**Item No.2**

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA**

**CIVIL APPELLATE JURISDICTION**

**APPELLATE SIDE**

HEARD ON: 20.04.2023

DELIVERED ON: 20.04.2023

**CORAM:**
**THE HON'BLE ACTING CHIEF JUSTICE T. S. SIVAGNANAM**
**AND**
**THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA**

**MAT 433 OF 2023**
**With**
**I.A. No. CAN 1 of 2023**

**Hari Pada Saha & Ors.**
**Vs.**
**The State of West Bengal & Ors.**

**Appearance:-**

**Mr. Ajay Debnath**
**Mr. Sujit Saha**
**Mr. Devranjan Das**
**Ms. Swagata Datta** ...... **for the appellants**

**Mr. Rupak Ghosh**
**Mr. Prantik Gorai** ......**for the State**

**Mr. Siddhartha Banerjee**
**Ms. Soni Ojha** .......**for the respondent no. 3**

**Mr. Kumarjyoti Tewari** ........**for the Union of India**

***JUDGMENT***

***(Judgment of the Court was delivered by* T.S. SIVAGNANAM*, ACJ.)***

1. This intra-Court appeal is directed against the order dated 23rd February, 2023 in W.P.A. 4264 of 2023. The appellants, who had borrowed loan from the 3rd respondent/finance company came before the Writ Court with a prayer that the Debts Recovery Tribunal does not have regular sitting, more particularly, D.R.T. – III and interim protection has to be granted to the appellants as the 3rd respondent has taken possession of the property, which was mortgaged and an e-auction notice has been issued.

2. The learned Writ Court dismissed the writ petition by the impugned order. When the appeal was entertained by order dated 16th March, 2023, the Division Bench restrained the 3rd respondent/finance company from confirming the auction sale already held till 12th April, 2023.

3. The learned advocate appearing for the appellants had mentioned this matter before this Court on 19th April, 2023 submitting that the order of stay had expired on 12th April, 2023 and the 3rd respondent will proceed to confirm the auction sale.

4. The learned advocate appearing for the 3rd respondent/ finance company would submit that as on date, D.R.T. – I is taking up all applications, which have been assigned to D.R.T. – III and all that the appellants should have done is to file

a put up petition before the Tribunal for the matter to be taken up. Since the cases assigned to D.R.T. – III are taken up by the D.R.T. – I and the appellants have taken no steps to bring up the matter before the Tribunal, thus, we need to consider as to what relief the appellants would be entitled to.

5. At the outset, we need to point out that a writ petition at the instance of a borrower from a private finance company is not maintainable. We are guided by the recent decision of the Hon’ble Supreme Court in ***M/s. South Indian Bank Ltd. & Ors. vs. Naveen Mathew Philip & Anr. etc. etc. (SLP [Civil] Nos. 22021-22022 of 2022)*** dated 17$^{th}$ April, 2023 . In the said decision, the bank was a private party and the question was whether a writ petition could have been entertained by the High Court. The Hon’ble Supreme Court held that a writ of mandamus is a prerogative writ and in the absence of any legal right, the Court cannot exercise the said power and more circumspection is required in a financial transaction, particularly when one of the parties would not come within the purview of Article 12 of the Constitution of India. Further, it was held that when a statute prescribes a particular mode, an attempt to circumvent shall not be encouraged by a writ court and a litigant cannot avoid the non-compliance of

approaching the Tribunal, which requires the prescription of fees and use the Constitutional remedy as an alternative. In this regard reference was made to the decision of the Hon'ble Supreme Court in ***Radha Krishan Industries v. State of H.P., (2021) 6 SCC 771.***

6. Further, the Hon'ble Supreme Court also reiterated the decision of law regarding the interference of the High Courts in matters pertaining to SARFAESI Act and referred to several decisions in this regard and the latest being in the case of ***Varimadugu Obi Reddy v. B. Sreenivasulu, (2023) 2 SCC 168.***

7. Further, the Hon'ble Supreme Court pointed out that the power conferred under Article 226 of the Constitution of India are rather wide but are required to be exercised only in extraordinary circumstances in matters pertaining to proceedings and adjudicatory scheme qua a statute, more so in commercial matters involving a lender and a borrower, when the legislature has provided for a specific mechanism for appropriate redressal.

8. Bearing in mind the above legal principles in mind, if we examine the facts of the case, the appellants had already approached the Tribunal and filed an application in S.A. 265 of 2021 challenging the measures initiated by the 3rd respondent/finance company under the provisions of the

SARFAESI Act. The grievance of the appellants is that the interlocutory applications filed by the appellants for stay of the e-auction and for grant of an order of injunction against the 3rd respondent to give effect to the e-auction notice dated 24th February, 2023 is pending and the applications have not been taken up for consideration.

9. We are informed by the learned advocate appearing for the 3rd respondent that if prayer was made before D.R.T. – I, the applications would have been listed but the appellants had not taken diligent steps in this regard. Considering the fact that D.R.T. – III is vacant as on date and D.R.T. - II is also vacant and the matters are being dealt with by D.R.T. – I, we are of the view that though a writ petition is not maintainable especially when the appellants have already invoked the remedy available under the SARFAESI Act and the application for interim relief is still pending before the D.R.T, we are inclined to issue a direction in this regard.

10. Accordingly, the appeal stands disposed of alongwith the connected application by requesting the D.R.T. – I to take up for consideration I.A. No.583 of 2023 and I.A. No.566 of 2023 in S.A. No.265 of 2021 at an early date, preferably before 12th May, 2023. Till then, the interim order, which was granted by

the Hon'ble Division Bench dated 16th March, 2023 shall continue.

11. There shall be no order as to costs.

12. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

**( T.S. SIVAGNANAM)**
**Acting Chief Justice**

I agree,

**(HIRANMAY BHATTACHARYYA, J.)**

PALLAB/KS(AR.C)