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ALLAHABAD HIGH COURT (LUCKNOW BENCH)

SINGLE BENCH

VEENA VERMA — Appellant

Vs.

DEBT RECOVERY TRIBUNAL — Respondent

(Before : Narayan Shukla, J)

W.P. No. 7605 (M/S) of 2010 and W.P. No. 168 (M/S) of 2011

Decided on : 02-01-2014

- Constitution of India, 1950 - Article 141, Article 226, Article 227, Article 32
- Foreign Exchange Management Act, 1999 - Section 35
- Recovery of Debts Due to Banks and Financial Institutions Act, 1993 - Section 17, Section 18, Section 22(2)(e)
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) - Section 13(2), Section 13(4), Section 13(4)(D), Section 17, Section 8(1)(1)

A. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) — Section 13(2), 13(4) — Security Interest (Enforcement) Rules, 2003 — Rules 6(2), 8(1), 8(2), 8(6), 9(3), 9(4), 9(5) — Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 22(2)(e) — Debt Recovery Tribunal (DRT) — Auction Sale Irregularities — Non-Compliance with Rules — Mandatory Provisions — Review Application — Impleadment and Amendment — Right to Information Act, 2005. The petitioner challenged an order from the Debt Recovery Tribunal (DRT) and a sale certificate, alleging irregularities in a bank's recovery proceedings under the SARFAESI Act. The petitioner, as a guarantor, mortgaged her house for a loan which subsequently went into default. The bank initiated recovery actions, issuing notices under Section 13(2) and 13(4) of

the SARFAESI Act. The petitioner contended that the bank failed to follow Rules 8(1), 8(2), and 8(6) of the Security Interest (Enforcement) Rules, 2003, specifically regarding possession notice publication and intimation of secured debt. Furthermore, the auction notice required a demand draft of 10% of the reserve price for tenders, 25% of the bid amount immediately after allotment, and the balance 75% within fifteen days. The petitioner alleged gross violations of Rules 9(3), 9(4), and 9(5) of the Rules, asserting that the 25% bid amount was not deposited immediately on the auction date (September 20, 2007), with payments extending to September 25, 2007. The balance 75% was also not deposited within the stipulated 15 days. Information obtained under the Right to Information Act, 2005, revealed that payments for both 25% and 75% were made partially in cash and partially through demand drafts/cheques on dates subsequent to the stipulated deadlines. The petitioner also argued that the auction purchaser did not initially submit the 10% demand draft and that the sale certificate was issued illegally without following forfeiture procedures. The DRT dismissed the petitioner's initial application and subsequently rejected a review application, along with requests for impleadment of the auction purchaser and amendment of the application. The DRT reasoned that the auction irregularities were not "new facts" and that there was no provision for amendment/impleadment during review proceedings.

B. Writ Jurisdiction — Maintainability — Alternative Remedy — SARFAESI Act, Section 17, 18 — Debt Recovery Tribunal (DRT) — Debt Recovery Appellate Tribunal (DRAT) — Res Judicata — Rule of Self-Imposed Restraint. The respondent objected to the maintainability of the writ petition, arguing that the petitioner had an effective alternative remedy by way of appeal under Section 18 of the SARFAESI Act to the Debt Recovery Appellate Tribunal (DRAT) against the DRT's order. This objection was supported by Supreme Court judgments, including *United Bank of India v. Satyawati Tondon and Ors.* and *Kanaiyalal Lalchand Sachdev and Ors. v. State of Maharashtra and Ors.*, which emphasize the principle that High Courts should generally not entertain writ petitions when an efficacious statutory remedy is available, particularly in matters of recovery of public dues. The petitioner countered that this objection regarding maintainability had already been considered and rejected by the High Court at the admission stage of the writ petition, which was subsequently affirmed by the Supreme Court. The petitioner invoked the principle of *res judicata*, citing cases like *Ashok Kumar Srivastav v. National Insurance Company Limited and Ors.*, arguing that an issue once decided is not open for re-adjudication, particularly when a

higher court has affirmed the admission of the writ petition. The Court held that, given the previous decision to admit the writ petition and the Supreme Court's affirmation, it was no longer open for the respondents to raise the objection of maintainability afresh. Therefore, the Court proceeded to hear the case on merits.

C. Debt Recovery Tribunal (DRT) — Powers — Review Jurisdiction — Impleadment and Amendment — Natural Justice — Adjudication of Irregularities — Material Information — Right to Information Act, 2005. The Court found that the DRT erred in rejecting the petitioner's application for impleadment of the auction purchaser and amendment of the application during the review proceedings. The Court held that the material information obtained by the petitioner via the Right to Information Act, detailing significant irregularities in the auction process (delayed payments, partial cash payments, non-forfeiture despite default), constituted "relevant and necessary facts." These facts were crucial for a proper adjudication of the matter and to prevent prejudice to the auction purchaser if the sale was set aside. The Court emphasized that the DRT should have taken these details on record, irrespective of whether they were considered "new facts." The dismissal of the review application, coupled with the refusal to allow impleadment and amendment, prevented a full and fair hearing on the alleged auction irregularities. Resultantly, the Court quashed the DRT's review order dated November 29, 2010, and allowed the review application. The original order dated January 3, 2008, was reviewed, and the DRT was directed to allow the petitioner's applications for impleadment and amendment in S.A. No. 98 of 2007. The DRT was mandated to hear and decide the case afresh after providing all concerned parties, including the newly impleaded auction purchaser, an opportunity of hearing. The Court also issued an interim direction that the petitioner should not be dispossessed from her dwelling house pending the fresh adjudication, considering a pre-existing stay order.

Counsel for Appearing Parties

Amrendra Nath Tripathi, S.M.A. Kazmi, Madan Gopal Misra and M.A. Khan, Advocate for the Appellant; N.K. Seth and Vinay Shankar, Advocate for the Respondent

Cases Referred

- City and Industrial Development Corporation Vs. Dosu Aardeshir Bhiwandiwala and Others, AIR 2009 SC 571 : (2009) 1 CTC 174 : (2008) 12 JT 127 : (2009) 1 SCC 168
- Omprakash Verma and Others Vs. State of Andhra Pradesh and Others, (2010) 11 JT

366 : (2010) 13 SCC 158

- Ashok Kumar Srivastav Vs. National Insurance Company Limited and Others, (1998) 4 AD 117 : AIR 1998 SC 2046 : (1998) 2 CTC 302 : (1998) 3 JT 519 : (1998) 3 SCALE 265 : (1998) 4 SCC 361 : (1998) SCC(L&S) 1137 : (1998) 2 SCR 1199 : (1998) 1 UJ 773 : (1998) AIRSCW 1904 : (1998) 4 Supreme 292
- Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., AIR 2004 SC 2371 : (2004) 2 BC 397 : (2004) 120 CompCas 373 : (2004) 2 CompLJ 209 : (2004) 2 CTC 759 : (2004) 4 JT 308 : (2004) 138 PLR 271 : (2004) 4 SCALE 338 : (2004) 4 SCC 311 : (2004) 51 SCL 513 : (2004) 3 SCR 982 : (2004) 2 UJ 980 : (2004) AIRSCW 2541 : (2004) 3 Supreme 243
- Anil Kumar Neotia and Others Vs. Union of India (UOI) and Others, AIR 1988 SC 1353 : (1988) 2 CompLJ 91 : (1988) 2 JT 227 : (1988) 1 SCALE 817 : (1988) 2 SCC 587 : (1988) 3 SCR 738 : (1988) 2 UJ 77
- Daryao and Others Vs. The State of U.P. and Others, AIR 1961 SC 1457 : (1962) 1 SCR 574
- Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and Another, AIR 2004 SC 1815 : (2004) 176 ELT 24 : (2004) 1 JT 232 : (2004) 1 SCALE 341 : (2004) 3 SCC 214 : (2004) 1 SCR 483 : (2004) AIRSCW 537 : (2004) 1 Supreme 975
- P. Lal Vs. Union of India (UOI) and Others, AIR 2003 SC 1499 : (2003) 96 FLR 1188 : (2003) 1 JT 649 : (2003) 2 LLJ 164 : (2003) 1 SCALE 644 : (2003) 3 SCC 393 : (2003) SCC(L&S) 289 : (2003) 1 SCR 846 : (2003) 2 SLJ 1 : (2004) AIRSCW 121 : (2003) AIRSCW 849 : (2003) 1 Supreme 961 : (2003) 8 Supreme 730
- Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others, (2010) 1 BC 698 : (2011) 101 CLA 146 : (2011) 162 CompCas 337 : (2011) 2 CompLJ 1 : (2011) 3 JT 159 : (2011) 2 RCR(Civil) 676 : (2011) 2 SCALE 233 : (2011) 2 SCC 782 : (2011) 106 SCL 1 : (2011) 2 SCR 602 : (2011) AIRSCW 1194 : (2011) AIRSCW 5913 : (2011) 1 Supreme 655
- Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another, (2010) 253 ELT 3 : (2010) 4 JT 54 : (2010) 4 SCC 772 : (2010) SCR 608
- United Bank of India Vs. Satyawati Tondon and Others, AIR 2010 SC 3413 : (2010) 3 BC 495 : (2010) 3 CompLJ 585 : (2010) 7 SCALE 696 : (2010) 8 SCC 110 : (2010) 9 SCR 1 : (2010) 9 UJ 4395 : (2010) AIRSCW 7049 : (2010) AIRSCW 5267

Final Result : Allowed

JUDGMENT

Shri Narayan Shukla, J.—Heard Sri Amrendra Nath Tripathi, learned Counsel for the petitioner as well as Sri S.M.A. Qazmi learned Senior advocate assisted by Sri Madan Gopal Mishra and Sri M.A. Khan, learned advocate and Sri N.K. Seth, learned Senior

Advocate alongwith Mr. Vinay Shanker, learned Counsel for the Bank. The petitioner has assailed the order dated 29.11.2010, passed by Debt Recovery Tribunal, Lucknow as also the sale certificate dated 18.1.2008 issued by the Canara Bank, Goila Branch, Indira Nagar, Lucknow.

2. Briefly facts as sorted out from the pleadings on record are that for establishment of a brick field a loan amounting to Rs. 9,90,000 was sanctioned to its proprietor Mr. Vivek Verma. He was also sanctioned another loan in the form of cash credit to the tune of Rs. 7,39,520 which was extended to Rs. 1,00,000 under the Gramodyog Rojgar Yojna. The petitioner took guarantee of the said loan and to secure the loan she mortgaged her house being House No. A-871 Indira Nagar, Lucknow. The property of the petitioner as well as of respondent No. 3, i.e. the land admeasuring 0.386 hectare consisting boundary wall and office built thereon was also mortgaged to secure the loan and the loan was not recoverable for two years as it was exempted from interest for two years.

3. Mr. Verma ran his brick industry successfully for four years but thereafter he started suffering losses. Consequently, he also committed default in repayment of loan. Therefore, respondent No. 2, Canara Bank initiated a recovery proceeding under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (herein after referred to as Act) and issued a notice u/s 13(2) of the Act dated 3.2.2007. In reply of notice the petitioner approached the Bank and pointed out some irregularities in the notice and also sought further time for repayment of loan. He also requested to credit mortgaged money amounting to Rs. 2,80,000 lying with the respondent-Bank but the same was not adjusted. However, respondent- Bank further issued a notice u/s 13(4)(D) of the Act read with Rule 6(2) of the Security Interest (Enforcement) Rules, 2003 (hereinafter referred to as Rules). It is stated by the petitioner that in exercise of power provided u/s 13(4)(D), the respondent- Bank took possession of the mortgaged property without following the provisions of Rules 8(1) and 8(2) of the Rules as neither any possession notice was delivered to borrower nor was it published in the newspapers as is required under Rule 8. The petitioner further complains that no notice under Rule 8(6) of the Rules was ever served upon the petitioner nor was secured debt intimated to him whereas the auction notice was published in the newspaper dated 17.8.2007 to auction the property on 20.9.2007. For the purpose of auction tenders were invited with the condition that tenders should be accompanied by demand draft of 10% i.e., 3,56,400 out of the reserve price, i.e., Rs. 35,64,000. It was also provided that successful bidder has to deposit 25% of the bid amount immediately after allotment of bid and 75% within fifteen days thereafter, failing which the amount deposited was liable to be forfeited.

4. The petitioner challenged the said notice dated 15.5.2007 issued u/s 13(4) of the Act before this Court through W.P. No. 6956 (M.B.) of 2007.

5. The respondent- Bank raised preliminary objection against the maintainability of the writ petition on the ground that the petitioner has alternative remedy to prefer an appeal u/s

17 of the Act. This Court by considering the aforesaid objection dismissed the writ petition on 19.9.2007 with the following observations.

"We find from the record that the proceedings u/s 13(4) of the Act have been initiated against the petitioner and this writ petition would not be maintainable inasmuch as he has got the remedy u/s 17 of the Act in view of the decision of Hon'ble Supreme Court in the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.,

Therefore, the petitioner filed an appeal which was registered as S.A. No. 98 of 2007 before the Debt Recovery Appellate Tribunal alongwith an application for interim relief. The respondent- Bank filed written statement in which he admitted that the account was classified as NPA on 1.4.2007 while notice was issued u/s 13(2) of the Act on 3.2.2007.

6. In reply the respondent-Bank also submitted that the auction has been finalized in favour of one Mohammad Momzzam Khan (respondent No. 4) being highest bidder. His highest bid was Rs. 6400780 against the reserve price of Rs. 35,64,000. It was also stated by the respondent-Bank that he had deposited the entire 25% of the bid amount well within time and balance 75% of the bid amount was to be paid by him before 8.10.2007.

7. The learned appellate Tribunal stayed the confirmation of auction sale held on 20.9.2007. Subsequently through the supplementary written statement the respondent Bank modified its statement regarding classification of petitioner's account as NPA and submitted that it was classified on 1.7.2006 instead of 1.4.2007. The respondent- Bank also submitted that the entire amount deposited by the auction purchaser has been duly credited to the loan account between the period of 20.9.2007 to 13.10.2007 and account has been closed. However, the Debt Recovery Tribunal finally dismissed the petitioner's application on 3.1.2008. Thereafter the petitioner filed a review application u/s 22(2)(e) of the Recovery of the Due Debt Bank and Financial Institution Act, 1993 (hereinafter referred to as Act, 1993) in which respondent-Bank also filed counter-affidavit. Meanwhile the petitioner sought information with respect to the auction held on 20.9.2009 from the Bank under Right to Information Act, 2005, which are as under;

(1) The mode of payment of 25%, i.e., cheque draft No. etc. of the bid amount.

(2) The mode of payment of 75% of the bid amount.

(3) The date of realization of the above said amount in the accounts of the Bank.

(4) The copy of sale-deed executed by the Bank in favour of auction purchaser.

8. The respondent-Bank furnished the information as asked above as under:

Item No. 1 : The mode of payment of 25% was partially by cash and by DD Cash pad Rs. 12,40,195 dated 22.9.2007 DD No. 111241 dated 25.9.2007 Amount Rs. 3,60,000/-

Item No. 2 : The mode of payment of 76% was partially by cash and by cheque Cash paid

Rs. 850585/- dated 8.10.2007 Cheque No. 111672 dated 11.10.2007 Amount Rs. 39,50,000.

Item No. 3 : The amounts deposited were realized on the dates on which it were received.

Item No. 4 : The information which relates to personal information the disclosure of which has no relationship to any public activity or interest is exempted from disclosure u/s 8(1)(1) of the Act, 2005.

9. Learned Counsel for the petitioner submits that the aforesaid information as supplied by the respondent-Bank reveals that auction held on 20.9.2007. 25% of the bid amount was paid partially by cash amounting to Rs. 12,40,195 on 22.9.2007 and partially by demand draft No. 1,11,241 dated 25.9.2007 amounting to Rs. 3,60,000. Balance 75% amount was partially paid by cash of Rs. 8,50,585 on 8.10.2007 and partially by cheque No. 111672 dated 11.10.2007 amounting to Rs. 39,50,000/-. It was also informed that the amounts deposited were released on the dates on which it were received. The petitioner also asked information regarding issuance of sale certificate if any pursuant to the auction held on 20.9.2007, which was replied by the respondent -Bank in the following manner,

On 18.1.2008 a sale certificate was issued in favour of M/S Mama Builders.

10. The learned Counsel for the petitioner further submitted that auction purchaser M/S Mama Builders did never submit any demand draft of 10% of the reserve price nor was 25% of the highest bid ever deposited by the auction purchaser. He further submitted that balance 75% of the total bid amount was not deposited within fifteen days of confirmation of sale and in said default the property was required to be re-sold and amount already deposited was required to be forfeited but instead of doing so the auction purchaser issued a sale certificate in favour of auction purchaser in illegal manner.

11. On the aforesaid back drop the petitioner has also prayed to declare the auction in question as nullity. Since auction took place during the pendency of the review application, the petitioner moved two applications in the review petition, one for amendment of the review petition and another for impleadment of auction purchaser, but those have been rejected on the ground that the respondent-Bank had already given description of auction through its counter-affidavit filed in the review application and "as such the irregularity in auction is not a new fact on which basis the impugned order be reviewed. Therefore, said auction could not be said to be a new fact on the basis of which, the order should be reviewed. The Tribunal further held that the petitioner failed to point out any apparent mistake on the face of the order. It also held that there was no provision for filing of the amendment/impleadment application during the review proceeding whereas learned Counsel for the petitioner submits that the judgment and order dated 3.1.2008 passed by the Tribunal was procured by the respondent- Bank by playing fraud on the Court. Therefore, the said order is nullity.

12. The petitioner also complains violation of Rules 9(3)(4) and (5) of the Rules. He further submits that the deposition of the 25% of the bid amount immediately after holding auction by the highest bidder is mandatory but it was not so made as auction was held on 20.9.2007 whereas the total 25% amount of the bid was deposited on 25.9.2007.

13. Thus, on the basis of the aforesaid illegalities, the learned Counsel for the petitioner submits that the order impugned deserves to be quashed and the auction in question be also declared as nullity.

14. Per contra learned Counsel for the opposite party No. 4 (auction purchaser) raised objection against the maintainability of the writ petition on the ground that the order impugned passed by the Debt Recovery Tribunal, Lucknow in Review Petition No. 1 of 2008 is appeal able before the Debt Recovery Appellate Tribunal, therefore, on the ground of availability of the alternative remedy to the petitioner, the instant writ petition is not maintainable.

15. In support of his submission he also cited a decision of Hon'ble Supreme Court i.e., United Bank of India Vs. Satyawati Tondon and Others, Relevant Paragraphs 43,44,45,52,53 and 55 are quoted below;

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 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, 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.

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.

52. In City and Industrial Development Corporation Vs. Dosu Aardeshir Bhiwandiwala and Others, the Court highlighted the parameters which are required to be kept in view by the High Court while exercising jurisdiction under Article 226 of the Constitution. Paragraphs 29 and 30 of that judgment which contain the views of this Court read as under:

29. In our opinion, the High Court while exercising its extraordinary jurisdiction under Article 226 of the Constitution is duty-bound to take all the relevant facts and circumstances into consideration and decide for itself even in the absence of proper affidavits from the State and its instrumentalities as to whether any case at all is made out requiring its interference on the basis of the material made available on record. There is nothing like issuing an ex parte writ of mandamus, order or direction in a public law remedy. Further, while considering the validity of impugned action or inaction the Court will not consider itself restricted to the pleadings of the State but would be free to satisfy itself whether any case as such is made out by a person invoking its extraordinary jurisdiction under Article 226 of the Constitution.

30. The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

(a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors.

The Court in appropriate cases in its discretion may direct the State or its instrumentalities as the case may be to file proper affidavits placing all the relevant facts truly and accurately for the consideration of the Court and particularly in cases where public revenue and public interest are involved. Such directions are always required to be complied with by the State. No relief could be granted in a public law remedy as a matter of course only on the ground that the State did not file its counter-affidavit opposing the writ petition. Further, empty and self-defeating affidavits or statements of Government spokesmen by themselves do not

form basis to grant any relief to a person in a public law remedy to which he is not otherwise entitled to in law"

53. In Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another, the Court was dealing with the issue whether the alternative statutory remedy available under the Foreign Exchange Management Act, 1999 can be by-passed and jurisdiction under Article 226 of the Constitution could be invoked. After examining the scheme of the Act, the Court observed:

31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

32. No reason could be assigned by the appellant's Counsel to demonstrate why the appellate jurisdiction of the High Court u/s 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum.

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 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.

16. Learned Counsel for the Bank, also raised the same objection and added one more judgment on the point of objection i.e., Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others, relevant paragraph 23 is extracted below:

23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants u/s 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available it 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.)

17. Mr. S.M.A. Kazmi, learned Senior Advocate, appearing for the respondent No. 4 contended that earlier when the petitioner tried to bypass the alternative remedy, the Division Bench of this Court in writ petition No. 6956 of 2007 observed that since the petitioner has got remedy u/s 17 of the Act, the writ petition could not be maintainable.

Similarly now after the order passed by the Debts Recovery Tribunal there is a provision of appeal against the order of the Appellate Tribunal u/s 18 of the Act, section 18 of the Act is extracted below:

18. Appeal to Appellate Tribunal.--(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal [under section 17, may prefer an appeal alongwith such fee, as may be prescribed] to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal:

[Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other man the borrower:]

[Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

Provides also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of the debt referred to in the second proviso.]

18. Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder.

19. But again the petitioner has ignored the aforesaid provision and has approached this Court under the writ jurisdiction. He further submits that a bare perusal of the relief clause of the writ petition shows that the petitioner has challenged only the order passed on the review application, but he has not challenged the main order passed by the Tribunal on 3rd January, 2008, whereby the petitioner's application S.A. No. 98 of 2007 was dismissed. Therefore, the writ petition deserves to be dismissed on the ground of alternative remedy.

20. In reply of objection raised against the maintainability of the writ petition, the learned Counsel for the petitioner submits that the objection on the maintainability of the writ petition as raised by the respondent has already been considered by this Court at the stage of admission of the writ petition and the same has been rejected by means of order dated 7.3.2011. This Court has also been pleased to admit the writ petition and pass interim order. The order passed by this Court has been affirmed by the Hon'ble Supreme Court. However the Supreme Court observed for the High Court to expedite the disposal of the appeal i.e., the case on hand.

21. On the aforesaid back drop he submits that the issue once decided is not open for readjudication and in support of his submission he has also cited some decisions of the Hon'ble Supreme Court Ashok Kumar Srivastav Vs. National Insurance Company Limited and Others, Relevant paragraph No. 11 is quoted herein below:--

11. It is well neigh settled that a decision on an issue raised in writ petition under Article 226 or Article 32 of the Constitution would also operate as res judicata between the same parties in subsequent judicial proceedings. The only exception is that the rule of res judicata would not operate to the detriment or impairment of a fundamental right. A Constitution Bench of this Court has considered the applicability of rule of res judicata in writ proceedings under Article 32 of the Constitution in Daryao and Others Vs. The State of U.P. and Others, and it was held that the basis on which the rule rests is founded on consideration of public policy and it is in the interest of public at large that a finality should attach to the binding decision pronounced by a Court of competent jurisdiction and it is also in the public interest that individuals should not be vexed twice over in the same kind of litigation.

22. Omprakash Verma and Others Vs. State of Andhra Pradesh and Others, relevant paragraph No. 70 is quoted below:

70. This Court has approved this well settled principle that a judgment of the Supreme Court cannot be collaterally challenged on the ground that certain points had not been considered. This Court in Anil Kumar Neotia and Others Vs. Union of India (UOI) and Others, held that it is not open to contend that certain points had not been urged or argued before the Supreme Court and thereby seek to reopen the issue. The relevant portion of the judgment is as follows:

17.....This Court further observed that to contend that the conclusion therein applied only to the parties before this Court was to destroy the efficacy and integrity of the judgment and to make the mandate of Article 141 illusory.....It is no longer open to the Petitioners to contend that certain portions had not been urged and the effect of the judgment cannot be collaterally challenged.

23. In Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and Another, relevant paragraph No. 38 is quoted herein below:

38. Even on merits we do not find any reason to entertain the plea sought to be urged in cross-objections. As we have already pointed out, the respondents have accepted the judgment of the High Court and also acted thereon. Merely because the other party has preferred an appeal, that cannot be a ground for the respondent also to disown that part of the judgment which was acceptable to it. Further, the issue which is now sought to be re-agitated stands concluded by the earlier order of remand passed by this Court. The respondent cannot now, in the second round of appeal to this Court, be permitted to urge such pleas as it could have urged in the earlier round or which it urged and was not accepted by this Court.

24. In P. Lal Vs. Union of India (UOI) and Others, relevant Paragraph No. 20 is quoted herein below:

20. We are unable to accept the submissions of Mr. Jethmalani. As has been pointed out hereinabove, against the portion of the impugned judgment which held that the appellant had locus and that the Central Administrative Tribunal had jurisdiction, respondent No. 3 had filed a Special Leave Petition. That has been dismissed by this Court on 10th December, 2000. It is therefore not open to respondent No. 3 to again raise these contentions. These findings in the impugned judgment have become final as against respondent No. 3. Even otherwise, we see no substance in these submissions.

25. Therefore, the learned Counsel for the petitioner submitted that the stage of objection on the maintainability of the writ petition has been cover and now the writ petition deserves to be heard and decided on merit.

26. Though the learned Counsel for the respondent re-emphasized his arguments against the maintainability of the writ petition on the ground that even after dismissal of the SLP by the Hon'ble Supreme Court, the question of maintainability is still open for consideration of this Court in the light of the decisions of the Hon'ble Supreme Court referred as above, however, without disputing the availability of appeal against the order impugned u/s 18 of the Act. I am of the view that now at this stage it is not open for the respondents to raise such an objection afresh against the maintainability of the writ petition, therefore I proceed to decide the case on merit.

27. Indisputedly during the pendency of the case before the Tribunal the auction took place, the petitioner raised finger over the several illegalities committed in the auction proceeding and therefore he has also prayed for declaring the auction held on 20.9.2007 as nullity on several grounds.

28. Upon perusal of the record I also find that before the Tribunal the petitioner moved an application for impleadment of auction purchaser as well as amendment of the application to challenge the auction held during the pendency of the application, but the same has been rejected on the ground that the description of auction was given in the counter-affidavit filed by the respondent Bank. The Tribunal has also denied to bring on record the certain relevant facts obtained under Right to Information Act, on the ground that there was enough time for the applicant to collect the detail under the Right to Information Act and to point out the illegalities committed by the respondent Bank in auction proceeding.

29. The Tribunal observed that " as stated above the auction had already taken place before passing the final impugned judgment and as such the irregularities in auction is not a new fact on which basis impugned order be reviewed. The applicant has failed to point out any apparent mistake on the basis of impugned order on which basis it can be considered for the review."

30. However, I am of the view that the Tribunal has not appreciated the petitioner's claim of impleadment and amendment of application correctly as the material information provided to the petitioner regarding irregularities happened in the auction are the relevant

and necessary facts which could have been taken on record and since, if the auction is set-aside the same shall prejudice the right of the auction purchaser. I am of the view that the application for impleadment of auction purchaser could have also been allowed. The several irregularities in auction which has been pointed out before this Court require adjudication by the Tribunal itself.

31. Therefore, the order dated 29.11.2010 passed on the application for review is quashed and Review application is allowed and the order dated 3.1.2008 passed in S.A. No. 98 of 2007 is reviewed with the direction that the petitioner's application for impleadment and amendment shall stand allowed to make necessary amendment in S.A. No. 98 of 2007 and thereafter it shall be heard and decided afresh by the Debt Recovery Tribunal, Lucknow after providing opportunity of hearing to the parties concerned.

32. Since the property auctioned is a dwelling house of the petitioner and the stay order passed by this Court is operating till date, I hereby provide that meanwhile the petitioner shall not be dispossessed from the house in question.

33. With the aforesaid observations/directions the writ petition No. 7605 of 2010 (MS) is allowed. In the aforesaid terms, the writ petition No. 168 (MS) of 2011 stand disposed of.