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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No. 1821 of 2016

Order reserved on 27.07.2017

Order delivered on 31.07.2017

1. M/s. Madhuban Vehicles and Fertilizers Private Limited, Corporate Identity Number: U50100CT2010PTC021984 (Incorporated under the Companies Act, 1956), Dhamdha Road, Jevra Sirsa, Durg – 491 00, Through: Director.
2. Mithilesh Singh, aged about 35 years S/o. Shri Kamal Singh, Director, M/s. Madhuban Vehicles and Fertilizers Private Limited (Mo.No. 09977301505)
3. Kamal Bhan Singh aged about 65 years, S/o. Late Shri Gulab Singh.
4. Santosh Kumar Singh aged about 32 years, S/o. Shri Kamal Bhan Singh.
5. Smt. Sushila Devi Singh aged about 62 years, W/o. Shri Kamal Bhan Singh.
   Petitioners No.2 to 5 all resident of Village – Jevra Sirsa, Dhamdha Road, Tahsil and District Durg (Chhattisgarh)

---Petitioners

Versus

Authorized Officer, State Bank of India, Secured Creditor, Enforcement Recovery Branch Section -1, Bhilai Nagar, Tahsil and District Durg (Chhattisgarh).

--Respondent

And

Writ Petition (C) No. 2437 of 2016

1. Abhijit Goswami aged about 56 years, S/o. Late Shri S. K. Goswami, Resident of Nehru Nagar (West), Bhilai, District – Durg (Chhattisgarh).
2. Smt. Krishna Moitra aged about 66 years, W/o. Shri P. K. Moitra, Resident of 266, Scindiya Nagar, Durg – 491 001, Tahsil and District Durg (Chhattisgarh).
3. Smt. Shree Jata Goswami aged about 51 years, W/o. Shri Abhijit Goswami, Resident of Nehru Nagar (West), Bhilai, District Durg (Chhattisgarh).
   All petitioners 1 to 3 working partners of “M/s. Petro General Engineering Works” with its Head Office at 43, Industrial

Estate, Bhilai, Tahsil & District Durg (Chhattisgarh).

---**Petitioners**

Versus

Bank of India, Bhilai Branch – Plot 6 Indira Place, Bhilai – 490 006, Through – Assistant General Manager/Authorized Officer, Bhilai Branch, Tahsil and District Durg (Chhattisgarh).

---**Respondent**

And

Writ Petition (C) No. 2447 of 2016

1. M/s. S. S. Moulder (P) Ltd., Village – Aklordih, Kh.No.687, Hathkhoj Road, Bhilai, District Durg (Chhattisgarh).
2. Sanjay Mantri aged about 48 years, S/o. Late Shri Om Prakash Mantri, Director.
3. Harsh Mantri aged about 53 years, S/o. Late Shri Om Prakash Mantri, Director.
4. Pawan Mantri aged about 42 years, S/o. Late Shri Om Prakash Mantri, Director.
5. Smt. Vimla Devi Mantri aged about 70 years, W/o. Late Shri Om Prakash Mantri, Director.

   All petitioners 2 to 5 residents of House No. 03, "Mantri Niketan" Bimla Kunj, Ram Nagar, Sunder Nagar, Kohka, Bhilai, Tahsil and District Durg (Chhattisgarh) 490 021.

---**Petitioners**

Versus

Bank of Baroda, A Body Corporate and a Banking Company Constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, having its Head Office at Mandvi, Baroda, Regional, Through – Chief Manager-cum-Authorized Officer, Stressed Assets Recovery Branch (S.A.R.B.), Sector-1, Bhilai, District Durg (Chhattisgarh).

---**Respondent**

For petitioner in all the writ petitions	: Mr. V. G. Tamaskar, Advocate.
For respondents Bank	: Mr. Abhishek Sinha and Mr. Ankit Singhal, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order [C.A.V.]

1. These writ petitions have been filed by the petitioners aggrieved by notices of recovery and possession issued by respondent-Bank under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act").

2. In these cases State Bank of India and the Bank of Baroda have raised a preliminary objection with regard to maintainability of these writ petitions on the common grounds that in respect of notices issued under Section 13(2) and 13(4) of SARFAESI Act. The petitioners have statutory alternative remedy of filing appeal under Section 17 of the SARFAESI Act and placed reliance of the decision of the Supreme Court upon **United Bank of India v. Satyawati Tondon & others**[1], **Jagdish Singh v. Heeralal & others**[2], **Commissioner of Income Tax and others v. Chhabil Dass Agarwal**[3] and **Standard Chartered Bank v. V. Noble Kumar and others**[4].

3. On the other hand learned counsel for petitioner would submit that existence of alternative remedy is not an absolute bar and in appropriate case where action of respondents is arbitrary and

1 AIR 2010 SC 3413
2 (2014) 1 SCC 479
3 (2014) 1 SCC 603
4 (2013) 9 SCC 620

involves jurisdictional issue writ petition can be entertained. He would also submit that deeds are not registered and mere deposit of title deeds would not create mortgage except in a cities specified in Section 58(f) of the Transfer of Property Act, therefore no proceeding for recovery can taken under the provisions of SARFAESI Act and all these proceedings are without jurisdiction and without authority of law. Reliance has been placed on judgments in the cases of **Sheeba Philominal Merlin and Esther Evelyan v. The Repatriates Co-op Finance and Development Bank Ltd (Govt. of India Enterprise), The General Manager, Repco Bank, The Authorized Officer, Repco Bank and S. Sasikumar**[5], **State of West Bengal and others v. Committee for Protection of Democratic Rights, West Bengal and others**[6], **United Bank of India Ltd. v. Lekharam Sonaram and Co. and others**[7], **Syndicate Bank v. Estate Officer & Manager, APIIC Ltd. and other**[8], **Radhika Devi v. Bajrangi Singh**[9], **Dr. Jagmittar Sain Bhagat v. Director, Health Services, Haryana and others**[10], **State of Madhya Pradesh and others v. Sanjay Nagayach and others**[11].

4. In the case of **United Bank of India v. Satyawati Tondon and**

5 2010 (5) CTC 449
6 (2010) 3 SCC 571
7 AIR 1965 SC 1591
8 (2007) 8 SCC 361
9 1997(1) MPWN 193
10 AIR 2013 SC 3060
11 (2013) 7 SCC 25

others (supra), the Supreme Court examined the issue of maintainability of writ petitions on the face of availability of remedy under Section 17 of the SARFAESI Act and it was held as under:-

> "17. 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 guarantor or any other person 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. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if 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 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, 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.
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> 18. While expressing the aforesaid view, we are conscious that the powers conferred 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 conferred 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. 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 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. 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 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 AIR 1969 SC 556, Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1: (AIR 1999 SC 22: 1998 AIR SCW 3345) and Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others (2003) 2 SCC 107: (AIR 2003 SC 2120 : 2003 AIR SCW 126) and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order.

19. In Thansingh Nathmal v. Superintendent of Taxes (1964) 6 SCR 654, the Constitution Bench considered the question whether the High Court of Assam should have entertained the writ petition filed by the appellant under Article 226 of the Constitution questioning the order passed by the Commissioner of Taxes under the Assam Sales Tax Act, 1947. While dismissing the appeal, the Court observed as under:

> "The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self- imposed limitations. Resort that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution, the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

20. In Titaghur Paper Mills Co. Ltd. v. State of Orissa

(1983) 2 SCC 433, a three-Judge Bench considered the question whether a petition under Article 226 of the Constitution should be entertained in a matter involving challenge to the order of the assessment passed by the competent authority under the Central Sales Tax Act, 1956 and corresponding law enacted by the State legislature and answered the same in negative by making the following observations:-

> "Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the Prescribed Authority under sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford in the following passage:
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> > "There are three classes of cases in which a liability may be established founded upon statute. . . . But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. . .the remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."
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> > The rule laid down in this passage was

> approved by the House of Lords in Neville v. London Express Newspapers Ltd. and has been reaffirmed by the Privy Council in Attorney-General of Trinidad and Tobago v. Gordon Grant & Co. Ltd. and Secretary of State v. Mask & Co. (AIR 1940 PC 105). It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

21. The views expressed in Titaghur Paper Mills Co. Ltd. v. State of Orissa (supra) were echoed in Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. and others(1985) 1 SCC 260 in the following words:-

> "Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."

22. In Punjab National Bank v. O.C. Krishnan and others (2001) 6 SCC 569, this Court considered the question whether a petition under Article 227 of the Constitution was maintainable against an order passed by the Tribunal under Section 19 of the DRT Act and observed:

> "5. In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable under Section 20 of the Recovery of Debts Due to Banks and Financial

Institutions Act, 1993 (for short "the Act"). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the decision of the High Court and whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.

6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

23. In CCT, Orissa and others v. Indian Explosives Ltd. (2008) 3 SCC 688, the Court reversed an order passed by the Division Bench of Orissa High Court quashing the show cause notice issued to the respondent under the Orissa Sales Tax Act by observing that the High Court had completely ignored the parameters laid down by this Court in a large number of cases relating to exhaustion of alternative remedy.

24. In City and Industrial Development Corporation v. Dosu Aardeshir Bhiwandiwala and others(2009) 1 SCC 168, the Court highlighted the parameters which are required to be kept in view by the High Court while exercising jurisdiction under Article 226 of the Constitution. Paragraphs 29 and 30 of that judgment which contain the views of this Court read

as under:-

"29. In our opinion, the High Court while exercising its extraordinary jurisdiction under Article 226 of the Constitution is duty-bound to take all the relevant facts and circumstances into consideration and decide for itself even in the absence of proper affidavits from the State and its instrumentalities as to whether any case at all is made out requiring its interference on the basis of the material made available on record. There is nothing like issuing an ex parte writ of mandamus, order or direction in a public law remedy. Further, while considering the validity of impugned action or inaction the Court will not consider itself restricted to the pleadings of the State but would be free to satisfy itself whether any case as such is made out by a person invoking its extraordinary jurisdiction under Article 226 of the Constitution.

30. The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

(a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors.

The Court in appropriate cases in its discretion may direct the State or its instrumentalities as the case may be to file proper affidavits placing all the relevant facts truly and accurately for the consideration of the Court and particularly in cases where public revenue and public interest are involved. Such directions are always required to be complied with by the State. No relief could be granted in a public law remedy as a matter of course only on the ground that the State did not file its counter-affidavit opposing the writ petition. Further, empty and self-defeating affidavits or statements of Government spokesmen by

> themselves do not form basis to grant any relief to a person in a public law remedy to which he is not otherwise entitled to in law."

25. In Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement and another (2010) 4 SCC 772, the Court was dealing with the issue whether the alternative statutory remedy available under the Foreign Exchange Management Act, 1999 can be bypassed and jurisdiction under Article 226 of the Constitution could be invoked. After examining the scheme of the Act, the Court observed:

> "31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.
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> 32. No reason could be assigned by the appellant's counsel to demonstrate why the appellate jurisdiction of the High Court under Section 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum."

26. In Modern Industries v. Steel Authority of India Limited (2010) 5 SCC 44, the Court held that where the remedy was available under the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, the High Court was not justified in entertaining a petition under Article 226 of the Constitution.

27. 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 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.
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> 28. Insofar as this case is concerned, we are convinced that the High Court was not at all justified in injuncting the appellant from taking action in furtherance of notice issued under Section 13(4) of the Act."

5. In view of the aforesaid legal position, since the petitioners have been alternative remedy of approaching in Debt Recovery Tribunal under Section 17 of the SARFAESI Act or competent appellate authority under Section 30 of the Act of 1993, the instant writ petitions are disposed off granting liberty to the petitioners to raise all the grounds raised herein before the competent authority. Needless to say the competent authority/appellate authority would consider and decide the said application/appeal strictly in accordance with law expeditiously. No order as to cost(s).

Sd/-

(Sanjay K. Agrawal)
Judge