AD-12
Ct No.09
14.08.2023
TN

WPA No. 10529 of 2022
IA No: CAN 1 of 2023

KK Importers Private Limited and others
Vs.
Debts Recovery Tribunal-III, Kolkata and others

Mr. Sakya Sen,
Mr. Arindam Chandra,
Mr. Atish Ghosh,
Ms. Antara Dey
.... for the petitioners

Ms. Amrita Panja Moulick
.... for the respondent nos. 3 & 4

Mr. Jayanta Sengupta,
Ms. Shebatee Datta
.... for the applicant/ respondent no. 5

On consent of parties, the writ petition itself is taken up for hearing, along with the application for vacating the interim order passed herein, since the adjudication on the vacating application would virtually involve taking up the writ petition itself on merits.

The writ petition was preferred at a juncture when the regular Presiding Officer was absent in the concerned Debts Recovery Tribunal, that is, the Debts Recovery Tribunal, 3rd Bench, and was entertained on such score.

Vide order dated June 27, 2022, the learned Single Judge taking up the matter had observed that since the matter was fixed before the DRT-III on the same day, that is, on June 27, 2022 and the writ petition had not been considered on merits, the respondents shall take leave of the court before initiating any action against the petitioners. The writ petition was directed to be listed after three weeks. In the event the interim application or any other proceeding is decided by the DRT-III, parties were given liberty to mention the matter before this court.

Learned counsel for the parties point out that on the said date, that is, on June 27, 2022, the matter was taken up for hearing and ultimately on July 12, 2022, the IA of the writ petitioners, filed against the order passed by the concerned District Magistrate under Section 14 of the SARFAESI Act, 2002, was decided by the DRT-III. The said order dated July 12, 2022 has been annexed by the parties respectively to their vacating application and supplementary affidavit.

It transpires from the said order that the Tribunal took into consideration the order dated June 27, 2022 passed by the coordinate Bench in the connected writ petition.

Thereafter, the Tribunal proceeded to decide on the petitioners' application, ultimately coming to the conclusion that the Tribunal did not find *prima facie* any defect in the order of the District Magistrate. It is seen from the said order that the Tribunal elaborately considered several aspects of the matter, including the fact that the District Magistrate had passed a reasoned and speaking order which reflected his consideration and satisfaction on the affidavit declaring nine clauses as laid down in Section 14(1)(b) of the SARFAESI Act, 2002.

However, it is contended by the writ petitioners that the District Magistrate did not consider the most important facet of the challenge taken out by the petitioners, to the effect that patent fraud had been practised on the District Magistrate insofar as the affidavit filed before the Magistrate did not disclose that the property was fully tenanted, which is evident from the notice of possession as well as the demand notice issued in the present case against the petitioners/borrowers by the financial institution.

In the absence of such consideration, it is submitted that the adjudication dated July 12, 2022 is palpably vitiated.

As such, the petitioners have taken out an application for recall of the said order, primarily on the ground that the facet of the allegations regarding fraud was not considered by the Tribunal at all.

Learned counsel appearing for the respondent-financial institution/applicant in the vacating application contends that the writ petitioners sat tight over the recall application for over a year without moving the same. As such, it is clearly seen that the attempt of the writ petitioners is to stall the proceeding and is not *bona fide*. It is submitted that in the absence of an independent challenge against the order dated July 12, 2022 before the appropriate forum designated in law, that is, the Debts Recovery Appellate Tribunal, this court ought not, within the limited scope of the writ petition, to entertain the dispute raised regarding the said order.

That apart, learned counsel for the respondent-financial institution argues that the writ petition is not maintainable as of today. It is argued that the same was entertained simply because the DRT-III was not functioning regularly at the relevant juncture. However, as of today, it is evident that the said Tribunal is fully functional, which is also exemplified by the order dated July 12, 2022 passed by the said forum. As such, the writ petition ought to be dismissed on the ground of maintainability alone, if not on other grounds. Learned counsel for the respondent-financial institution places reliance on the judgment of *Phoenix ARC Private Limited vs. Vishwa Bharati Vidya Mandir and others*, reported at *(2022) 5 SCC 345* and argues that a writ petition against a private party is, under normal circumstances, not maintainable. It is only maintainable when a public function/public duty is carried out by the authority.

However, it was also held by the Supreme Court, it is contended, that if proceedings are initiated under the SARFAESI Act and/or any proposed action is to be taken and the borrower is aggrieved by any of the actions of the private bank/bank/ARC, the borrower has to avail the remedy under the SARFAESI Act and no writ petition would lie and/or is maintainable and/or entertainable under Article 226 of the Constitution of India.

Heard learned counsel for the parties.

The peculiar predicament in the present case is that the respondent-financial institution argues that the writ petition is not maintainable at the present juncture due to availability of the DRT-III, although it might have been justified for the court to entertain the same at the relevant point of time, when the DRT-III was not functioning regularly. However, the said objection has to be taken with a pinch of salt.

Even on June 27, 2022, when the writ petition was moved for the first time, it is evident that the DRT-III was functioning, *albeit* to a limited extent, since the order itself recorded that the matter was fixed before the DRT-III on the said date. In fact, the application of the writ petitioners was duly heard by the DRT-III and an order passed therein on July 12, 2022, contemporaneously with the writ petition being entertained.

Having not taken the point of maintainability and the same being not kept open at that juncture, the respondents have fully participated in the present writ petition and cannot now resile and take an objection regarding the maintainability of the same. Such an exercise, if given premium to, would permit the litigants to take opportunities and liberties before the court, *de hors* the law.

Thus, the point of maintainability, taken at this belated juncture, is turned down.

Learned counsel appearing for the respondent no. 5, at this juncture, rightly points out that the said respondent was not represented on June 27, 2022 when the order-in-question was passed and, as such, there was no scope of taking any objection as to maintainability of the writ petition.

However, it is recorded in the said order that the affidavit-of-service filed on that date was kept on record, indicating and implying that due service has been effected on all the respondents. Thus, the respondent no. 5 chose to lose its opportunity to challenge the maintainability of the writ petition at the earliest possible opportunity.

Moreover, no subsequent complaint has been raised by the respondent no. 5 to the effect that no copy of the writ petition was served on the said respondent.

In fact, the respondent no. 5 waited for quite a long time to file the application for modification, not taking the point of maintainability specifically at any point of time.

Since the order-in-question was passed by the coordinate Bench on June 27, 2022, it cannot be said that the respondent no. 5 had no opportunity thereafter, to challenge the maintainability of the writ petition. Rather, the said respondent has submitted to the jurisdiction of the court by taking out an application for vacating the interim order passed therein.

Such belated challenge to the maintainability, as such, cannot be entertained.

That apart, the point of maintainability loses relevance on another aspect of the matter as well. It is well-settled that fraud vitiates all and can be set up as a ground of challenge before all forums.

The writ petitioners clearly canvassed the point of fraud, insofar as the demand notice as well as the notice of possession issued by the respondent no. 5 clearly mentioned the property being fully tenanted, which was clearly suppressed in the affidavit filed by the District Magistrate. Nothing in the order of the District Magistrate, challenged in the writ petition, discloses any consideration of such fraud at all. The District Magistrate's order does not indicate anything to show that it was pointed out to the District Magistrate that the property was fully tenanted, which would and should have prompted the District Magistrate to enter into at least a preliminary enquiry as to whether the tenancy was prior to the loan being taken.

In any event, since the Debts Recovery Tribunal, despite the said point having been taken by the writ petitioners, also did not advert to the issue of fraud at all, the exercise carried out by the Debts Recovery Tribunal by its order dated July 12, 2022 has rightly been challenged by way of a recall application by the writ petitioners.

However, for the sake of propriety, although the District Magistrate's order actually does not reflect any consideration on the property being fully tenanted, since the writ petitioners have chosen to take out a recall application before the Debts Recovery Tribunal, which is the designated forum in law to take into consideration such aspect as well, this court is not interfering in the present writ petition.

However, for all practical purposes, the recall application of the writ petitioners ought to be adjudicated first by the Debts Recovery Tribunal before allowing the possession of the property to be taken within the contemplation of Section 14 of the SARFAESI Act, 2002, pursuant to the order impugned in the present writ petition.

Accordingly, WPA No. 10529 of 2022 is disposed of by restraining the respondents from taking any coercive or other action in terms of the impugned order passed by the District Magistrate under Section 14 of the SARFAESI Act, 2002, prior to disposal of the recall application filed by the writ petitioners before the DRT-III for recall of the order dated July 12, 2022.

The Tribunal shall dispose of the said recall application in accordance with law upon hearing learned counsel for the parties, without being unduly influenced by any of the observations made herein on merits, by the end of September, 2023. Such time-limit is, however, peremptory and mandatory.

IA No: CAN 1 of 2023 is, accordingly, disposed of.

It is, however, made clear that the restraint order passed herein shall continue till the disposal of the recall application filed by the writ petitioners, as indicated above, and shall be subject to the final order passed on the said recall application by the Tribunal.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)