

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

WPA 11360 of 2020

**Bansal Enterprises
Vs.
Bank of Baroda & Ors.**

For the petitioner : Mr. Suddhasatva Banerjee
Mr. Pushan Kar
Mr. Soumabho Ghose
Mr. Sagnik Majumder
Mr. Teeshan Das.....advocates

For the Bank of Baroda : Mr. Avishek Guha
Mr. Rohit Bhattacharjee.....advocates

For the Union of India : Ms. Pronoti Goswami..... advocate

Heard on : 07.01.2021

Judgment on : 14.01.2021

Hiranmay Bhattacharyya, J.:

The writ petitioner claims to be a lessee of an immovable property which was put up for auction sale in terms of the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short “the SARFAESI Act”) and the Security Interest (Enforcement) Rules, 2002 (for short “the 2002 rules”). The petitioner claims that he contacted an official of the Bank as the website was not functional. The said official assured him that a new date for such auction will be fixed. The writ petitioner claims that he could not

participate in such auction as the website was not functional. The writ petitioner alleges that the respondent Bank has proceeded to finalise such auction by disregarding the assurances given to the writ petitioner. The writ petitioner says that the Bank in collusion with the participants finalised the auction sale. The writ petitioner filed the instant writ petition praying for a mandamus directing the respondents to set aside, cancel and withdraw the e-auction sale.

Mr. Banerjee, learned Advocate for the petitioner, has contended that the respondent Bank acted illegally and arbitrary by holding such auction when the other intending purchasers including the petitioner could not participate due to unworkable website. According to Mr. Banerjee, collusion between the Bank and the highest bidder is apparent as the property is sought to be transferred at an abnormally low price. Mr. Banerjee further contended that the writ petitioner has only challenged the manner in which such auction was conducted but not the measures taken by the secured creditor under Subsection 4 of Section 13 of the SARFAESI Act. He contended that neither the SARFAESI Act nor the 2002 rules framed thereunder has provided the manner in which auction is to be conducted. Thus, according to Mr. Banerjee, the Debts Recovery Tribunal (for short "the Tribunal") do not have the jurisdiction to decide the instant dispute. According to Mr. Banerjee before a tribunal can be held to have jurisdiction to decide a particular matter it must not only have the jurisdiction to try and adjudicate the dispute brought before it but must also have the authority to pass the order sought for. In support of such contention, Mr. Banerjee placed

reliance upon a judgment of the Hon'ble Supreme court of India in the case of *Official Trustee, West Bengal and ors. vs. Sachindra Nath Chatterjee and Anr.* reported at AIR 1969 SC 823. Mr. Banerjee further contended that as the writ petitioner was deprived of his right to participate in the e-auction, he filed the instant writ petition.

Mr. Banerjee contended that the object of auction sale is maximum participation by intending purchasers and to fetch the best possible market price. Mr. Banerjee contended that any irregularity in conducting the auction sale can be challenged under Article 226 of the Constitution of India and in support of such contention he relied upon the following judgments of the Hon'ble Supreme Court of India in the case of (i) *Gajraj Jain vs. State of Bihar and Ors.* reported at (2004)7 SCC 151, (ii) *S.J.S. Business Enterprises (P) Ltd. vs. State of Bihar and Ors.* reported at (2004)7 SCC 166 and (iii) *Karnataka State Industrial Investment and Development Corporation Limited vs. S.K.K. Kulkarni and Ors.* reported at (2009) 2 SCC 236.

Mr. Guha, learned Advocate for the respondent has seriously disputed the contentions of Mr. Banerjee. He contended that Subsection 4 of Section 13 of the SARFAESI Act empowers the secured creditor to take recourse to sale of an immovable property i.e. the secured asset for recovery of the secured debt. He further contended that Section 17 of the SARFAESI Act provides that if any person including the borrower is aggrieved against any of the measures taken by the secured creditor, such aggrieved person has to approach the Tribunal. According to him,

the instant writ petition is not maintainable as an alternative efficacious remedy is available to the petitioner.

Mr. Guha relied upon the judgments in the case of (i) *Kanaiyalal Lalchand Sachdev and Ors. vs. State of Maharashtra and Ors.* reported at 2011 AIR SCW 1194, (ii) *Authorised Officer, State Bank of Travancore and another vs. Mathew K.C.* reported at (2018) 3 Supreme Court Cases 85, (iii) an unreported judgment of this Hon'ble Court in the case of *Bishnu Bikash Sarkar & Anr. vs. ICICI Home Finance Company Limited & Ors.* passed on February 6, 2019 in CAN 923 of 2019 with CAN 924 of 2019 in MAT 128 of 2019 and (iv) *United Bank of India vs. Satyawati Tondon and Ors.* reported at (2010) 8 Supreme Court Cases 110 in support of his contention that the High Court should not entertain a petition under Article 226 of the Constitution of India when an effective alternative remedy is provided under the SARFAESI Act for redressal of his grievance.

Mr. Guha further contended that sale of secured asset in public auction under Section 13(4) of SARFAESI Act which ended in issuance of sale certificate is a complete and absolute sale and in support of such contention he relied upon a decision of the Hon'ble Supreme Court of India in the case of *Shakeena & anr. Vs. Bank of India* and others reported at 2019 SCC Online SC 1059.

I have heard the learned advocates of the respective parties and have considered the materials on record.

The main question which falls for determination is whether the Tribunal would have jurisdiction to consider and adjudicate

any dispute relating to conducting the auction sale under Section 13(4) of the SARFAESI Act.

In order to decide the said issue it will be profitable to recapitulate some of the provisions of the SARFAESI Act and the 2002 Rules.

Sub section 4 of Section 13 of the SARFAESI Act specifies various modes which can be adopted by the secured creditor for recovery of the secured debt. The secured creditor can take possession of the secured assets of the borrower and transfer the same by way of sale for realising the secured assets. Section 17 speaks of the remedies available to any person including the borrower who may feel aggrieved against the action taken by the secured creditor under Sub section 4 of Section 13 of the Act. Subsection 2 of Section 17 casts a duty upon the tribunal to consider whether the measures taken by the secured creditor for enforcement of the security interest are in accordance with the provisions of the act and rules framed thereunder. Subsection 3 of Section 17 provides that if the tribunal after examining the facts and the circumstances of the case and evidence produced by the parties, comes to the conclusion that the measures taken by the secured creditor under Sub section 4 of Section 13 of the said act are not in accordance with the provisions of the act and the rules framed thereunder, then it can by order direct restoration of possession of secured assets to the borrower or such other aggrieved person who may have applied under Section 17(1).

Section 18 of the SARFAESI Act provides a right of appeal to the Appellate Tribunal.

Thus, the SARFAESI Act contains a detailed mechanism for redressal of grievances of any person including the borrower who feels aggrieved against the actions taken by the secured creditor for recovery of the secured debt.

The 2002 Rules have been framed in exercise of the powers conferred under Subsection (1) and Clause (b) of Subsection (2) of Section 38 read with Subsection (4), (10) and (12) of the SARFAESI. Rule 8 of the 2002 Rules lays down the procedures for sale of immovable secured assets.

In *Authorised Officer , Indian Overseas Bank and another vs. Ashok Saw Mill*, reported at (2009) 8 SCC 366, the Hon'ble Supreme Court after examination of various provisions of the SARFAESI Act and the 2002 rules held that the tribunal has been vested with the power to declare any action taken by the secured creditor for recovery of its dues as invalid and also to restore possession even if such possession may have been made over to the transferee. The Hon'ble Supreme Court held as under—

“35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in sub-section (3) thereof.

36. The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.”

The SARFAESI Act empowers the secured creditor to recover its secured debt by way of sale of the secured asset. The 2002 Rules, particularly Rule 8 lays down the procedures of conducting such sale. Any error or wrongful use of powers by the secured creditor in the process of conducting the e-auction affects the auction sale. The said act casts an obligation upon the tribunal to consider as to whether such sale is in accordance with the provisions of the act and the rules framed thereunder. Thus, I am of the view that the tribunal is empowered under the act to decide as to whether there was any error or wrongful use of powers in conducting the auction sale by the respondent authority. For the reasons as aforesaid, I am unable to accept the submission of Mr. Banerjee that the tribunal lacks jurisdiction to decide the issue raised in the writ petition regarding alleged irregularity in the process of holding e-auction.

Now the next question arises as to whether the High Court should entertain an application under Article 226 of the Constitution of India when alternative remedies are available to the petitioner under the SARFAESI Act.

The Hon’ble Supreme Court of India after considering the various provisions of the SARFAESI Act in *Satyawati (supra)*

held that the remedies available to an aggrieved person are both expeditious and effective. It was further held therein that the High Court must insist that before availing remedy under Article 226 of the Constitution a person must exhaust all remedies available under the relevant statute. The Hon'ble Supreme Court held as under –

“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 institution. In or 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 legislation 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.

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. ”

The Hon'ble Supreme Court in the case of *Mathew K.C.* (*supra*) deprecated the tendency of the subordinate courts in not applying the well settled decision that a party must exhaust the

remedies available under the relevant statute before availing the remedy under Article 226. The Hon'ble Supreme Court in the said reported case held as under-

“17. We cannot help but disapprove the approach of the High Court for reasons already noticed in Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engg. Works (p) Ltd., observing: (SCC p. 463, para 32)

“32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops.” ”

The Hon'ble Supreme Court of India in *Kanaiyalal (supra)* after noticing the various provisions of the SARFAESI Act and the 2002 Rules held that the High Court was justified in declining to exercise its jurisdiction under Article 226 and 227 of the Constitution on the ground that an efficacious statutory remedy of appeal under Section 17 of the Act was available.

A Division Bench of this Hon'ble Court in the case of *Bishnu Bikash (supra)* after taking into consideration the observations made by the Hon'ble Supreme Court in various judgments held that the High Court is likely to fall into a grave error if a writ petition is entertained notwithstanding the fact that the writ petitioners have an efficacious statutory alternative remedy available.

Though I am conscious that the powers conferred upon the High Court under Article 226 of the Constitution of India is very

wide and there is no express limitation on the exercise of that power but, at the same time, I am not oblivious of the rules of self-imposed restraint which a High Court is to keep in view while exercising power under Article 226 of the Constitution of India. Since an alternative efficacious remedy for redressal of the grievances of the petitioner is available under Section 17 of the SARFAESI Act, I am not inclined to entertain the instant writ petition and the same is liable to be dismissed.

Let me now deal with the decisions cited by Mr. Banerjee. Though there is no quarrel to the proposition of law laid down by the Hon'ble Supreme Court in the case of *Sachindra Nath Chatterjee (supra)* that the jurisdiction of a court must include the power to hear and decide the questions at issue, the authority to hear and decide the particular controversy that has arisen between the parties, since I have already held that the tribunal has the jurisdiction to hear and decide the dispute that have arisen between the parties in relation to the conduct of the auction sale, the said reported case is not of much assistance to the petitioner.

In *Gajraj Jain (supra)* and *S.J.S. Business Enterprises (supra)*, the Hon'ble Supreme Court of India while considering the auction sales conducted in terms of the provisions of the State Financial Corporation Act 1951 held that an auction sale can be set aside on an application filed under Article 226 of the Constitution of India in case such sale was not held in accordance with the statute or that the authorities acted unfairly or unreasonably. The aforesaid decisions of the Hon'ble Supreme

Court of India is not applicable to the facts of the instant case as the auction sale by the respondent Bank was done in exercise of the powers under Section 13(4) of the SARFAESI Act and the said Act provides a detailed mechanism for ventilating the grievance by an aggrieved party before the tribunal. Furthermore, the question as to whether a writ petition can be entertained notwithstanding the availability of alternative efficacious remedies under the SARFAESI Act has been well settled by the Hon'ble Supreme Court.

The issue before the Supreme Court in *S.K.K Kulkarni (supra)* was whether a particular court has territorial jurisdiction to hear the matter in view of the provisions of Section 31 (1) of the State Financial Corporation Act 1951. The said judgment has no manner of application to the facts of the instant case.

One of the issues which fell for consideration in the decision cited by Mr. Guha in *Shakeena (supra)* was whether a sale under Section 13(4) becomes complete and absolute upon issuance of a sale certificate in favour of the successful bidder or the same requires registration under the provisions of the Registration Act. The said issue is not germane in the instant case and as such the judgment rendered in *Shakeena (supra)* is not applicable to the facts of the instant case.

For the reasons as aforesaid, WPA 11360 of 2020 is dismissed without however any order as to costs. The dismissal of the instant writ petition shall not, however, debar the petitioner in approaching the appropriate forum in accordance with law if so advised.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties on priority basis upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)