

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

Sl. No.1(DL)
srm

W.P.A. No. 6111 of 2023
Naba Kumar Dutta
Versus
Union of India & Ors.

For the Petitioner : Mr. Subhendu Sekhar Roy,
Mr. Dilip Kumar Samanta,
Mr. Biswapriya Samanta

For the Respondent Nos.3 to 5/ : Mr. Avishek Guha,
Bank of Baroda Ms. Sonal Agarwal,
Ms. Enakshi Saha

Hearing concluded on : 06.09.2024
Judgment on : 06.09.2024

Shampa Sarkar, J.:-

1. Supplementary affidavit and affidavit-of-service filed by the petitioner, are taken record.
2. The writ petition has been filed by the borrower, for setting aside the notice dated February 7, 2023 issued under Rule 8(6) and Rule 9(1) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the Rules of 2002) on the ground that in another writ petition being W.P. No.21968(W) of 2019, a learned

coordinate Bench of this Court was of the, *prima facie*, view that at the stage of Rule 8(5) of the said Rules, 2002 a consultation should be provided to the borrower, before the valuation of the secured asset was determined and denial of such opportunity was violative of the fundamental right of the borrower. Accordingly, in that case, by an *ad interim* order, the sale notice had been stayed. It is submitted that the *vires* of Rule 8(5) was challenged in the said proceeding. It is further contended that the borrower is willing to pay the amount which was fixed as the reserve price.

3. Mr. Guha, learned Advocate for the Bank of Baroda submits that the writ petition is not maintainable in view of the alternative remedy. Relying upon the provision of Section 13(8) of the SARFAESI Act, it is submitted that if the dues of the secured creditor, together with all costs, charges and expenses incurred by such creditor was tendered to the secured creditor at any point of time before the publication of the notice of public auction, the secured asset could not be transferred. Mr. Guha submits that, after the amendment of Section 13(8), the borrower had time till the publication of the sale notice, to redeem the mortgage by paying the amount. Such amendment was introduced in 2016, by substituting the earlier provision that the borrower had the right of redemption up to the completion of sale/transfer. Reliance is further placed on Rule 8(5) of the Rules of 2002 to substantiate that the said rule provided that the authorized officer was

required to obtain the valuation of the property from an approved valuer, and in consultation with the secured creditor, fix the reserve price. Upon such fixation of the reserve price, sale could be conducted by public auction or by inviting tenders etc. Rule 8(6) provided that the authorized officer should issue a notice of 30 days to the borrower, with regard to sale of the immovable secured asset under sub-rule (5). Accordingly, such notice under Rule 8(6) was served upon the petitioner/borrower, but the petitioner did not reply to the said notice. He did not indicate his desire to redeem.

4. Finally, it is submitted that the Hon'ble Apex Court in the matter of Celir LLP vs. Bafna Motors (Mumbai) Private Limited & Ors. reported in (2024) 2 SCC 1, had held that the borrower's right of redemption did not stand terminated on the basis of the earlier provision, till the transfer was completed in favour of the auction purchaser by registration of the sale certificate and delivery of possession of the secured asset. The amended provision made it clear that the right of the borrower to redeem the secured asset was extinguished on the very date of publication of the notice of public auction under Rule 9(1) of the Rules of 2002. In effect, the right of redemption available to the borrower under the present statutory regime, was drastically curtailed. The right was available only till the date of publication of the notice under Rule 9(1) of the Rules of 2002 and not till the completion of the sale. The Hon'ble Apex Court further held that the High Court under Article 226 of the

Constitution of India could not apply equitable considerations to overreach the outcome contemplated by the statutory process prescribed under the SARFAESI Act.

5. Mr. Guha further goes on to rely on certain decisions of the Hon'ble Apex Court in support of his contention that the writ petition should not be entertained. The remedy of the borrower, even against the sale notice would be before the appropriate tribunal. On the facts, it is submitted that the sale has failed as of now, as no bidders had put forward their bid upto 11.00 a.m.
6. Having heard learned Advocates for the respective parties, this Court finds that the *vires* of Rule 8(5) has not been challenged in this writ petition. Support has been drawn from an interim order passed in another matter in which the *vires* of Rule 8(5) of the Rules of 2002, was challenged. However, this Court does not find that His Lordship had stayed the operation of Rule 8(5). Rather, His Lordship was of the, *prima facie*, view that the right of consultation or participation in the process of evaluation should have been given to the borrower. In the facts of that case, the sale notice was stayed up to January 31, 2020. It is informed that the same has been extended.
7. Thus, the submission of Mr. Roy, learned Advocate appearing for the petitioner with regard to the prayer for stay of operation of any action under Rule 8(5) cannot be acceded to by this Court, in the facts of this case. There are no pleadings

that the petitioner was not provided with the notice under rule 8(5) of the Rules.

No infraction of law has been alleged. Only allegation is that the right of consultation with regard to the price was curtailed. The law permits the borrower to redeem the mortgage up to the date of publication of the notice for public auction. Rule 8(6) grants this opportunity to the borrower by mandating the authorized officer to serve a notice of 30 days for sale of the immovable secured asset under sub-rule (5).

8. In my opinion, this was the stage where the borrower could raise all his objections, including the objection with regard to the reserve price and also exercise his option to redeem the mortgage. After this exercise is over and the period of 30 days from receipt of the notice by the borrower had lapsed, the borrower does not have a chance to redeem. The borrower, in this case, had the opportunity to reply to the notice under Rule 8(6) and make his submissions and suggestions with regard to the reserve price. If he was aggrieved by the price fixed, and informed by the authorized officer in the notice, which is available from the table at page 24 of the petition, the borrower could have challenged the said notice before the Debts Recovery Tribunal. This was the stage where the borrower could quote the price which he thought was just and proper. The incorporation of Rule 8(6) only reflects the intention of the legislature to give one last opportunity to the borrower to raise all his objections to the sale notice.

Thereafter, once the publication was made, the borrower did not have any chance.

Once he was given a chance to redeem the mortgage by matching the price, all requirements had been complied with.

9. The last issue which is to be discussed here is the maintainability of the writ petition. The Hon'ble Apex Court in the matter of *United Bank of India vs. Satyawati Tandon & Ors.* reported in (2010) 8 SCC 110, had discussed the scope of interference by the writ court under Article 226 of the Constitution of India in a proceeding under the SARFAESI Act. The relevant paragraphs are quoted below for convenience:-

“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.

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 a 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 b Parishad, Whirlpool Corpn. v. Registrar of Trade Marks and Harbanslal Salnia 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.”

10. Similar view was taken by the Hon’ble Apex Court in the matter of *PHR Invent*

Educational Society vs. UCO Bank & Ors., reported in 2024 SCC OnLine SC 528.

The relevant paragraphs are quoted below:

“28. Insofar as the contention of the Borrower and its reliance on the judgment of this Court in the case of *Mohammad Nooh* (supra) is concerned, no doubt that non-exercise of jurisdiction under Article 226 of the Constitution on the ground of availability of an alternative remedy is a

rule of self-restraint. There cannot be any doubt with that proposition. In this respect, it will be relevant to refer to the following observations of this Court in the case of *Commissioner of Income Tax v. Chhabil Dass Agarwal* :

'15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in *Thansingh Nathmal* case [AIR 1964 SC 1419], *Titaghur Paper Mills* case [*Titaghur Paper Mills Co. Ltd. v. State of Orissa*, (1983) 2 SCC 433 1983 SCC (Tax) 131] and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.'

29. It could thus clearly be seen that the Court has carved out certain exceptions when a petition under Article 226 of the Constitution could be entertained in spite of availability of an alternative remedy. Some of them are thus:

- (i) where the statutory authority has not acted in accordance with the provisions of the enactment in question;
- (ii) it has acted in defiance of the fundamental principles of judicial procedure;
- (iii) it has resorted to invoke the provisions which are repealed; and
- (iv) when an order has been passed in total violation of the principles of natural justice.

30. It has however been clarified that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance.

31. Undisputedly, the present case would not come under any of the exceptions as carved out by this Court in the case of *Chhabil Dass Agarwal* (supra).

32. We are therefore of the considered view that the High Court has grossly erred in entertaining and allowing the petition under Article 226 of the Constitution.

33. While dismissing the writ petition, we will have to remind the High Courts of the following words of this Court in the case of Satyawati Tondon (supra) since we have come across various matters wherein the High Courts have been entertaining petitions arising out of the DRT Act and the SARFAESI Act in spite of availability of an effective alternative remedy:

'55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.'"

11. In the *Phoenix ARC Private Limited vs. Vishwa Bharati Vidya Mandir & Ors.*

reported in (2022) 5 SCC 345, the Hon'ble Apex Court had taken a similar view.

The relevant paragraph is quoted below:-

"18. Even otherwise, it is required to be noted that a writ petition against the private financial institution - ARC the appellant herein under Article 226 of the Constitution of India against the proposed action/actions under Section 13(4) of the SARFAESI Act can be said to be not maintainable. In the present case, the ARC proposed to take action/actions under the SARFAESI Act to recover the borrowed amount as a secured creditor. The ARC as such cannot be said to be performing public functions which are normally expected to be performed by the State authorities. During the course of a commercial transaction and under the contract, the bank/ARC lent the money to the borrowers herein and therefore the said activity of the bank/ARC cannot be said to be as performing a public function which is normally expected to be performed by the State authorities. 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, borrower

has to avail the remedy under the SARFAESI Act and no writ petition would lie and/or is maintainable and/or entertainable. Therefore, decisions of this Court in *Praga Tools Corpn.* and *Ramesh Ahluwalia* relied upon by the learned counsel appearing on behalf of the borrowers are not of any assistance to the borrowers.”

12. Thus, in all the above decisions, the Hon'ble Apex Court clarified the scope of interference by a writ court. The repeated submissions of the petitioner that the *vires* of Rule 8(5) is under challenge and this court should interfere in this case, is not accepted. Such contention is beyond the scope of the writ petition. The prayers in the writ petition are quoted below:

- “a) A Writ in the nature of Mandamus commanding the respondents to cancel, rescind, withdraw and/or set aside the impugned sale notice (Annexure P/2 to the Writ Petitioner) forthwith;
- b) A Writ in the nature of Mandamus commanding the respondents to cancel, rescind, withdraw and/or set aside the recovery proceeding initiated by the respondent no.5 against the petitioner and the borrower without securing compliance of the Circular/Guideline of the respondent no.2 dated 22.08.2007 (Annexure P/1 to the Writ Petition) forthwith;
- c) A Writ in the nature of Certiorari directing the respondents to transmit and produce all relevant records of this case including the impugned sale notice (Annexure P/2 to the Writ Petition) including the entire records relating to the recovery proceeding initiated by the respondent no.5 against the petitioner and the borrower before this Hon'ble Court so that conscionable justice may be done to by quashing the same;
- d) Rule NISI in terms of prayers (a), (b) and (c) above;
- e) Injunction restraining the respondents including their agents, servants, employees and/or subordinates from giving any effect or further effect to the impugned sale notice (Annexure P/2 to the Writ Petition) and the recovery proceeding initiated by the respondent no.5 against the petitioner and the borrower in any manner and in any form till the disposal of the Rule;
- f) Ad-interim orders in terms of prayers

- e) above;
- g) Costs of and incidentals to this Writ petition;”

13. Subsistence of an interim order passed by a learned coordinate Bench in another matter, which does not discuss the facts and the law, but only stays a sale notice, would not justify interference by this Court under Article 226 of the Constitution of India, thereby preventing the bank from exercising its right under the special statute which provides easy remedy to the banks to enforce the security created by mortgage of the property, without intervention of court.
14. In the matter of *Bafna Motors* (supra), the entire process and the law relating to redemption, publication of sale notice and sale, have been discussed and deliberated upon in detail.
15. The Hon’ble Apex Court finally concluded in the matter of *Bafna Motors* (supra), reported in (2024) 2 SCC 1, as follows:-

“**110.** We summarise our final conclusion as under:

110.1. The High Court was not justified in exercising its writ jurisdiction under Article 226 of the Constitution more particularly when the borrowers had already availed the alternative remedy available to them under Section 17 of the SARFAESI Act.

110.2. The confirmation of sale by the Bank under Rule 9(2) of the 2002 Rules invests the successful auction-purchaser with a vested right to obtain a certificate of sale of the immovable property in the form given in Appendix V to the Rules i.e. in accordance with Rule 9(6) of the Security Interest (Enforcement) Rules, 2002.

110.3. In accordance with the unamended Section 13(8) of the SARFAESI Act, the right of the borrower to redeem the secured asset was available till the sale or transfer of such secured asset. In other words, the borrower's right of redemption did not stand terminated on the date of the auction-sale of the secured asset itself and remained alive till the transfer was completed in favour of the auction-purchaser, by registration of the sale certificate and delivery of possession of the secured asset. However, the amended provisions of Section 13(8) of the SARFAESI Act, make it clear that the right of the borrower to redeem the secured asset stands extinguished thereunder on the very date of publication of the notice for public auction under Rule 9(1) of the 2002 Rules. In effect, the right of redemption available to the borrower under the present statutory regime is drastically curtailed and would be available only till the date of publication of the notice under Rule 9(1) of the 2002 Rules and not till the completion of the sale or transfer of the secured asset in favour of the auction- purchaser.

110.4. The Bank after having confirmed the sale under Rule 9(2) of the 2002 Rules could not have withheld the sale certificate under Rule 9(6) of the 2002 Rules, and entered into a private arrangement with a borrower.

110.5. The High Court under Article 226 of the Constitution could not have applied equitable considerations to overreach the outcome contemplated by the statutory auction process prescribed under the SARFAESI Act.

110.6. The two decisions of the Telangana High Court in Concern Readymix and Amme Srisailam do not lay down the correct position of law. In the same way, the decision of the Punjab and Haryana High Court in Pal Alloys also does not lay down the correction position of law.

110.7. The decision of the Andhra Pradesh High Court in Sri Sai Annadhatha Polymers and the decision of the Telangana High Court in K. V. V. Prasad Rao Gupta lay down the correct position of law while interpreting the amended Section 13(8) of the SARFAESI Act.'

16. Under such circumstances, the writ petition fails.

17. The petitioner had the right to approach the Debts Recovery Tribunal, in accordance with law, at the appropriate stage. The SARFAESI Act, is a complete code which not only provides a comprehensive mechanism for recovery of dues but also envisages creation of Tribunals for redressal of grievances of an

aggrieved person. The procedure prescribed by the Act and the Rules have repeatedly been directed to be adhered to by the Hon'ble Apex Court. In the facts of this case, the petitioner has not expressed any considered opinion as to what would be the reserve price. Just an omnibus allegation will not justify passing of any order by this court.

18. The Debts Recovery Tribunal, if approached, shall proceed independently and strictly in accordance with law, without being influenced by the observations made hereinabove.
19. There shall be no order as to costs.
20. Parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)