Serial No. 01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

CRP No. 14 of 2016

Date of Decision: 28.07.2022

Shri Manik Dhar **Vs.** Indian Overseas Bank & Anr.

Coram:

Hon'ble Mr. Justice H. S. Thangkhiew, Judge

Appearance:

For the Petitioner(s) : Mr. K. Paul, Sr. Adv. with
Mr. S. Thapa, Adv.

For the Respondent(s) : Ms. T. Yangi B, Sr. Adv. with
Ms. I.M. Lyngdoh, Adv.

i) Whether approved for reporting in Law journals etc: Yes/No

ii) Whether approved for publication in press: Yes/No

JUDGMENT AND ORDER

1. This application under Article 227 of the Constitution of India has been filed assailing the impugned orders dated 09.09.2015 and 18.04.2016, passed by the Recovery Officer, Debts Recovery Tribunal, Gauhati in O.A. No. 12 of 2007, against the proclamation of attachment

of the petitioner's property which is alleged, is yet to be registered in the name of the petitioner and that the said impugned orders, run contrary to an earlier order dated 10.12.2009 of the Recovery Officer itself. Being aggrieved that the impugned orders had been passed without considering the earlier order dated 10.12.2009, the petitioner is before this Court.

2. The factual aspects that are necessary for consideration of the matter is that the petitioner, had applied for credit facilities from the respondents Bank under a fund-based account namely; Term Loan and working Capital Term Loan account with varying limits against hypothecation of all movable assets. The respondents Bank sanctioned the said credit facilities in favour of the petitioner and various amounts were sanctioned on many dates, as per the set terms and conditions, against the securities stipulated in the sanction letters. The petitioner in confirmation thereof, executed various documents. To secure the loan, the guarantor of the petitioner created an equitable mortgage in favour of the respondents of a plot of land situated in Silchar and apart from the said plot, the petitioner vide letter dated 06.04.2004, mortgaged his flat situated at Iakatori Complex Keating Road, Shillong as part of the collateral securities towards the Loan account. It appears that after

having availed of the loan, the petitioner could not re-pay the same and the respondent Bank thereafter, on such non-repayment, filed an application under Section 19 of the ***Recovery of Debts due to Banks and Financial Institutions Act, 1993*** now known as ***Recovery of Debts and Bankruptcy Act, 1993,*** before the Debt Recovery Tribunal, Gauhati, praying for issuance of recovery certificate for Rs. 1,44,97,391/- (Rupees One Crore, Forty-Four Lakhs, Ninety-Seven Thousand, Three Hundred and Ninety-One) only along with future interest, and the same was registered as O.A. No. 12 of 2007. The learned Tribunal vide Judgment and Order dated 29.05.2008 then issued a recovery certificate in favour of the respondent holding as follows: -

> ***"Issued Recovery Certificate in favour of the applicant for the recovery of Rs. 1,44,97,391/- (Rupees One Crore, Forty Four Lakhs, Ninety Seven Thousand, Three Hundred and Ninety One) only against both the defendants along with the future interest @ 14% per annum from the date of filing of the application till realization of the amount and also cost of the application".***

3. Thereafter, pursuant to the order dated 29.05.2008, a certificate was issued under Section 19 (22) of the Recovery of Debts Act and by order dated 24.02.2009, the Recovery Officer directed attachment of the properties of the petitioner. However, on 10.12.2009, on a report of the Recovery Inspector DRT, that the apartment situated

at Iakitori Complex was yet to be registered, the said attachment was recalled to await till proper registration was completed. By another order dated 31.03.2011, the learned Tribunal recorded that, as there was no other property on record against which recovery proceedings could be carried out, it directed the applicant Bank to furnish property particulars belonging to the petitioner and that till submission thereof, the matter be kept in abeyance.

4. Thereafter, it appears by order dated 09.09.2015 the learned Tribunal on coming to a finding that the petitioner had purchased the other property in his name and the said sale had been confirmed by the vendor, then rejected the petitioner's prayer from the liability against the said certificate and fixed 28.10.2015 for report and for passing of necessary orders on proclamation of attachment. The petitioner sought recall of the said order which was came to be rejected by order dated 18.04.2016 and while rejecting the prayer, the Recovery Officer ordered for attachment of the property. At this juncture, the petitioner then approached this Court.

5. Mr K. Paul, learned Senior counsel assisted by Mr. S. Thapa, learned counsel for the petitioner submits that the learned Recovery Officer, Debts Recovery Tribunal could not have passed the

impugned orders as the same were in conflict with the earlier orders and has argued that the doctrine of *stare decisis,* operates as a bar against the Tribunal passing the said impugned orders, until and unless the earlier orders are recalled, modified or set aside. He further submits that no reason had been attributed as to the reasons for passing the impugned orders, when the circumstances had not changed, inasmuch as, the property is yet to be registered in the name of the petitioner.

6. Learned Senior counsel submits that substantial payments have been made towards the repayment of loan and adjustments had been done by the respondent Bank including adjustments of fixed deposits, Government cheques and the sale of land at Silchar, apart from other cash deposits which he submits in aggregate have amounted to over Rs. 1,14,00,000/-. Learned Senior counsel contends that the order of attachment could not have been passed when the property is still not registered in the name of the petitioner and submits that the petitioner never wilfully or deliberately defaulted in payment of dues and the default was caused due to compelling and unprecedented situations which resulted in a dip in his financial business and activity. He therefore submits that the impugned orders being non est and untenable in the eye of law, are liable to set aside and quashed.

7. Ms. T. Yangi B, learned Senior counsel assisted by Ms. I.M. Lyngdoh, learned counsel for the respondents in reply submits that the instant petition is not maintainable, inasmuch as, there is an effective alternate remedy under the provisions of Section 20 of the Act itself and therefore, the invocation of Article 227 is uncalled for. In this context, learned Senior counsel has relied upon the case of ***Punjab National Bank vs. O.C. Krishnan*** reported in (***2001) 6 SCC 569***, which she submits the Hon'ble Supreme Court has clearly enunciated the principle that exhaustion of alternative remedy was essential under the provisions of the Act and that this fast-track procedure cannot be allowed to be derailed, by taking recourse to Article 226 or 227 of the Constitution. On this issue of maintainability, learned counsel has also placed reliance on the cases of ***United Bank of India vs. Satyawati Tondon & Ors.*** reported in ***AIR 2010 SCC 3413*** and ***Kanaiyalal Lalchand Sachdev & Ors. vs. State of Maharashtra & Ors.*** reported in ***(2011) 2 SCC 782***.

8. Learned Senior counsel submits that recourse to Section 19 of the Act was taken before the Debt Recovery Tribunal at Gauhati, due to the non-payment of the outstanding dues, as per the terms and conditions of the loan agreement by the petitioner and the guarantor and

as such the loan came to be classified as a Non-Performing Asset on 01.07.2004. With regard to the contention that the said property sought for attachment situated at Iakatori Complex, Keating Road is yet to be registered, learned Senior counsel submits that the vendor of the property by letter dated 10.05.2013, had informed the respondent Bank that she had received the entire consideration amount from the petitioner and that the possession had also been handed over. She further submits that the respondent Bank was also informed by the vendor that although requisite permissions for transfer and registration had been received, the petitioner was the one who did come forward to complete the formalities.

9. It was in this situation she submits, that an application was filed by the respondent Bank which was served upon the petitioner, upon which the order dated 09.09.2015 was passed by the Recovery Officer DRT. The learned Senior counsel then submits, that the petitioner filed an application for recall of the order dated 09.09.2015, but on 18.04.2016 sought liberty to withdraw the same, which was however rejected. The Recovery Officer she submits, then ordered for attachment of the said property, by holding that the petitioner was in possession of the flat for which an equitable mortgage had been created,

a fact that had also been confirmed by the Presiding Officer of the Tribunal, at the time of issuance of the recovery certificate. In this context, the learned Senior counsel submits that equitable mortgage by deposit of title deeds is not void for want of stamp or registration and the moment the title deeds are deposited by way of security, it is a mortgage. Learned counsel has referred to the judgment of ***United Bank of India vs. Lekharam Sonaram*** reported in ***AIR 1965 SC 1591*** to impress upon the point that any document which shows evidence of title would be sufficient to create a mortgage by deposit of title deeds. Reference has also been made by the learned Senior counsel to the judgment in the case of ***Prakash Sahu vs. Sawlal & Ors.*** reported in ***(2010) 5 SCC 401*** to show that an unregistered sale agreement can be used and deposited for collateral purpose.

10. In conclusion, she submits that though the impugned order dated 18.04.2016 is not an order of review per se, even if the same is taken to be so, the Tribunal by virtue of Section 22 (2)(e) of the Act is vested with the power to review its own order. She lastly submits that whatever facts or law as agitated by the petitioner ought to be examined by the statutory Appellate Authority and not in a proceeding under Article 227 of the Constitution of India.

11. I have heard learned counsel for the parties.

12. It is noted that this matter has been pending disposal for a considerable period of time as it appears from the order sheets that the matter was adjourned on numerous occasions as talks and attempts for settlement were being made which had begun since October, 2017. The settlement however could not be achieved and accordingly, the matter has been taken up for final hearing and disposal.

13. From the submissions, pleadings and materials on record, it can be seen that it is only the subsequent events before the Recovery Officer after the grant of certificate of recovery by the learned Tribunal vide order dated 29.05.2008, that has given rise to further issues between the parties with regard to the recovery of the loan. As argued by the counsel for the petitioner, prayer is sought for the invocation of Article 227 of the Constitution of India in view of the perceived contradictory orders that had been passed by the Recovery Officer, with regard to the attachment of the petitioner's property/flat situated at Keating Road, Shillong.

14. The ground put up by the petitioner that the property could not be attached as it is yet to be registered in his name and the counter argument by the respondents that the same was permissible in view of

the creation of an equitable mortgage, has been duly considered and noted by this Court. However, the overbearing issue herein, which cannot be disregarded, is that the orders impugned herein emanate from proceedings that have been conducted under a special statute i.e the ***Recovery of Debts due to Banks and Financial Institutions Act, 1993*** now known as ***Recovery of Debts and Bankruptcy Act, 1993***. This Act was brought about to provide for the establishment of Tribunal for expeditious adjudication and recovery of debts due to Banks and Financial Institutions. Another fact that cannot be ignored, is that the certificate from the learned Tribunal was granted as far back as 29.05.2008 and though partial recovery had been made, the certificate is yet to be executed to the extent granted.

15. The proceedings were initiated by an application under Section 19 of the Act and the normal course for persons aggrieved with orders passed by the learned Tribunal was to take recourse to an appeal before an Appellate Tribunal as provided in Section 20 of the Act. The petitioner herein, though clearly being aggrieved with orders normally appealable under this statute itself, however chose to approach this Court by way of the instant application under Article 227 by invoking the doctrine of ***stare decisis*****,** however without having any other issue

such as, lack of jurisdiction or any grave procedural irregularity that may have been occasioned in the proceedings before the Tribunal. On perusal of the impugned orders passed on the applications by the respondents, which ordered for proclamation of attachment of the petitioner's property, in the considered view of this Court, these orders at most, would amount to modification or review of the earlier order dated 10.12.2009. The exercise of such powers by the Tribunal is provided in Section 22 (2) (e) of the Act which reads as follows.

> ***"22. Procedure and powers of the Tribunal and the Appellate Tribunal.—(1) ……...***
>
> ***(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:—***
>
> ***(a) ……..***
> ***(b) ……***
> ***(c) ……..***
> ***(d) ……***
> ***(e) reviewing its decisions;"***

As such, no procedural impropriety can be attributed to the learned Tribunal in passing the said orders in view of the above quoted provision.

16. In such proceedings initiated under a special statute and the provision for appeal being specifically provided under Section 20 of the Act, the Hon'ble Supreme Court in the case of ***Punjab National Bank vs. O.C. Krishnan*** *(supra)* has held that when there is an alternate remedy Courts should refrain from exercising jurisdiction under Articles 226 and 227. Para 6 of the judgment which is relevant is quoted herein below:-

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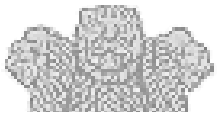

> ***"6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available judicial prudence demands that the court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."***

17. In another landmark judgment in the case of ***Authorised Officer, State Bank of Travancore and Anr vs. Mathew K.C.*** reported in **(2018) 3 SCC 35,** it has been held as follows:-

> ***"10. In Satyawati Tondon, the High Court had restrained further proceedings under Section 13(4) of the Act. Upon a detailed consideration of the statutory scheme under the SARFAESI Act, the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding: (SCC pp. 123 & 128, paras 43 & 55)***
>
> *"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.*
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> * * *

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 Union Bank of India v. Panchanan Subudhi, further proceedings under Section 13(4) were stayed in the writ jurisdiction subject to deposit of Rs.10,00,000 leading this Court to observe as follows: (SCC pp. 553-54, para 7)

"7. In our view, the approach adopted by the High Court was clearly erroneous. When the respondent failed to abide by the terms of one-time settlement, there was no justification for the High Court to entertain the writ petition and that too by ignoring the fact that a statutory alternative remedy was available to the respondent under Section 17 of the Act."

12. The same view was reiterated in Kanaiyalal Lalchand Sachdev v. State of Maharashtra, observing: (SCC p. 789, para 23)

"23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See Sadhana Lodh v. National Insurance Co. Ltd, Surya Dev Rai v. Ram Chander Rai and SBI v. Allied Chemical Laboratories.)"

13. In Ikbal, it was observed that the action of the Bank under Section 13(4) of the SARFAESI Act available to

challenge by the aggrieved under Section 17 was an efficacious remedy and the institution directly under Article 226 was not sustainable, relying upon Satyawati Tondon, observing: (Ikbal case, SCC pp. 94-95, paras 27-28)

"27. No doubt an alternative remedy is not an absolute bar to the exercise of extraordinary jurisdiction under Article 226 but by now it is well settled that where a statute provides efficacious and adequate remedy, the High Court will do well in not entertaining a petition under Article 226. On misplaced considerations, statutory procedures cannot be allowed to be circumvented.

28. ... In our view, there was no justification whatsoever for the learned Single Judge to allow the borrower to bypass the efficacious remedy provided to him under Section 17 and invoke the extraordinary jurisdiction in his favour when he had disentitled himself for such relief by his conduct. The Single Judge was clearly in error in invoking his extraordinary jurisdiction under Article 226 in light of the peculiar facts indicated above. The Division Bench also erred in affirming the erroneous order of the Single Judge."

17. We cannot help but disapprove the approach of the High Court for reasons already noticed in <u>Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engg. Works (P) Ltd,</u> observing: (SCC p. 463, para 32)

"32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting

wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

[Emphasis supplied]

18. The issue as to whether the instrument/document put up as collateral by the petitioner would suffice to be considered a mortgage on the property need not be gone into as this will be the subject of the statutory appeal should the petitioner pursue this remedy.

19. For the aforementioned facts and circumstances, no case has been made out for interference by this Court in exercise of powers under Article 227 of the Constitution of India and as such, the instant petition is dismissed leaving the petitioner to seek appellate remedy as provided under the statute to assail the impugned orders.

20. Registry to transmit the records back to the Debts Recovery Tribunal, Guwahati immediately.

21. No order as to costs.

JUDGE

Meghalaya
28.07.2022
"V. Lyndem-PS"