(2000) 05 DEL CK 0012

In the Delhi High Court

Case No : I.As No. 3542/85, 4076/85 and 1179 of 2000 in Suit No. 115/75

Bank of India APPELLANT

Vs

Luk Auto Ancillary (India) Ltd. and Others RESPONDENT

Date of Decision : 19-05-2000

Acts Referred:

Banks and Financial Institutions Act, 1993 — Section 17(1), 18, 31(1), 34
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Companies Act, 1956 — Section 442, 446, 537
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 31

Citation : (2003) 115 CompCas 436 : (2000) 54 DRJ 393 : (2001) 1 RCR(Civil) 73

Hon'ble Judges : J.B. Goel, J

Bench : Single Bench

Advocate : Mr. Valmiki Mehta, for the Appellant; Mr. Rajeev Behl, Advocate, for Official Liquidator, Mr. Tarun Diwan, Mr. B.N. Nayar and Advs., for the Respondent

Judgement

J.B. Goel, J.—plaintiff, Bank of India had filed a suit for recovery of Rs. 2475045.02 against four defendants namely, (1) M/s Luk Auto Ancillary (India) Ltd., (2) L.N. Raina, (3) Vijay Kumar Mundhra and (4) M/s Globe Motors Ltd. Defendant No. 1 being the principal debtor and defendants No. 2, 3 and 4 as its sureties. Defendants No. 1 and 2 and defendants No. 3 and 4 filed two separate written statements contesting the suit. Issues were settled. Defendants No. 1 and 4 had gone in liquidation and were represented by official Liquidator on various dates. However, during trial defendants did not appear. plaintiff led ex parte evidence and vide judgment dated December 3, 1984 the suit was decreed in the sum of Rs. 2475042.02 with costs and future interest at the rate of 19.25% per annum. After the aforesaid decree was passed defendant No. 3 has filed an application (IA No. 3542/85 under Order 9 Rule 13 CPC) and later on defendant No. 2 also filed similar application (IA No. 4076/85) both under Order 9 Rule 13 CPC for setting aside the ex parte decree against them. Defendant No. 2 having died, Shri Chand Raina, his son, the only LR was substituted for him.

These applications remained undisposed of and in the meantime, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short the RDB Act) came into force. The proceedings have not yet been transferred to the Debt Recovery Tribunal established under RDB Act and an objection has been taken on behalf of defendant No. 3 that as defendants No. 1 and 4 have gone into liquidation the proceedings are not liable to be transferred to the Debt Recovery Tribunal. Subsequently another is No. 1179/2000 u/s 151 has also been filed by defendant No. 3 to restrain the plaintiff from proceeding with the execution proceeding pending before the Debt Recovery Tribunal and for stay of those execution proceedings for the reasons stated therein.

2. Learned counsel for the parties have addressed arguments on the question whether the proceeding now pending here are or are not liable to be transferred to the Debt Recovery Tribunal.

3. Learned counsel for defendant No. 3 has contended (1) that defendants No. 1 and 4, the two companies had gone in liquidation and the suit could not have been continued without the permission of the Company Court u/s 446 of the Companies Act, 1956 and that permission had been obtained in respect of one such company and not in respect of the other and as such the decree passed is illegal and void. (2) The present proceedings are not liable to be transferred u/s 31 of the RDB Act to the Tribunal. Firstly because proceedings under Order 9 Rule 13 CPC are not proceedings contemplated u/s 31 of the RDB Act. Secondly because notwithstanding the non obstinate clause contained in Section 18 and 34 of the RDB Act, the provisions of Section 446 of the Companies Act, which is a special law have overriding effect on the provisions of this RDB Act. The proceedings are to be taken before the Company Court in view of Section 446 of the Companies Act. (3) The liability of defendant No. 3 as surety is coextensive with that of defendant No. 1, the principal debtor. However, the actual liability that may be found recoverable from defendant No. 1 could be determined by the Company Court in winding up proceedings and as such at present there is no certain amount that could be recovered from defendant No. 3 and as such the execution against him could not proceed. (4) That in view of the provisions of Rule 118 (3) of the Company (Court) Rules the interest in the decree could not be awarded more than at the rate of 4% per annum and the interest awarded at the rate of 19.25% per annum is illegal and without jurisdiction. The decree is thus illegal and unenforceable. He has relied on Mayour Syntex Limited Vs. Punjab & Sind Bank 1997 IV AD 821, Industrial Credit and Investment Corporation of India Ltd. Vs, M/S Srinivasan Agency and another, 1996 (3) S 40, Life Insurance Corporation of India Vs. M/s Asia Udyog Pvt. Ltd and Ors. 1982 (1) Del 582 and Punjab National Bank Ltd. Vs. Shri Vikram Cotton Mills and Another, . Learned counsel for the official Liquidator has supported him. Whereas learned counsel for the plaintiff has disputed the contentions and has contended that u/s 31 of the RDB Act all the suits and the proceedings which fall within the purview of the RDB Act pending on the appointed date in any Court stand transferred to the Tribunal. The proceedings contemplated would include all

proceedings relating to the matter involved in the suit including execution proceedings and the proceedings under Order 9, Rule 13 CPC. These proceeding thus automatically stand transferred to the Tribunal on the appointed date and this Court has no jurisdiction to proceed with the same and/or to pass any order thereon. He has relied on the judgment in Risk Capital and Technology Finance Corporation Ltd. Vs. Harnath Singh Bapna and others, . He has also contended that the RDB Act is a special Act and overrides the provisions of the Companies Act including those of its Section 446 in view of the mandatory provisions of Sections 18, 31 and 34 of the RDB Act which confer exclusive jurisdiction on the Tribunal in respect of matter which are within his jurisdiction, power and authority. Those provisions have taken out the powers of the Court to proceed in such suit or proceedings. Any objection regarding executability of the decree also if available could be taken before the Tribunal where execution proceedings are pending. Otherwise there is no illegality of invalidity in the decree. He has also contended that in respect of both defendant No.1 and defendant No. 4 permission of the Company Court was obtained for proceeding with the present suit before the decree was passed, copies of the order are on record.

4. I have considered these contentions and the material on record. On behalf of plaintiff copies of two orders passed by Company Court have been placed on record. One order dated 9th December, 1977 in CA 537/77 in CP 35/69, shows that M/s Globe Motors Ltd. had already been ordered to be wound up. By this order the Bank of India i.e. the plaintiff in the present suit No. 115/75 has been granted permission u/s 446 of the Companies Act to proceed with the suit. By the other order dated 5th March, 1982 passed in CA 446/81 in CP 95/78 in M/s Globe Motors Ltd. (in liquidation) through the official liquidator Vs. M/s Luk Auto Ancillary (I) Ltd., permission has been granted to Bank of India i.e. the present plaintiff to proceed with the suit. Thus permissions to proceed with the present suit were granted by the Company Court separately against both defendant No. 1 and defendant No. 4 u/s 446 of the Companies Act to proceed with the suit. These permissions had been granted before the decree was passed on December 3, 1984. This contention thus is not well advanced and has no merit.

5. Now the question is whether Section 446 of the Companies Act has overriding effect on the provision of the RDB Act. Sections 17(1), 18, 31(1) and 34 of the RDB Act read as under:-

"17. Jurisdiction, powers and authority of Tribunals:-

(1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the bank and financial institutions for recovery of debts due to such banks and financial institutions.

(2) x x x x x x x

18. Bar of jurisdiction. On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or

authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17.

31. Transfer of pending cases:-

(1) Every suit or other proceeding pending before any court immediately before the date of establishment of a Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment, within the jurisdiction of such Tribunal, shall stand transferred on that date to such Tribunal:

Provided that nothing in this sub-section shall apply to any appeal pending as aforesaid before any court.

(2) x x x x x x x

34. Act to have over-riding effect- (1) Save as otherwise provided in sub-section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2) The provisions of this Act or the rules made there under shall be in addition to, and not in derogation, of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporation Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984) and the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986)."

6. The value of the present suit was more than Rs. 10 lakhs as such the suit which falls within the purview of the Act, the suit and all the proceedings automatically stood transferred to the Tribunal by virtue of Section 31 of this Act on the establishment of the Tribunal. The Tribunal was established by means of Government of India Notification dated July 5, 1994. As such the proceedings pending before this Court stood transferred on that date to the Tribunal. The provisions of this Act came for consideration before the Supreme Court recently in Allahabad Bank Vs. Canara Bank and Another, and issue involved were relating to the impact of the provisions of the RDB Act on the provision of the Companies Act, 1956. The provisions of the two Acts have been elaborately considered. This judgment has been delivered on 10-4-2000. And it has been held by the Supreme Court that the provisions of Sections 17 and 18 of the RDB Act are exclusive so far as the question of adjudication of the liability of the debtor to a bank is concerned. It has further been held that'' proceedings'' in Section 31 includes an ''execution proceedings'' pending before a Civil Court before the commencement of the Act. And the suit and proceedings so pending on the date of the Act stand transferred to the Tribunal and have to be disposed of "in the same manner" as applications u/s 19 of that Act. The question whether the proceedings under Order 9 Rule 13 CPC are also proceedings within the meaning

of Section 31 of this Act, has been considered by this Court in Risk Capital and Technology Finance Corporation Ltd. Vs. Harnath Singh Bapna and others, and after considering the object and scheme of the Act it was held by this Court that the term ''proceeding'' is of very wide connotation and includes an application under Order 9 Rule 13 CPC within the meaning of Section 31 of the Act. No judgment to the contrary has been brought to my notice. In view of this judgment the two proceedings under Order 9, Rule 13 CPC pending in this Court at the instance of defendants No. 2 and 3 are liable to be transferred to the Tribunal and this Court cannot proceed with the same.

7. Now the question is whether Section 446 of the Companies Act has overriding effect on the provisions of the RDB Act. This question has been considered in the case of Allahabad Bank Vs. Canara Bank and Another (supra) by the Hon''ble Supreme Court in detail as to the impact of the provisions of the RDB Act on the provisions of the Companies Act, 1956 under five points. Under point No. 1 it has been held that the provisions of Sections 17 and 18 of the RDB Act are exclusive so far as the question of adjudication of liability of the defendant/debtor to the bank is concerned. It has also been held that the proceedings in Section 31 of that Act includes an execution proceedings pending before a Civil Court before the commencement of the Act and the suits and proceedings so pending on the date of the Act stand transferred to the Tribunal and have to be disposed of "in the same manner" as applications u/s 19. Under Points 2 and 3 the question was "does the Act override the provisions of Sections 442 and 537 and Section 446 of the Companies Act. " After going into the details of historical background, object and purpose of the RDB Act and the relevant case law, it has been held in para 50 of the judgment as under :-

"50. For the aforesaid reasons, we hold that at the stage of adjudication u/s 17 and execution of the certificate u/s 25 etc. The provisions of the RDB Act, 1993 confer exclusive jurisdiction in the Tribunal and the Recovery Officer in respect of debts payable to Banks and Financial institutions and there can be no interference by the Company Court u/s 442 read with Section 537 or u/s 446 of the Companies Act, 1956. In respect of the monies realised under the RDB Act, the question of priorities among the Banks and Financial Institutions and other creditors can be decided only by the Tribunal under the RDB Act and in accordance with Section 19(19) read with Section 529A of the Companies Act and in no other manner. The provisions of the RDB Act, 1993 are to the above extent inconsistent with the provisions of the Companies Act 1956 and the latter Act has to yield to the provisions of the former. This position holds good during the pendency of the winding up petition against the debtor company and also after a winding up order is passed. No leave of the Company Court is necessary for initiating or continuing the proceedings under the RDB Act, 1993. Points 2 and 3 are decided accordingly in favor of the appellant and against the respondents."

8. The decision of this Court in Mayur Syntex Ltd. (in Liquidation) and Atlantic

Engineering Services Pvt. Ltd. Vs. Punjab and Sind Bank, taking a contrary view has been overruled in this judgment. Thus it is clear that it is the provisions of RDB Act which override the provisions of Sections 442, 537 and 446 of the Companies Act, 1956 and not the vice versa. The question of working out priorities as between Banking and Financial Institutions and other creditors of the two defendant companies has to be done only by the Tribunal and not by the Company Court. Section 446 of the Companies Act thus is not available to the defendants.

An execution petition is already pending before the Tribunal. The grounds taken regarding legality, validity or executability of the decree, if at all available could be taken in execution, only before the Tribunal and not before this Court.

It is thus held that all the proceedings pending in this Court are liable to be transferred to the Debt Recovery Tribunal. It is ordered accordingly.

I.As. No. 3542/85, 4076/85 and all other applications pending in this Court are transferred to the Debt Recovery Tribunal.

In view of the above discussion, is No. 1179/2000 is not maintainable here and the same is dismissed.

The applications along with the records of the suit be sent to the Debt Recovery Tribunal forthwith.

Parties are directed to appear before that Tribunal on 4th July, 2000.