**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**Civil Writ Petition No.4704 of 2016 (O&M)
Date of decision: 28th July, 2016**

Mahesh Kumar ....Petitioner

versus

Punjab and Sind Bank and others ...Respondents

***CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN***

1. Whether the reporters of the local papers may be allowed to see the judgment?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

Present: Mr. Salil Bali, Advocate for the petitioner.

Mr. Ashok Kumar, Advocate for respondent No.1-Bank.

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Ajay Kumar Mittal, J.

1. Through the present writ petition filed under Articles 226/227 of the Constitution of India, the petitioner prays for quashing the order dated 15.02.2016 (Annexure P-11) passed by the Debts Recovery Tribunal, Chandigarh (for short 'DRT') whereby the application for condonation of delay has been declined and the petitioner has not been allowed to participate in the auction proceedings despite being fully competent and eligible. Further prayer has also been made for a direction to the respondent-Bank to accept the bid of the petitioner and not to evict him from the house in question.

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. The petitioner is a tenant under respondent No.2- Sh. Bal Krishan in the ground floor of the property bearing House No.7, Aggar Nagar Enclave, Ferozepur Road, Ludhiana consisting of two rooms, drawing room, kitchen, bathrooms and front verandah along with common passage/entrance/main gate since December, 2004 as per memorandum of rent note dated 15.12.2004 (Annexure P-1) on a monthly rent of ₹ 4,000/- per month. After sometime, respondent No.2 in order to get the premises vacated started harassing the petitioner and being a businessman, he had taken loans/cash credit facilities from financial institutions and had allegedly mortgaged the present property to Punjab and Sind Bank for availing the loan facility. This fact came to the knowledge of the petitioner from respondent No.2 who received a notice dated 21.01.2014 (Annexure P-2) under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act') which was served by respondent No.1(Punjab and Sind Bank) for recovery of the loan facility availed by respondent No.2 and for getting the symbolic possession of the house in question. Aggrieved thereby, the petitioner filed a suit for declaration and permanent injunction in the Civil Court on 22.09.2014 (Annexure P-3) for protecting his right as a tenant in the house in question and further to restrain the respondents from illegally dispossessing him. After notice in the civil suit, an application under Order 7 Rule 11 the Code of Civil Procedure (for short 'CPC') was filed by respondent No.1-Bank for rejection of the plaint/suit filed by the petitioner. Vide order dated 12.12.2014, the application of the Bank was accepted and the civil suit filed by the petitioner was rejected observing that in view of Section 13 of the SARFAESI Act, the

aggrieved person could approach the DRT under Section 17 of the SARFAESI Act. Thereafter, the petitioner preferred securitization application (Annexure P-4) before the DRT, Chandigarh along with an application for condoning the delay under Sections 5 and 14 of the Limitation Act, 1963 read with Section 17 (7) of the SARFAESI Act, which had occurred because of approaching wrong forum. Notice was issued to the respondent-Bank, inter alia, stating that the property in question was symbolically possessed by the bank and the same had been put to auction. The respondent-Bank issued a public notice for E-auction on 07.12.2015 (Annexure P-5). The petitioner arranged funds to bid in the auction for the house in question and in order to participate in the auction, he wrote a letter to the respondent-Bank on 12.01.2016 (Annexure P-7 (colly.) for knowing the appropriate procedure for participating in the bid process and for depositing the earnest money of ₹ 2,250 lacs. The respondent-Bank issued a letter dated 13.01.2016 asking the petitioner to participate in the bid (Annexure P-8). The petitioner prepared a demand draft dated 14.01.2016 in favour of EMD Collection A/c No.06831100013200 P&SB amounting to ₹ 22,50,000/- (Annexure P-9) as mentioned in the auction notice dated 07.12.2015. On the date of the auction, since the respondent-Bank did not get any response for the bidding for the house in question and the petitioner was the only sole bidder, therefore, the respondent-Bank apprised the petitioner to come in the Lok Adalat on 13.02.2016. The petitioner, in order to, settle the matter in the Lok Adalat got a new demand draft dated 12.02.2016 amounting to ₹ 20 lacs in favour of the Punjab and Sind Bank (Annexure P-10). On 13.02.2016, when the petitioner appeared before the Lok Adalat for settlement and to pay the amount, it was averred by the respondent-Bank that the Lok Adalat was not a forum for finalizing the auction bid and the petitioner could not sign as he was not the borrower but only a bidder and therefore, was a third party, not competent to sign the settlement. Vide order dated 15.02.2016, the DRT, Chandigarh declined to condone the delay and dismissed the application of the petitioner (Annexure P-11). Hence, the instant writ petition.

3. A written statement has been field on behalf of respondent No.1 – Punjab and Sind Bank wherein it has been inter alia stated that respondent No.3 M/s Swati Cast and Forge Private Limited had been availing credit facilities from respondent No.1 Bank from time to time to the extent of ₹ 21,25,96,000/- through its directors respondent No.2 Shri Bal Krishan, Smt.Parmod Rani and Shri Anand Sagar. They stood as joint and several continuing guarantors for the repayment of the said credit facilities to respondent No.1. They failed to adhere to the financial discipline of the respondent Bank so the account of respondent No.3 was classified as non performing assets on 31.12.2013 as per norms and guidelines laid down by the Reserve Bank of India. Since respondent No.2 and 3 failed to pay the due amount, the respondent Bank was left with no alternative but to serve a notice under section 13(4) of the SARFAESI Act. It also took the symbolic possession of the mortgaged property including the property in dispute on 25.3.2014 which was duly published in the newspaper on 27.3.2014. Thereafter the respondent Bank put the property in dispute on sale on 7.12.2015. The bids were to be received on 14.1.2006 through e-auction. Learned counsel for the petitioner stated before the Tribunal on 16.12.2015 that the petitioner was ready to participate in the bidding and will also pay the higher price than the bid received. On 18.1.2016, the application for condoning the delay was declined but at the request of the petitioner, the matter was referred to the Lok Adalat for 13.2.2016 wherein the petitioner refused to sign and the matter was not settled. On 12.1.2016, the

petitioner again wrote a letter to the respondent Bank for participating in the bid. The respondent Bank replied that the petitioner may participate in the bid. Still the petitioner did not participate in the bid. It has been further averred that the petitioner is claiming himself to be tenant in the property in dispute on the basis of forged and fabricated memorandum of rent deed dated 15.12.2004 which is not a registered document and does not confer any legal right on the petitioner. On these premises, prayer for dismissal of the petition has been made.

4. We have heard learned counsel for the parties.

5. On perusal of the averments made in the writ petition and the written statement, we find that the petitioner had filed the Civil Suit No.647 dated 22.9.2014 in which the Bank moved an application under Order 7 Rule 11 Code of Civil Procedure for the rejection of the plaint. The said application was allowed on 12.12.2014 and the suit filed by the petitioner was rejected. The petitioner thereafter approached DRT by filing Securitization petition/application No.235 of 2015. An application under Section 5 of the Limitation Act, 1963 (in short, the 1963 Act) for condonation of delay of 155 days i.e. 129 and 26 days and under Section 14 of the 1963 Act for exclusion of 100 days on account of time spent before the trial court at Ludhiana had been filed. In the meantime, the Bank issued an E-auction notice dated 7.12.2015 wherein house in question was also shown at Serial No.14. The petitioner filed an application before DRT seeking to pay off the property and for listing the matter in the Lok Adalat on 12.12.2015. However, the matter was not listed on 12.12.2015 but was taken up on 13.2.2016 when the petitioner being third party refused to sign and accordingly, the DRT dismissed the said application on 15.2.2016. The DRT had also declined to condone the delay. The order passed

by DRT appended as Annexure P.11 which has been impugned in the writ petition reads thus:-

"IA.No.35 of 2016

in SARR 235 of 2015

Mahesh Kumar

Vs.

PSB

15.2.2016

Present : None for Applicant

Shri Ashok Kumar Verma Advocate for respondent.

It is already 3.15 p.m. Despite Passovers none is present for the applicant.

IA No. 1350 of 2015

This was an application by the applicant being third party who wanted to pay off the property and for listing the matter in the Lok Adalat on 12.12.2015. It was not listed in the Lok Adalat on 12.12.2015 when the matter was listed on 13.02.2016, the applicant being the third party refused to sign, as such, IA 1350 is dismissed.

IA No. 35 of 2016

This is application for condonation of delay. The applicant appeared in person and wanted to settle the matter. The matter was listed in the Lok Adalat on 13.02.2016 wherein he refused to sign and the matter was not settled.

Order was passed on 18.01.2016, in IA 35 of 2016 whereby condonation of delay was being declined but on the prayer of the applicant it was referred to the Lok Adalat.

As such, I see no ground to condone the delay.

IA No.35 of 2016 is dismissed.

Copy of the order be supplied to the parties as per Rule and after due compliance the record be consigned to the record room."

6. Learned counsel for the petitioner was unable to substantiate that the impugned order passed by the DRT was illegal or unsustainable in law.

7. In so far as claim of petitioner as tenant is concerned, it could not be examined by this Court in writ proceedings it being a disputed question of fact as no legal or valid document which could conclusively establish him to be tenant has been appended with the petition. Moreover, the primary dispute herein is between respondent No.1 Bank and respondent Nos. 2 and 3. The bank had every right to recover its dues by sale of the mortgaged properties in dispute being its secured assets. Examining the scope of writ jurisdiction under Article 226 of the Constitution of India where disputed questions of facts are involved, a Division Bench of this Court in ***N.C.Mahendra v. Haryana State Electricity Board and others***, AIR 1984 Punjab 26 had laid down that ordinarily a writ would not issue in favour of a person where disputed questions of facts are raised. The relevant portion reads thus:-

> "12. An identical legal position ensures within this country and High Courts have repeatedly held that the exercise of jurisdiction under Article 226 of the Constitution is discretionary and not obligatory without being exhaustive, it is settled law that the Court would not ordinarily issue a writ in favour of a person, who has (i) an adequate alternative remedy,

> (ii) who is guilty of delay which is unexplained, (iii) who is guilty of conduct disentitling him to relief, (iv) where the interest of justice do not require that relief should be granted, (v) where the petitioner raises a disputed question of fact, (vi) where the grant of writ would be futile, and (vii) where the impugned law has not come into force. It would follow from the above that the grant or refusal of a writ is within the judicial discretion of the Court and that indeed is the line which divides the extra ordinary remedy from the ordinary one by of a civil suit." (Emphasis supplied).

The Supreme Court in **State Cadre Authority and another v. K.S.Bajpal and others,** (1990) (Suppl.) SCC 713, **Bhagubhai Dhanabhai Khalasi and another v. The State of Gujarat and others,** (2007) 4 SCC 241 and **Mukesh Kumar Agrawal v. State of UP and others, (**2009) 13 SCC 693 has held that wherever disputed question of fact is raised in writ proceedings, the writ petition was not an appropriate remedy. Reference may also be made to the judgment of the Apex Court in ***Dwarka Prasad Agarwal (D) by Lrs. and another vs. B.D.Agarwal and others,*** AIR 2003 SC 2686, wherein it was observed as under:-

> "We may, however, hasten to add that as at present advised we do not intend to enter into the contention of the petitioners that their fundamental right under Article 19 of the Constitution of India had been infringed. This Court would have entered into the question, if the facts were undisputed or admitted. The question as regard infringement of fundamental right and that too under Article 19 of

the Constitution of India cannot be gone into when the facts are disputed. Whether Dwarka Prasad Agarwal and consequently the substituted petitioners are owners of the newspapers and if so to what extent being disputed, it cannot be said, that by reason of the impugned order dated 3.9.1992 passed by the first respondent herein alone, the fundamental right of the petitioners under Article 19 had been infringed."

8. Learned counsel for the Bank prayed that respondent No.1-Bank be permitted to auction the property in dispute to recover its outstanding liabilities from respondent Nos. 2 & 3. In view of the above, the writ petition is disposed of as noticed above. However, we permit the respondent Bank to hold fresh auction of the property in dispute wherein the petitioner shall be entitled to submit a bid which shall be considered in accordance with law.

(Ajay Kumar Mittal)
Judge

(Ramendra Jain)
Judge

July 28, 2016
'gs'

Whether speaking/reasoned? Yes/No

Whether reportable? **Yes**