

July 6, 2022
Sl. No.21
Court No.1
PA - RB

MAT 729 of 2021
IA No. CAN/1/2021

JMC Garments and Anr.
vs.
State of West Bengal and Ors.

Mr. Abhrajit Mitra,
Mr. Shayan Gupta,
Mr. Nigam Ashish Chakroborty,
Mr. Agniva Banerjee, Advocates
... for the appellants

Ms. Sutapa Sanyal,
Ms. Susnita Saha, Advocates
... for the State

Mr. Probal Kr. Mukherjee,
Mr. Sailesh Mishra, Advocates
... for the respondent nos. 3 & 4

By this intra-court appeal, writ petitioner has challenged the order of the learned Single Judge dated 7th of July, 2021 whereby WPA 7921 of 2021 has been dismissed on the ground of constructive *res judicata*.

Appellant had filed the writ petition before the learned Single Judge with a prayer to cancel/rescind the deed of conveyance dated 6th of March, 2019 and also to recall the sale notice appended to the deed of conveyance. Case of the appellant in the writ petition is that the appellant had availed financial assistance from the bank and had committed default in making repayment, therefore, the account of the appellant was declared as NPA by the respondent bank. Further case of the appellant is that he had mortgaged the property comprising of one storey structure having the carpet area

of 4682 sq.ft. Thereafter, the appellant had constructed three more floors thereon and in the proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'SARFAESI Act, 2002) the property in question was sold disclosing only the structure on the ground floor and the sale certificate was also issued in respect of the land with ground floor construction but while executing the conveyance deed dated 6th of march, 2019, the sale certificate was manipulated and the sale deed was executed in respect of G+3 storeyed building which was never mortgaged.

Learned Single Judge has dismissed the petition on the ground that appellant had filed I.A. No. 1512 of 2019 in S.A. No. 243 of 2018 before the Debts Recovery Tribunal (DRT) for the same relief, which was dismissed, therefore, on the basis of the constructive *res judicata*, such an issue cannot be allowed to be raised in the petition.

Submission of learned counsel for the appellant is that I.A. No. 1512 of 2019 was not decided by DRT on merit, therefore, principles of *res judicata* or constructive *res judicata* will not be attracted. He further submits that in the order under Section 14 of the SARFAESI Act, 2002, in the sale notice and even in the sale certificate, what was sold was 4682 sq. ft. of land with single storeyed structure, therefore, sale deed for 18828 sq. ft. with G+3

structure could not be executed by manipulating the sale certificate.

Learned counsel for the respondent bank has opposed the petition by submitting that the learned Single Judge has rightly attracted the principles of *res judicata* and that the prayer made in the writ petition for cancellation of sale deed cannot be granted in exercise of writ jurisdiction and that the appellant had deposited the title deed and after valuation of the entire structure, it was sold.

Having heard the learned counsel for the parties and on perusal of the record, it is noticed that the learned Single Judge had dismissed the petition only on the ground of constructive *res judicata* without entering into the merits of the matter.

The record further reflects that the tenant of the premises had filed S.A. No. 243 of 2018 before the Debts Recovery Tribunal-3, Kolkata with a prayer to direct the bank not to disturb peaceful enjoyment of tenancy and to stay further SARFAESI proceedings. In the Second Appeal, appellant had filed interlocutory application being I.A. No. 1512 of 2019 with a prayer to cancel/quash/rescind the sale deed dated 25th of September, 2018 on the ground that the sale deed was registered on the basis of manipulated/interpolated sale certificate. Same plea which has been raised in the present writ petition was raised in the I.A. but the said

I.A. has not been decided by the DRT on merit. A perusal of the judgment dated 24th of February, 2021 passed by the DRT-III, Kolkata in S.A. 243 of 2018 reveals that the Tribunal had examined the claim of the tenant on merit and had found that *bona fide* of the tenant was highly doubtful and accordingly, had dismissed the S.A. and in one line, without entering into the merits of the pending I.A.s, had dismissed the I.A.s by observing as under:

“12. In the light of the ratio of the judgment delivered by the Hon’ble Apex Court, instant S.A. is dismissed along with pending I.A.s, if so any. No costs.”

Thus, even the I.A. No. of the appellant was not taken note of nor the plea raised by the appellant in I.A. No. 1512 of 2019 has been noted, considered or adjudicated by the Tribunal, hence, the principle of *res judicata* will not be attracted in the present case.

Hon’ble Supreme Court in the matter of **Erach Boman Khavar vs. Tukaram Shridhar Bhat and Another** reported in **(2013) 15 SCC 655**, after taking note of the earlier judgments on the point, has held as under:

“**39.** From the aforesaid authorities it is clear as crystal that to attract the doctrine of *res judicata* it must be manifest that there has been a conscious adjudication of an issue. A plea of *res judicata* cannot be taken aid of unless there is an expression of an opinion on the merits. It is well settled in law that principle of *res judicata* is applicable between the two stages of the same litigation but the question or issue involved must have been decided at earlier stage of the same litigation.”

Hence, we are unable to uphold the order of the learned Single Judge, whereby, writ petition has been dismissed on the ground of constructive *res judicata*. So far as the other issues raised before this Court on the merits of the controversy are concerned, we are of the opinion that the same are required to be examined by the learned Single Judge at the first instance so that there may not be any loss of forum to the parties.

Thus, we allow the appeal and set aside the order of the learned Single Judge and restore the matter back before the learned Single Judge for adjudication of the petition on merit, in accordance with law.

[Prakash Shrivastava, C.J.]

[Rajarshi Bharadwaj, J.]