

(2015) 03 PAT CK 0009

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 13773 of 2009, Interlocutory Application No. 1658 of 2015, Civil Writ Jurisdiction Case No. 14827 of 2009 and Interlocutory Application No. 8108 of 2012

Basuki Exports and Others

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 12-03-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19, 20

Citation : (2015) 03 PAT CK 0009

Hon'ble Judges : Birendra Prasad Verma, J.

Bench : Single Bench

Advocate : K.D. Chatterjee, Senior Advocate and Gajendra Pratap Singh, for the Appellant; Sanjiv Kumar, Advocates for the Respondent

Judgement

Birendra Prasad Verma, J.—In the aforesaid two writ petitions the issues of facts as also of law involved are similar and common. Therefore, with the consent of the parties, both the matters were heard together and are being disposed of by this common order/judgment.

2. The petitioner No. 1 of C.W.J.C. No. 13773 of 2009, namely, M/s. Basuki Exports, and the petitioner No. 1 of C.W.J.C. No. 14827 of 2009, namely, M/s. Silkos, are two separate Partnership Firms. The petitioner No. 2- Mr. Rajesh Kumar Drolia of both the writ petitions is same and common person, being the partner of the aforesaid two partnership Firms. In fact, according to the learned Senior counsel appearing on behalf of the petitioners of both the cases M/s. Basuki Exports and M/s. Silkos are sisters concern, as evidently the petitioner No. 2- Mr. Rajesh Kumar Drolia of both the cases looks after the management of the aforesaid two partnership firms.

3. The petitioners have filed the aforesaid two writ petitions under Articles 226 and 227 of the Constitution of India assailing the validity and correctness of

judgment and order/certificate dated 01.09.2009 passed in O.A. Case No. 88 of 1999 (Annexure-15 in C.W.J.C. No. 13773 of 2009) as also the judgment and order/certificate dated 01.09.2009 passed in O.A. Case No. 87 of 1999 (Annexure-15 in C.W.J.C. No. 14827 of 2009), both passed by the learned Presiding Officer of Debts Recovery Tribunal, For the State of Bihar, at Patna, whereby and whereunder the applications filed by the respondent State Bank of India, Bhagalpur Branch, Bhagalpur under Section 19 of The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (In short "Act, 1993") have been allowed.

4. By the impugned judgment and order/certificate dated 01.09.2009 the petitioner M/s. Basuki Exports and its partners including the petitioner No. 2, who were defendants in O.A. Case No. 88 of 1999 have been held liable jointly and severally to pay the loan and interest upto 15.07.1999 amounting to Rs. 56,97,316.72 and thereafter future interest w.e.f. 16.07.1999 @ 19.25% per annum with quarterly rests with costs. Similarly by the impugned judgment and order/certificate dated 01.09.2009, petitioner- M/s. Silkos and its partners including the petitioner No. 2, who were defendants in O.A. Case No. 87 of 1999 have been held liable jointly and severally to pay the debts with interest upto 15.07.1999 to the Bank amounting to Rs. 1,00,11,365.86 as also with future interest @ 9% per annum w.e.f. 16.07.1999 till the realization of the entire sum due and recoverable.

5. Learned Senior counsel appearing on behalf of the petitioners of both the cases, while assailing the validity and correctness of the impugned judgment and order/certificate dated 01.09.2009 has raised various issues of facts. According to him, the impugned judgments and orders/certificates passed by the learned Debts Recovery Tribunal, Patna, are not sustainable in law and are fit to be set aside by this Court. It is contended that so far M/s. Basuki Exports is concerned, it is the second round litigation before this Court. On earlier occasion, order dated 02.08.2001 passed in O.A. No. 88 of 1999 as also the order dated 04.07.2003 passed in M.A. No. 49 of 2001 by the Debts Recovery Tribunal, Patna were set aside by the learned Single Judge of this Court by order dated 12.04.2004 passed in C.W.J.C. No. 7412 of 2003 (Annexure-4 of C.W.J.C. No. 13773 of 2009) and the matter was remitted back to the Debts Recovery Tribunal, Patna for hearing and deciding O.A. No. 88 of 1999 on merits afresh. According to him, the aforesaid order dated 12.04.2004 passed by the learned Single Judge was not interfered with in L.P.A. No. 641 of 2004 brought by the respondent Bank as the matter was remitted back to the learned Debts Recovery Tribunal, Patna. It is pleaded that despite the aforesaid remand order made by this Court, reasonable opportunity of hearing was not given to the petitioners while deciding the aforesaid two O.A. No. 87 of 1999 as also O.A. No. 88 of 1999 by the impugned judgment and order/certificate dated 01.09.2009. It was contended that for all practical purposes the impugned judgments and orders/certificates are ex parte in nature. It was also pleaded that many issues of facts raised on behalf of the petitioners in both the matters were not gone into by the

learned Debts Recovery Tribunal, Patna. Therefore, it would be in the interest of justice that all the issues of facts and law raised on behalf of the parties are finally and conclusively decided by this Court in these two proceedings after looking into the materials produced by both the parties. It was next contended that alternative remedy available to the petitioners under Section 20 of the Act, 1993 shall not come in the way of the petitioners in getting all the issues decided by this Court in the present proceeding in view of the latest judgment of the Hon''ble Apex Court in the case of Commissioner of Income Tax and Others Vs. Chhabil Dass Agarwal, as also a Division Bench judgment of this Court in the case of Tis Fab Limited Vs. State of Bihar and Others, .

6. Per contra, learned counsel appearing on behalf of the respondent State Bank of India has strongly contested the claim of the writ petitioners of both the cases and at the very outset he has raised the question of maintainability of these two writ petitions on the ground of availability of efficacious statutory alternative remedy under Section 20 of the Act, 1993. It was pleaded that the issues of facts raised on behalf of the petitioners in the aforesaid two writ petitions can be effectively and properly gone into by the Debts Recovery Appellate Tribunal in exercise of its power under Section 20 of the Act, 1993. According to him, since the petitioners have failed to exhaust the statutory alternative efficacious remedy provided under Section 20 of the Act, 1993, these writ petitions are liable to be dismissed on that ground alone. It was next pleaded that the impugned judgments and orders/certificates passed by the learned Debts Recovery Tribunal, Patna are not ex parte in nature, rather despite sufficient opportunity given to these writ petitioners, they failed to file even their written statement as also the evidence on affidavits in support of their cases. According to him, so far case of M/s. Basuki Exports is concerned, the matter was remitted back on earlier occasion by this Court and despite the remand order made by this Court, the petitioners did not file their written statement as also the evidence on affidavits. Hence, the facts pleaded by the Bank in its respective applications filed under Section 19 of the Act, 1993 had to be accepted and, therefore, the orders/judgments passed by the learned Debts Recovery Tribunal, Patna cannot be legally faulted. In support of his above contentions he has placed reliance on several judgments of the Hon''ble Apex Court as also of this Court, namely: T.P. Vishnu Kumar Vs. Canara Bank P.N. Road, Tiruppur and Others, , Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others, , United Bank of India Vs. Satyawati Tondon and Others, , Punjab National Bank Vs. O.C. Krishnan and Others, , Jag Narayan Singh and Others Vs. State Bank of India and Others--> and Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, .

7. After having heard the parties and on consideration of materials available on record, this Court finds that there is no dispute that the petitioners of both the cases had approached the respondent Bank for financial accommodation for running their business and on agreement between the parties, loan amount was advanced to the petitioners. However, subsequently, the petitioners defaulted in

making payment of the instalments, as a result of which their accounts became as non-performing assets (NPA). Consequently, respondent Bank approached the Debts Recovery Tribunal, Patna, by filing O.A. Case No. 87 of 1999 and O.A. Case No. 88 of 1999 for recovery of debts along with interest from the defendants, which have ultimately been allowed by the impugned judgments and orders/certificates dated 01.09.2009 passed in both the cases separately, which have been brought on record as Annexure-15 in both the writ petitions. This Court further finds that many of the parties of aforesaid O.A. Case No. 87 of 1999 as also O.A. Case No. 88 of 1999 have not been impleaded either as petitioners or the respondents in these two writ petitions. According to the petitioners, they were not given reasonable opportunity to defend their cases, but according to the findings recorded by the learned Debts Recovery Tribunal, Patna the petitioners failed to file even their written statements contesting the claims of the respondent Bank. The Debts Recovery Tribunal has also recorded a finding of fact that the petitioners did not file their evidence on affidavits in support of their cases. Evidently, the issues raised on behalf of the petitioners for assailing the impugned judgments and orders/certificates are based on disputed question of facts in view of the averments made in the counter-affidavit filed on behalf of the respondent Bank in both the writ petitions as also the findings recorded by the learned Debts Recovery Tribunal, Patna. Indisputably, the judgment and order passed under Section 19 of the Act, 1993 by the Debts Recovery Tribunal is appealable under Section 20 of the Act, 1993 before the Debts Recovery Appellate Tribunal provided the order was not passed with the consent of the parties. In these two writ petitions, indisputably, the impugned judgments and orders/certificates were not passed with the consent of the parties. Therefore, appeal would be maintainable before the Debts Recovery Appellate Tribunal in terms of Section 20 of the Act, 1993, but the petitioners, without resorting to the provisions of Section 20 of the Act, 1993 have directly moved before this Court in these two proceedings under Articles 226 and 227 of the Constitution of India.

8. This Court is of the considered opinion that the issues of facts must be raised and gone into at the first instance by the statutory authorities under a particular statute and only thereafter the power of judicial review under Article 226 of the Constitution of India can be effectively and properly exercised by the High Court. In these two cases the petitioners have raised many disputed issues of facts, which are required to be examined and gone into by looking into the different records/materials/evidence produced by the parties, which can be properly and effectively done only by the statutory authority and in the present case the Debts Recovery Appellate Tribunal.

9. The plea raised on behalf of the respondent Bank about non-maintainability of these two writ petitions on the ground of availability of efficacious alternative remedy under Section 20 of the Act, 1993, which was resisted by the petitioners on the ground of lack of its effectiveness, are no longer res-integra in view of several judicial pronouncements of the Hon"ble Apex Court as also this Court.

10. In the case of *United Bank of India v. Satyawati Tondon* (supra), the Hon'ble Apex Court has outlined the legislative history and the object of the Act, 1993 at great details in paragraphs 1 to 6. It has been held that the Act, 1993 has not only laid down the special procedural mechanism for speedy recovery of the dues of Banks and financial institutions, but it has also made provisions for ensuring that the defaulting borrowers are not able to invoke the jurisdiction of the civil courts for frustrating the proceedings initiated by the Banks and other financial institutions. After taking into consideration the object of the Act, 1993 as also The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (In short "SARFAESI Act") and the different judicial pronouncements of the Hon'ble Apex Court, it was observed that while dealing with the petitions involving challenge to the action taken for recovery of the public dues, the High Court must insist that before availing remedy under Article 226 of the Constitution of India, a person must exhaust the remedies available under the relevant statute. It was further observed that while exercising jurisdiction under Article 226 of the Constitution with respect to the orders passed under the Act, 1993 or the SARFAESI Act, the High Courts would exercise their discretion in such matters with greater caution, care and circumspection. For better appreciation, paragraphs- 43, 44, 45 and 55 of the aforesaid judgment are reproduced herein below, which read as follows:--

"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 a code into 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, the 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.

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 the 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"

11. Though, admittedly, the impugned judgments and orders/certificates passed by the learned Debts Recovery Tribunal are appealable in terms of Section 20 of the Act, 1993, but the learned counsel appearing on behalf of the petitioners, by referring to the recent judgment of the Hon''ble Apex Court in the case of Commissioner of Income Tax v. Chhabil Dass Agarwal (Supra) submitted that in view of the principles laid down there, the present writ petitions are maintainable and the non-availing of alternative remedies may not be treated as a bar for getting the issues decided in the present proceeding. I am afraid, the submissions of the learned counsel appearing on behalf of the petitioners are not only misconceived, rather contrary to the judicial pronouncements of the Hon''ble Apex Court. Before reproducing relevant portion of paragraphs- 11 and 15 of the aforesaid judgment, wherein law has been laid down on this subject, it would be appropriate to notice that in that case the order passed by the High Court of Sikkim in exercise of power under Article 226 of the Constitution of India without asking the petitioner of that case to avail of the alternative forum was set aside by the Hon''ble Apex Court with liberty to file an appropriate petition/appeal against the order passed by the statutory authorities. Relevant portion of paragraphs 11 and 15 laying down ratio on these issues are reproduced herein below, which read as follows:--

"11. It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226.

X x x

15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the filed. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

(Emphasis supplied)

12. So far these two writ petitions are concerned, they do not come within any of the exceptions enumerated by the Hon"ble Apex Court in paragraph-15 in the case of Commissioner of Income Tax v. Chhabil Dass Agarwal (Supra). Therefore, in view of availability of statutory forum of Debts Recovery Appellate Tribunal to the petitioners for redressal of valid grievances, it has to be held that these writ petitions are not maintainable at this stage. Consequently, these two writ petitions have to fail and are, accordingly, dismissed, but without costs.

13. The interim order dated 27.10.2009 passed in C.W.J.C. No. 13773 of 2009 and the interim order dated 06.11.2009 passed in C.W.J.C. No. 14827 of 2009 stand vacated. I.A. No. 1658 of 2015 in C.W.J.C. No. 13773 of 2009 and I.A. No. 8108 of 2012 in C.W.J.C. No. 14827 of 2009 stand, accordingly, disposed of.

14. However, if so advised, the petitioners of both the cases shall be at liberty to file an appeal before the Debts Recovery Appellate Tribunal raising all the issues, which have been raised in the present proceedings. If such separate appeals are filed on behalf of the petitioners impleading all the necessary parties within a period of four weeks from today, then the Debts Recovery Appellate Tribunal shall consider their appeals on merits and shall not dismiss the same on the ground of limitation as these two writ petitions were filed on a bona fide legal advise on 15.10.2009 and 05.11.2009 respectively and both the writ petitions remained pending before this Court till date.