

November 9, 2022
AD 15
Court No.1
SG

MAT 1050 of 2022
with
CAN 1 of 2022

Masrur Alam

vs.

The State of West Bengal and others

Mr. Swarup Banerjee,
Md. Salman,
Mr. Sajal Kumar Ghosh, Advocates
... for the appellant

Ms. Sima Adhikari,
Ms. Kakali Naskar, Advocates
... for the State

Mr. Ayanabha Raha,
Mr. Onkar Ganguly, Advocates
... for Canara Bank

This appeal is at the instance of the writ petitioner challenging the order of learned Single Judge dated 29.06.2022 whereby WPA 10600 of 2022 has been disposed of with certain observations.

The appellant had approached the writ Court with the plea that he had obtained the loan facility from the respondent bank and there was a default in payment of the amount, therefore the account of the appellant was declared NPA on 13.12.2018 and OTS attempt was made but in default the bank had initiated proceedings under SARFAESI Act.

The plea taken by the appellant in the writ petition was that the appellant had mortgaged the property at 24/1A, Chandra Nath Roy Road, Kolkata 700039. Further case of the appellant was that though the bank had sold the different property at 24/1, Chandra Nath

Roy Road but the sale certificate was issued and the sale deed was executed in respect of mortgaged property situated at 24/1A, Chandra Nath Roy Road. Further case of the appellant is that the possession of the appellant's property being 24/1A, Chandra Nath Roy Road was taken illegally on 21.02.2020 in pursuance to the order of the District Magistrate.

According to the appellant, the action of the bank was fraudulent, therefore the complaint was made to the police authorities and when no action was taken by them, the writ petition was filed.

Learned Single Judge after examining the matter has reached to the conclusion that the appellant had not challenged the sale of the property at 24/1A, Chandra Nath Roy Road, PS Tiljala, Kolkata 700 039 before any forum and the possession was taken by the District Magistrate upon proper publication with regard to the premises 24/1A, Chandra Nath Roy Road, PS Tiljala, Kolkata 700 039. Learned Single Judge also found that the issue raised by the appellant cannot be decided by the police authorities and the issue can neither be investigated by the writ Court nor the police authorities. In the aforesaid background, learned Single Judge has dismissed the writ petition.

Submission of learned counsel for the appellant is that the bank has sold the property being 24/1, Chandra Nath Roy Road, PS Tiljala, Kolkata 700 039 which is not

the property of the appellant and no auction sale notice of the property at 24/1A, Chandra Nath Roy Road, PS Tiljala, Kolkata 700 039 has been issued. The bank authorities have committed offence for which the police complaint was made but no action has been taken. He has further submitted that the sale deed and the sale certificate for property at 24/1A Chandra Nath Roy Road are required to be set aside.

Learned counsel appearing for the bank has opposed the petition and has submitted that the appellant has already approached the DRT by filing SA which is pending and the DRT has jurisdiction to go into the issue, therefore learned Single Judge has not committed any error. He has further submitted that if there is any deficiency in the pleadings in the pending SA, the same can be cured.

Learned counsel for the State has also opposed the submission of learned counsel for the appellant.

We have heard learned counsel for the parties and perused the record.

During the course of hearing learned counsel for the appellant has referred to the auction sale notice annexure P-6 and the sale confirmation communication dated 28.08.2018 which do not show that the property which was sold by the bank was 24/1A, Chandra Nath Roy Road, PS Tiljala, Kolkata 700 039. He has also referred to the sale deed dated 23.07.2019 by submitting

that the sale deed has been executed for 24/1A, Chandra Nath Roy Road, PS Tiljala, Kolkata 700 039 which was not the sold property. This issue which the appellant is raising requires factual inquiry to ascertain as to which property was sold.

The record reflects that the appellant has already filed SA 323 of 2019 before the DRT-3 at Calcutta and prayer C in that issue is to “set aside the impugned sale of premises No. 24/1/A, Chandra Nath Roy Road, PS Tiljala, Kolkata 700 039.” This is the same property for which the present dispute has been raised. Since the appellant has already approached DRT with the prayer in this regard and the issue is pending in SA 323 of 2019, therefore the appellant should pursue his remedy before DRT. If there is any deficiency in the pleadings in SA 323 of 2019 then the appellant has remedy to file an application and amend the SA so that the challenge to the sale of the premises No. 24/1A, Chandra Nath Roy Road, PS Tiljala, Kolkata 700 039 is not defeated on any technical ground.

The law in regard to scope of interference in SARFAESI matter by the High Court in exercise of the jurisdiction under Article 226 of the Constitution is well settled. Hon’ble Supreme Court in the matter of **United Bank of India vs. Satyawati Tondon and Others** reported in **(2010) 8 SCC 110** in this regard has held that:

“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.”

It has further been held that:

“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.”

In the matter of **Authorized Officer, State Bank of Travancore and Another vs. Mathew K.C.** reported in **(2018) 3 SCC 85**, it has been held that:

“**3.** The Sarfaesi Act is a complete code by itself, providing for expeditious recovery of dues arising out of loans granted by financial institutions, the remedy of appeal by the aggrieved under Section 17 before the Debts Recovery Tribunal, followed by a right to appeal before the Appellate Tribunal under Section 18. The High Court ought not to have entertained the writ petition in view of the adequate alternate statutory remedies available to the respondent. The interim order was passed on the very first date, without an opportunity to the appellant to file a reply. Reliance was placed on *United Bank of India v. Satyawati Tondon and Sri Siddeshwara Coop. Bank Ltd. v. Ikbali*. The writ petition ought to have been dismissed at the threshold on the ground of maintainability. The Division Bench erred in declining to interfere with the same.”

In a recent judgment dated **12th of January, 2022** in **Civil Appeal Nos. 257-259 of 2022** in the matter of **Phoenix ARC Private Limited vs. Vishwa Bharati Vidya Mandir and Ors.**, Hon’ble Supreme Court has held that:

“**13.2.** Applying the law laid down by this Court in *Mathew K.C. (supra)* to the facts on hand, we are of the opinion that filing of the writ petitions by the borrowers before the High Court Under Article 226 of the Constitution of India is an abuse of process of the court. The writ petitions have been filed against the proposed action to be taken Under Section 13(4).

As observed hereinabove, even assuming that the communication dated 13.8.2015 was a notice Under Section 13(4), in that case also, in view of the statutory, efficacious remedy available by way of appeal Under Section 17 of the SARFAESI Act, the High Court ought not to have entertained the writ petitions. Even the impugned orders passed by the High Court directing to maintain the status quo with respect to the possession of the secured properties on payment of Rs 1 crore only (in all Rs 3 crores) is absolutely unjustifiable. The dues are to the extent of approximately Rs 117 crores. The ad-interim relief has been continued since 2015 and the secured creditor is deprived of proceeding further with the action under the SARFAESI Act. Filing of the writ petition by the borrowers before the High Court is nothing but an abuse of process of court. It appears that the High Court has initially granted an ex-parte ad-interim order mechanically and without assigning any reasons. The High Court ought to have appreciated that by passing such an interim order, the rights of the secured creditor to recover the amount due and payable have been seriously prejudiced. The secured creditor and/or its assignor have a right to recover the amount due and payable to it from the borrowers. The stay granted by the High Court would have serious adverse impact on the financial health of the secured creditor/assignor. Therefore, the High Court should have been extremely careful and circumspect in exercising its discretion while granting stay in such matters. In these circumstances, the proceedings before the High Court deserve to be dismissed.”

Hence, the issue relating to sale of the premises No. 24/1/A, Chandra Nath Roy Road, PS Tiljala, Kolkata 700 039 need not be gone into by this Court in exercise of writ jurisdiction, therefore any observations made by learned Single Judge on merit in this regard are set aside.

So far as the grievance of the petitioner that in spite of making a complaint to the police authorities, no action has been taken by them, we are of the opinion that for such inaction the petitioner should avail the remedy under Cr.P.C.

Hon'ble Supreme Court in the matter of **Sakiri Vasu vs. State of Uttar Pradesh and Others** reported in **(2008) 2 SCC 409** has settled that under Section 156(3) of the Cr.P.C., the Magistrate has very wide powers to direct registration of FIR and to ensure proper investigation. In this regard, it has been held that:

“27. As we have already observed above, the Magistrate has very wide powers to direct registration of an FIR and to ensure a proper investigation and for this purpose he can monitor the investigation to ensure that the investigation is done properly (though he cannot investigate himself). The High Court should discourage the practice of filing a writ petition or petition under Section 482 CrPC simply because a person has a grievance that his FIR has not been registered by the police, or after being registered, proper investigation has not been done by the police. For this grievance, the remedy lies under Sections 36 and 154(3) before the police officers concerned, and if that is of no avail, under Section

156(3) CrPC before the Magistrate or by filing a criminal complaint under Section 200 CrPC and not by filing a writ petition or a petition under Section 482 CrPC.”

In view of the aforesaid, we are of the opinion that the petitioner should take recourse to the provisions under Cr.P.C. in case of inaction by the police authorities.

It is relevant to mention here that the reliefs claimed in the writ petition by the appellant are mainly confined to the inaction of the police authorities for which the petitioner has appropriate remedy under the provisions of Cr.P.C.

At this stage learned counsel for the appellant has submitted that the DRT should decide the pending application expeditiously. Hence, we direct that the DRT to decide the pending application expeditiously without granting any unnecessary adjournment.

Accordingly, the appeal is disposed of.

[Prakash Shrivastava, C.J.]

[Rajarshi Bharadwaj, J.]