THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extra Ordinary Jurisdiction)

S.B: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

W.P. (C) No.40 of 2019

1. Shri. Umesh Prasad Sharma,
S/o Shri Dadhi Ram Sharma,
R/o Padamchey, East Pendam,
P/o Pachak, P.S. Pakyong,
East Sikkim-737132.

2. Shri Madan Sharma,
S/o Shri Dadhi Ram Sharma,
R/o Padamchey, East Pendam,
P/o Pachak, P.S. Pakyong,
East Sikkim-737132. ..... Petitioners

Versus

1. Allahabad Bank,
Represented by and through
the Chief Manager,
Gangtok Branch,
Sikkim Trader International Building,
Metro Point, NH-31A,
Gangtok, East Sikkim.

2. Shri Duk Nath Nepal,
S/o D.R. Nepal,
R/o Daragaon, Tadong,
East Sikkim.

3. Smt. Rekha Nepal,
W/o Duk Nath Nepal,
R/o Daragaon, Tadong,
East Sikkim.

4. Shri Dadi Ram Sharma,
S/o Late H.P. Sharma,
R/o Padamchey, East Pendam,
P/o Pachek, P.S. Pakyong,
East Sikkim 737132.

5. Recovery Officer-I
DRT Siliguri, M/O Finance,
Siliguri-1, 2nd Mile, Sevoke Road,

PCM Tower 2nd Floor, Siliguri,
West Bengal-734001. .....Respondents

Application under Article 227 of the Constitution of India.

Appearance:

Mr. A. Moulik, Senior Advocate with Ms. K. D. Bhutia, Advocate for the petitioners.

Mr. Sudesh Joshi, Advocate for Respondent no.1,

Mr. Pratap Khati, Advocate for Respondent Nos. 2 & 3.

None appears for respondent Nos. 4 and 5.

Date of Hearing: 02.09.2021 & 03.09.2021

Date of Judgment: 30.09.2021

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. The petitioners were not parties before the Debts Recovery Tribunal (the Tribunal). They are adult sons of the respondent no.4 who was proceeded against before the Tribunal having stood as guarantor for the loan taken by the respondent no.2 from the respondent no.1 in Case No.TRC /127/2018 in re: Allahabad Bank vs. M/s Majestic Printers and Publishers and Ors. The respondent no.4 had for that purpose mortgaged the landed property in dispute (the property) to the respondent no.1 as a guarantor. The respondent no.3 wife of respondent no.2 was also a

guarantor. The respondent no.2 was the Certificate Debtor no.2 and the respondent no.4 was Certificate Debtor no.3.

2. They have approached this court under Article 227 of the Constitution of India seeking for quashing of the order dated 13.11.2019 (impugned order) purportedly passed by the Tribunal. They seek a declaration that the property involved in the auction sale shall not be sold in auction to realize the dues of the respondent no.1; a declaration that the other landed properties of respondent no.2 first be proceeded against to realize the dues of respondent no.1; and a direction that the loan shall be realized from the respondent no.3 from her employer duly adjusting the considerable amount towards recovery of loan.

3. The petitioners state that the property was originally acquired by the father of respondent no.4, late Hari Prasad Sharma and the respondent no.4 got this property as his share from his father on partition and as such it is an ancestral property of the petitioners. It is the petitioner's case that there is an old *'ekra'* house in the property where the petitioners along with their father-the respondent no.4 and other family members used to reside. It is stated that the petitioners and the respondent no.4 jointly cultivate the

land appurtenant to the old *'ekra'* house. It is the petitioners' case that if they are removed from the *'ekra'* house and the land appurtenant thereto they would be rendered homeless.

4. It is stated that the petitioners as well as respondent no.4 are Hindus governed by Mitakshara School of Hindu Law and that by virtue of their birth; they have become owners of the property along with respondent no.4 as coparceners.

5. According to the petitioners the respondent no.2 owns and possesses various landed properties bearing plot nos. 396 (area .2420), 405 (area .0240), 1191 (area .1680), 1489 (area .0600), 1489/1789 (area .2460), 1248/1790 (area .1840) and 1249/1791 (area .2320). The petitioners have relied upon a communication bearing memo no. 63/DCE dated 12.10.2017 issued by the Sub-Divisional Magistrate, East District Collectorate of the Government of Sikkim which states so. It is asserted that these properties which are recorded in the name of respondent no.2 are apart from land bearing plot no.1487/1789 at Tintek Block, East Sikkim which has been attached for sale by auction by the respondent no.1.

6. The petitioners further assert that the respondent no.3-wife of respondent no.2 who was also a guarantor of the loan taken by respondent no.2 is a regular employee of the Government of Sikkim in the Energy and Power Department, Gangtok in the rank of ARS. Her gross monthly salary is Rs.49,000/- and net amount received by her per month is Rs.33,669/-.

7. Although the respondent no.4 was arrayed as a party in the present writ petition and served, he has chosen not to appear and file his say.

8. The respondent no.1 challenges the *locus standi* of the writ petition. The respondent no.1 also contests the claim of the petitioners that the property is ancestral property. According to the respondent no.1 the property was gifted to respondent no.4 by his father late Hari Prasad Sharma by a gift deed dated 21.03.2001 duly registered before the sub-registrar. According to the respondent no.1 the gift deed and *'parcha khaityan'* made from the original title deeds were deposited by the respondent no.4 as the mortgager for creating a mortgage with the respondent no.1. The respondent no.1 further pleads that the provisions of the Recovery of Debts Due to Banks and

Financial Institutions Act, 1993 (the DRT Act) provides an efficacious remedy to any person who may have grievances against the order/judgment of the Tribunal and the aggrieved person may preferred an appeal to the Debts Recovery Appellate Tribunal (the Appellate Tribunal). It is thus contended that in view of the availability of efficacious statutory remedy the petitioners ought to have exhausted it before invoking the jurisdiction of this court.

9. The respondent no.1 does not dispute the assertion of the petitioners about their humble background; that the petitioners live with the respondent no.4 in the *'ekra'* house and their livelihood being dependent upon the property.

10. The respondent no.2 states that he was running a printing press in the name and style of M/s Majestic Printers and Publishers. He was earlier banking with UCO Bank when in the year 2006 the respondent no.1 approached him to be a customer and assured him of granting a loan. Although he had sought a loan of Rs.25 lakhs only, Rs.18 lakhs was sanctioned and finally an amount of Rs.15 lakhs was lent to him. The respondent no.3, his wife, stood as his guarantor. The respondent no.1 asked the respondent no.2 to ensure another guarantor. He

requested respondent no.4, who then stood as a guarantor for the loan. On 14.03.2006 the respondent no.4 applied to withdraw as a guarantor. After receiving the respondent no.4's request for discharge as a guarantor the respondent no.1 started pressurising respondent no.2 to pay the entire loan and as a result he could not concentrate on his business which ultimately led to the downfall. The respondent no.2 has not denied the assertion made by the petitioners that he is owner of various other properties besides the one secured with the respondent no.1.

11. The respondent no.3 also accepted that she had stood as a guarantor on behalf of respondent no.2, her husband. The respondent no.3 has stated in her counter-affidavit that she had informed the respondent no.1 at the time when respondent no.2 took the loan that she was not a regular employee and could not be able to submit any salary certificate. However, the respondent no.3 has not disputed the petitioners' assertion that she was now a regular employee earning a salary of Rs.49,000/- per month.

12. Rejoinders to the counter-affidavits filed by respondent nos.1 and respondent nos. 2 and 3 were also

filed by the petitioners. The petitioners took the plea of the factum of the Appellate Tribunal being outside the State of Sikkim and their inability to approach it; the financial burden on them to deposit 50% of the debt to prefer an appeal; the respondent no.2 having extensive property yet not attached from where the respondent no.1 could realize their dues; and the protection guaranteed by the Old Laws of Sikkim against auction sale of properties if on such sale the holding would become less than 5 acres. It was also pleaded that the respondent no.3 who was also a guarantor was a government servant and therefore, in a position to repay the loan taken by her husband the respondent no.2.

13. Mr. A. Moulik, learned Senior Advocate for the petitioners submitted that when the property was gifted by the father of respondent no.4 the petitioners were already born and thus had acquired a right over the coparcenary property. He insisted that the property was ancestor property. To explain what is ancestral property and the effect thereof he relied upon ***State Bank of India vs. Ghamandi Ram (Dead) Through Gurbax Rai***[1]; ***Lakkireddi Chinna Venkata Reddi & Ors. vs. Lakkireddi Lakshmama***[2]; ***Vineeta***

[1] AIR 1969 SC 1330
[2] AIR 1963 SC 1601

Sharma vs. Rakesh Sharma & Ors.[3]***.*** To contest the plea of the respondent no.1 of not having availed the efficacious alternative remedy Mr. A. Moulik relied upon ***Bharati Reddy vs. State of Karnataka & Ors.***[4] and ***Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited & Ors.***[5].

14. Mr Sudesh Joshi, learned counsel for respondent no.1 on the other hand drew the attention of this court to paragraph 5 of the writ petition which according to him clearly explains the nature of the property. The learned counsel submits that on these pleadings it is evident that the property was not an ancestral property. He submitted that what is ancestral property has been crystallized by the Supreme Court in ***Shyam Narayan Prasad vs. Krishna Prasad & Ors.***[6]; ***Govindbhai Chhotabhai Patel & Ors. vs. Patel Ramanbhai Mathurbhai***[7] and ***Maktul vs. MST. Manbhari & Ors.***[8] He further submitted that the petitioner could have availed of the alternative remedy and having not done so, the writ petition was not maintainable.

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[3] (2020) 9 SCC 1
[4] (2018) 12 SCC 61
[5] (2014) 6 SCC 1
[6] (2018) 7 SCC 646
[7] (2020) 16 SCC 255
[8] AIR 1958 SC 918

15. A reading of the judgments of the Supreme Court cited by the petitioners makes it clear that a party who applies for issuance of a writ should, before he approached the court, have exhausted other remedies open to him under the law. However, this is not a bar to the jurisdiction of the High Court to entertain the petition or to deal with it. It is rather a rule which courts have laid down for the exercise of their discretion.

16. In ***Harshad Govardhand Sondagar*** (supra) the Supreme Court examined a case of the appellants who claimed to be tenants of different premises in Mumbai mortgaged to different banks as securities for loan advanced by the banks. The Supreme Court examined the various provisions of the Transfer of Property Act, 1882, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act") and it was held that before the mortgage was created, the borrower had already leased out the same in favour of the lessee and thus the lessee would have the right to enjoy the property in accordance with the terms and conditions of the lease. It was further held that there was no remedy available to a lessee of the borrower under Section 17 of the SARFAESI Act before the Tribunal, in

case of dispossession by the secured creditor and therefore, the remedy would lie under Article 226 and 227 of the Constitution of India.

17. In ***Assistant Commissioner of State Tax & Ors. Vs. M/s Commercial Steel Limited***[9] held:

> ***"11****. The respondent had a statutory remedy under section 107. Instead of availing of the remedy, the respondent instituted a petition under Article 226. The existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is:*
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> *(i) a breach of fundamental rights;*
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> *(ii) a violation of the principles of natural justice;*
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> *(iii) an excess of jurisdiction; or*
>
> *(iv) a challenge to the vires of the statute or delegated legislation.***"**

18. The writ petition is contested by the respondent no.1 on the ground of availability of an efficacious alternative remedy. The respondent no.1 submits that Section 20 of the RDB Act provides an appeal against the order of the Tribunal to any person aggrieved by an order made, or deemed to have been made by a Tribunal.

19. The petitioners have challenged the impugned order. The impugned order was passed by the respondent no.5 the Recovery Officer-I of the Tribunal (the Recovery Officer)

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[9] Civil Appeal No. 5121 of 2021 (decided on 03.09.2021)

under Section 25 of the RDB Act. It is not an order passed by the Tribunal. Section 20 of the RDB Act provides for an appeal to the Appellate Tribunal to any person aggrieved by an order made, or deemed to have been made by a Tribunal only and not against any order passed by the Recovery Officer under Section 25 thereof. As such this court is of the view that against the impugned order passed by the Recovery Officer of the Tribunal no appeal could have been preferred under Section 20.

20. A proceeding under Section 25 of the Act is appealable under Section 30. Section 30 provides that notwithstanding anything contained in Section 29, any person aggrieved by an order of the Recovery Officer made under the Act may, within thirty days from the date of which a copy of the order is issued to him, prefer an appeal to the Tribunal. On receipt of an appeal the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under Section 25 to 28.

21. The proceeding was at the stage of Section 25 of the Act. Section 25, as seen above, relates to the mode of

recovery of debts. Section 26 deals with the validity of certificate and amendment thereof and provides that it shall not be open to the defendant to dispute before the Recovery Officer the correctness of the amount specified in the certificate, and no objection to the certificate on any other ground shall also be entertained by the Recovery Officer. The Presiding Officer however, would have the power to withdraw the certificate or correct any clerical or arithmetical mistake in the certificate by sending intimation to the Recovery Officer. Section 27 deals with stay of proceedings under certificate and amendment or withdrawal thereof. The Presiding Officer has power to grant time for payment of the amount provided the defendants makes a down payment of not less than 25% of the amount specified in the recovery certificate and gives an unconditional undertaking to pay the balance within a reasonable time acceptable to the applicant bank or financial institution holding recovery certificate. Section 28 deals with other modes of recovery other than as provided in Section 25. Thus it is clear that the scope of Section 30 appeal is limited to confirm, modify or *set aside* the order made by the Recovery Officer in exercise of his powers under Section 25 to 28.

22. Although both Sections 20 and 30 of the RDB Act uses the expression *"any person aggrieved"* the scope of the two provisions is materially different. Whereas an appeal under Section 20 is preferred against an order of the Tribunal the appeal under Section 20 is against the order made by the Recovery Officer. The issues sought to be raised in the present petition by the petitioners, who are not parties before the Tribunal are not determinable by the Recovery Officer who is concerned only for recovering the amount specified by the Tribunal in the recovery certificate. The respondent no.4 in an appeal under Section 20 of the RDB Act could have raised those issues while challenging the final order passed by the Tribunal under Section 19 (20) of the RDB Act. This court is not examining whether the petitioners could have challenged the final order passed by the Tribunal in the facts of the case as it is only academic.

23. This court shall now examine if the property is an ancestral property of the petitioners or if they had any enforceable right on the property mortgaged by the respondent no.4 in favour of the respondent no.1 as a guarantor.

24. According to Hindu Law by Sir Dinshaw Fardunji Mulla 23rd Edition *"all property inherited by a male hindu from his father, father's father or father's father father, is ancestral property."* A property of a Hindu male devolves on his death. This was reiterated by the Supreme Court in ***Shyam Narayan Prasad*** (supra).

25. A three-Judge Bench decision of the Supreme Court in ***C. N. Arunachala Mudaliar vs. C.A. Muruganatha Mudaliar***[10] held that father of a Joint Hindu family governed by Mitakshara law has full and uncontrolled powers of disposition over his self-acquired immovable property and his male issue could not interfere with these rights in any way. The Supreme Court while examining the question as to what kind of interest a son would take in the self-acquired property of his father which he receives by gift or testamentary bequest from him, it was held that Mitakshara father has absolute right of disposition over his self-acquired property to which no exception can be taken by his male descendants. It was held that it was not possible to hold that such property bequeathed or gifted to a son must necessarily rank as ancestral property. It was

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[10] AIR 1953 SC 495

further held that a property gifted by a father to his son could not become ancestral property in the hands of the donee simply by reason of the fact that the donee got it from his father or ancestor.

26. On their pleadings, evidently, the petitioners have not inherited the disputed property. Their father, the respondent no.4, is still alive. The petitioners state that the respondent no.4 got the property as his share from his father late H.P. Sharma on partition. However, the petitioners have not filed any partition deed to substantiate their claim. The respondent no.1 has however, pleaded that the property was gifted to respondent no.4 by his late father Hari Prasad Sharma vide gift deed dated 21.03.2001 duly registered in the office of the sub-registrar. The respondent No.1 has also filed the gift deed and the *'parcha khatiyan'* by which the property was mortgaged by respondent no.4 with the respondent no.1 as the guarantor. Without examining whether this document purporting to be a gift deed is in fact a gift deed or a sale deed as sought to be argued by Mr. A. Moulik it is quite evident that respondent no.4 had not got the disputed property as his share on partition as claimed by the

petitioners. It is also evident that the respondent no.4 acquired the property on transfer by his father who had originally acquired it. These facts make the property self acquired property of late Hari Prasad Sharma and thereafter, of the respondent no.4 and consequently not the ancestral property of the petitioners. As such the respondent no.4 has a right to deal and dispose of the property as he desires.

27. It is not in dispute that the respondent no.4 had mortgaged the property in favour of the respondent no.1. Section 58 (a) of the Transfer of Property Act, 1882 states that a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The respondent no.4 had the right to do so and the petitioners who are his adult sons could not have any right to stop him in dealing with his self acquired property in the manner he chose. Evidently no attempt was also made by the petitioners to do so. The mortgage on the property does create rights in favour of the respondent no.1.

28. In view of the aforesaid this court is of the considered view that the present case is not a fit case for interference with the recovery proceedings. More so when the respondent no.4 himself doesn't seem to have any grievance and the petitioners have no right over the property.

29. The writ petition is dismissed. Consequently, the interim order dated 20.12.2019 stands vacated. Pending application, if any, is also disposed. In the circumstances, no order as to cost.

(Bhaskar Raj Pradhan)
Judge

Approved for reporting : **Yes**
Internet : **Yes**

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