IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1157 OF 2023

Rajeev Kishor Mehta,	]	
R/of Gamdevi, Mumbai – 400 007.	]	**.. Petitioner**
Versus		
1. HDFC Bank Ltd.,	]	
Registered Office at Lower Parel, Mumbai	]	
2. Beautiful Diamonds Ltd.	]	
(Now Splendour Gems Ltd. - In Liquidation)	]	
Through Official Liquidator, Fort, Mumbai	]	
3. The Recovery Officer,	]	
Debts Recovery Tribunal – II,	]	
Colaba, Mumbai	]	**.. Respondents**

Mr. Nitin Thakkar, Senior Advocate, with Mr. T.N. Tripathi, Ms. Kalyani Wagle and Ms. Somya T., Advocates, i/by T.N. Tripathi & Co., for the Petitioner.

Mr. Kevic Setalvad, Senior Advocate, with Mr. Dharam Jumani, Mr. Mihir Nerurkar, Ms. Prapti Kedia, Ms. Neha Rautela and Mr. Rushikesh Dusane, Advocates, i/by Agama Law Associates, for Respondent No.1.

Mr. Mohamedali M. Chunawala with Mr. P.S. Gujar, Advocates for Respondent No.4-UOI.

Mr. Nishit Dhruva with Mr. Prakash Shinde, Ms. Niyati Merchant, Mr. Yash Dhruva and Mr. Harsh Sheth, Advocates, i/by MDP Legal, for Respondent No.5.

Mr. Ranjeev Carvalho, Advocate for the Official Liquidator.

CORAM : A.S. CHANDURKAR & RAJESH S. PATIL, JJ

The date on which the arguments were heard : 22ND OCTOBER 2024.

The date on which the Judgment is pronounced : 21ST JANUARY 2025.

JUDGMENT : [Per A.S. Chandurkar, J.]

1. Rule. Rule made returnable forthwith and heard learned counsel for the parties.

2. The petitioner has raised a challenge to the order dated 5th February 2020 passed by the Recovery Officer, Debts Recovery Tribunal-II, Mumbai in Recovery Proceedings No.709 of 2004. By the said order, Warrant of Arrest came to be issued against three Certificate Debtors including the petitioner, who is Certificate Debtor No.6 in the aforesaid proceedings. Besides aforesaid, the petitioner's bank accounts, lockers and shares have been attached and he has been restrained from operating any type of bank accounts, lockers and shares. Various other ancillary directions have been issued. This order came to be passed on the application below Exhibit-82 that was moved by the 1st respondent – HDFC Bank Ltd. *(hereinafter referred to as "the Bank")*. By that application, the Bank had prayed that a show cause notice be issued to the Certificate Debtors as per Section 25(b) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 *(for short, "Act of 1993")* and in the event of failure to show cause, it was prayed that the Certified Debtors be subjected to civil arrest. By recording a finding that the petitioner failed to show any intention to repay the outstanding amount, the said order came to be passed.

3. Mr. Nitin Thakkar, learned Senior Advocate for the petitioner at the outset submitted that when the writ petition was filed, the impugned order dated 5th February 2020 had not been uploaded. As the petitioner apprehended his arrest, he had moved this writ petition. After a copy of

the order was available, the writ petition was amended and the order dated 5th February 2020 was placed on record. According to him, the show cause notice dated 15th January 2018 issued by the Recovery Officer was without application of mind and it did not make out any ground whatsoever for the petitioner's arrest. He referred to Rule 73(1)(b) under the Second Schedule to the Income Tax Act, 1961 *(for short, "the Act of 1961")* to indicate that the procedure prescribed therein as well as the satisfaction required to be recorded prior to ordering arrest was absent. There was no authority whatsoever with the Recovery Officer to suo-moto issue a notice to show cause why a Warrant of Arrest should not be issued. Reference was made to Regulation 60(17) of the Regulations of Practise, 2010 as well as Form 55 to indicate non-compliance of the requisites in that regard. He took the Court through various proceedings initiated by the Bank to which the petitioner was also a party. He sought to distinguish the role of the petitioner with that of the other Certificate Debtors and submitted that though this distinction was placed before the Debts Recovery Tribunal in the reply filed by the petitioner, the same was not taken into consideration. By treating the position of the petitioner to be similar with that of the other Certificate Debtors, the impugned order came to be passed. Considering the drastic nature of directions issued which resulted in curtailing the civil liberty of the petitioner, it was necessary for the Recovery Officer to have taken into consideration all relevant aspects before passing the order. In absence of recording of any satisfaction as per Rule 73(1)(b) under the Second Schedule to the Act of 1961, the impugned order was not sustainable. To substantiate his contentions, the learned Senior Advocate placed reliance on the following decisions :-

- *Vinod Hingorani S/o. Ramchand Rochiram Hingorani Vs. The Securities & Exchange Board of India and Anr., 2015 SCC OnLine Bom 1665*
- *Ch. Harpal Singh and Ors. Vs. Lala Hira Lal, AIR 1954 Allahabad 402*
- *Pundlik Mahadu Nazire Vs. Maharashtra State Farming Corporation, 1992 Mh.L.J. 455*
- *Gaon Sabha and Anr. Vs. Nathi and Ors., (2004) 12 SCC 555*

4. Mr. Kevic Setalvad, learned Senior Advocate for the Bank opposed the aforesaid submissions. At the outset, he submitted that the order passed below Exhibit-82 on 5th February 2020 had been challenged by Certificate Debtor Nos.2 and 3 in Writ Petition No.132 of 2023 *(Kishor K. Mehta and Anr. Vs. Recovery Officer, Debts Recovery Tribunal, Mumbai-II and Ors.)*. While considering such challenge, a Co-ordinate Bench was of the view that the matter required re-consideration at the hands of the Recovery Officer. By the judgment dated 27th February 2023, Recovery Petition No.709 of 2004 was restored before the Recovery Officer and the

impugned order dated 5th February 2020 was directed to be treated as an interim order pending consideration of the Recovery Petition. It was submitted that since the petitioner was also party to the application below Exhibit-82 and the order impugned by the petitioner was directed to be treated as an interim direction, a similar course could be followed. In that context, it was urged that on principles of res judicata analogous to Explanation VI to Section 11 of the Code of Civil Procedure, 1908, it was not permissible for the petitioner to agitate all contentions afresh. It was submitted that similar opportunity could be granted to the petitioner who could be heard by the Recovery Officer. In that regard, the learned Senior Advocate placed reliance on the following decisions :-

- *ITW Signode India Ltd. Vs. Collector of Central Excise, (2004) 3 SCC 48*
- *Narayana Prabhu Venkateswara Prabhu Vs. Narayana Prabhu Krishna Prabhu (Dead) by LRs., (1977) 2 SCC 181*
- *Dharampal Satyapal Ltd. Vs. Deputy Commissioner of Central Excise, Gauhati and Ors., (2015) 8 SCC 519*
- *Kishor K. Mehta and Anr. Vs. Recovery Officer, Debts Recovery Tribunal-II, Mumbai and Anr., (OOCJ Writ Petition No.132 of 2023, Judgment dated 27th February 2023)*

5. We have heard the learned counsel for the parties at length and with

their assistance we have also perused the documents placed on record. It is seen that Original Application No.146 of 2002 filed by the Bank was decided on 11th April 2002 and the Bank was held entitled to recover an amount of Rs. 14,74,51,929.35 from the Certificate Debtors. The Bank thereafter filed Recovery Proceeding No.709 of 2004. The Bank on 2nd February 2018 moved an application seeking directions to be issued for the civil arrest of Certificate Debtor Nos.2 to 7 and also for deposit of their passports. The petitioner as Certificate Debtor No.6 filed affidavit in reply and denied the prayers made in the application. It was stated that he had no means to pay the decretal amount and insolvency proceedings filed in 2006 were still pending. There was no element of bad faith or malafides attributed to the petitioner. The learned Recovery Officer decided the application filed by the Bank below Exhibit-82 on 5th February 2020. He considered the application filed by the Bank qua Certificate Debtor Nos.2, 3 and 6 and directed issuance of warrant of arrest against them. He further directed that the bank accounts, lockers and shares standing in their names be attached and restrained them from operating any such facility. Various other ancillary directions were also issued. It is further seen from the record that Certificate Debtor Nos.2 and 3 had challenged the aforesaid order passed below Exhibit-82 by preferring Writ Petition No.132 of 2023. The said writ petition was decided on 27th February 2023. The Co-ordinate Bench of this Court was of the view that the matter required re-consideration at the hands of the Recovery Officer. In paragraph 26 of the aforesaid judgment, it has been observed as under:-

> *26. It is the gravity of the consequences that is arrest and detention that has persuaded us to grant an opportunity to the petitioners. It is for that limited purpose we have entertained the writ petition, despite the alternate remedy of statutory appeal. Considering the facts and circumstances, the appropriate course of action would be to permit the respondent-Bank to file additional submissions before the Recovery Officer placing on record such material as may be in possession of the respondent-Bank including the newspaper items and the material that forms the basis of the same. Also to direct the petitioners to file affidavits-of-disclosure within a time-bound period and to file affidavit-in-reply to the additional material. The impugned order will have to be treated as an interim direction and findings recorded in the impugned order by the Recovery Officer to be treated as prima facie findings subject to confirmation or otherwise of the interim order. Till the decision is taken thereupon, the interim order passed in this petition regarding stay of arrest shall continue. The interim order passed in this petition is only regarding stay of order directing arrest and detention. As regards the direction on restriction on travel under the impugned order, the same shall continue till the disposal of proceedings before the Recovery Officer. According to us, this course of action would grant both, the petitioners and the respondent-Bank, an opportunity to put-forth their case."*

6. It is on this premise that the learned Senior Advocate for the Bank sought to contend that since this Court had considered the challenge to

the common order dated 5th February 2020 passed by the Recovery Officer below Exhibit-82 insofar as Certificate Debtor Nos.2 and 3 were concerned and an opportunity was given to them to re-agitate their contentions afresh, a similar course may be followed insofar as the petitioner who is Certificate Debtor No.6 is concerned. A contention was also raised that the aforesaid adjudication would operate as res-judicata given the reasons assigned while deciding Exhibit-82. The learned Senior Advocate for the petitioner however joined issue on this aspect and submitted that the defence raised by the petitioner was distinct from the defence raised by the Certificate Debtor Nos.2 and 3 and therefore, the observations made in the aforesaid decision would not be applicable to the petitioner.

7. What we find on the reading of the judgment dated 27th February 2023 in Writ Petition No.132 of 2023 is that the Court has considered in detail the application moved by the Bank below Exhibit-82, the reply filed by the petitioners therein and the manner of consideration of the matter by the Recovery Officer. It has been observed that the issue "whether the petitioners are white collar criminals" had been framed unnecessarily as this issue was beyond the scope of Rule 73(1) under the Second Schedule of the Act of 1961.To that extent, the petitioner cannot have any grievance as this finding enures to his benefit. It has then been observed that the

application preferred by the Bank below Exhibit-82 did not give much particulars to enable a proper consideration of the matter as required under Rule 73(1). The Bank produced certain newspaper report and extracts from the websites of the "Financial Express" published on 19th November 2022. The Court however found that all this material was not placed before the Recovery Officer for his consideration. It is on that premise that the Division Bench was of the view that all such material deserved to be placed before the Recovery Officer at the first instance for a factual enquiry. Considering the implications flowing from the grant of prayers made in the application in the context of Rule 73(1), the Court was of the view that an opportunity ought to be given to the said petitioners as the application on the basis of which the order was passed did not contain necessary details. It is for this reason that the proceedings were remanded to the Recovery Officer by treating the order dated 5th February 2020 passed by him as an interim order pending consideration of the application below Exhibit-82. Various other ancillary directions were also issued to enable consideration of the application below Exhibit-82 afresh.

8. Though it was strenuously urged on behalf of the petitioner that Certificate Debtor No.6 was not similarly situated as Certificate Debtor Nos.2 and 3, what we find is that the application filed by the Bank below Exhibit-82 was composite in nature and similar prayers were made against

Certificate Debtor Nos.2, 3 and 6. A specific finding having been recorded that the application below Exhibit-82 having not given necessary particulars, it was also the duty of the Recovery Officer to enforce the pending recovery carefully. It is this aspect of the matter which persuades us to follow a similar course as directed by the Co-ordinate Bench while deciding Writ Petition No.132 of 2023. While considering the challenge raised by the Certificate Debtor Nos.2 and 3 to the common order dated 5th February 2020 that a re-look at the said application was necessary, we are satisfied that a similar direction needs to be issued even in the present proceedings. As stated in the earlier decision that since the impugned order proceeded to issue a warrant of arrest, the writ petition was entertained notwithstanding the fact that an alternate remedy was available to the petitioners for challenging the order passed by the Recovery Officer. We have therefore not entered into the merits of the rival contentions which could be urged before the Recovery Officer. We are thus satisfied that issuance of similar directions as issued in Writ Petition No.132 of 2023 would serve the ends of justice:-

Accordingly the following order is passed:

a) Recovery Proceeding No.709/2024 filed by the Bank before the Recovery Officer stands restored to file.

b) The impugned order dated 5th February 2020 passed by the

Recovery Officer shall be treated as an interim order pending consideration of the application below Exhibit-82.

c) The observations made in the impugned order dated 5th February 2020 shall be treated as prima facie findings of the Recovery Officer. The Recovery Officer shall, after giving an opportunity to the parties decide whether to confirm, modify or set aside the impugned order dated 5th February 2020. It is clarified that all contentions of both parties are expressly kept open. Any observations made in the order dated 5th February 2020 shall not preclude the Recovery Officer from taking a different view of the matter on merits.

d) (i) The Petitioner and the Bank shall appear before the Recovery Officer on 3rd February 2025.

(ii) Upon appearance of the parties, the Recovery Officer shall stipulate the period within which the Petitioner would file an affidavit of disclosure with documentation in reference of the properties including the one referred in the record of the writ petition annexing all necessary details. This period shall not be more than two weeks from the date of appearance.

(iii) The Recovery Officer shall grant the Bank an opportunity to file an additional affidavit/ application placing on record the material in support of the contention that a case under Rule 73(1) under the Second Schedule to the Act of 1961 is made out against the Petitioner. This period shall not be more than four weeks.

(iv) The Recovery Officer shall direct the Petitioner to file reply affidavit to the additional application of the Respondent-Bank within a period of three weeks from the date the application is filed. If the reply affidavit is not filed within three weeks, the Petitioner would forfeit his right to file reply affidavit and the Recovery Officer would be entitled to proceed in the matter on that basis.

(v) After the pleadings are complete, the Recovery Officer will take a final decision on merits within a period of three months.

(e) Till the decision is so taken, the ad-interim order passed in the writ petition on 13^{th} February 2020 would continue subject to the petitioner co-operating in the adjudication of the application.

(f) Rule is disposed of in aforesaid terms with no order as to costs.

[RAJESH S. PATIL, J.] **[A.S. CHANDURKAR, J.]**