

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APO/92/2021
WPO/89/2021
IA NO: GA/1/2021
MOHAN MOTOR BUSINESS PVT. LTD. AND ANR.
VERSUS
ICICI BANK LIMITED AND ANR.

AND

APO/93/2021
WPO/91/2021
IA NO: GA/1/2021
METRO NIKETAN PVT. LTD. AND ANR.
VERSUS
ICICI BANK LIMITED AND ORS.

BEFORE:

HON'BLE CHIEF JUSTICE PRAKASH SHRIVASTAVA
HON'BLE JUSTICE RAJARSHI BHARADWAJ

Date: 18th November 2022.

APPEARANCE:

Mr. Rajarshi Dutta, Advocate
Mr. Sarbajit Mukherjee, Advocate
Mr. Sayantan Bose, Advocate
Ms. Madhurima Das, Advocate
... for appellants

Mr. Avishek Guha, Advocate
Ms. Akansha Chopra, Advocate
... for respondent bank.

The Court:- These intra-court appeals are at the instance of the writ petitioners challenging the order of the Learned Single Judge dated 27.04.2021 whereby WPO/89/2021 and WPO/91/2021 were dismissed with costs.

The appellants-borrowers had committed default in repayment, hence, proceedings under the provisions of SARFAESI Act were initiated. Being aggrieved with the classification of the account as NPA and issuance of notice under Section 13(2) of the SARFAESI Act, the appellants had approached the Writ Court.

By the impugned order, though the Writ Court had reached to the conclusion that an ipso facto challenge to the genesis of the bank's action before the Writ Court by itself is not a justification of maintainability of the writ petition after measures have already been taken under the SARFAESI Act, but thereafter, Learned Writ Court has examined two questions, firstly whether the bank had authority to classify the account in question as NPA at the relevant juncture and secondly, whether the petitioners were entitled to the benefit as contemplated in Clause 17.2.2 of the Prudential Norms of 2015.

Undisputedly, subsequently, the proceedings against the appellants under Section 13(4) of the SARFAESI Act have also been taken up. Against the proceedings under the SARFAESI Act, the appellants have remedy of approaching the DRT. Learned counsel for the respondent bank has handed over a bunch of judgements, which clearly lay down that against the action under the SARFAESI Act, the writ normally should not be maintained.

In the matter of *United Bank of India v. Satyawati Tondon* : (2010) 8 SCC 110, Hon'ble Supreme Court took the view that:-

“42. There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued under Section 13 (4) or action taken under Section 14, then she could have availed remedy by filing an application under section 17(1). The expression “any person” used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

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

challenge to the action taken for recovery of the public dues, etc. In 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 High Court is bound to keep in view while exercising power under article 226 of the Constitution.”*

In the subsequent judgment, in the matter of *Authorised Officer, State Bank of Travancore And Another v. Mathew K.C.* : (2018) 3 SCC 85 the earlier judgments on the point were noted and it was held that:-

“14. A similar view was taken in Punjab National Bank v. Imperial Gift House, observing : (SCC p. 622, paras 3-4)

“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 department, 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 taxpayer's 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 Tondon, has also not been kept in mind before passing the impugned interim order : (SCC pp. 123-24, para 46)

“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.”

16. The writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum. The opinion of the Division Bench that the counter-affidavit having subsequently been filed, stay/modification could be sought of the interim order cannot be considered sufficient justification to have declined interference.

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.”

18. The impugned orders are therefore contrary to the law laid down by this Court under Article 141 of the Constitution and unsustainable. They are therefore set aside and the appeal is allowed.”

In the above case, in the matter of Authorised Officer, State Bank of Travancore (supra), in paragraph 15, Hon'ble Supreme Court has taken the view that 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.

In the judgment in the matter of ICICI Bank Limited And Others v. Umakanta Mohapatra And Others : (2019) 3 SCC 497, a writ petition against an action under the SARFAESI Act has been held to be not maintainable.

In view of the above settled legal position, we find substance in the objection of maintainability of the petition and we are of the view that the proper remedy available to the appellants is to approach the DRT under Section 17 of the SARFAESI Act against the action of the respondent bank. At this stage, an issue has been raised about the expiry of limitation in approaching the DRT in filing an application under Section 17 of the SARFAESI Act. It has been pointed out by learned counsel for the respondent bank that each action under Section 13 of the Act gives a fresh cause of action to the appellants to approach the DRT. That apart, the appellants were bona fide prosecuting the writ petition, therefore, they have the option to claim the benefit of Section 14 of the Limitation Act. Counsel for the appellants has also brought to the notice of this Court that additional limitation will be available in view of the order of the Hon'ble Supreme Court dated 10th January 2022 in Suo Moto Writ Petition No.3 of 2020.

In view of the above, we dispose of the present appeals permitting the appellants to approach the DRT for redressal of their grievance. We make it clear that any observation made by the Learned Single Judge in the

order under challenge will not affect the case of the appellants on merit before the Tribunal. In the circumstances of the case, we are unable to sustain the imposition of costs of Rs.50,000/- by Learned Single Judge, which is accordingly set aside.

Appeal is accordingly disposed of.

[PRAKASH SHRIVASTAVA, C.J.]

[RAJARSHI BHARADWAJ, J.]

s.kumar / sm