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**(2004) 03 AHC CK 0212**  
**In the Allahabad High Court**  
**Case No : Writ Petition No. 543 (M/S) of 2004**

Smt. Krishna Kumari Talwar

APPELLANT

Vs

Debt Recovery Tribunal

RESPONDENT

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**Date of Decision :** 11-03-2004

**Acts Referred:**

Constitution of India, 1950 — Article 226  
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 17, 17(2)  
Constitution of India, 1950 — Article 226  
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 17, 17(2)  
Constitution of India, 1950 — Article 226  
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 17, 17(2)

**Citation :** AIR 2004 All 342 : (2005) 2 BC 187 : (2004) 54 SCL 131

**Hon'ble Judges :** Devi Prasad Singh, J

**Bench :** Single Bench

**Advocate :** Rajendra Singh, for the Appellant; V.L. Varma, for the Respondent

**Final Decision :** Disposed Of

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## Judgement

Devi Prasad Singh, J.—Heard Shri Ashit Kumar Chaturvedi on behalf of petitioner and Shri V.L. Verma on behalf of respondent No. 6.

Brief facts of the case is that, respondents Punjab and Sindh Bank Branch Officer at GT Road, District Ghaziabad, U.P. had offered to grant of cash credit (hypothecation) limit of Rs. 15 lakhs to respondent Nos. 3, 4 and 5. The petitioner Smt. Krishna Kumari Talwar stood as guarantor along with others. The petitioner had also executed an equitable mortgaged of the property in question in favour of respondents bank. The credit limit was enhanced up to Rs. 20 lakh, at later stage. Several other properties were also hypothecated to the bank in pursuance of enhanced cash credit limit. Since the defendant failed to make the repayment of loan, the respondent bank had sent the demand notice for payment of Rs. 41,23,793.33. In the event of default of payment the civil suit

was filed, which was later on transferred to Debt Recovery Tribunal, Lucknow (respondent No. 1). After hearing the parties, the respondent No. 1 by the impugned judgment and order dated 12-1 -2004, a copy of which has been filed as annexure No. 1 to the writ petition, has issued recovery certificate against the defendants of the suit, jointly and severally for the recovery of the sum of Rs. 41,23,793.33 together with pendente lite and future interest at the rate of 23.25 per cent per annum with quarterly rest, till realisation together with costs. It has been also provided by the respondent No. 1 that all property hypothecated and mortgaged will remain attached under the jurisdiction of Tribunal and defendant of the suits were restrained not to sale, transfer or alienate any of the mortgaged/hypothecated properties. Respondent No. 1 further directed that the said amount shall be recovered from the sale of hypothecated/mortgaged property and the balance of amount shall be recovered from the defendant otherwise as per law.

Feeling aggrieved with the impugned order, the present writ petition has been filed by the petitioner that she is an old lady of 75 years and she has been cheated by respondent Nos. 2 to 5 in connivance with the officers of the Punjab and Sindh Bank. It has been submitted by the petitioner that she had never intend to mortgage nor she had mortgaged her house No. 57, Arya Nagar, District Ghaziabad. According to learned counsel for the petitioner, the petitioner had never signed any paper as guarantor and the respondent No. 1 had not heard the petitioner on merit, nor the recall application was heard.

2. On the other hand, the evidence discussed by the Tribunal shows that on one or other pretext the proceedings of the suit was interrupted from time to time and prolonged on account of non-co-operation on part of the petitioner as well as respondent Nos. 2 to 5 of the present writ petition. On the other hand, learned counsel for the respondents bank submits that the alternative appellate remedy is available to the petitioner u/s 17(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 (in short hereinafter referred as Act.). For convenience Sub-section (2) of Section 17 is reproduced as under :

"... 17(2). Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal seventy-five per cent of the amount claimed in the notice referred to in Sub-section (2) of Section 13 :

Provides that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section."

Since statutory remedy is available to the petitioner and the appellate court is fully empowered to decide the factual dispute as well as illegality alleged to be committed by the opposite party No. 1, the present writ petition is not maintainable.

3. Learned counsel for the petitioner submits that u/s 18 of the Act there is no

absolute bar and this court may entertain the writ petition against the impugned order under the extraordinary power conferred by Article 226 of Constitution of India. No doubt this court may exercise extraordinary power under Article 226 of Constitution of India but that power should be used sparingly and normally in those cases where there is no disputed question of fact exist for adjudication. In the present case the submission of the petitioner requires to decide the disputed question of fact which can be well appreciated by the appellate court after summoning the paper book of the original case from respondent No. 1.

4. In a case report in Dwarka Prasad Agarwal (D) by Lrs. and Another Vs. Ramesh Chandra Agarwala and Others, . Supreme Court held that in a case where the dispute between the parties were eminently is of civil nature (sic) Apex Court ruled that where the CPC confers jurisdiction on the Civil Court to determine a dispute of Civil nature, unless the same is barred under a statute either expressly or by necessary implication, the controversy should be adjudicated upon by the Civil Court itself not by exercising the extraordinary power by the High Court.

For convenience relevant portion from the said judgment is reproduced as under :--

"22, The dispute between the parties was eminently a civil dispute and not a dispute under the provisions of the Companies Act. Section 9 of the CPC confers jurisdiction upon the civil courts to determine all disputes of civil nature unless the same is barred under a statute either expressly or by necessary implication. Bar of jurisdiction of a civil court is not to be really inferred. A provision seeking to bar jurisdiction of a Civil Court requires strict interpretation. The court, it is well settled, would normally lean in favour of construction, which would uphold retention of jurisdiction of the civil court. The burden of proof in this behalf shall be on the party who asserts that the civil court's jurisdiction is ousted. ( Sahebgouda (dead) by Lrs. and Others Vs. Ogeppa and Others, . Even otherwise, the civil court's jurisdiction is not completely ousted under the Companies Act, 1956." (p. 228)

In the present case there is statutory right of appeal and the appellate court has got ample power to decide the present dispute.

5. In one another case in Dipak Chandra Ruhidas Vs. Chandan Kumar Sarkar, Supreme Court held that the power of appellate court is much wider than power conferred to High Court or Supreme Court and the appellate authority has got wide power to go into, interfere and discuss to decide the controversy in question.

For convenience para 15 of the said judgment is reproduced as under:--

"Section 116 - A provides for an appeal. The said provision must be given a liberal and purposive construction. The scope of an appeal should be held to be wider than an application for judicial review or a petition under Article 136 of the Constitution of India."

6. The Apex Court in *Shri Bimal N. Desai Vs. State of Karnataka and Others*, ruled that the alternative remedy of statutory appeal cannot be bypassed for conditions like limitation, payment of court fee or deposit of some amount or fulfillment of some other conditions for entertaining the appeal.

For convenience para 13 of the said judgment is reproduced as under:--

"13. It has been settled by a long catena of decisions that when a right or liability is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of Constitution. This rule of exhaustion of statutory remedies is no doubt a rule of policy, convenience and discretion and the court may in exceptional cases issue a discretionary writ of certiorari. Where there is complete lack of jurisdiction for the officer or authority or tribunal to take action or there has been a contravention of fundamental rights or there has been a violation of rules of natural justice or where the Tribunal acted under a provision of law, which is ultra vires, then notwithstanding the existence of an alternative remedy, the High Court can exercise its jurisdiction to grant relief. In the present case, the alternative remedy of challenging the judgment of the court was not before some other forum or tribunal. On the contrary, by virtue of Sub-section (3) of Section 27 of the Act, the order passed by the court amounted to a decree against which an appeal lay to the High Court. When the party had statutory remedy of assailing the order passed by the Court District Court by filing an appeal to the High Court itself, he could not bypass the said remedy and take recourse to proceedings under Articles 226 and 227 of the Constitution. Such a course of action may enable a litigant to defeat the provisions of the statute which may provide for certain conditions for filing the appeal, like limitation, payment of court fee or deposit of some amount or fulfillment of some other conditions for entertaining the appeal."

In the present case the petitioner's liability to repay the amount in question is on account of mortgaged of the property as she stood as a guarantor. The liability of the petitioner emerges virtually on account of an agreement or contract entered into between the parties by way of mortgaged deed.

7. Against the apex court in a case in *National Highway Authority of India Vs. Ganga Enterprises and Another*, held that the contractual matters should not be agitated in a proceedings under Article 226 of Constitution of India. The relevant portion of the said judgment is reproduced as under :--

"... It is settled law that disputes relating to contracts cannot be agitated under Article 226 of Constitution of India. It has been so held in the cases of *Kerala SEB v. Kurien E. Kalathil*, *State of U.P. v. Bridge and Roof Co. (India) Ltd.* and *Bareilly Development Authority v. Ajai Pal Singh*. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum."

In the case of Secretary, Minor Irrigation and Rural Engineering Services, U.P. and Others Vs. Sahngoo Ram Arya and Another, apex court of the country held that the alternative remedy of Tribunal cannot be bypassed on the ground that Tribunal lacks power to pass interim order. Relevant portion of the case of Sahngoo Ram (supra) is reproduced as under :

"Mr. Sunil Gupta, learned counsel appearing for the petitioner contended that the remedy before the Tribunal under the U.P. Public Services (Tribunal) Act is wholly illusory inasmuch as the Tribunal has no power to grant an interim order. Therefore, he contends that the High Court ought not to have relegated the petitioner to a fresh proceeding before the said Tribunal. We do not agree with these arguments of the learned counsel. When the statute has provided for the constitution of a Tribunal for adjudicating the disputes of a government servant, the fact that the Tribunal has no authority to grant an interim order is no ground to bypass the said Tribunal. In as appropriate case after entertaining the petitions by an aggrieved party if the Tribunal declines an interim order on the ground that it has no such power then it is possible that such aggrieved party can seek remedy under Article 226 of the Constitution but that is no ground to bypass the said Tribunal in the first instance itself."

8. While giving emphasis to avail the statutory remedy before filing a writ petition, Supreme Court in a case in Union of India (UOI) and Others Vs. Ingersoll Rand (India) Ltd., held that the alternative statutory remedy should not be bypassed while a writ petition for the redressal of grievances. The relevant portion of the said judgment is reproduced as under :--

"By the impugned judgments the Karnataka High Court has allowed the writ petitions filed by the respondents and has directed the appellants to refund the amount of excise duty paid by the respondents without requiring the respondents to pursue the remedy available under the statutory provisions governing the refund of the duty paid. The matter is covered by the decision of the larger Bench of this Court in Mafatlal Industries Ltd. v. Union of India wherein this Court has laid down that the High Court in exercise of its power under Article 226 of Constitution cannot give direction for refund in disregard of the provisions contained in the Central Excises and Salt Act."

9. In view of above, the present writ petition is devoid of merit on account of availability of alternative remedy of statutory appeal.

Accordingly, writ petition is dismissed on account of availability of appellate remedy. In case petitioner prefers an appeal within a period of one month from today, the appeal shall not be rejected by the appellate authority on the ground of limitation and shall be decided on merit in accordance to law after considering the entire facts and circumstances raised by the petitioner.

It shall be open for the petitioner to move an application for interim relief before the appellate authority, which shall be considered by the authority expeditiously preferably within a period of one month from the date of filing of application. Till

the application of interim relief is considered and decided by the appellate authority it is provided that in pursuance to impugned order dated 12-1-2004 though the recovery proceedings may go on but petitioner's house in question may not be put to auction and sale unless the other mortgaged properties failed to satisfy the bank dues.

The appellate authority is further directed to decide the appeal expeditiously, preferably within a period of four months from the date of filing of appeal in accordance to law.