

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

**WPA No. 13979 of 2023
Shaun Automobiles Private Limited
Vs.
State Bank of India and others**

With

**WPA No. 13667 of 2023
Citystar Infrastructures Limited
Vs.
State Bank of India and others**

For the petitioner in WPA 13979 of 2023	:	Mr. Nimesh Mishra, Mr. Debjit Mukherjee, Ms. Arundhuti Barman Roy, Ms. Mayuri Ghosh, Mr. Tamaghna Saha
For the petitioner in WPA 13667 of 2023	:	Mr. Kishore Datta, Mr. Reetobroto Kumar Mitra, Mr. Rudrajit Sarkar, Mr. Debangshu Dinda
For the SBI in both the matters	:	Mr. Pankaj Kumar Mukherjee
For the respondent no.3 in both the matters	:	Mr. Debashis Karmakar, Mr. Arya Nandi, Mr. Satyam Ojha, Mr. Parikshit Lakhotia
For the intervenor	:	Mr. Sudipto Panda, Ms. Oindrila Ghosal

Hearing concluded on : 23.06.2023
Judgment on : 30.06.2023

Sabyasachi Bhattacharyya, J:-

1. M/s. Shaun Automobiles Private Limited (in short, “Shaun”) is the petitioner in WPA No.13979 of 2023 and Citystar Infrastructures Limited(in brief, “Citystar”)is the petitioner in WPA No.13667 of 2023.
2. The causes of action and subject-matter of dispute in the two writ petitions being identical, the disputes are taken up for hearing together.
3. Shaun had taken a loan from the State Bank of India (SBI). Being unable to repay the same, the SBI initiated proceedings before the Debts Recovery Tribunal (DRT). Pursuant to the award of the Tribunal, recovery proceedings were initiated by the Bank, in which Shaun entered a One-Time Settlement (OTS) which culminated in a compromise between the judgment debtor and the Bank. The terms of the compromise were enumerated in a communication dated December 17, 2013, made by the Bank to Shaun.
4. The said compromise petition has been annexed to a supplementary affidavit used on behalf of the Citystar, affirmed on June 20, 2023. As per the terms, Rs.10.40cr was to be paid in full and final settlement of the claim, which was payable in several tranches. Out the said four tranches, the first was quantified as Rs.0.05cr (since Rs.1.00cr had already been deposited). Upon such payment, which was to be made

immediately on acceptance of the offer, out of the total assets secured, one property situated at 25, Rakhal Das Auddy Road, Kolkata-27 was to be released.

5. Admittedly, Citystar paid the first tranche on behalf of the award debtor Shaun in due time and the property was accordingly released in favour of Citystar.
6. However, in the “other” terms and conditions of the settlement, it was specified that in case the compromise amount is not paid as per the above arrangement, all rights and remedies to the Bank prior to the Compromise Settlement will be available to the Bank again. This includes the right to collect from the Company and the guarantors the entire amount due, prior to the Compromise Settlement, together with interest thereon at applicable rate.
7. The dispute arose thereafter, when Shaun failed to repay the subsequent tranches of installment in terms of the settlement.
8. Upon such failure, the SBI moved the Tribunal by making an application, registered as IA No.218 of 2022 for modification of award passed by the Presiding Officer. Such application was, according to Citystar, filed during pendency of WPA 13979 of 2023, filed at the instance of Shaun. In the said proceeding, the Presiding Officer, *vide* order dated May 19, 2023, proceeded to conduct auction sale arising out of IA No.218 of 2022.
9. By the order dated May 19, 2023 passed in RC/IA/218 of 2022, the Recovery Officer passed an order directing half share of Shaun and Citystar in 25, Rakhal Das Auddy Road, Kolkata to be put on e-

auction sale for the recovery of certificate dues. Being thus aggrieved, Citystar has preferred WPA 13667 of 2023.

10. On the other hand, Shaun has also challenged the order dated May 19, 2023 and the consequent Sale Notice dated May 20, 2023 in WPA 13979 of 2023.
11. The primary argument made on behalf of Shaun is that the Recovery Officer acted without jurisdiction in reviewing its own order dated September, 14, 2015 passed in the attachment application being IA No.218 of 2022, against which no appeal was preferred by the SBI. Such *suo motu* review by the Recovery Officer is *de hors* his authority since the Recovery Officer is not the Tribunal or its Presiding Officer but merely a staff/officer of the Tribunal. That apart, there is error/mistake apparent on the face of record which can justify such review.
12. Although there is limited scope of review apropos Rule 87 of the Second Schedule of the Income Tax Act, 1961, which is not applicable to the present case. Even if so applicable, the scope of Rule 87 is not as wide as order 47 of the Code of Civil Procedure. Hence an appeal in the guise of review, that too by the Recovery Officer himself, is not permissible in law.
13. Learned counsel places reliance on the *State of West Bengal and others Vs. Confederation of State Government Employees, West Bengal and others*, reported at 2022 SCC OnLine Cal 2878, where a Division Bench of this Court held that while deciding a review of an order, the Court has a limited scope of correcting errors and/or mistakes

apparent on the face of the records and not otherwise. In the guise of review, the entire matter cannot be reopened.

14. The order dated November 14, 2022 and all subsequent orders, including that of May 19, 2023, it is contended next, were passed in violation of the principle of *Res Judicata* and the Recovery Officer lacks jurisdiction to reopen decided issues in the guise of review.
15. It is argued that the issues directly and substantially in issue in the previous attachment application, which were finally decided by the Recovery Officer *vide* order dated September 14, 2015, have been reopened by the impugned orders herein. In such context, Shaun places reliance on the judgment of *Srihari Hanumandas Totala vs. Hemant Vithal Kamat*, reported at (2021) 9 SCC 99.
16. Learned counsel for the petitioner in WPA 13979 of 2023 (Shaun) next contends that Section 5 of the Limitation Act does not apply to an appeal under Section 30 of the Recovery of Debts and Bankruptcy Act, 1993 (hereinafter referred to as, “the 1993 Act”). Upon the lapse of 30 days from the passing of the order dated September 14, 2015, the right of appeal of the SBI from the same stood extinguished and the order attained finality. Thus, the subsequent exercise of review/recall of the said order by the Recovery Officer in the absence of any such appeal is contrary to law.
17. In support of such proposition, learned counsel cites *International Assets Reconstruction Company of India Ltd. Vs. The Official Liquidator of Aldrich Pharmaceuticals Ltd. and others*, reported at (2017) 16 SCC 137.

18. Learned counsel further argues that the Recovery Officer had inherent lack of jurisdiction to enter the issues, going beyond the Recovery Certificate itself. Sections 26 and 27 of the 1993 Act are the only provisions under which the award/Recovery Certificate can be modified, that too by the Presiding Officer. Such exercise was undertaken by the Recovery Officer patently *de hors* the statute. By the impugned order, despite such point of law having been raised before the Recovery Officer, it was rejected in a cryptic manner and the Recovery Certificate was essentially amended by the Recovery Officer.
19. Alternative remedy would not be a bar to exercise of the jurisdiction of this Court under Article 226 of the Constitution, it is next argued, since there is a palpable illegality and a jurisdictional error, on which grounds this Court ought to exercise its jurisdiction. Reliance is placed on the judgment of the Supreme Court in *M/s. Godrej Sara Lee Limited Vs. The Excise and Taxation Officer-Cum-Assessing Authority and others*, reported at 2023 SCC OnLine SC 95.
20. As regards the contention of the Bank that Shaun has not challenged the order dated November 14, 2022, it is submitted that IA No.218/2022 is still pending. The order dated November 14, 2022 and all other orders including the impugned order dated May 19, 2023 passed in connection with the said proceeding are bad in law. It is argued that all the orders, including the order dated November 14, 2022, being nullity, since without jurisdiction and bad in law, ought

to be deemed to have merged into the impugned order dated May 19, 2023.

- 21.** The financial company, ASREC, has also contended that the writ petition is not maintainable since Citystar does not have licence under the Bengal Money Lenders Act, 1940 (hereinafter referred to as “the 1940 Act”) to grant the loan in the first place. Shaun contends that in special cases where it is observed that the action of a Court, Authority or Tribunal is without and/or in excess of jurisdiction, the writ court can entertain a petition despite there being an alternative remedy, more so, since the orders impugned are bad for lack of inherent jurisdiction. That apart, the 1940 Act does not create a bar in entertaining a writ application. The recent authority of *M/s. Godrej Sara Lee Limited (supra)* is also relied on.
- 22.** Insofar as the 1940 Act is concerned, it is argued by learned counsel for Shaun that the same debars the lender from instituting any suit for recovery of money without a licence but does not prevent a loan from being granted by any person having no licence, which principle is reiterated under Section 30 of the 1940 Act. In this context, learned counsel for Shaun places reliance on the judgment reported at 2010 SCC OnLine Cal 44 [*Ashvin & Co. Vs. Bajaj Tea House*].
- 23.** It is, thus, argued that ASREC is a non-suitor but was entertained by the Recovery Officer without jurisdiction. ASREC does not have a recoverable debt in the subject recovery case. The recovery proceeding initiated by ASREC is, in fact, pending adjudication before another Tribunal, that is, DRT-I, Kolkata where award is yet to be passed.

Hence, ASREC could not have been permitted by the Recovery Officer to intervene and make submissions at all, thereby having its rights adjudicated and property enforced despite its own proceeding still pending adjudication. Hence, it is submitted that the impugned orders be set aside.

- 24.** Citystar, the writ petitioner in WPA 13667 of 2023, alleges that it had advanced a secured loan in favour of the borrower/Shawn to pay the OTS amount by paying Rs. 1.05cr, the first tranche of the instalments, and the title deed was accordingly released by the SBI. To secure the Writ petitioner Citystar, half share in the land was mortgaged with the petitioner by deposit of two title deeds (one of which was released and the other was freehold). The said payment was duly accepted by the Bank. Thus, the Bank cannot now resile from such position by asking for a sale of such asset of the Citystar, having released the deed in favour of Citystar in pursuance of the OTS, since Citystar's obligation regarding the first tranche was fulfilled in full and final settlement.
- 25.** It is argued that by learned counsel that though the loan advanced by Citystar was in favour of the borrower-Company, the same was secured by the mortgagor as 1/4th undivided owner of the released property and by one J.P. Bagaria/mortgagor/respondent no.13 as 1/4th undivided owner of the freehold property.
- 26.** The application filed by the award holder against Shawn was for modification of the Compromise Certificate dated March 18, 2014 and for attachment of the property. The respondent-Bank had never preferred any appeal from the order dated September 14, 2015,

whereby the application for modification and attachment was dismissed by the Recovery Officer considering that, after release of the title deed of the concerned property, an equitable mortgage has been created in favour of Citystar and the original title deeds are also lying with it. Citystar had no notice of hearing and was not represented during hearing; however, the borrowers had canvassed the entire fact and had accordingly made submissions also to secure the interest of the Citystar. Notably, SBI has never preferred any appeal from the said order.

- 27.** After almost 7 years, the Bank again filed an application before the Recovery Officer seeking modification of the Certificate, knowing fully well that the Recovery Officer does not have the jurisdiction to do so. Immediately upon such application being moved on November 14, 2022, an order was passed by the Recovery Officer attaching the properties mortgaged with Citystar, without even putting Citystar on notice. Citystar was notified only after such order of attachment. Accordingly, Citystar filed an application before the Recovery Officer, *inter alia*, praying for allowing its intervention in the proceeding and vacation of order dated November 14, 2022, as well as cancellation of the warrant of attachment dated November 16, 2022 and setting aside of Sale Proclamation dated January 5, 2023.
- 28.** Such application was dismissed by the impugned order dated May 19, 2023. However, the Bank's application bearing IA No.218 of 2022 is still pending and various orders were passed therein, including the order dated November 14, 2022 and finally the order dated May 19,

2023, directing sale of the assets secured with Citystar. It is contended that the order of the Recovery Officer lacks inherent jurisdiction, since the Recovery Officer lost jurisdiction to reopen the same cause that had already been decided by the order dated September 14, 2015, being hit by the principle of *Res Judicata*.

- 29.** No appeal having been preferred by the Bank against such order, the limitation period has also expired and the observations made in the order dated September 14, 2015 have attained finality.
- 30.** The Bank has taken the plea that the writ petition was filed without exhausting the statutory remedy of appeal.
- 31.** However, it is argued that if an order is passed without jurisdiction, the writ court can interfere under Article 226 of the Constitution. The powers conferred on the Recovery Officer by the 1993 Act, in particular Section 2(k), read with Section 7 thereof, does not give the power of review of its own decision on merits. The power to recall, review or modify only lies with the Tribunal. The Recovery Officer's limited power is at best to review decisions as per the Second Schedule to the Income-Tax Act, 1961 and the Income-Tax (Certificate Proceedings) Rules, 1962 but is limited to mistakes of fact apparent on the face of the record. The same is not the case here.
- 32.** It is argued by Citystar that since IA No.218/2022 is still pending and the order of November 14, 2022 and other connected orders having been passed therein, those are also without jurisdiction as the previous orders have merged with the final order of sale.

- 33.** ASREC has relied on Union Bank of *India Vs. Satyawati Tondon and others*, reported at 2010 AIR 3413, to reiterate the point of maintainability of the writ petition. It is submitted that in cases where the action of the authorities is without jurisdiction, the writ court can entertain the writ petition. Moreover, the 1940 Act is a bar to the lender from instituting any suit for recovery of the money without a licence but is not a bar to loan being granted. Hence, Citystar also seeks setting aside the order impugned in the writ petition.
- 34.** The respondent no.1-Bank primarily argues that Citystar is a stranger to the transactions with SBI. It is contended that upon classification of the accounts of Shaun as Non-Performing Assets (NPA), Original Application No.504 of 2010 was filed by the Bank for recovery of dues, amid which parties entered into a settlement upon certain terms, including a default clause. A Certificate was issued by the DRT-II, Kolkata in terms of such settlement. However, Shaun did not adhere to the terms and accordingly the clock started running as it was before the Compromise Settlement agreed upon.
- 35.** Shaun was not the owner of the subject property and could not enter into an agreement with anyone, including Citystar, regarding the same. Moreover, it is argued that the doctrine of merger does not apply here along with other orders passed by the Recovery Officer, DRT-II, Kolkata in RC/32/2014.
- 36.** By placing reliance on Sections 30 and 30A of the 1993 Act, it is argued that the only alternative remedy available to the petitioners in

the writ petitions was to move in appeal under the said provisions against the orders impugned herein. The said remedy has been evaded to bypass the limitation as well as to avoid the mandatory pre-deposit of 50 per cent of the amount before the appellate authority. It is argued that there was no jurisdictional error on the part of the Recovery Officer in passing the impugned order.

- 37.** The ASREC submits that the entire property situated at 25, Rakhal Das Auddy Road, comprised of 1 Bigha, 1 Cottah, 1 Chittaks and 9 sq.ft., was registered with four separate Title Deeds in the name of Smt. Kusum Bagaria, Smt. Jayshree Shah, Sri Shaunak Bagaria and Sri Jyotiprakash Bagaria having 1/4th share of each. Out of the said four properties, two properties belonging to Kusum Bagaria and Jaishree Bagaira are already mortgaged with the ASREC since on or about July 23, 2004. A separate application under Section 19 of the 1993 Act, being O.A. No.107 of 2008, is pending before the DRT-I, Kolkata in that regard.
- 38.** Physical possession of the entire property, it is contended, was taken by the receiver on February 25, 2017 pursuant to an order passed by the Presiding Officer, DRT-I Kolkata. Even today, the final possession of the entire property lies with the receiver.
- 39.** No legal steps, it is argued, have been taken by either of the petitioners for restoration of possession and, as such, the purported agreement between the petitioners in the two writ petitions is an afterthought, only to defeat the process of recovery.

- 40.** The 1/4th share of Sri Saunak Bagaria, along with that of Sri Jyoti Prakash Bagaria, coming to half of the property, was attached by the Recovery Officer, DRT-II, Kolkata as their personal properties. 1/4th shares each in the name of Saunak Bagaria and Jyoti Prakash Bagaria were put on e-auction on June 30, 2023. 1/4th share of the Saunak Bagaria is under challenge in the present writ petitions. Shaun and the proforma respondent are habitual defaulters and defaulted in payment of loan amounting to Rs.13.9cr. and Rs.9.61cr to ASREC.
- 41.** It is argued by learned counsel for ASREC that the agreement allegedly entered by the petitioners, that is, between Shaun and Citystar is null and void in the eye of law, having been made with the ulterior motive and afterthought to evade legitimate dues of the Bank and other financial institutions, including the ASREC.
- 42.** It is an admitted proposition that the said property is the subject-matter of agreement and is owned by Sri Shaunak Bagaria and Sri Jyoti Prakash Bagaria. However, the records reveal that the agreement was entered into by Shaun Automobile and Citystar Infrastructures, neither of which are owners of the said property. The real owner of the property is not a party to the agreement, for which the purported agreement dated December 15, 2010 is bad in law and liable to be cancelled.
- 43.** A bare reading of the Schedule, it is argued by ASREC, reveals that the entire land has been mortgaged with Citystar without taking into consideration the half share of the property already mortgaged with

ASREC in the year 2004. Hence, such an agreement is not enforceable, having been executed in excess of authority.

44. Only the address, that is 25, Rakhal Das Auddy Road, has been indicated in the Schedule, even without giving any other details of the property about the shares against which the petitioner has lent money.
45. The impugned agreement is an unregistered agreement. Section 17 of the Registration Act, 19085 mandates that every agreement must be compulsorily registered by paying appropriate stamp duty, failing which the said document is to be declared null and void and not executable. The parties, therefore, cannot claim their right based on such an unregistered agreement.
46. It is further argued that it is evident from the agreement that Citystar provided a loan of Rs.1cr in favour of Shaun by charging an interest of 12 per cent per month, which was purely commercial in nature. Section 8 of the 1940 Act requires that the money lending business shall be carried on only after obtaining a valid licence. In the absence of such a licence, Citystar is not entitled to carry out such transaction; thus, it is unlawful and liable to be cancelled.
47. Section 24 of the Contract Act, 1872 provides that if any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void. Hence, the present agreement, which largely deals with an unlawful monetary transaction and unlawful creation of mortgage, is *void ab-initio*.

- 48.** Moreover, it is argued that Section 13 of the 1940 Act stipulates that if a lender does not have a licence, no court shall pass any order in favour of the money lender, as in the present proceeding. The word “suit” used in the Section must be interpreted in a wider sense, to incorporate all judicial proceedings, as the intent of the legislators was to deprive lenders of the benefits provided under the Act in the absence of licence.
- 49.** It is next argued by ASREC that a reasoned order was passed by the Recovery Officer. As such, the same was appealable and the writ court ought not to enter into the merits of the same. In view of the alternative remedy available to the petitioners by way of the provisions laid down in Sections 30 and 30A of the 1993 Act, the writ court ought not to interfere, it is submitted.
- 50.** Reliance is placed on *Satyawati Tondon (supra)* as well as *South Indian Bank Ltd. Sand others Vs. Naveen Mathew Philip and another* [2023 SCC OnLine SC 435] in support of such proposition, highlighting the fact that without payment of the principal deposit for the alternate remedy, the writ petition is not maintainable in law.
- 51.** In the Compromise Agreement, it is contended, it is clearly indicated that all facilities given to the borrower are to be withdrawn if it failed to deposit the entire amount within the stipulated time.
- 52.** The Recovery Officer, thus, modified the order dated September 14, 2022, which is not under challenge in the present writ petitions. Hence, the same cannot be the subject-matter of challenge herein.

- 53.** Learned counsel also relies on Rule 87 of the Income Tax (Certificate Proceedings) Rules, 1962 and submits that the Recovery Officer may modify its own order under the said provision.
- 54.** It is also argued that Citystar is well protected by the order passed by the Recovery Officer dated May 19, 2023. It is argued that one of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through judicial precedents is that the High Court should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available, as held in *Satyawati Tondon's case*. Accordingly, it is argued that the writ petitions ought to be dismissed.
- 55.** Learned counsel for the proposed intervenor submits that he is claiming as a tenant under one Subodh Kumar Bose, Sachindra Nath Bose and Samarandra Nath Bose and is in possession in respect of 3 cottahs, 6 chittaks, 7 sq.ft. demarcated and bounded space in premises no.25, Rakhal Das Auddy Road, where he is running a motor vehicle repairing garage for more than 60 years and at least 20 people are earning their livelihood from the said garage. Certain photocopies of rent receipts have been annexed with the written notes of arguments by the proposed intervenor in that regard.
- 56.** It is submitted that the landlords entered into an agreement for sale with the proposed intervenor on May 10, 1989 in respect of the tenanted portion for an agree price of Rs.2,36,930/- and also received an earnest money of 1,37,680/-, in terms of which the intervenor has been enjoying the garage.

- 57.** On January 25, 1991, Jyoti Prakash Bagaria informed the intervenor regarding purchase of the entire property by them from the landowners through four deeds, which was executed without knowledge of the intervenor as well as the landlords, for which he filed a suit for specific performance and permanent injunction in Alipore Court, bearing T.S. No.18 of 1991.
- 58.** The suit was decreed in part on contest and the original landlord was asked to return the earnest money with interest to the intervenor. Being aggrieved by such judgment and decree dated December 13, 2000, the intervenor preferred a First Appeal, bearing FA No. 248 of 2001, before this Court in which, *vide* order dated August 14, 2001, this Court granted stay of operation of the judgment and Decree dated December 13, 2000 passed by the Trial Court. The respondents, Jyoti Prakash Bagaria and three others, were also restrained by an order of injunction from interfering with the possession of the intervenor in the suit premises, which is still subsisting. A photocopy of the said order is also sought to be relied on.
- 59.** The respondents, Jyoti Prakash Bagaria and three others, were also parties to the suit and took loans from Banks in suppression of such facts. When notice was pasted in the month of January 2023, the intervenors came to know about the entire case and approached the Recovery Officer in the RC proceeding pending before him and sought time to submit the orders of the High Court along with all rent receipts. However, since the mother of the learned advocate for the intervenor expired in the meantime, the papers could not be

submitted by him and the Recovery Officer, *vide* order dated May 8, 2023, declared the intervenor an illegal occupant. The intervenor took out a recalling application in such context along with all documents by way of an affidavit, but the Recovery Officer failed to note the same in his order and turned down the recalling application. The intervenor has learnt that the DRT-II was lying vacant for so long but there would be an appointment very soon. As such, the intervenor is waiting to prefer an application under Section 17 of the SARFAESI Act before the Second Bench.

- 60.** However, the Recovery Officer has, on the one hand, declared the intervenor an illegal occupant and, on the other, fixed the date of e-auction on June 30. Hence, in spite of enjoying an injunction from the Division Bench of this Court, he would suffer immensely and his rights would be seriously affected if the order of e-auction is allowed to stand and said order is not stayed forthwith till filing of the SARFAESI application before the Presiding Officer, DRT-II, Kolkata. Otherwise, it is submitted that the police might simply come in and drag out the intervenor as well as 20 of his employees, who earn their bread and butter from the garage, despite the intervenor enjoying an order of injunction from the Division Bench, on the strength of the observation of the Recovery Officer that the intervenor is a mere illegal occupant.
- 61.** Thus, the intervenor seeks appropriate orders in the present writ petition.
- 62.** Upon hearing learned counsel for the parties, the prayer for intervention by the alleged tenant is taken up first for adjudication.

- 63.** The tenant's relief lies before the Tribunal in an appropriate application filed under Section 17 of the SARFAESI Act. The gamut of the present dispute is limited to the respective rights of Shaun, Citystar and the SBI primarily. Whichever way the outcome of the writ petition goes, such a decision will be subject to the rights, if available under the law, of the alleged tenant.
- 64.** In any event, the proposed intervenor is allegedly enjoying an injunction order from the Division Bench, which would suffice for the time being.
- 65.** There is no scope of broadening the ambit of the writ petition by permitting the alleged tenant to ventilate his grievances and/or vindicate his rights. Hence, the tenant is neither a proper nor a necessary party to the present proceedings. Accordingly, the prayer for intervention is hereby refused.
- 66.** Insofar as respondent no.3 in both the writ petitions is concerned, namely, ASREC, the said financial company is also a third party to the present dispute. ASREC has claimed a prior mortgage with regard to a portion of the property at 25, Rakhal Das Auddy Road in its own recovery proceeding and it would be premature to adjudicate its rights vis-à-vis the SBI, Shaun and the Citystar in the present writ petition.
- 67.** The relief, if any, of ASREC also lies before the Tribunal, in its own pending application. Thus, ASREC's rights cannot be decided in the present proceeding, more so, since ASREC was not a party to the agreement between Citystar and Shaun on the one hand and that between the SBI and Shaun on the other.

- 68.** In order to effectively decide the issues involved in the present matter, certain orders are to be taken note of.
- 69.** OA 504 of 2010, initiated by the SBI against Shaun and others, culminated in a Compromise Certificate being issued on March 18, 2014 for Rs.10,40,00,000/- (Rupees Ten Crore Forty Lakh only), which the defendants were to jointly and severally pay to the applicant-Bank in lieu of the total claim of SBI of Rs.13,92,00,301.29p and interest, *pendente lite* and future, at the rate of 14.75 per annum, as agreed between the Certificate Holder Bank and the Certificate Debtors, in terms of the joint compromise petition annexed thereto.
- 70.** There are certain interesting features of the Compromise Petition, based on which the same was issued.
- 71.** The said Compromise Proposal dated December 17, 2013 pertained to the payment of Rs.10.40cr towards full and final settlement, over a maximum period of twelve months. The amount was to be deposited in four tranches. The first of such instalments was to be Rs.0.05cr (taking into account Rs.1.00cr already deposited), was to be paid immediately on the acceptance of the offer. The fourth column of a chart indicating such instalments, captioned "Release of Property", indicated that the property at 25, Rakhal Das Auddy Road, Kolkata-700027 would be released on the payment of the first installment.
- 72.** There is no doubt that such instalment was paid by Citystar on behalf of Shaun and was accepted by SBI.
- 73.** The interesting provisions in the Compromise Proposal begin after the chart, under the caption "Other Terms & Conditions". In the present

context, some of the bullet points included thereunder, as discussed below, assume importance.

- 74.** The third condition was that 'no dues certificate' will be issued and personal guarantee will be released on payment of the "full" Compromise Amount.
- 75.** Condition 4 stipulates that release of securities will be made "once full and final payment is received by the Bank" as per the repayment terms and conditions, as mentioned above.
- 76.** The last condition is that in case the Compromise Amount is not paid as per the above arrangements from the date of communication of sanction, "all rights and remedies available to the Bank prior to the Compromise Settlement will be available to the Bank again". This includes the right to collect from the Companies and the guarantors the entire due, prior to the Compromise Settlement, together with interest thereon at applicable rate.
- 77.** Thus, there is an apparent contradiction between the chart contained in the Compromise Proposal, which indicates that, upon payment of the first installment of Rs.1.05cr, the property at 25, Rakhal Das Auddy Road, Kol-27 would be released, and the fourth condition thereunder, which speaks about release of securities to be made only after full and final payment is received by the Bank as per the repayment terms and conditions as mentioned in the chart, signifying that the securities would be released only upon full payment of all the installments, as opposed to payment of only the first installment.

- 78.** Reading the Clauses of the Compromise Proposal harmoniously, the ‘release of property’ referred to in the chart has to be subject to full and final payment, which would only entitle all the securities to be released, including the property in 25, Rakhal Das Auddy Road. Hence, the release of property, as envisaged in the Chart, on payment of the first instalment, was only on an *ad hoc* basis, subject to final payment of the entire due.
- 79.** Such construction also finds support in the third condition under the heading “Other Terms and Conditions”, which stipulates that ‘no dues certificate’ will be issued and personal guarantee will be release only on payment of the full compromise amount.
- 80.** Hence, *prima facie*, the argument of the petitioners, that the property at 25, Rakhal Das Auddy Road stood finally released and became free of encumbrances immediately upon the payment of the first installment of Rs. 1.05cr, is contrary to the terms of the Compromise Proposal, which attained finality upon having obtained the seal of the Tribunal.
- 81.** It must be considered that an award in the nature of compromise has components both of the sanction of a Tribunal order and elements of a contract between the parties. In respect of the element of contract, the intention of the parties has to be gathered from the agreement itself, coupled with the conduct of the parties.
- 82.** In the present case, although the Bank accepted the first instalment paid by Citystar on behalf of Shaun, such acceptance could not exceed the scope of the Compromise Proposal itself. Hence, merely by

such acceptance, it cannot be said that the Bank waived or relinquished its rights over the security amount, in the absence of any such specific undertaking being given by the SBI to Citystar. Even under Section 92 of the Transfer of Property Act, 1882 (for short, “the 1882 Act”), no right of subrogation is conferred on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

- 83.** In the present case, thus, applying the principle of Section 92 of the 1882 Act as well, there could not be partial subrogation by Citystar by way of payment of only one instalment out of the total claim of the Bank in terms of the settlement between the Bank and the borrower. Citystar, it is to be noted, could not acquire a right in the property by paying the first instalment on behalf of Shaun which would exceed what Shaun, the borrower, could itself acquire.
- 84.** In any event, the Bank is also justified in arguing that the agreement entered into between Citystar and Shaun bound only the parties thereto. The Bank, not being a party to the same, cannot be said to be bound by the terms thereof. The acceptance of the first instalment from Citystar was in lieu of the first tranche in terms of the Compromise Proposal which itself provided that the securities would be released only upon full and final payment.
- 85.** There being no formal release of the securities by the Bank in favour of Shaun and/or Citystar, it cannot be held that Citystar acquired a title to the said property, free of all encumbrances.

- 86.** Contrary to such proposition, the lifeblood of an equitable mortgage is the deposit of title deeds. In the present case, it is seen that the Bank returned the title deed of 25, Rakhal Das Auddy Road upon the payment of the first installment to Shaun, which, in turn, was handed over by Shaun to Citystar. However, it was not a direct transaction between SBI and Citystar. Moreover, such handing over was subject to the parent Compromise Agreement which got the seal of the Tribunal by the Compromise Certificate issued by the Tribunal. Whatever may be the physical transaction between the parties related to the title deeds, the same was always subject to the Compromise Agreement between the SBI and Shaun. Unless the entire securities were released by the SBI, there could not have arisen any occasion for Citystar to acquire any unencumbered interest therein. Citystar, being a subsequent mortgagee, cannot override the mortgage rights of SBI with regard to the said property. Unless a “no dues certificate” was issued by the bank, which could only be done on payment of the full compromise amount, it cannot be said that Citystar acquired any title in the property free from encumbrances.
- 87.** In fact, the last condition of the “Other Terms and Conditions” in the Compromise Proposal stipulated that unless the entire settled amount was paid to the SBI, all rights and remedies available to the Bank prior to the Compromise Settlement would be available to the Bank again. This included the right to collect from Shaun and the guarantors the entire amount due prior to the Compromise Settlement, together with interest thereon at applicable rate.

- 88.** The moment Shaun failed to pay the subsequent instalments, the compromise failed to come through. As such, the SBI became entitled to recover the full amount (to secure which, the properties were mortgaged with SBI in the first place) from Shaun, the borrower, and the guarantors.
- 89.** Hence, the principle of “equity” sought to be invoked by the Recovery Officer in his order dated September 14, 2015, passed in RC No.32 of 2014, was not so equitable, after all, being contrary to the agreement itself. Citystar, in the ultimate analysis, claims its rights though Shaun, which had executed the mortgage in favour of Citystar subsequent to the title deeds of 25, Rakhal Das Auddy Road being released by the SBI to Shaun upon payment of the first instalment. Hence, Citystar cannot claim a right which would be greater than that of Shaun in terms of the Compromise Agreement. As discussed above, the Bank became entitled to recover the entire amount due, with interest, the moment Shaun, the borrower, failed to pay its subsequent instalments in terms of the Compromise Certificate. The terms and conditions of the Compromise Proposal, which were crystallized by issuance of the Compromise Certificate, clearly stipulated that the rights of the Bank prior to the Compromise settlement would revert, once the compromise amount was not paid, and the release of securities would take place only upon full and final payment being received by the Bank.
- 90.** Thus, there was no scope of the Recovery Officer, at the first instance, on September 14, 2015, to release the attachment on 25, Rakhal Das

Auddy Road property. In any event, such release of attachment was *de hors* the provisions of the Compromise Certificate, hence, beyond the jurisdiction of the Recovery Officer.

- 91.** It is only the Presiding Officer of the Tribunal who could modify the order in accordance with law under certain circumstances.
- 92.** The status of the Recovery Officer under the scheme of the SARFAESI Act and Rules is somewhat curious, being somewhere in between an executing court and a court bailiff, seen from the perspective of a civil suit's execution. Whereas the Recovery Officer does not have powers akin to those conferred on the executing court under Order XXI Rules 97 to 100 of the Code of Civil Procedure, it can interpret a Compromise Certificate for the purpose of enforcement within the periphery of law. However, the interpretation lent in the order dated September 14, 2015 was patently *de hors* the law and amounted to a tinkering with the Compromise Certificate, which was beyond the inherent authority of the Recovery Officer.
- 93.** The argument of the petitioners that the order dated September 14, 2015 of the Recovery Officer attained finality in the absence of a challenge in appeal cannot be accepted, since the same was merely an interlocutory order passed in RC No.32 of 2014 and merges with subsequent orders passed at the final stage of the proceeding.
- 94.** On the other hand, by a subsequent order dated November 14, 2022, the Recovery Officer clearly interpreted the Compromise Agreement correctly and proceeded to modify the previous order by directing attachment of the released properties as well.

- 95.** It is relevant to mention that the subsequent orders passed by the Recovery Officer, although keeping the application technically pending, were in the nature of final adjudication of the issue of attachment.
- 96.** Seen in such perspective, even the order dated September 14, 2015 was a nullity and, in any event, merged with the subsequent orders of the Tribunal passed at a final stage of the hearing of RC/32/2014. The subsequent order dated November 14, 2022, thus, could not be said to be barred by *res judicata*, since the same was in the nature of a final consideration, keeping in view the default in payment of subsequent instalments by the Certificate Debtor.
- 97.** In the above context, it cannot be said that the Recovery Officer acted without jurisdiction in having reopened the position as on September 14, 2015 passed by his predecessor-in-interest.
- 98.** The judgments sought to be relied on by the parties regarding availability of alternative remedy, thus, cut both ways. Just as no appeal was preferred against the order dated September 14, 2015, the subsequent order dated November 14, 2022 and subsequent orders passed on its basis were also not challenged in appeal.
- 99.** In any event, as well-settled, even as per the judgments cited by the parties, alternate remedy is not an absolute bar to the writ jurisdiction. In the present case, the Recovery Officer could not be said to have acted without jurisdiction to such extent that the writ court ought to interfere under Article 226 of the Constitution.

- 100.** In fact, the scope of review either under Rule 87 of the Income Tax Rules or otherwise is not germane in the present consideration, since the exercise undertaken by the Recovery Officer in its order dated November 14, 2022 and its subsequent orders are not merely based on a review of the previous order dated September 14, 2015 but took into cognizance subsequent developments and were passed at a final stage of the Recovery Proceeding. Hence, it cannot be said that the Recover Officer acted palpably without jurisdiction in passing the impugned orders. In any event, even if there were certain errors in the ratio of the Recovery Officer in its order dated November 14, 2022, in the absence of any challenge to the same within the statutory period and in view of the conclusion thereof being in consonance with law, there is no occasion to set aside the same in the present writ petition. Hence, WPA No.13979 of 2023 and WPA No.13667 of 2023 are dismissed on contest, without any order as to costs.
- 101.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)