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RAJASTHAN HIGH COURT
सत्यमेव जयते

HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Civil Writ Petition No. 11013/2023

Naseem Ahmad Khan S/o. Sh. Jameel Ahmad, Plot No. 115, Shiv Colony, Moti Nagar, Vaishali Nagar Jaipur-302021

----Petitioner

Rajasthan High Court
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Versus

1. Icici Home Finance, Through Branch Manager Bhaskar Heights Building, Fourth Floor, Near S K Hospital, Sikar (Raj.)-302001.
2. The Authorized Officer, Icici Home Finance, Bhaskar Heights Building, Fourth Floor, Near S K Hospital, Sikar (Raj.)-302001
3. Ambit Finvest Private Limited, Thourgh Brach Managr. Office No. 405-406, 4Th Floor, City Corporate, Malviya Marg, C-Scheme, Jaipur-302001

----Respondents

For Petitioner(s) : Dr.Abhinav Sharma
For Respondent(s) : Mr.Vineet Sharma
Mr.Ajay Shukla
Mr.Raghav Sharma
Mr.Aakash Sharma

HON'BLE MR. JUSTICE AVNEESH JHINGAN

Order

20/12/2024

1. This petition is filed seeking quashing of order dated 20.04.2023 passed by the Debts Recovery Tribunal (For short 'the DRT') rejecting the prayer for stay during pendency of the Securitization Application (for short 'SA'). Further prayer is that the proceedings of taking over of the physical possession of the property mentioned in the petition having been mortgaged with the financial institution to secure the loan be quashed.

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2. The facts are that the petitioner on 19.03.2022 purchased the property in question from his brother Huma Shameem (hereinafter referred to as 'seller'). The seller had availed the loan facility from India Bull Ltd and had mortgaged the property to secure the loan. The petitioner for purchasing the property in question availed credit facility from Ambit Finvest Private Limited (for short 'respondent No.3'). The proceedings were initiated by respondent No.1 under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the Act') for recovery of the due amount as the borrower failed to maintain financial discipline and the account was declared Non Performing Asset (for short 'NPA') on 06.06.2021. In continuation of the recovery proceedings, physical possession of the property in question was taken over. The petitioner aggrieved of the proceedings under Section 13 of the Act filed Securitization Application (for short 'SA') before the DRT, Jaipur accompanied by an application for stay. The application for stay was rejected on 20.04.2023. Hence, the present petition.

3. Learned counsel for the petitioner submits that action of the respondent No.1 is illegal as there was non compliance of Section 26(d) of the Act. During the due diligence done by the petitioner and the respondent No.3, no charge was found against the property. Further submission is that the petitioner is a bona-fide purchaser of the property and not being borrower and cannot avail remedy of appeal. It is contended that for filing appeal against the impugned order before the Debts Recovery Appellate Tribunal a pre-deposit of 50% of the amount due is to be made. Reliance is placed upon decision of the Supreme Court in the case of

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Commissioner of Income Tax & Ors. Vs. Chhabil Dass Agarwal reported in **(2014) 1 SCC 603** to contend that the petitioner should not be relegated to the alternative remedy.

4. As per contra the petitioner has a remedy of appeal. Submission is that the seller had availed a loan facility from India Bulls Pvt Ltd., the loan was taken over by respondent No.1 by making payment to India Bulls Ltd. The seller and the petitioner are brothers and in order to hoodwink the financial institutions after the loan account having been declared NPA, the mortgaged property was transferred. It is submitted that Section 26(d) of the Act was duly complied with and the property mortgage was registered with Central Registry of Securitization Asset Reconstruction and Security Interest of India. The argument is that the seller after taking the documents of mortgaged property from the India Bulls Pvt. Ltd. instead of handing over it to respondent No.1 the petitioner borrowed loan from respondent No 3. The fraud was played with the financial institution for which FIR No.1003/2023 is lodged at Police Station Mansarovar against the seller and the petitioner.

5. It is an admitted fact that the petitioner aggrieved of the recovery proceedings initiated under Section 13 of the Act has availed statutory remedy before the DRT and the SA is pending.

Section 18 of the Act is reproduced:-

> "**18**. Appeal to Appellate Tribunal.—(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal1[under section 17, may prefer an appeal along with such fee, as may be prescribed] to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.

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> Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:
> Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:
> Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of debt referred to in the second proviso.
> (2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder."

6. The grievance raised in the present petition is against the rejection of prayer for interim protection. The contention that petitioner being a bonafide purchaser cannot file appeal lacks merit. Section 18 of the Act is widely worded and provides a remedy of statutory appeal to any person aggrieved of any order passed by the DRT.

The Supreme Court in the case of ***Union of India vs. Satyawati Tondon and Ors.*** reported in **[(2010)8 SCC 110]** has held:-

> "42. There is another reason why the impugned order should be set aside. If respondent No. 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression 'any person' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person

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> who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

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7. The other argument for not availing the remedy of is that there would be a pre-requisite of deposit of 50% of the amount due. The petitioner is breathing hot and cold in the same breath. On one hand the case set is that petitioner is not a borrower and cannot avail remedy of appeal and at the same time reliance is placed on second provisio to Section 18 of the Act to argue that appeal of borrower cannot be entertained without pre-deposit. These contrary contention may not hold this court for long. Suffice to say applicability of the pre-deposit is to dealt by the appellate authority. Even otherwise the remedy of appeal is neither inherent nor a natural right but is a statutory right. The statute can embargo the right of appeal with a precondition of making a pre-deposit. The Supreme Court in the case of **Technimont Pvt. Ltd. Vs. State of Punjab & Ors.** reported in **(2021) 12 SCC 477** has upheld Section 62(5) of Punjab Value Added Tax Act, 2005 wherein there was a mandatory condition of pre-deposit of 25% for availing the remedy of appeal. It was held that condition is not onerous, harsh, unreasonable and violative of Article 14 of Constitution of India.

8. Apart from the exceptional circumstances, the self imposed restriction of non interference in writ petition in case where

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statutory remedies are available is to be rigorously applied in cases covered by the Act. Supreme Court in case of UOI V/s Satyawati Tandon and ors. (supra) held:-

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> "43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution in an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues, are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.
>
> 44. While expressing the aforesaid view, we are conscious that the powers coferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights coferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.
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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

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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, Whirlpool Corpn. v. Registrar of Trade Marks and Harbanslal Sahnia v. Indian Oil Corpn. Ltd. and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order."

9. The Supreme Court in the case of **PHR Invent Education Society Vs. UCO Bank and Ors.** reported in **(2024) 6 SCC 579** reiterating the decision in case Satyawati Tandon held:-

> "37. It could thus clearly be seen that the Court has carved out certain exceptions when a petition under Article 226 of the Constitution could be entertained in spite of availability of an alternative remedy. Some of them are thus:
> (i) where the statutory authority has not acted in accordance with the provisions of the enactment in question;
> (ii) it has acted in defiance of the fundamental principles of judicial procedure:

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(iii) it has resorted to invoke the provisions which are repealed: and;
(iv) when an order has been passed in total violation of the principles of natural justice.

38. It has however been clarified that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance.

39. Undisputedly, the present case would not come under any of the exceptions as carved out by this Court in Chhabil Dass Agarwal.

40. We are therefore of the considered view that the High Court has grossly erred in entertaining and allowing the petition under Article 226 of the Constitution.
41. While dismissing the writ petition, we will have to remind the High Courts of the following words of this Court in Satyawati Tandon since we have come across various matters wherein the High Courts have been entertaining petitions arising out of the DRT Act and the SARFAESI Act in spite of availability of an effective alternative remedy.

> "55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

10. The contentions raised on the merits of the case need not be gone into at this stage. The Petitioner has already availed the

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statutory remedy before the DRT and the matter is pending. By raising the issues on merits in a writ petition challenging the order passed on stay application, the petitioner is availing two parallel remedies and intends to sail into two boats and it cannot be permitted.

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11. Moreover, whether mortgaged property transferred by brother of the petitioner in his favour after declaration of the loan account as NPA is bona-fide that to in back drop of allegation of fraud by respondent No 1 and lodging of FIR gives rise to disputed questions of fact. The another aspect is that as to whether the property was mortgaged as per Section 26 (d) of the Act is a question to be adjudicated on foundation of facts to be determined at first instance.

12. Reliance of the learned counsel for the petitioner on the decision of the Supreme Court in **Commissioner of Income Tax & Ors. Vs. Chhabil Dass Agarwal** (supra) is of no avail, having already availed statutory remedy and for failure to make up a case falling within the ambit of exceptions carved out by Supreme court.

13. The petition is dismissed relegating the petitioner to the remedy of appeal.

14. The observations made herein above shall not be construed as an expression on the merits of the case given by this Court and are only for the purpose of deciding this writ petition.

(AVNEESH JHINGAN),J

Monika/Chandan/65

Whether Reportable: Yes

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