rely upon the judgment of the Full Bench of this Court in case of **Nitin Shantilal Bhagat (Supra)**. However, in view of the discussion made herein above, this aspect is not required to be gone into.

14. The challenge to the order impugned in the petition is made relying upon the judgment of the Hon'ble Apex Court in case of **NKGSB Cooperative Bank Limited (Supra)**. The issue before the Hon'ble Apex Court in that judgment was as to whether an advocate can be appointed as a Court Commissioner under Section 14(1A) of the Act. While dealing with the said issue, in Para 38 of the judgment, the Hon'ble Apex Court has observed as under:

"38. Furthermore, as was the situation obtaining before insertion of sub-Section (1A) wherein the CMM/DM could avail the services of an advocate or any officer subordinate to him for discharging the ministerial work of taking possession of the secured assets and

documents relating thereto, nothing prevents him/her from continuing to follow the same regime even after the insertion of sub-Section (1A). At the same time, while entrusting the act of taking possession of the secured assets consequent to the order passed under Section 14(1) of the 2002 Act to any officer subordinate to him, the CMM/DM ought to exercise prudence in appointing such person who will be capable of executing the orders passed by him. Merely because he has power to appoint "any" officer subordinate to him, it would not permit him to appoint a peon or clerk, who is incapable of handling the situation."

15. The observation of the Hon'ble Apex Court in the above referred paragraph as regards incapability cannot be read to mean incapability of the cadre or rank as a whole. The Hon'ble Apex Court appears to have referred to incapability of an individual. The staff of district judiciary is appointed after having undergone rigorous selection process and is the backbone of the system of the district judiciary. Hence, there is no reason for doubting the capability of a person. It is contended on behalf of the petitioners that the Magistrate has not recorded any subjective satisfaction as regards capability of the person appointed as court commissioner in the present case. In the opinion of this Court, the question of recording subjective satisfaction would arise only if there is some doubt about the capability of the person. The Magistrate is the best judge as regards competence or capability of a person for being appointed as a Court Commissioner. In the absence of any doubt about the capability, it would not be proper for this Court to interfere with judgment of the learned Magistrate as regards capability of a person. As observed by the Hon'ble Apex Court in case of **NKGSB Cooperative Bank Limited (supra)**, the act of taking possession of an asset is a ministerial job, and therefore, the capability of a person who is day in and day out performing a ministerial job as a part of his regular duty cannot be doubted to be incapable of performing a job of taking possession under the Act. The observations of the Hon'ble Apex Court must not be read to mean that the staff of the District Judiciary cannot not at all be appointed as a Court Commissioner. Therefore, the challenge to the

appointment of a court staff as a Court Commissioner must fail.

16. It is contended by the learned Advocate appearing for the petitioners that this Court in several such petitions has granted interim relief against the similar orders and in several other matters, such orders have been quashed and set aside by this Court. It is required to be noted in this regard that the orders passed in service are either merely interim orders or the orders passed upon the consent of the other side. This Court had no occasion to examine the aforesaid aspects in those matters.

17. The petition, therefore, being devoid of any merit, is hereby dismissed. The interim relief granted earlier stands vacated. No cost.

(M. R. MENGDEY,J)

RAVI OZA

After the judgment is pronounced, learned Advocate appearing for the petitioners has requested to continue the interim relief granted earlier for sometime.

Having regard to the request made on behalf of the learned Advocate appearing for the petitioners, the interim relief granted earlier shall continue to operate for period of 10 days from today.

(M. R. MENGDEY,J)

RAVI OZA