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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ W.P.(C) 6899/2024, CAV 230/2024 & CM APPL. 28730-28731/2024
ZAHID HUSSAIN Petitioner

Through: Mr. M. Sufian Siddqui, Mr. Rakesh Bhugra, Ms. Alya Veronica and Mr. Md. Niyazuddin, Advocates

versus

KOTAK MAHINDRA BANK LTD. Respondent

Through: Mr. Ravi Gupta, Senior Advocate with Mr. Mahip Datta Parashar, Ms. Sanya Lamba, Ms. Muskan Mehra, Advocates with Mr. G.S. Pandey and Mr. Vikram Sharma, AR

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Date of Decision: 14th May, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ: (ORAL)

CAV 230/2024

1. Since, learned counsel for the Respondent has entered appearance on behalf of the Respondent, the caveat stands discharged.

W.P.(C) 6899/2024 & CM APPL. 28730-28731/2024

2. Present writ petition has been filed seeking quashing of the judgement dated 26th April, 2024 passed by Debt Recovery Tribunal-II, New Delhi ('DRT') in TSA 37/2022 ('formerly SA 274/2022'), whereby, the learned Tribunal has dismissed the application filed by the Petitioner under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act').

3. The application under Section 17 of the SARFAESI Act, was filed by the Petitioner (along with his brothers) seeking a prayer that orders dated



05th March, 2021, 20th March, 2022 and 23rd May, 2022 passed by the Chief Metropolitan Magistrate ('CMM') appointing a Receiver for taking over possession of the property i.e., basement, ground floor and third floor along with roof rights of the property bearing plot no. 17 admeasuring 200 sq. yds. in Block No. B-4, in the layout plan of Safdarjung Development Residential Scheme ('subject property').

3.1 This writ petition has been filed only by the Petitioner and the remaining two applicants before DRT have not been arrayed as parties to this petition.

3.2 It is stated that the contention of the applicants before the DRT was that they are the legal heirs of late Tajunissa, who allegedly stood as a guarantor for the financial loan advanced to the principal borrower-M/s Affinity Beauty Salon Pvt. Ltd. ('Affinity'). It was stated that the mortgage of the subject property had been fraudulently created by one Mr. Vishal Sharma, the Director of Affinity, in connivance with the bank officials and the signatures of late Tajunissa and her family members were obtained on the mortgage documents fraudulently in October, 2018. It was stated that the title documents of the subject property were handed over by late Tajunissa to Mr. Vishal Sharma in good faith and they have been fraudulently used by Mr. Vishal Sharma to create a mortgage over the subject property to illegally raise funds. It was stated that the mortgage documents executed earlier in the year 2015 by the Petitioner herein, were also signed at the behest of Mr. Vishal Sharma and it was not the intention of the Petitioner or late Tajunissa to create a mortgage of the subject property.

3.3 It was contended by the Petitioner that no notice as mandated under Section 13(4) of the SARFAESI Act was served on Late Tajunissa during



her lifetime. It is stated that Late Tajunissa expired on 16th October, 2020 and therefore, the notice for possession issued on 31st March, 2021 by the receiver under SARFAESI Act is bad in law. It was contended that the entire proceedings under SARFAESI Act have to be initiated by the Respondent bank afresh and the same cannot continue in furtherance of the earlier notice dated 13th August, 2019 issued under Section 13(2) of the SARFAESI Act.

4. The Respondent Bank appeared before the DRT and submitted that the principal borrower- Affinity, approached the bank in the month of 2014 to avail financial facilities. It was stated that the bank initially sanctioned an amount of Rs. 16.50 crores *vide* sanction letter dated 06th June, 2014, which was subsequently renewed for a total amount of Rs. 33.51 crores. It was stated that the Petitioner herein acting under a Special Power of Attorney dated 29th July, 2015 ('SPA') executed by Late Tajunissa duly executed mortgage documents in favour of the bank in the year, 2015 as well as by deposit of title deeds in favour of the bank to secure repayment of the financial facilities. It was stated that late Tajunissa herself executed the renewal of mortgage documents by affixing her thumb impressions in the year, 2018 and created a mortgage over the subject property.

4.1 It was stated that Mr. Abdul Samad was the son-in-law of late Tajunissa and was appointed as a Director of Affinity on 01st January, 2015 and continued to be a Director till May, 2017. It was stated that Mr. Abdul Samad as well, mortgaged his immovable property in favour of the HDFC bank for the financial facilities availed by Affinity, which loan account was also assigned to the Respondent Bank herein.

4.2 It was stated that the financial facility was renewed on 02nd May, 2018 and late Tajunissa had herself executed the relevant documents by affixing



her thumb impression along with her daughter Ms. Naseem Bano. It was stated that Ms. Naseem Bano is the wife of Mr. Abdul Samad and they both as well had, separately, executed mortgage documents in favour of the bank. It was therefore stated that the mortgage documents were executed first in 2015 and thereafter, renewed in 2018.

4.3 It was stated that the SPA executed by late Tajunissa in favour of her son, the Petitioner is duly witnessed by Mr. Nasir Hussain (another son) and Ms. Naseem Bano (her daughter). It was stated that the mortgage documents in 2015 were executed by the Petitioner in favour of the bank for creating the mortgage in pursuance of the said SPA.

4.4 It was stated that Respondent bank issued notice under Section 13(2) of the SARFAESI Act on 13th August, 2019 and despite service of the notice Late Tajunissa failed to file any objection. It was stated that notice under Section 13(4) of the SARFAESI Act was issued on 13th October, 2020 for taking symbolic possession of the subject property. It was contended that therefore all provisions of the SARFAESI Act have been complied with and there is no illegality in the orders of CMM.

5. It is a matter of record that the Petitioner and his brothers approached this Court in W.P.(C) 13416/2024, seeking a direction to DRT to dispose of its SA expeditiously. The Division Bench *vide* Order dated 09th April, 2024 allowed the said prayer and requested DRT to dispose of the pending SA on or before 30th April, 2024.

6. The DRT thereafter heard the matter on a day-to-day basis and *vide* impugned judgment dated 26th April, 2024 has dismissed the SA filed by Petitioner and his brothers and has *inter-alia* returned the following findings of fact:



(a) The DRT held that the allegation of the Petitioner that late Tajunissa handed over the original title deeds of the subject property to Mr. Vishal Sharma under misrepresentation and without any intention to create a mortgage is incorrect.

(b) The DRT held that in view of the fact that late Tajunissa's son-in-law, Mr. Abdul Samad was a Director in Affinity, who had independently mortgaged his own property with the bank and the fact that Petitioner herein was a good friend of Mr. Vishal Sharma, another Director in Affinity, DRT concluded that Late Tajunissa and her family members were well aware of the loan transaction between the principal borrower (Affinity) and the bank and duly participated in the transaction of the mortgage.

(c) The DRT held that the mortgage documents in favour of the Respondent Bank were executed in 2015, by the Petitioner herein[himself] as the SPA holder of late Tajunissa. The DRT held that the said SPA was executed by late Tajunissa in favour of the Petitioner herein and is duly witnessed by Mr. Nasir Hussain (another son) and Ms. Naseem Bano (daughter) of late Tajunissa. The DRT concluded that the Petitioner herein executed a valid mortgage in the year 2015 on behalf of late Tajunissa and handed over the original title deeds of the subject property to Respondent Bank. The DRT thus held that the allegation that Mr. Vishal Sharma had wrongfully created a mortgage of the subject property was not borne out from the record.

(d) The DRT returned a finding that in the year, 2018, the mortgage renewal documents were duly executed by Late Tajunissa in favour of Respondent bank for the subject property by affixing her



thumb impression. The DRT held that simultaneously, Ms. Naseem Bano (late Tajunissa's daughter) also executed mortgage renewal documents with respect to the first floor in property bearing Plot No. 17, Block B-4, Safdarjung Enclave, New Delhi-110029. The DRT concluded that the record evidences that the execution of the renewal documents in the year 2018 by Late Tajunissa and Ms. Naseem Bano was a conscious and a voluntarily act.

(e) The DRT therefore, concluded that the initial mortgage in the year 2015 and its renewal in the year 2018 was with the consent and to the knowledge of late Tajunissa and her legal heirs [including the Petitioner herein].

(f) The DRT held that notices under Section 13(2) and 13(4) of the SARFAESI Act, had been issued by the Respondent Bank to Late Tajunissa while she was alive and she did not prefer any objection against the notice under Section 13(2) of the SARFAESI Act. The Tribunal, thus, concluded that there was compliance with the provisions of the SARFAESI Act.

(g) The DRT held that on the basis of the documents filed on record and the pleadings, the applicants before it (including the Petitioner herein) have admitted that Ms. Naseem Bano and late Tajunissa had executed the mortgage renewal documents in the presence of the officials of the Respondent Bank in the year 2018. The DRT, thus, concluded that there is no dispute with respect to the veracity of the thumb impressions of late Tajunissa affixed on these documents and therefore, that there is no need for sending the documents executed in the year 2018 to CFSL and accordingly,



dismissed I.A. No. 3137/2024.

(h) The DRT after perusing the original of the SPA produced before it, returned a finding that it was unable to accept on a perusal of the document that the ink thereon is bright or it appears to have been executed on a fresh paper. The DRT held that in the pleadings the applicants (including the Petitioner herein) had admitted the execution of the documents of mortgage by Late Tajunissa in the year 2018 and also that she had executed the SPA. The DRT, therefore, rejected the allegation that SPA is a forged document as alleged or it has not been notarized in accordance with law.

7. Aggrieved by the aforesaid fact findings returned by the DRT, the Petitioner herein, has preferred the present petition.

Arguments of the counsel for the parties

8. Learned counsel for the Petitioner states that DRT has committed an error in holding that statutory notice under Section 13(4) of the SARFAESI Act was duly served on late Tajunissa during her lifetime. He states that the said finding is not borne out from the record. He states that on the death of the guarantor i.e., late Tajunissa, the proceedings initiated *vide* notice dated 13th August, 2019 under Section 13(2) of the SARFAESI Act, came to an end and therefore, the subsequent orders passed by the CMM, appointing the Receiver must also fail. He states that in the present writ petition, the Petitioner is not challenging the findings of fact returned by DRT but is only raising the aforesaid legal question.

8.1 He states that DRT's order has been passed in violation of the principle of natural justice as the application I.A. No. 3137/2024 seeking reference of the alleged SPA to CFSL and I.A. No. 2097/2024 seeking



permission to cross-examine the Authorised Representative ('AR') of Respondent bank was rejected. He further states that the matter was heard on a day-to-day basis between 16th April, 2024 to 19th April, 2024 and therefore, the Petitioner was denied an opportunity to present its case completely.

8.2 He states that though the Petitioner has an alternate remedy to file an appeal before the Debt Recovery Appellate Tribunal ('DRAT'), the said remedy is onerous as the Petitioner would be obliged to make a pre-deposit of 50% of the amount of debt due.

9. In reply, learned senior counsel for Respondent Bank states that the present writ petition is not maintainable in view of the alternate efficacious remedy of appeal. He states that the grounds raised in the petition assails the findings of fact returned by DRT and the same cannot be assailed in these writ proceedings. He states that this is the 26th round of litigation initiated by the legal heirs of Late Tajunissa to defeat the rights of Respondent Bank. He states that the present writ petition has been filed only by one of the original applicants before the DRT and the remaining two applicants have not joined the proceedings with the intent to file further proceedings at a subsequent stage to interfere in the recovery process.

10. We have heard the learned counsel for the parties and perused the record.

11. The submission of the Petitioner that there has been violation of principles of natural justice is belied from the record. The DRT has passed a detailed judgment dealing with each of the contentions of the applicants in S.A. No. 274/2022. The challenge to the said findings of fact by DRT cannot be maintained in the writ proceedings, as this Court will not review or



reweigh the evidence upon which the determination of the DRT is based. The remedy of the Petitioner to challenge the said findings of fact would lie only before the DRAT.

12. The DRT in the impugned order has given detailed reasons for dismissing I.A. No. 3137/2024 filed by the Petitioner seeking reference of the SPA dated 29th July, 2015 to CFSL. The DRT held that in its opinion the thumb impression of Late Tajunissa on the SPA executed in 2015 and documents for renewal of mortgage executed in 2018 were all admitted in the pleadings and therefore, there was no purpose in referring the documents to CFSL. The challenge to the said reasons recorded in the impugned order can be assailed by the Petitioner before DRAT, as it necessarily entails a challenge to the findings of fact returned by DRT and the appellate forum is competent to adjudicate on the said challenge. The dismissal of I.A. No. 3137/2024 does not constitute a violation of natural justice as alleged by the Petitioner herein as it has been dismissed with reasons.

13. Similarly, DRT *vide* order dated 15th April, 2024 dismissed I.A. No. 2097/2024 by which the Petitioner sought an opportunity to cross-examine the AR of Respondent bank. Thereafter, DRT heard the matter on a day-to-day basis between 16th April, 2024 to 19th April, 2024 and returned a finding that the documents executed in the year 2015 and 2018 were genuine and therefore, a valid mortgage of the subject property has been created. The Petitioner has not challenged DRT's order dated 15th April, 2024, separately and with the fact findings returned by DRT on the issue of validity and genuineness of the mortgage documents, the challenge to the order dated 15th April, 2024 would also have to be maintained before DRAT, which is the appellate forum competent to correct errors of fact, if any. However,



with the DRT, having dismissed I.A. No. 2097/2024 by a reasoned order, the Petitioner cannot contend that there has been any violation of natural justice.

14. As regards the submission of the Petitioner that the notice under Section 13(4) of the SARFAESI Act was not served on Late Tajunissa and the DRT erred in holding that the notice was served, is also a challenge to a finding of fact and can be raised before the appellate forum i.e., DRAT.

15. It is settled law that an alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution and in an appropriate case the Court may entertain a writ petition, however, the Court has the discretion to not entertain the writ petition where an effective alternate remedy is available to the aggrieved person. Pertinently, in matters pertaining to proceedings initiated by banks under SARFAESI Act, the Supreme Court in *South Indian Bank Limited and Others v. Naveen Mathew Philip and Another*¹, reiterated that in order to give effect to the object of the SARFAESI Act, writ petitions ought not to be entertained by High Courts in a routine manner, when an efficacious alternate remedy is provided by law to the affected parties. The relevant paras read as under:

“13. In view of the fair stand taken by the learned Senior Counsel appearing for the Appellants, we do not wish to interfere with the impugned orders passed. We may, however, reiterate the settled position of law on the interference of the High Court invoking Article 226 of the Constitution of India in commercial matters, where an effective and efficacious alternative forum has been constituted through a statute. We are also constrained to take judicial notice of the fact that certain High Courts continue to interfere in such matters, leading to a regular supply of cases before this Court. One such High Court is that of Punjab & Haryana.

14. A writ of certiorari is to be issued over a decision when the Court finds that the process does not conform to the law or statute. In other words, courts are not expected to substitute themselves with the decision-making

¹ 2023 SCC OnLine SC 435



authority while finding fault with the process along with the reasons assigned. Such a writ is not expected to be issued to remedy all violations. When a Tribunal is constituted, it is expected to go into the issues of fact and law, including a statutory violation. A question as to whether such a violation would be over a mandatory prescription as against a discretionary one is primarily within the domain of the Tribunal. So also, the issue governing waiver, acquiescence, and estoppel. ...

.....

18. While doing so, we are conscious of the fact that the powers 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.”

(Emphasis supplied)

16. In the same decision, the Supreme Court observed that a borrower approaching the DRAT cannot avoid the non-compliance of the statutory provision of pre-deposit. The relevant para reads as under: -

“16. ... When a statute prescribes a particular mode, an attempt to circumvent shall not be encouraged by a writ court. 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.”

(Emphasis supplied)

17. In this petition, the Petitioner has alleged that due to the non-service of the Notice under Section 13(4) of the SARFEASI Act, the proceedings for appointment of receiver stand vitiated and he is entitled to skip the statutory remedy of filing an appeal before the DRAT and approach this Court in writ proceedings. However, in similar circumstances where violation of the procedure laid down under Section 13 was alleged by the writ petitioner, the Supreme Court in *United Bank of India v. Satyawati*



*Tondon and Others*² deprecated the High Court's action in entertaining the writ and observed that the writ petitioner therein had available to him the efficacious remedy under the statute of approaching the DRT and DRAT. The relevant paras of the aforesaid judgment read as under:

“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 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.

² (2010) 8 SCC 110



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.

...

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.”

(Emphasis supplied)

18. For the reasons recorded above, we are not inclined to entertain the present petition as the Petitioner has an alternate efficacious remedy of approaching the DRAT for challenging the impugned judgment.

19. The Petitioner has consciously elected to file the present writ petition so as to avoid its liability to comply with the statutory condition of pre-deposit before DRAT, which in our considered opinion is not a reasonable basis for invoking the writ jurisdiction. The Petitioner was thus aware that the writ petition was not maintainable. Accordingly, the present writ petition is dismissed with cost of Rs.15,000/- payable to Respondent Bank within two weeks.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

MAY 14, 2024/hp/msh/MG/Akt