

(2004) 08 OHC CK 0018
In the Orissa High Court
Case No : Writ Petition (C) No. 2428 of 2004

Allied Chemical Laboratories

APPELLANT

Vs

Presiding Officer, Debt Recovery and Another

RESPONDENT

Date of Decision : 16-08-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 19 Rule 1
Constitution of India, 1950 — Article 226, 227
Debts Recovery Tribunal (Procedure) Rules, 1993 — Rule 12(6)

Citation : AIR 2005 Ori 32 : (2005) 1 BC 258 : (2004) 98 CLT 418 : (2005) 128 CompCas 939 : (2004) 2 OLR 420

Hon'ble Judges : A.K. Patnaik, J; A.K. Parichha, J

Bench : Division Bench

Advocate : Ramakanta Mohanty, D.K. Mohanty, P.K. Rath, S.N. Biswal, A.P. Bose and P.K. Satpathy, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

A.K. Parichha, J.—The petitioner has challenged the order dated 9.4.2003 passed by the Presiding Officer, Debts Recovery Tribunal Orissa, Cuttack in O.A. No. 328 of 2001 in terms of which the claim of Opp. Party No. 2-Bank for a sum of Rs. 23,27,390.16 has been decreed with interest and cost.

2. The petitioner is the sole proprietor of the firm, namely, "M/s. Allied Chemical Laboratories". For bringing some technical changes in his unit he availed a loan of Rs. 3.5 lakhs from Opp. Party No. 2-Bank in the year 1986. In the year 2001 the Bank filed Original Application No. 322 of 2001 before the Debts Recovery tribunal, (in short, "DRT"), Patna for recovery of the loan amount and interest thereon from the petitioner. The said Original Application was transferred to the DRT, Orissa, Cuttack and was renumbered as OA No. 328 of 2001. On notice, the petitioner appeared and filed show-cause taking a plea that the claim is barred by limitation. He also pleaded that neither he himself nor his guarantor ever executed the revival letters and balance confirmation acknowledgment and that

Opp. Party No. 2 created those fake documents. Opp. Party No. 2 filed reply to the said show-cause and also filed affidavit evidence of the Branch Manager of the Bank. The petitioner then made a prayer before the DRT demanding production of the Branch Manager for cross-examination, but the learned DRT rejected the said prayer and basing on the affidavit evidence decreed the claim of Opp. Party No. 2 vide the impugned order. Aggrieved by the order decreeing the claim, the petitioner has filed this writ petition under Article 226 of the Constitution.

3. The submission of the learned counsel for the petitioner is that by not giving an opportunity to cross-examine the witness of Opp. Party No. 2-Bank, the DRT not only violated the principles of natural justice but also acted contrary to the provisions of Rule 12(6) of the Debts Recovery Tribunal (Procedure) Rules, 1993 (hereinafter referred to as "the Rules, 1993"). According to him, when the petitioner had specifically challenged the genuineness of revival letters and balance confirmation acknowledgments produced by Opp. Party No. 2, opportunity of cross-examining the Branch Manager should have been extended and the documents should have been sent for examination by the hand-writing expert. Opp. Party No. 2 in the counter affidavit while denying the allegations that the revival letters and balance confirmation acknowledgments were fake and forged, specifically asserted that production of witness who has given evidence by affidavit is not mandatory and that the DRT may refuse such prayer of a party, if it feels that the prayer is not bona fide. Opp. Party No. 2 also challenged the maintainability of the present writ petition on the ground that the power under Articles 226 and 227 of the Constitution cannot be invoked where specific appellate forum is available. According to Opp. Party No. 2, the petitioner has filed this writ petition with an intention to drag the recovery proceeding which has already been initiated on the basis of the judgment and certificate issued thereon and also to overcome the delay of 10 months which has occurred after the passing of the impugned order.

4. From the above noted stand of the parties, the points which emerge for consideration are : (i).whether the present writ petition is maintainable in spite of availability of appellate forum; (ii) whether disallowing the prayer of the petitioner for production of the Branch Manager of the Bank for cross-examination was violative of the principle of natural justice and the provisions of the Rules, 1993.

5. As has been held in the case of *Bombay Telephone Canteen Employees' Association, Prabhadevi Telephone Exchange Vs. Union of India* and another, normally writ jurisdiction is not to be invoked where alternative, effective and efficacious remedy is available under the law. But this rule is not an absolute one. Availability of an alternative forum does not ipso facto oust the writ jurisdiction of the High Court. The High Court has always its discretion to grant relief under Article 226 of the Constitution even if there are other alternative statutory remedies. This view finds support from the observation of the apex

Court in the cases of *The Collector of Monghyr and Others Vs. Keshav Prasad Goenka and Others*, *Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar*, *M.S. Grewal and Another Vs. Deep Chand Sood and Others*, and *T.K. Rangarajan Vs. Government of Tamil Nadu and Others*, to the effect that a law Court will lose its efficiency if it cannot possibly respond to the need of the Society and justice oriented approach ought not to be thwarted on the basis of technicalities. In *T.K. Rangarajan's* case (supra) it was pointedly observed that High Court is empowered to exercise its extraordinary jurisdiction to meet unprecedented extraordinary situations.

6. The observations of the apex Court in the above noted cases clearly suggest that existence of alternative remedy is not a bar for entertaining a writ petition under Articles 226 and 227 of the Constitution particularly in cases where natural justice is violated or established procedure of law flagrantly ignored or where ends of justice will be defeated by refusing to invoke the extraordinary jurisdiction.

7. In the present case, the contention of the petitioner is that in spite of the clear provision under Rule 12(6) of the Rules, 1993 to allow cross-examination of a witness who has tendered his evidence by way of affidavit, his demand for cross-examination of the Branch Manager of the Bank was rejected and the impugned order was passed without affording any opportunity of hearing. According to him, such action of the DRT is not only against the established procedure of law but also violative of the principles of natural justice.

8. It is apparent from the impugned order under Annexure-1 as well as order dated 11.11.2002 under Annexure-A/2 that the petitioner prayed for allowing him to cross-examine the Branch Manager of the Bank who had produced the revival letters and balance confirmation acknowledgments to prove that those documents were forged ones and that they were never executed by him or his guarantor. But the said prayer was rejected by the learned DRT with the following observations :

*** ** To require the opposite party for purpose of cross examination, the party seeking that prayer should initially establish by specific proof of facts which would warrant summoning of the witness to explain the facts asserted by him. Unless such discharge of initial burden, he (petitioner) cannot seek for summoning the opposite party's Affidavit holder.

Saying that calculation of interest is wrong, account is wrong, or saying he signed blank documents and bonds but they were manipulated is not sufficient. The party should first prove such things by discharging his initial burden.

Saying account is wrong is not sufficient. He should file his calculation and show how it is wrong. Then the other side will be called to substantiate the correctness of their claim. For this oral evidence is not necessary. A calculation on paper will be sufficient.

As far as execution of documents and it's validity are concerned, it is for the party to prove how they are not valid and binding (when he admits the documents and execution).

No such circumstances are placed by the petitioner in his petition or pleadings. His prayer appears to be for gaining time or for satisfying his desire to grill the affidavit holder in the witness box. This Tribunal does not find any grounds to summon the applicant's affidavit holder as the matter stands. However, if during the course of hearing arguments if the Tribunal feels the necessity, it will consider and pass appropriate orders."

9. Rule 12(6) of the Rules, 1993 reads thus :

"The Tribunal may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing on such conditions as the Tribunal thinks reasonable;

Provided that where it appears to the Tribunal that either applicant or defendant desires the production of a witness for cross-examination, and that such witness can be produced an order shall not be made authorizing the evidence of such witness to be given by affidavit."

Thus, the provisions of Rule 12(6) makes it clear that the Tribunal may for sufficient reasons order the proof of a particular fact or facts by affidavit, but such affidavit evidence will not be entertained if any of the parties desires the production of the witness for cross-examination. Order 19, Rule 1 of the CPC provides that any Court may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable; provided that where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit. A close reading of the above noted provisions shows that while the Court has some option under Order 19, Rule 1, CPC to examine the bona fides of a party asking for production of a witness for cross-examination, the DRT has no such option under Rule 12(6) of the Rules, 1993 as the proviso to the said Rule 12(6) states that where either the applicant or the defendant desires the production of a witness for cross-examination and such witness can be produced an order shall not be made authorizing such witness to give evidence by affidavit. In the impugned order as well as in the order dated 11.11.2002. learned DRT Cuttack not only remarked about lack of bona fide intention of the petitioner, but also said that, in matters, relating to claim of the Bank, there is hardly any scope for oral evidence forgetting the fact that the petitioner had challenged the claim of Opp. Party No. 2 on the ground of limitation and had alleged that Bank has created fake and forged balance confirmation acknowledgments and revival letters to overcome the bar of limitation. He also ignored the demand for examination of those revival letters

and balance confirmation acknowledgments by an expert saying that such examination is unnecessary. This approach of the DRT is clearly violative of the principles of natural justice as well as the provision of Rule 12(6) of the Rules, 1993. In such extraordinary circumstance, the power of this Court under Articles 226 and 227 of the Constitution has to be exercised to set right the injustice which has been caused to the petitioner.

10. We accordingly allow the writ petition, set aside the impugned order and direct the DRT, Cuttack to dispose of OA No. 328 of 2001 afresh in accordance with law after giving opportunity to the petitioner to cross-examine the Branch Manager of the Bank who had tendered his affidavit evidence and after getting genuineness of the disputed document examined by an expert. To avoid further delay, we direct the parties to appear before the DRT on 25th August, 2004 when the latter shall fix a date of hearing.

A.K. Patnaik, J.

11. I agree.