

**HON'BLE SRI JUSTICE SANJAY KUMAR
AND
HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO**

W.P.No.39259 of 2015

ORDER: (per Hon'ble Dr.Justice B.Siva Sankara Rao)

The Writ Petition is maintained by the sole petitioner by name K.Krishna, against 5 respondents viz; 1) Debt Recovery Tribunal (for short, 'the DRT') Hyderabad, represented by its Registrar, 2) the Andhra Pradesh State Finance Corporation, Hyderabad Branch(for short, 'the APSFC') represented by its Manager, 3) Kishore Kumar Rawal, Proprietor of M/s Tirupathi Jewellers, Hyderabad, 4) V.Venkata Krishna and 5) V.Radha, W/o 4th respondent, Hyderabad, under Article 226 of the Constitution of India, with the following prayer:-

To issue a writ, order or direction, more particularly one in the nature of a Writ of Certiorari calling for the records pertaining to the order dated; 11.09.2015 in S.A.No.512 of 2013 on the file of the 1st respondent and quash the same as being contrary to Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'SARFAESI Act'), Article 14 of the Constitution and contrary to the direction of the Hon'ble High Court in W.P.No.18081 of 2014 dated 16.07.2014 and consequently direct the first respondent-DRT to hear the case on merits and dispose of the same in accordance with law and to pass any such other order(s) as this Hon'ble Court may deem fit and proper in the circumstances of the case and in the interest of justice".

2. The averments in the affidavit in support of the Writ Petition and the prayer supra speak that the petitioner filed securitization application S.A.No.512 of 2013 before the DRT, Hyderabad questioning the action of the APSFC (R.2) to conduct auction sale of his house property bearing No.9-1-33/A/1 admeasuring 424 sq.yards situated in Prashanti Nagar, near Lungar House of Hyderabad through notice dated 25.01.2013, fixing the auction on 24.06.2013 as illegal, that R.3-owner of the jewellery shop took loan of Rs.60,00,000/-

(Rupees sixty lakhs only) from APSFC(R.2) and respondent Nos. 4 and 5 are agents between the respondent Nos.2 and 3 supra in facilitating the loan, that the petitioner while in need of money and was intended to sell his house property supra, approached the 4th respondent who agreed to buy the same and took signed blank papers from him along with title deeds of his house property and later the respondents 2 to 4 supra conspired to create equitable mortgage of his house property for the loan availed by the 3rd respondent, fraudulently and without knowledge or consent of the petitioner. It is further averred that at the stage of admission of S.A.No.512 of 2013 filed by him, the DRT, Hyderabad, directed initially the status quo to be maintained, vide order in I.A.No.2868 of 2013 that was passed in August, 2013, which was subsequent to the date of auction 24.06.2013, that. He further avers that he challenged in the S.A.No.512 of 2013, not only violation of statutory rights under Section 13(2) and 13(4) of the SARFAESI Act and Rule 8 of the Security Interest (Enforcement) Rules (for short, 'SI Rules'), but also on other grounds including under Sections 17,19 and 23 of the Indian Contract Act, stating the equitable mortgage is non-est in law, that during pendency of SA No.512 of 2013, he filed application IAIR No.909 of 2014 before the DRT, Hyderabad seeking to declare said equitable mortgage as sham and invalid and consequently to hold that the APSFC (R.2) cannot invoke the SARFAESI Act and said IAIR No.909 of 2014 was dismissed without numbering and hearing and the same was thereby challenged in the earlier writ petition W.P.No.18081 of 2014 and this Court was pleased to allow the same with a direction to the DRT, Hyderabad to number the application and dispose of the same in accordance with law and after giving opportunity to both the parties. It is further averred that the Presiding Officer of the DRT, Calcutta is the In Charge of the DRT, Hyderabad, holding Courts by visiting therefrom twice in a month for a couple of days in taking of urgent matters, that on 11.09.2015 when the matter was listed, Kum.

Jagadamba, learned Junior counsel of the writ petitioner, requested time for filing arguments to be made by Senior Counsel, however, the impugned order was passed by the Chairman, DRT, Hyderabad(R.1) in cryptic manner without reference to any of the contentions raised in the case and thereby the impugned order is totally misconstrued the relief sought in the S.A.No.512 of 2013, as if merely challenged the sale notice dated 21.05.2013 fixing auction sale on 25.06.2013, though the challenge was even to right of the APSFC to invoke provisions of the SARFAESI Act and there is no valid security interest available to create by 4th respondent in favour of the APSFC(R.2) for the alleged loan taken by 3rd respondent and the learned Chairman of the DRT misconstrued in saying the auction has not taken place on 25.06.2013 and securitization application has become infructuous thereby. It is his further contention that the impugned order suffers from legal infirmities for non-application of mind evident on the face of record, for failure to exercise jurisdiction vested under the Act on the DRT and bad in law being unjust, arbitrary and unreasonable, resulting irreparable loss and injury to the writ petitioner in compelling him to file any securitization application repeating the contentions; though he is a poor man and cannot afford to file applications repeatedly and pursue them for years without end by incurring heavy expenses of litigation, including the Court fee and the order is made on the teeth of the clear directions given in W.P.No.18081 of 2014, dated 16.07.2014, and thereby amenable to contempt jurisdiction. It is further averred that the APSFC (R.2) issued notice, dated 07.10.2015, soon after the impugned order was made by the DRT and the same may be suspended pending W.P. to avert irreparable loss and injury to the writ petitioner, that the writ petitioner has no other alternative and efficacious remedy available, approached by filing the writ petition invoking Article 226 of the Constitution of India. Hence, to issue the writ prayed for.

3. There was caveat petition already filed vide C.F.No.177202 of 2015, dated 29.09.2015 on behalf of the APSFC (R.2) to the Writ Petition and Sri Y.N. Lohita, Standing Counsel for the APSFC (R.2), having taken notice on 09.12.2015 and took time to file counter which is ultimately submitted; from the petitioner wants to hear the writ petition arguments, he is also ready to submit arguments in the writ petition without need of counter, this Court heard the learned counsel for the petitioner and APSFC(R.2) before admission of the writ petition and before ordering notice to respondent Nos.3 to 5. The DRT represented by Registrar is a proforma party. Perused the material on record.

4. Learned counsel for the petitioner reiterated the contentions raised in the Writ Petition and drawn attention of the Court to the order passed on 16.07.2014 in W.P.No.18081 of 2014. Learned counsel for the APSFC(R.2) impugned very maintainability of the Writ Petition by referring to expressions of the Apex Court, mainly of three Judges Bench in **Bishnu Ram Borah vs Parag Saikia**^[1] and the latest in **Union of India Vs. Major General Shri Kanth Sharma**^[2] saying there is alternative and efficacious statutory remedy of appeal against the impugned order in S.A.No.518 of 2013 is available to the petitioner to assail before the appellate tribunal under Section 18 of the SARFAESI Act, to go into merits including complicated questions of facts involved, the writ Court cannot go into disputed and complicated questions of fact by entertaining the writ petition bypassing alternative and efficacious statutory remedy created under Section 18 of the SARFAESI Act and therefrom sought for dismissal of the same.

5. The prayer in the Writ Petition is impugning the legality and correctness of the order of the DRT passed under Section 17 of the SARFAESI Act, in S.A.No.512 of 2013. The impugment in S.A.No.512 of 2013 is the demand notice, possession notice and sale notice fixing public auction and as per the impugned order, on the date

fixed for public auction sale could not even be held undisputedly. It is thereby the DRT disposed of the S.A.No.513 of 2013 saying the parties are at liberty to take up the issue as and when the APSFC takes further auction against the secured asset.

6. As referred supra, when Section 18 of the SARFAESI Act, provides an alternative and efficacious statutory remedy of appeal against the order passed by the DRT under Section 17 of the SARFAESI Act within 30 days from the date of receipt of the order of the DRT, there is a self-imposed restraint to entertain the Writ Petition bypassing the alternative and efficacious statutory remedy, whereunder, the appellate Court can decide all the disputed and complicated questions of facts raised, though such an ordeal, the writ Court cannot undertake, unless shown the case falls under any special exceptional circumstances. No doubt, the proviso to Section 18 of the SARFAESI Act speaks subject to deposit of amount of debt due 50% or as being detriment by the DRT which is less by reducing for not less than 25%. Same cannot be a special exceptional circumstance.

7. Coming to legal position in this regard, in **Bishnu Ram Borah** supra placed reliance by learned counsel for APSFC(R.2), it was held with a caution that the interference of High Court under Article 226 of the Constitution of India with decision of a Tribunal on the basis of fact finding enquiry undertaken by it is not proper. It was therefrom held that High Court exceeded its jurisdiction by embarking upon enquiry into the facts in dispute of the case on hand as to whether respondents are entitled to the grant of license in preference to the appellant and after set aside the order of Tribunal and in issuing Mandamus directing the Deputy Commissioner to grant license to respondents subject to enquiry. It was held such a decision is in excess of the jurisdiction under Article 226 of the constitution of India and based on an erroneous approach. The expression clearly says further that the High Court could not even undertake the ordeal of

going into the disputed questions of fact by giving a fact finding much less positive direction to grant license. In the other decision of **Major General Shri kanth Sharma** supra, it was held that under Sections 30 and 31 of the Armed Forces Tribunals Act, 2007 (for short, 'the Act'), a statutory right of appeal of the case is provided of the case falling under Section 30(2) of the Act, with the leave of the tribunal under Section 31 of the Act, or with leave granted by the Supreme Court of India; entertaining the writ petition by the High Court under Article 226 of the Constitution of India, would amount to bypassing the machinery created under Sections 30 and 31 of the Act, and thereby set aside the order of the High Court holding the writ petition as not maintainable.

For that conclusion the Apex Court referred catena of expressions including **Cicily Kallarackar Vs. Vehicle Factory**^[3] where it was held by the Apex Court that when under Section 27A(1)(c) of the Consumer Protection Act, 1986, it is provided a statutory right of appeal to Supreme Court, entertainment of writ petition by the High Court against the order of the National Consumer Disputes Redressal Commission (National Commission), is nothing but bypassing statutory appeal which is an improper exercise of jurisdiction by the High Court and held such order passed by the High Court is a nullity for want of jurisdiction and issued a direction of caution to all High Courts not to entertain writ petitions against orders of the National Commission. One among other expressions under the Consumer protection Act relied for that conclusion is **Nivedita Vs. Cellular Operators Association of India**^[4] in which it was held that once there is a statutory right of appeal either under Section 19 or 21 of the Act, entertaining writ petition by High Court in bypassing the efficacious remedy is improper and unsustainable.

8. From the above, coming back to the case on hand, a perusal of the impugned order no way takes away any of the contentions of the writ petitioner that are raised, as the order is very clear that parties are

at liberty to take up the issue as and when the APSFC takes steps for fresh auction against the secured asset. In view of the disputed questions of fact involved as to the right of creation of mortgage and what rights that could pass under the contract for sale said to have been entered by the petitioner with the 4th respondent, for his standing as guarantor to the 3rd respondent to bring the same to sale by invoking provisions of the SARFAESI Act, since reserved to raise, there is nothing shown of the case falls under any of the exceptional circumstances, despite the self-restraint against entertaining Writ Petition bypassing the efficacious statutory remedy of appeal provided to impugn the order in S.A.No.512 of 2013, dated 11.09.2015, from the Writ Petition prayer to set aside the impugned order as contrary to Section 17 of the SARFAESI Act and Article 14 of the Constitution of India, that too, when there is no further prayer sought even to direct the DRT to hear the case and to dispose of on merits.

9. Accordingly and in the result, the Writ Petition is dismissed. No order as to costs. Consequently, miscellaneous petitions, if any, pending shall stand closed.

SANJAY KUMAR, J

Dr. B. SIVA SANKARA RAO, J

Dt.29.06.2016

vvr.

[\[1\]](#) 1984(2) SCC 488

[\[2\]](#) 2015(3) SCJ 689

[\[3\]](#) 2012(6) SCC 859

[\[4\]](#) 2011 (14) SCC 337