

(2016) 07 P&H CK 0207
In the Punjab And Haryana At Chandigarh
Case No : CWP No. 13592 of 2016.

Arrun Kumar Sharma and Others - Petitioners @HASH Punjab National Bank and another

Date of Decision : 14-07-2016

Acts Referred:

Enforcement of Security Interest Act, 2002 — Section 13(2)

Citation : (2017) 1 PLJ 204 : (2017) 1 RCRCivil 119

Hon'ble Judges : Ajay Kumar Mittal and Arun Palli, JJ.

Bench : Division Bench

Advocate : Neetish Handa, Advocate, for the Petitioners

Final Decision : Dismissed

Judgement

Ajay Kumar Mittal, J. - The petitioners pray for quashing the impugned order dated 7.6.2016, Annexure P.13 passed by Debt Recovery Tribunal-I, Chandigarh (in short, DRT-1) whereby appeal under section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) has been dismissed. Further prayer has been made for quashing the notices issued by the Bank under section 13(2) of the SARFAESI Act and the application for possession of the property filed by the respondent Bank. Direction has also been sought to the respondents not to initiate coercive methods against the petitioners under the SARFAESI Act.

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. Petitioner Nos. 1 and 2 applied for housing loan for the purchase of a residential house and its construction with the intention to create an asset and also derive income from the same and repay the loan amount. Respondent No.1 Bank sanctioned housing loan of Rs. 3.63 crores i.e. Rs. 2.43 crores for the purchase of the house and Rs. 1.20 crores for the construction. Accordingly, a loan agreement for housing loan was executed on 24.3.2013, Annexure P.2 between petitioner No.1 along with his wife Smt.Seema Sharma and Punjab National Bank, Sector 17, Chandigarh. The monthly instalment of Rs. 2,42,607/- was to be paid by petitioner Nos. 1 and 2 who

authorised the Bank to recover the said amount from Account No.1418000107058478 in case of default. Out of the sanctioned amount of loan, an amount of Rs. 2,43,00,000/- only was disbursed on 18.7.2013 in the loan account No.008700NC00721877 in the name of petitioner No.2. The balance amount has not been disbursed by the respondent Bank till date. Petitioner No.2 had provided necessary documents of the property i.e. sale deed for the purpose of mortgaging the same with the bank. According to petitioner No.1, due to business exigencies, the payments due were irregular but a lump sum amount amounting to 3-4 instalments were duly disbursed from time to time in one go with the Bank and till August 2015, only an amount of Rs. 8,82,000/- was overdue towards them. Respondent Bank did not disburse the loan amount for construction purposes. Complaint under Section 138 of the Negotiable Instruments Act, 1881 (in short, "1881 Act") was also lodged against petitioner Nos. 1 and 2 as well as their company and partnership firm i.e. Petitioner No.3 and Lotus Refineries Pvt. Limited. According to the petitioners, an amount of Rs. 48,73,485/- over a period of two years from the date of the start of the loan account has been deposited even after attachment of the properties as well as freezing of the accounts of petitioner No.1. Respondent Bank through its counsel issued a legal notice dated 26.8.2015, Annexure P.8 to petitioner No.1 and 2 in their individual capacity stating that they had borrowed housing loan to the tune of Rs. 32 lacs for construction of house and the same has not been paid by them and in case they fail to keep upto their obligation, their assets would be declared as Non Performing Asset (NPA). In the meantime, respondent Bank filed a complaint under section 138/142 of the 1881 Act dated 19.10.2015 before the trial court for dishonouring of one of the cheque dated 25.8.2015. Respondent Bank also filed CWP No. 23165 of 2015 (Punjab National Bank v. Estate Office and others) with a prayer for creating a charge over the assets besides marking lien on the revenue records of the property which was dismissed by this court vide order dated 31.10.2015, Annexure P.9. The Estate Officer vide letter dated 8.7.2014, Annexure P.6 informed that the lien could not be marked as the said property had been secured in the interest of the investors of the National Spot Exchange Limited scam. Accordingly, respondent Bank issued notices for the possession of the property under Section 13(4) of the SARFAESI Act against the petitioners. The petitioners approached this court through CWP No.4874 of 2016. Vide order dated 15.3.2016, Annexure P.11, the writ petition was dismissed with the liberty to the petitioners to approach the DRT-I, Chandigarh. In the meantime, symbolic possession was taken by the respondent Bank which was intimated through notice dated 18.3.2016, Annexure P.12. The petitioners approached the DRT-I Chandigarh by filing SA No.83 of 2016 to bring forth the lapses as well as shortcomings which were the mandatory technicalities to be followed by the respondent Bank before the process of sale of property was initiated but the same were not followed. The proceedings after the declaration of the NPA were upheld to be in consonance with the provisions of the SARFAESI Act as well as the rules vide order dated 7.6.2016, Annexure P.13. According to the petitioners, the auction process was held by the bank but the Bank was not

able to sell the property on the prescribed date of auction i.e. 7.6.2016. Hence the instant writ petition by the petitioners.

3. We have heard learned counsel for the petitioners.

4. After perusing the averments made in the writ petition and hearing learned counsel for the petitioners, we find that the petitioners have an alternative efficacious remedy of appeal against the impugned order. Moreover, the disputed questions of fact have been sought to be raised in the writ petition. The Apex Court in *Commissioner of Income Tax and others v. Chhabil Dass Agarwal*, (2013) 357 ITR 357, elaborately considered the question of entertaining writ petition where alternative statutory remedy was available. After examining the relevant case law on the point, it was recorded in Paras 14 to 20 as under:-

"14. In the instant case, the only question which arises for our consideration and decision is whether the High Court was justified in interfering with the order passed by the assessing authority under Section 148 of the Act in exercise of its jurisdiction under Article 226 when an equally efficacious alternate remedy was available to the assessee under the Act.

15. Before discussing the fact proposition, we would notice the principle of law as laid down by this Court. It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226. (See: *State of U.P. v. Mohammad Nooh*, AIR 1958 SC 86; *Titaghur Paper Mills Co. Ltd. v. State of Orissa*, (1983) 2 SCC 433; *Harbanslal Sahnia v. Indian Oil Corpn. Ltd.*, (2003) 2 SCC 107; *State of H.P. v. Gujarat Ambuja Cement Ltd.*, (2005) 6 SCC 499).

16. The Constitution Benches of this Court in *K.S. Rashid and Sons v. Income Tax Investigation Commission*, AIR 1954 SC 207; *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 425; *Union of India v. T.R. Varma*, AIR 1957 SC 882; *State of U.P. v. Mohd. Nooh*, AIR 1958 SC 86 and *K.S. Venkataraman and Co. (P) Ltd. v. State of Madras*, AIR 1966 SC 1089 have held that though Article 226 confers a very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there had been a breach of principles of natural justice or procedure required for decision has not been adopted. (See: *N.T. Veluswami Thevar v. G. Raja Nainar*, AIR 1959 SC 422;

Municipal Council, Khurai v. Kamal Kumar, (1965) 2 SCR 653; Siliguri Municipality v. Amalendu Das, (1984) 2 SCC 436; S.T. Muthusami v. K. Natarajan, (1988) 1 SCC 572; Rajasthan SRTC v. Krishna Kant, (1995) 5 SCC 75; Kerala SEB v. Kurien E. Kalathil, (2000) 6 SCC 293; A. Venkatasubbiah Naidu v. S. Chellappan, (2000) 7 SCC 695; L.L. Sudhakar Reddy v. State of A.P., (2001) 6 SCC 634; Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra, (2001) 8 SCC 509; Pratap Singh v. State of Haryana, (2002) 7 SCC 484 and GKN Driveshafts (India) Ltd. v. ITO, (2003) 1 SCC 72).

17. In Nivedita Sharma v. Cellular Operators Assn. of India, (2011) 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows:

"12. In Thansingh Nathmal v. Supdt. of Taxes, AIR 1964 SC 1419 this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7).

"7. ... The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 this Court observed: (SCC pp. 440-41, para 11)

"11. ... It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford, 141 ER 486 in the following passage: (ER p. 495) `... There are three classes of cases in which a liability may be established founded upon a statute. ... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.'" The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd., 1919 AC 368 and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd., 1935 AC

532 (PC) and Secy. of State v. Mask and Co., AIR 1940 PC 105 It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

14. In *Mafatlal Industries Ltd. v. Union of India*, (1997) 5 SCC 536 B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

"77. ... So far as the jurisdiction of the High Court under Article 226-or for that matter, the jurisdiction of this Court under Article 32-is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."(See: *G. Veerappa Pillai v. Raman & Raman Ltd.*, AIR 1952 SC 192; *CCE v. Dunlop India Ltd.*, (1985) 1 SCC 260; *Ramendra Kishore Biswas v. State of Tripura*, (1999) 1 SCC 472; *Shivgonda Anna Patil v. State of Maharashtra*, (1999) 3 SCC 5; *C.A. Abraham v. ITO*, (1961) 2 SCR 765; *Titaghur Paper Mills Co. Ltd. v. State of Orissa*, (1983) 2 SCC 433; *H.B. Gandhi v. Gopi Nath and Sons*, 1992 Supp (2) SCC 312; *Whirlpool Corpn. v. Registrar of Trade Marks*, (1998) 8 SCC 1; *Tin Plate Co. of India Ltd. v. State of Bihar*, (1998) 8 SCC 272; *Sheela Devi v. Jaspal Singh*, (1999) 1 SCC 209 and *Punjab National Bank v. O.C. Krishnan*, (2001) 6 SCC 569

18. In *Union of India v. Guwahati Carbon Ltd.*, (2012) 11 SCC 651, this Court has reiterated the aforesaid principle and observed:

"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in *Munshi Ram v. Municipal Committee, Chheharta*, (1979) 3 SCC 83. In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23).

"23. ... when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded.""

19. 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*, *Titagarh Paper Mills case* 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 had 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.

20. In the instant case, the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In *Ram and Shyam Co. v. State of Haryana*, (1985) 3 SCC 267 this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility. In the instant case, neither has the assessee-writ petitioner described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case."

5. Keeping in view the availability of alternative remedy of appeal against the impugned order and the law laid down by the Supreme Court on the issue, we do not find any ground to interfere in exercise of writ jurisdiction under Articles 226/227 of the Constitution of India. Consequently, the same is hereby dismissed.