IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(Appellate Side)

Reserved on: 08.09.2022
Pronounced on: 13.09.2022

MAT 1075 of 2022
With
CAN 1 of 2022

Sri Gour Gopal Das

...Appellant

-Vs-

The State of West Bengal and Others

...Respondents

Present:-

Mr. Biswaroop Bhattacharya,
Mr. Subhankar Chakraborty,
Mr. Saptarshi Bhattacharjee, Advocates
… for the appellant

Mr. S. Pal Chodhuri,
Ms. Diya Nandi, Advocates
… for the SBI

Mr. Amitesh Banerjee, Sr. Advocate
Ms. Ipsita Banerjee, Advocate
… for the State

Mr. Dwaipayan Basu Mallick,
Mr. Sabyasachi Chanda, Advocates
… for the respondent No. 10

Mr. Ovik Sentupta, Advocate
… for the respondent No. 11

Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA, CHIEF JUSTICE

THE HON'BLE JUSTICE RAJARSHI BHARADWAJ, JUDGE

Prakash Shrivastava, CJ:

1. By this intra-court appeal, the writ petitioner has challenged the order dated 11.07.2022 by which learned Single Judge has dismissed WPA 12010 of 2022.

2. The writ petition was filed by the appellant challenging the action under SARFAESI Act and seeking a direction to the official respondent to take immediate compliance of the communication dated 28th of June, 2022. The plea raised in the writ petition was that the respondent No. 10 namely Smt. Indira Chatterjee was the original owner of the land who had entered into a development agreement dated 5th of March, 2000 with the respondent No. 8 namely Prodyot Roy and after completion of construction of three storied building on the land in question, appellant had purchased the subject property in the year 2005 by the conveyance deed executed by the respondent Nos. 8 and 10. According to the appellant, he had not obtained any loan or financial facility from the respondent No. 4, State Bank of India, but on 14.08.2019 suddenly notice for possession was affixed on the subject property by the State Bank of India. Hence, the appellant had immediately lodged the complaint and thereafter the writ petition was filed.

3. Learned Single Judge has noted that the appellant has been served with the notice dated 14th of August, 2021 issued by the SBI and that the appellant has remedy under the SARFAESI Act. It has been noted that the primary relief in the petition is for a restraint on all the respondents from taking any action under the garb of the SARFAESI Act and the prevalent Rules. It has been found by the learned Single Judge that the appellant has remedy under Section 17 of the SARFAESI Act which provides a comprehensive and effective remedy even where disputed question of facts are involved. Learned Single Judge has further found that the appellant could not establish that the issue raised in the writ petition could not be set aside by the DRT or in the pending

suit. Hence, learned Single Judge has reach to the conclusion that the remedy of exercising jurisdiction under Article 226 of the Constitution is not appropriate.

4. Submission of the learned Counsel for the appellant is that the property purchased by him was never mortgaged with the SBI and that the signature of the respondent No. 10 was fraudulently taken in the conveyance deed on which the bank is relying upon and it is a case of fraud.

5. As against this, submission of learned Counsel for the respondent bank is that the property was purchased by one Gopal Chandra Maity who had mortgaged it with the bank, therefore, the action under the SARFAESI Act has been initiated, hence learned Single Judge has rightly relegated the appellant to the DRT.

6. We have heard the learned Counsel for the parties and perused the record.

7. On the one hand, the appellant is contending that the property in question was purchased by him from the respondent Nos. 8 and 10 and it was never mortgaged with the respondent State Bank of India, but on the other hand, the plea of the respondent State Bank of India is that the subject property was purchased by one Gopal Chandra Maity by a registered deed and to him the housing loan was sanctioned by the respondent SBI on 12.12.2006 after necessary inspection and the borrower had executed several security documents on 12.12.2006. Further plea of the Bank is that equitable mortgage in respect of the subject property was created and on default the proceedings under SARFAESI Act were initiated and symbolic possession of the property was taken on 05.08.2021, thereafter application under Section 14 of the

Act was allowed by the District Magistrate on 23.03.2022 and the physical possession was taken and the property is sold to the highest bidder and certificate of sale has been issued.

8. The aforesaid rival contentions of both the parties reveal that there is a factual dispute in respect of the title of the property. Such a dispute cannot be decided in exercise of the writ jurisdiction under Article 226 of the Constitution or writ appellate jurisdiction. Since, in substance, the appellant is challenging the action taken under the SARFAESI Act, therefore, proper remedy available to the appellant is to approach the DRT under Section 17 of the SARFAESI Act. Hon'ble Supreme Court in the matter of **General Manager, Sri Siddeshwara Cooperative Bank Limited and Another vs. Ikbal and Others** reported in **(2013) 10 SCC 83** has held that:

> "**26.** In *Satyawati Tondon* the Court was concerned with an argument of alternative remedy provided under Section 17 of the SARFAESI Act. Dealing with this argument, the Court had observed that where an effective remedy was available to the aggrieved person, the High Court must insist that before availing the remedy under Article 226 the alternative remedies available to him under the relevant statute are exhausted. In Paras 43, 44 and 45 of the Report, the Court stated as follows: (SCC p. 123)
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> > "*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.

44. 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.

45. 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."

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."

9. In a recent judgment in the matter of **Phoenix Arc Private Limited vs. Vishwa Bharati Vidya Mandir and Others** reported in **(2022) 5 SCC 345**, Hon'ble Supreme Court has held that:

"**21.** Applying the law laid down by this Court in *Mathew K.C.* 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."

10. Learned Counsel for the appellant has placed reliance upon the Division Bench judgment of this Court in the matter of **Debasree Das vs. State of West Bengal and Others** reported in **2010 SCC OnLine Cal 2357**, but in that case the factual dispute of the nature which exists in the present case was not existing.

11. It is also worth noting that title suit at the instance of the appellant is also pending, wherein, the appellant has remedy of leading evidence and to establish his claim.

12. In the aforesaid circumstances of the case, we are of the opinion that learned Single Judge has not committed any error in

refusing to entertain the writ petition. Thus, we find no reason to interfere in the order of the learned Single Judge. The appeal is accordingly dismissed.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(RAJARSHI BHARADWAJ)
JUDGE

Kolkata
13.09.2022

PA(SS)

(A.F.R. / N.A.F.R.)