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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 9589/2018

ABHISHEK AGARWAL ..... Petitioner

Through: Mr. Munish Malhotra, Ms. Manpreet Kaur and Ms. Prerana Chaturvedi, Advs.

versus

STATE BANK OF INDIA ..... Respondent

Through: Mr. Sanjiv Kakra, Mr. Bheem Sain Jain and Ms. Vashali Kakra, Advs.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

O R D E R

% **12.09.2018**

CM. No. 37367/2018 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

W.P.(C) 9589/2018

1. The challenge in this writ petition is to the order dated 25th August, 2018 passed by DRT-I, Delhi dismissing the application filed by the petitioner under Section 17 of the SARFAESI Act, 2002 (in short Act of 2002) on the ground that the Tribunal has no jurisdiction to adjudicate any order passed by the learned CMM and therefore the objection raised by the petitioner is not maintainable.

2. It is the submission of Mr. Munish Malhotra, learned counsel for the

petitioner that the only remedy for the petitioner against the order passed by the learned CMM is by filing an application under Section 17 of the Act of 2002. He states, the Tribunal has erred by relying on the judgment of the Supreme Court in the case of ***Harshad Govardhan Sondagar vs. International Assets Reconstruction Co. Ltd. & Ors. (2014) 6 SCC 1*** wherein, in para 29 the Supreme Court has held that the Tribunal has no jurisdiction to adjudicate any order passed by the learned DM / CMM. He states that in the said judgment, the Supreme Court was concerned with an issue whether any remedy was available to a lessee of borrower under Section 17 of the Act of 2002 before DRT in case of dispossession by secured creditor or CMM / DM. It was in that context, the Supreme Court held that remedy for such a lessee against decision of CMM / DM under Section 14 of 2002 Act handing over possession to secure creditor lies under Articles 226 and 227 of the Constitution of India, which is not the case herein. He also states that even such a position has under gone a change in view of insertion of sub-section 4(A) to Section 17.

3. Learned counsel appearing for the respondent has taken an objection on the maintainability of the petition in view of the remedy of appeal being available for the petitioner before the DRAT under Section 18 of the Act of 2002. On this submission of the counsel for the respondent, Mr. Munish Malhotra, would submit that the remedy under Article 226 of the Constitution of India is not barred and the petitioner can approach this Court. He has relied upon the following judgments which were also referred to in the impugned order in support of his submission:

1. ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors. AIR 1999 SC22.***

2. D.R. Aggarwal v. New Delhi Municipal Committee and Anr. AIR 1999 Del 67.

4. The Supreme Court in Para 15 of the ***Whirlpool Corporation (supra)*** has held as under:

> *"**15.** Under Article 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 filed 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 or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but 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."*

It is not the case of the petitioner that his case falls within the three contingencies referred therein.

5. In so far as the judgment relied upon by the learned counsel for the petitioner in the case of ***D.R. Aggarwal (supra)*** is concerned, the Supreme Court has in Para 4 and 6 has held as under:

> *"4. In support of the contention that the remedy of writ petition is barred, learned counsel for the respondents has relied upon the decision of the Supreme Court in the case of Mafat Lal Industries Limited v. Union of India, 1996 (9)*

SCALE 457 (at pages 518-520). The said decision has no applicability to the facts and circumstances of the present case. Further it may be noticed that in Mafat Lal's case too the constitution bench held that so far as the jurisdiction of the High Courts under Article 226 of the Constitution of India or of Supreme Court under Article 32 is concerned, it remains unaffected by the provisions of the Act. There can, however, be no doubt that while exercising the jurisdiction under Article 226, the Court will examine various facets of the case before determining whether the facts of the case justify interference in exercise of discretionary and extraordinary jurisdiction vested in High Court under Article 226. The Court may also take into consideration the fact of availability of remedy of statutory appeal as also the precondition of deposit for hearing of the appeal and then decide on facts to entertain or not the writ petition. Reliance has also been placed on behalf of NDMC on the decision of the Supreme Court in the case of Assistant Collector of Central Excise v. Dunlop India Limited , . In this decision too it was not held that the writ petition under Article 226 is not maintainable. What has been held is that the Court will examine whether there are good and sufficient reasons to bypass the alternative remedy provided by the statute. The Court will also examine facts to determine whether the statutory remedy is ill-suited or not. This decision also does not in any manner show that a writ petition per se is not maintainable in the matters where the challenge is to the assessments made by the Municipal authorities.

6. In view of the aforesaid well settled legal I proposition, the writ petition could not have been dismissed in limine as not maintainable without going into the facts and circumstances of the case. Whether to interfere or not while exercising writ jurisdiction would depend on facts and circumstances of each case. In a given case, depending on the facts of that case, the Court may still come to the conclusion that in view of the facts and the remedy of *appeal, it would not entertain the writ petition but it has not been so held in the judgment under appeal."*

6. The provision of Appeal under Section 18 reads as under:

***"18. Appeal to Appellate Tribunal**.—(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal [129][under Section 17, may prefer an appeal along with such fee, as may be prescribed] to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal:*

[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."

7. In a recent pronouncement, which is reported as ***(2018) 3 SCC 85,***

Authorized Officer, State Bank of Travancore and Anr. V. Mathew K.C. the Supreme Court by referring to its various judgments in the case of (i) ***CIT v. Chhabil Dass Aggarwal (2014) 1 SCC 603*** (ii) ***Punjab National Bank v. O.C. Krishnan 7 (2001) 6 SCC 569*** (iii) ***United Bank of India v. Satyawati Tandon (2010) 8 SCC 110*** (iv) ***Union Bank of India v. Panchanan Subudhi (2010) 15 SCC 552*** (v) ***Kanhaiya Lalchand Sachdev v. State of Maharashtra (2011) 2 SCC 782*** (vi) ***Sri Siddeshwara Coop Bank Ltd. v Ikbal (2013) 10 SCC 83 (vii) Punjab National Bank v. Imperial Gift House (2013) 14 SCC 622*** has in Paras 5, 9, 10, 11 to 15 held as under:

> *"5. We have considered the submissions on behalf of the parties. Normally this Court in exercise of jurisdiction under Article 136 of the Constitution is loathe to interfere with an interim order passed in a pending proceeding before the High Court, except in special circumstances, to prevent manifest injustice or abuse of the process of the court. In the present case, the facts are not in dispute. The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well defined exceptions as observed in Commissioner of Income Tax and Others vs. Chhabil Dass Agarwal, 2014 (1) SCC 603, as follows:*
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> > *"15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in*

defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments 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 still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

9. Even prior to the SARFAESI Act, considering the alternate remedy available under the DRT Act it was held in Punjab National Bank v. O.C. Krishnan [Punjab National Bank v. O.C. Krishnan, (2001) 6 SCC 569] that: (SCC p. 570, para 6)

"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."

"10. In Satyawati Tandon (supra), the High Court had restrained further proceedings under Section 13(4) of the Act. Upon a detailed consideration of the statutory scheme under the SARFAESI Act, the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding :-

"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 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 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.

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> *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."*

11. In Union Bank of India and another vs. Panchanan Subudhi, 2010 (15) SCC 552, further proceedings under Section 13(4) were stayed in the writ jurisdiction subject to deposit of Rs.10,00,000/- leading this Court to observe as follows :

> *"7. In our view, the approach adopted by the High Court was clearly erroneous. When the respondent failed to abide by the terms of one-time settlement, there was no justification for the High Court to entertain the writ petition and that too by ignoring the fact that a statutory alternative remedy was available to the respondent under Section 17 of the Act."*

12. The same view was reiterated in Kanaiyalal Lalchand Sachdev and others vs. State of Maharashtra and others, 2011 (2) SCC 782 observing:

> *"23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is*

available to any aggrieved person. (See Sadhana Lodh v. National Insurance Co. Ltd.; Surya Dev Rai v. Ram Chander Rai and SBI v. Allied Chemical Laboratories.)"

13. In Ikbal (supra), it was observed that the action of the Bank under Section 13(4) of the 'SARFAESI Act' available to challenge by the aggrieved under Section 17 was an efficacious remedy and the institution directly under Article 226 was not sustainable, relying upon Satyawati Tandon (Supra), observing :

"27. No doubt an alternative remedy is not an absolute bar to the exercise of extraordinary jurisdiction under Article 226 but by now it is well settled that where a statute provides efficacious and adequate remedy, the High Court will do well in not entertaining a petition under Article 226. On misplaced considerations, statutory procedures cannot be allowed to be circumvented.

28.......In our view, there was no justification whatsoever for the learned Single Judge to allow the borrower to bypass the efficacious remedy provided to him under Section 17 and invoke the extraordinary jurisdiction in his favour when he had disentitled himself for such relief by his conduct. The Single Judge was clearly in error in invoking his extraordinary jurisdiction under Article 226 in light of the peculiar facts indicated above. The Division Bench also erred in affirming the erroneous order of the Single Judge."

14. A similar view was taken in Punjab National Bank and another vs. Imperial Gift House and others, (2013) 14 SCC 622, observing:-

"3. Upon receipt of notice, the respondents filed representation under Section 13(3-A) of the Act, which was rejected. Thereafter, before any further action could be taken under Section 13(4) of the Act by the Bank, the writ petition was filed before the High Court.

4. In our view, the High Court was not justified in entertaining the writ petition against the notice issued under Section 13(2) of the Act and quashing the proceedings initiated by the Bank."

15. It is the solemn duty of the Court to apply the correct law without waiting for an objection to be raised by a party, especially when the law stands well settled. Any departure, if permissible, has to be for reasons discussed, of the case falling under a defined exception, duly discussed after noticing the relevant law. In financial matters grant of ex-parte interim orders can have a deleterious effect and it is not sufficient to say that the aggrieved has the remedy to move for vacating the interim order. Loans by financial institutions are granted from public money generated at the tax payers expense.

Such loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same. The caution required, as expressed in Satyawati Tandon (supra), has also not been kept in mind before passing the impugned interim order:-

"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."*

8. The plea of Mr. Malhotra even by referring to the judgment in the case of ***State Bank of Travancore (supra)***, wherein the Supreme Court has referred to its judgment in the case of ***Chhabil Dass Aggarwal (supra)*** is that the Supreme Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question or in defiance of the fundamental principles of judicial procedure or has resorted to invoke provisions which are repealed or when an order has been passed in total violation of principle of natural justice. This submission is untenable in view of the judgment of the Supreme Court in ***Chhabil Das Aggarwal (supra)*** as

noted by the Supreme Court in ***State Bank of Travancore (supra)*** that the proposition laid down in ***Thansingh Nathlam v. Supt. of Taxes, AIR 1964 SC 1419*** and ***Titaghur Paper Mills Co. Ltd. V. State of Orissa, (1983) 2 SCC 433*** and other similar judgments that the High Court will not entertain the petition under Article 226 of the Constitution of India, if an effective alternate remedy available to the aggrieved person or the statute under which the action complained of has been taken, itself contains a mechanism for redressal of grievances still holds field.

9. In view of the above, the fact that the remedy of appeal is available to the petitioner under Section 18 of the Act of 2002, we refuse to exercise our jurisdiction under Article 226 of the Constitution of India. The petition is dismissed.

CM. No. 37368/2018 (for Stay)

Dismissed as infructuous.

CHIEF JUSTICE

V. KAMESWAR RAO, J

SEPTEMBER 12, 2018/*jg*