

(2002) 08 OHC CK 0010
In the Orissa High Court
Case No : O.J.C. No. 11191 of 2001

Banwarilal Muralilal and Another		APPELLANT
	Vs	
Indian Overseas Bank and Others		RESPONDENT

Date of Decision : 05-08-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Constitution of India, 1950 — Article 226, 227, 326
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 21

Citation : (2002) 94 CLT 730 : (2002) 2 OLR 354

Hon'ble Judges : R.K. Patra, J; Pradip Mohanty, J

Bench : Division Bench

Advocate : B.H. Mohanty, D.P. Mohanty, R.K. Nayak and T.K. Mohanty, for the Appellant; N. Patra, A.K. Patra and B.N. Shadangi, For O.P. No. 1, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Patra, J.—Being felt aggrieved by the order dated 2.8.2001 (Annexure-1) made by the learned Presiding Officer, Debts Recovery Tribunal, Cuttack in Misc. Case No. 49 of 1996 rejecting the prayer to set aside the ex parte decree, the petitioner has filed this writ petition for quashing of the same. The petitioner has also challenged the vires of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "the Act") and the scheme made thereunder.

2. The case of the petitioner is that although the impugned order of the learned Presiding Officer is appealable u/s 20 of the Act before the Appellate Tribunal, he has not followed the alternative remedy as the vires of the Act is under challenge and the remedy by way of appeal is not effective and otherwise onerous inasmuch as he has to deposit 75% of the decretal amount. In this connection, Shri Mohanty, learned counsel for the petitioner has relied upon the decisions of the Supreme Court in M.G. Abrol Vs. Shantilal Chhotalal and Co., and Collector of

Customs and Excise, Cochin and Others Vs. A.S. Bava, . Shri N. Patra, learned counsel appearing for the decree-holder opposite party No. 1, submits that the writ petition should not be entertained as alternative remedy by way of statutory appeal is available under the Act.

3. The constitutional validity of the Act came up for consideration before the Supreme Court in Union of India v. Delhi High Court Bar Association (Civil Appeal No. 4679 of 1995). By judgment dated 14.3.2002 AIR 2002 SCW 1347 the Supreme Court has upheld the constitutional validity of the Act. The operative part of the order reads as follows :

"For the aforesaid reasons, while allowing the appeals of the Union of India and the Banks, we hold that the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is a valid piece of legislation. As a result thereof, the writ petitions or appeals filed by various parties challenging the validity of the said Act or some of the provisions thereof, are dismissed..."

4. In view of the fact that the constitutional validity of the Act has been upheld by the Supreme Court, challenge of the petitioner with regard to validity of the Act before us no more subsists.

5. The question that arises for consideration is, whether this Court in exercise of its writ jurisdiction should interfere with the impugned decision of the learned Presiding Officer, Debts Recovery Tribunal by which he rejected the petitioner's petition made under Order 9, Rule 13, CPC to set aside the ex parte decree. It may be noted that the learned Presiding Officer in a detailed order declined to set aside the ex parte decree.

6. Let us now examine the decisions cited by Shri Mohanty. In Shantilal Chhotelal & Co. (supra), the High Court had interfered with the order passed by the Customs authority although that order was appealable. The Supreme Court declined to interfere with the order of the High Court by observing that there was no exceptional circumstances to interfere with the High Court's discretion. It was further observed that the writ petitioners had no effective remedy, for they could not file an appeal without depositing as a condition precedent the large amount of penalty imposed on them. That apart, the existence of an effective remedy does not oust the jurisdiction of the High Court but is only one of the circumstances that the Court should take into consideration in exercising its discretionary jurisdiction under Article 326. In A. S. Bhava (supra), the writ petitioner's appeal was dismissed on failure to make the deposit. Although existence of remedy by way of revision u/s 36 of the Central Excise and Salt Act, 1944 was available, the High Court granted relief to the writ petitioner as the validity of the notification imposing duty under the Central Excise and Salt Act was challenged.

7. Now coming to the facts of the case, we may say that although Section 21 of the Act requires the appellant to deposit with the Appellate Tribunal 75% of the decretal amount, the proviso to the said Section (Section 21) empowers the

Appellate Tribunal to waive or reduce the amount to be deposited for reasons to be recorded in writing. In view of the aforesaid proviso giving discretion to the Appellate Tribunal to waive or reduce the amount to be deposited with it, it cannot be said that the appeal provision is onerous one. At this stage, we may refer to a Three-Judge Bench decision of the Supreme Court in *Sales Tax Officer, Jodhpur v. Shiv Ratan G. Mohatta* AIR 1966 SC 142 wherein it has been observed that the assessee has to deposit sales tax while filing an appeal, does not always mean that he can always bypass the remedies provided under the Sales Tax Act. It is now well settled that rule of exhaustion of statutory remedy before the writ is granted is a rule of policy, convenience and discretion rather than a rule of law and the Court may, in exceptional cases issue a discretionary writ notwithstanding the fact that the statutory remedies have not been exhausted. But in the facts and circumstances of the case and in view of the observation of their lordship (extracted above) in the recent case of *Union of India v. Delhi High Court Bar Association* and for the reasons aforesaid, we are not inclined to exercise our discretionary jurisdiction in the matter.

The writ petition is accordingly dismissed. With the dismissal of the writ petition, the interim order stands vacated.

Pradip Mohanty, J.

8. I agree.