
(2010) 12 OHC CK 0035

In the Orissa High Court

Case No : Writ Petition (C) No's. 9040, 9041 of 2009

Berhampur Cold Storage (P) Ltd. and Others

APPELLANT

Vs

ICICI Bank Ltd. and Another

RESPONDENT

Date of Decision : 22-12-2010

Acts Referred:

Arbitration Act, 1940 — Section 24

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 5, 8, 8(1)

Companies Act, 1956 — Section 22(1), 446

Constitution of India, 1950 — Article 226, 227

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 19, 34

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 32(1)

State Financial Corporations Act, 1951 — Section 46B

Citation : (2011) 1 ILR (Ori) 371 : (2011) 1 OLR 1001 Supp

Hon'ble Judges : L. Mohapatra, J;C.R. Dash, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

C.R. Dash, J.—Contents and relief(s) claimed in both the writ petitions being same, they are taken up together for disposal by this common order.

2 Whether the Debt Recovery Tribunal, Cuttack ("D.R.T."in short) (opp.party No. 2 in both the writ petitions) lacks jurisdiction to entertain Original Application No. 96 of 2009 (Defendants whereof are the Petitioners in W.P.(C) No. 9040 of 2009) and Original Application No. 88 of 2009 (Defendants whereof are the Petitioners in W.P.(C) No. 9041 of 200(0 is the sole question that arises for consideration in the present writ petition.

3 Defendants in O.A. No. 96 of 2009 and Defendants in O.A. No. 88 of 2009 filed different Misc. Applications raising the issue of lack of jurisdiction by the D.R.T., Cuttack to entertain the aforesaid Original Applications filed by the present opposite party No. 1 - Bank seeking issuance of Recovery Certificates. They passed for deciding the issue of jurisdiction as a preliminary issue and prayed for

stay of the proceedings in both the O. As. direction the parties to seek for settlement of their dispute by arbitration in view of existence of Arbitration Clause in the agreement between opposite party No. 1 -Bank and Petitioner No. 1 to 6 in W.P.(C) No. 9040 of 2009 (Defendant Nos. 1 to 6 before the D.R.T.) as well as between the opposite party No. 1 - Bank and Petitioner Nos. 1 to 6 in W.P. (C) No. 9041 of 2009 (Defendant Nos. 1 to 6 before the D.R.T.), issue raised in all the M. As. arising out of the aforesaid O. As. being same, learned D.R.T., Cuttack disposed of the same by common order dated 17.06.2009 passed separately in both the O. As., and rejected the claim of the present Petitioners. Said common order dated 17.06.2009 passed in the M. As. arising out of O.A. Nos. 96 of 2009 and 88 of 2009 have been impugned in the present writ petitions. M/s. Berhampur Cold Storage v. ICICI Bank (C.R. Dash, J.)

4 Facts relevant in W.P.(C) No. 9040 of 2009 are as follows - Opposite party No. 1 - Bank entered into a Management and Collection Agreement (M & C Agreement) vide Annexure-2/A with Petitioner Nos. 1 to 6 (Defendant Nos. 1 to 6 before the D.R.T., Cuttack) on 07.09.2005 appointing Petitioner Nos. 1 to 6 as its Management & Collection Agent (M & C Agent) as well as Warehousing Management Agent (W.M.A.). As per the agreement vide Annexure-2/A, it was the duty of Petitioner Nos. 1 to 6 to identify borrowers for Warehouse Receipt Based Financing Scheme (W.R.B.F. Scheme) for extending agricultural loans. Petitioner Nos. 7 to 13 (Defendants No. 7 to 13 before the D.R.T., Cuttack) are the persons, to who opposite party No. 1 - Bank extended financial assistance as loan for a period of 12 months under the W.R.B.F., Scheme. Loans were advanced to Petitioner Nos. 7 to 13 keeping their agricultural produces as security, which were pledged on lien basis to opposite party No. 1 - Bank in accordance with the W.R.B.F. Scheme. Petitioner Nos. 1 to 6 being the M & C Agents had the duty to identify the borrowers, keep the agricultural produces pledged by the borrowers in their godowns / warehouses and purchase the produces as and when required in accordance with the scheme. They (Petitioner Nos. 1 to 6) were not recipients of any loan from the opposite party No. 1 - Bank. Opposite party No. 1 - Bank filed O.A. No. 96 of 2009 seeking issuance of a Recovery Certificate for a sum of Rs. 23,35,01,220/-(twenty-three crores thirty-five lakhs one thousand two hundred twenty) claiming that all the Petitioners were jointly and severally liable to repay the aforesaid amount. Same is the fact in W.P.(C) No. 9041 of 2009, where Petitioner Nos. 1 to 6 (Defendants No. 1 to 6 before the D.R.T.) are the M & C Agents under the W.R.B.F. Scheme and Petitioners Nos. 7 to 10 (Defendants No. 7 to 10 before the D.R.T.) are the individual borrowers under the said scheme.

5. In both the O. As. the Defendants (Petitioners in both the writ petitions) filed Misc. Applications questioning jurisdiction of the D.R.T., Cuttack on the following grounds

(I) The basis of the proceeding before the D.R.T., Cuttack by opposite party No. 1 - Bank being the M & C Agency Agreement (filed as Annexure-2/A in both the

writ petitions), the Tribunal is completely devoid and deprived of any jurisdiction in view of Clause-39 of the said Agreement (Annexure-2/A) providing for settlement of all disputes arising between the parties pertaining to or arising out of the agreement in accordance with the Arbitration and Conciliation Act, 1996, subject to exclusive jurisdiction of Courts at Mumbai.

(II) In the Civil Suit bearing C.S. No. 87 of 2008 filed by Defendant Nos. 7 and 8 in O.A. No. 88 of 2009 and in C.S. No. 88 of 2008 filed by Defendant No. 6 in O.A. No. 96 of 2009 before the competent Court at Berhampur, the Bank, without filing a written statement, took a stand that the Suits were not maintainable in view of the Arbitration Clause, i.e., Clause-39 in Annexure-2/A.

(III) There have been various correspondence between the parties depicting suggestion and acceptance of names of sole arbitrators prior to filing of the original applications.

6. Opposite party No. 1 - Bank objected to the claim of the Petitioners before the D.R.T. on the ground that in view of Section 34 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 ("R.D.B. Act" in short). Which given overriding effect to the said Act as against other remedies, opposite party No. 1 - Bank was within its competence to move the D.R.T., Cuttack for issue of Recovery Certificate in both the O. As. and the D.R.T. alone has the exclusive jurisdiction to try the claims.

7. Learned D.R.T., Cuttack, on consideration of the contentions raised by learned Counsels for the parties, found exclusive jurisdiction with it to try the claim of opposite party No. 1 - Bank in view of overriding effect of Section 34 of the R.D.B. Act and dismissed the Misc. Applications filed by the Defendants.

8. Mr. Kanungo, learned Counsel for the Petitioners in both the writ petitions reiterates the same contentions, as were raised before the D.R.T., Cuttack. He lays stress primarily on Clause-39 of the M & C Agreement in Annexure-2/A in both the writ petitions providing for settlement of dispute by arbitration and conduct of the opposite party No. 1 - Bank in invoking Clause-39 of Annexure-2/A to get C.S. No. 87 of 2008 and C.S. No. 88 of 2008 dismissed on the basis of said arbitration clause, i.e. Clause-39 in Annexure-2/A. Referring to order dated 04.01.2008 passed by Hon'ble the Chief Justice of this Court on a petition filed by some of the Defendants u/s 11(6) of the Arbitration and Conciliation Act, 1996, Mr. Kanungo, learned Counsel for the Petitioners submits that the order dated 04.01.2008 so passed shows that the Hon'ble Chief Justice was of the opinion that the dispute between the parties should be referred to the Arbitration though, of course, by a competent Court. Opposite Party No. 1 - Bank having not questioned maintainability of the Arbitration Proceeding before Hon'ble the Chief Justice, subsequent filing of the aforesaid O. As. by it (Bank) before the D.R.T. is barred by the principles of constructive res judicata. It is further submitted by Mr. Millan Kanungo, learned Counsel for the Petitioners that opposite party No. 1 - Bank in a Notice u/s 11 of the Arbitration and Conciliation Act, 1996, which is

dated 21.04.2008 addressed to Defendant Nos. 1 to 6 in O.A. No. 88 of 2009, called upon to approve M/s. Berhampur Cold Storage v. ICICI Bank (C.R.DASH, J.) appointment of any one of three retired judges of this Court as sole arbitrator to resolve the dispute as early as possible in terms of Clause-39 of the M & C Agreement. Lastly, it is submitted by Mr. Kanungo, learned Counsel for the Petitioners that Arbitration and Conciliation Act, 1996 being a later Special Act, the non-abs ante clause in Section 5 thereof giving overriding effect to the provision of the Act shall prevail over the R.D.B. Act, which is a former Special Act. He relies on the case of The Industrial Credit and Investment Corporation of India Limited and etc. Vs. Vanjinad Leathers Ltd. and etc., and Solidaire India Ltd. v. Fair Growth Financial Services Ltd. and Ors. 1 (2001) BC 656 (SC) to substantiate such contention.

9. Mr. R.K. Mohanty, learned Counsel for opposite party No. 1 - Bank on the other hand oppugns the contention raised by Mr. Kanungo, learned Counsel for the Petitioners on the ground that the D.R.T., Cuttack has got exclusive jurisdiction so far as the present dispute is concerned and no other remedy can be resorted to by the Bank in view of overriding effect of Section 34 of the R.D.B. Act. He relies on the case of Allahabad Bank Vs. Canara Bank and Another, , to substantiate his contention that the jurisdiction of the D.R.T. to adjudicate the dispute between the parties is exclusive. He further relies on the case of Kohinoor Creations and Others Vs. Syndicate Bank, to substantiate his contention that irrespective of existence of Arbitration Clause in the agreement between the concerned opposite parties and the Bank, jurisdiction of the Debt Recovery Tribunal constituted under the R.D.B. Act is not ousted by such Arbitration Clause.

10. Which of the two Acts would prevail ? Whether the provisions of Arbitration and Conciliation Act 1996 ("Arbitration Act" for short) override the R.D.B. Act is the question raised by the parties. Mr. Kanungo, learned Counsel for the Petitioners takes up through different judicial pronouncements and especially Sections 5 and 8 of the Arbitration Act and Section 34 of the R.D.B. Act to submit that both the statutes being Special Statutes and the Arbitration Act being a later statute, non-abs ante clause in Section 5 of the Arbitration Act has to have overriding effect irrespective of existence of a non-abs ante clause in Section 34 of the R.D.B. Act. Mr. R.K. Mohanty, learned Counsel for the opposite parties on the other hand takes up through different judicial pronouncements and different provisions of the R.D.B. Act including Section 34 thereof to contend that the D.R.T. has exclusive jurisdiction under the R.D.B. Act to try any dispute involving dues of a Bank or Financial Institution and even existence of arbitration clause in the agreement between the parties can not affect the exclusive jurisdiction of D.R.T. constituted under R.D.B. Act

11. Basis of present dispute between the parties is the existence of the Arbitration Clause, i.e., Clause-39 in the agreement between the parties vide Annexure-2/A. said Clause-39 reads thus

All disputes between the parties here to pertaining to or arising out of this

agreement shall be settled by the parties in accordance with the Arbitration and Conciliation Act 1996, as amended from time to time, and shall be subjected to exclusive jurisdiction of Courts at Mumbai.

The aforesaid Agreement vide Annexure-2/A was executed between the parties on 07.09.2005. By that time both the aforesaid statutes were operating in the field. Whether the aforesaid clause in the Agreement vide Annexure-2/A binds the parties is dependent on the questions - (1) whether the D.R.T. constituted under the R.D.B. Act has exclusive jurisdiction to try the dispute in question and (2) whether the agreement providing for arbitration clause, as aforesaid, takes away jurisdiction of the D.R.T.

12. The Supreme Court, considered the provisions of the R.D.B. Act in the case of Allahabad Bank v. Canara Bank (supra) while dealing with adjudication regarding debts due to Banks or Financial Institutions and the exclusivity of the jurisdiction of the D.R.T. The Hon"ble Supreme Court held thus:

21. In our opinion, the jurisdiction of the Tribunal in regard to adjudication is exclusive. The RDB Act requires the Tribunal alone to decide applications for recovery of debts due to Banks or Financial Institutions u/s 18, the jurisdiction of any other court or authority which would otherwise have had jurisdiction but for the provisions of the Act, is ousted and the power to adjudicate upon the liability is exclusively vested in the tribunal. (This exclusion does not however apply to the jurisdiction of the Supreme Court or of a High Court exercising power under Articles 226, 227 of the Constitution). This is the effect of Section 17 and 18 of the Act.

22. We hold that the provisions of Section 17 and 18 of the RDB Act are exclusive so far as the question of adjudication of the liability of the Defendant to the Appellant Bank is concerned.

Hon"ble Supreme Court, in the aforesaid case, further held that process of the Debt Recovery Tribunal was superior, because it intended to provide a speedy and summary remedy for recovery of thousands of crores of rupees which were due to Banks and Financial Institutions. Hon"ble Supreme Court in the case of Union of India and Another Vs. Delhi High Court Bar Association and Others, , has reiterated the same view in paragraph-4 of the judgment, which reads thus - M/s. Berhampur Cold Storage v. ICICI Bank (C.R. Dash, J.)

4. ...According to Section 18 of the Act, no court or other authority is entitled to exercise any jurisdiction, powers or authority in relation to matters in respect of which such jurisdiction, powers and authority are vested with the Tribunal. Section 18, however, provides that the bar on other Courts and authorities to entertain such disputes shall not in any way oust the jurisdiction of this Court or the High Courts in exercise of their jurisdiction under Articles 226 and 227 of the Constitution.

13. The special machinery of the D.R.T. has been constituted as per the preamble

of the R.D.B. Act, "for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto". In paragraph-24 of the judgment in Union of India v. Delhi High Court Bar Association (supra), the Hon"ble Supreme Court has held thus

24. The manner in which a dispute is to be adjudicated upon is decided by the procedural laws which are enacted from time to time. It is because of the enactment of the CPC that normally all disputes between the parties of a civil nature would be adjudicated upon by the civil courts. There is no absolute right in anyone to demand that his dispute is to be adjudicated upon only by a civil court. The decision of the Delhi High Court proceeds on the assumption that there is such a right. As we have already observed, it is by reason of the provisions of the CPC that the civil courts had the right, prior to the enactment of the Debts Recovery Act, to decide the suits for recovery filed by the banks and financial institutions. This forum, namely, that of a civil court, now stands replaced by a Banking Tribunal in respect of the debts due to the bank....

In view of the provisions contained in Sections 17, 18 and 19 of the R.D.B. Act and the aforesaid judicial pronouncement it is to be held that the Debt Recovery Tribunal has got exclusive jurisdiction in respect of debts which are in excess of rupees ten lakhs and for such a claim the D.R.T. becomes the original and obvious forum by a Bank or Financial Institution instead of a Civil Court.

14. Section 34 of the R.D.B. Act, which gives over-riding effect to the provisions of the Act as against any other law or instrument having effect by virtue of any law other than the R.D.B. Act, reads as follows:

34. Act to have over-riding effect. - (1) Save as provided under 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 Corporations 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), the Sick Industrial Companies (Special Provisions) Act 1985 (1 of 1986) and the Small Industries Development Bank of India Act, 1989 (39 of 1989). A cursory reading of the aforesaid provisions makes it clear that the provisions of R.D.B. Act shall have over-riding effect not only against other law for the time being in force (except those statute saved by Sub-Section 2) but also against any instrument having effect by virtue of any law other than the R.D.B. Act. The agreement between the parties vide Annexure-2/A providing for the Arbitration Clause in Clause-39 is to be held as covered under "any instrument" having effect by virtue of any law. We feel persuaded to take such a view in as much as Clause-39 being a part of a valid agreement vide Annexure-2/ A can be said to have effect by virtue of the Contract Act and the Arbitration

Clause vide Clause-39 in Annexure-2/A has the potentiality to bring the lis under the purview of the Arbitration Act. Section 34 as aforesaid sweeps the field and the R.D.B. Act shall have overriding effect not only against any other law for the time being in force but also against any agreement between the parties made in derogation of exclusivity of jurisdiction of the Tribunal constituted under the Act. Therefore, any agreement made in derogation of the R.D.B. Act shall not survive the sweep of Section 34 of the Act. It is, however, contended that in view of Clause-39 in Annexure-2/A, provisions of the Arbitration Act becomes applicable to the disputes between the parties and the Arbitration Act being a later special statute shall have to override the provisions of the R.D.B. Act. We keep this question alive for discussion at the appropriate stage.

15. Hon"ble Supreme Court, as back as in 1973 in the case of Mohd. Subrati alias Mohd. Karim Vs. State of West Bengal, , had held that mere existence of an arbitration clause in an agreement does not by itself create an obligation on the Court to stay the suit or to give any opportunity to the Defendant to consider the question of enforcing the Arbitration Clause. The right to institute a suit in some Court is conferred on a person having a grievance of civil nature, M/s. Berhampur Cold Storage v. ICICI Bank (C.R. Dash, J.) under the General Law. The Arbitration Agreement does not by itself operate as a bar to the suit in the Court. In the case of Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, , Hon"ble Supreme Court held thus

51. When parties agree to have their disputes settled by arbitration it does not mean that both have bound themselves not to go to court to have the disputes settled. At page 163 of Russel on Arbitration, Twentieth Edn. It is stated that "a party to a contract to refer disputes to arbitration has a perfect right to bring an action in respect of those disputes, and the court has jurisdiction to try such disputes. Any provision to the contrary would be an ouster of the jurisdiction of the Courts.

52. Lord Macmillan in the House of Lords decision in Heyman v. Darwins Ltd. pointed out as under:

I venture to think that not enough attention has been directed to the true nature and function of an arbitration Clause in a contract. It is quite distinct from the other clauses. The other Clauses set out the obligations which the parties undertake towards each other hinc inde. But the arbitration Clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution.

53. It may be that even after entering into an arbitration Clause any party may institute legal proceedings. It is for the other party to seek stay of the suit by showing the arbitration Clause and satisfying the terms of the provisions of law empowering the court to stay the suit....

Though the aforesaid judgment was rendered by Hon''ble Supreme Court in the context of Arbitration Act, 1940, the principles laid down therein would hold good even for the purpose of consideration of the question under the Arbitration Act, 1996. The Hon''ble Supreme Court, by the aforesaid judgment, we feel, has set down applicable legal principles, so far as effect of arbitration clause in an agreement and liberty of a party to such agreement to move the Court for settlement of dispute is concerned.

16. Reliance is placed by Mr. Millan Kanungo, learned Counsel for the Petitioners on Sections 5 and 8 of the Arbitration and Conciliation Act, 1996, which are extracted below for ready reference:

5. Extent of judicial intervention:

Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this Part.

8. Power to refer parties to arbitration where there is an arbitration agreement:

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2.) The application referred to in Sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3.) Notwithstanding that an application has been made under Sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

It is the established principle that while examining a particular provision of a statute to find out whether the jurisdiction of a Court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be held to be ousted unless the very statutory provision explicitly indicates or even by inferential conclusion the Court arrives at the same when such a conclusion is the only conclusion. The Arbitration and Conciliation Act, 1996 does not contain any provision explicitly ousting jurisdiction of a Court except what is provided in Section 5, and Section 8 thereof does not restrict right of a party to maintain a suit in express term, rather it confers primacy on the Court to determine the question with regard to existence of an arbitration agreement.

17. Hon''ble Supreme Court in their landmark pronouncements in *Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another*, has clearly ruled that the Arbitration Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the arbitration agreement do not take the steps stipulated u/s 8 of the Act. Considering the statutory provisions, the

Hon"ble Supreme Court held thus:

12. For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matter governed by Part-I of the Act, judicial authority shall not intervene except where so provided in the Act. Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the arbitral tribunal, if - (1) the parties to the arbitration agreement have M/s. Berhampur Cold Storage v. ICICI Bank (C.R. Dash, J.) not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that Arbitration Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under Sub-sections (1) & (2) of Section 8 of the Act.

13. Secondly there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitratOrs.

14. Thirdly, there is no provision - as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against his, u/s 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the Court may refer the same to arbitration provided that the same can be separated from the rest of the subject matter of the suit. Section also provided that the suit would continue so far as it related to parties who have not joined in such application.

15. The relevant language used in Section 8 is -"in a matter which is the subject matter of an arbitration agreement". Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The word "a matter" indicates entire subject matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is - even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible u/s 8 of the Act ? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is

to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed." Admittedly, in the present case some of the Defendants of both the O. As. pending before the D.R.T. are not parties to the arbitration agreement. According to opposite party No. 1 Bank all the Defendants are jointly and severally liable. Learned Counsels for the parties however, did not choose to address us on the aspect of applicability of Section 8 of the Arbitration Act and as to whether learned D.R.T. should have referred the parties to Arbitration by invoking Section 8. They have confined their submission as to which provision between Section 5 of the Arbitration Act and Section 34 of the R.D.B. Act has got primacy. We, therefore, refrain ourselves from commenting on merit regarding applicability of Section 8 of the Arbitration Act to the facts of the present case.

18 In view of the above we are inclined to hold that, the D.R.T. having replaced Civil Court so far as the dispute in question is concerned, and it is having original jurisdiction to try the present lis, it's jurisdiction is not ousted or taken away by virtue of Clause-39 in Annexure-2/A. Opposite party No. 1 Bank, can not therefore, be faulted for approaching the D.R.T. as from our discussion it is clear by now that existence of an arbitration agreement itself does not prevent a party from moving the competent court.

19. It is clear from our discussion by now that the non obstante Clause in Section 5 of the Arbitration Act shall come into play after a dispute is brought before an arbitrator for settlement in accordance with Part-1 of the Act. Unless a matter is brought for arbitral proceeding in accordance with the provisions of the Act, the non obstante clause in Section 5 of the Act can not have overriding effect against any provision of any other Act. We have already held that existence of Arbitration Clause in an agreement does not ipso facto oust the jurisdiction of a competent court or the jurisdiction of the D.R.T. after coming into force of the R.D.B. Act. Unless the competent court exercises its jurisdiction u/s 8 of the Arbitration Act in favour of the party seeking settlement of dispute through arbitration, such court continues to have jurisdiction over the matter and the non obstante clause in Section 5 of the Act does not come into play in such situation to have overriding effect against the statute which governs the field so far as the proceeding in a court is concerned. In the present case, the D.R.T. still being in seisin over the matter and we having not been addressed on merit of the case regarding applicability of Section 8 of the Arbitration Act to the facts of the present case, the contention simpliciter regarding overriding effect of Section 5 of the M/s. Berhampur Cold Storage v. ICICI Bank (C.R.DASH, J.) Arbitration Act on the basis of Clause-39 in Annexure-2/A is totally misconceived. We feel persuaded to rule here at the cost of repetition that existence of an arbitration

clause in an agreement between the parties as in the present case per se does not attract operation of Section 5 of the Arbitration Act; and if a competent court/forum does not exercise its jurisdiction u/s 8 of the Act in favour of the parties seeking such exercise of jurisdiction and continue to proceed with the matter, Section 5 of the Arbitration Act in such a case is also not attracted to have overriding effect on the statute governing the proceeding before the court/forum. Viewed from his perspective, we are constrained to hold that the question of primacy of the provisions contained in Section 5 of the Arbitration Act vis-à-vis Section 34 of the R.D.B. Act as raised by learned Counsels for the parties in the facts of the present case is more illusory than real.

20. In view of our findings as aforesaid the question raised by learned Counsels for the parties on facts of the present case becomes mere academic but still we propose to address the questions to find out in the even of a supposed conflict which of the provision would have primacy.

21. Now the question that arises, as to which statute has got primacy in the matter. Whether the Arbitration Act should give way to the R.D.B. Act or the R.D.B. Act should give way to the Arbitration Act. There is no dispute at the Bar so far as the settled law on the point is concerned and it is agreed that when there is conflict between two Special Statutes, it is the later statute which must prevail. (See *Solidaire India Ltd. v. Fair Growth Financial Services Ltd.* supra). Viewed from such perspective, the Arbitration Act being the later statute has to prevail, if we take a simple common sense approach without going into the niceties of both the statutes.

22. The Hon'ble Supreme Court was faced with a similar question in *Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another*, in which the Hon'ble Apex Court carved out a fine exception and held that the non-abs ante clause of the later Act would prevail, but if it is found that the later Act was a general statute as against the special earlier Act, then the later Act would give way to the earlier one. Hon'ble Supreme Court held thus:

Both the statutes have competing non-abs ante provisions. Section 46-B of the 1951 Act provides that the provision of that statute and of any rule or order made there under shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force whereas Section 32(1) of the 1985 Act also provides that the provisions of the said Act and of any rules or schemes made there under shall have effect notwithstanding anything inconsistent therewith contained in any other law. Section 22(1) also carries a non obstante clause and says that the said provision shall apply notwithstanding anything contained in Companies Act, 1956 or any other law. The 1985 Act being a subsequent enactment, the non obstante clause therein would ordinarily prevail over the non obstante clause found in Section 46-B of the 1951 Act unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one. In that event the maxim *generalia specialibus non derogant* would apply.

In the case of *Solidaire India Ltd. (supra)*, the Hon''ble Supreme Court poised with the same question embarked upon harmonious interpretation of the Special Court Act, 1992 and the Sick Industrial Companies (Special Provisions) Act, 1985 and held that the Special Court Act, 1992 would prevail over the Sick Industrial Companies (Special Provisions) Act, 1985 Hon''ble Supreme Court said:

It is settled rule of interpretation that if one construction leads to a conflict, whereas on another construction, two Acts can be harmoniously constructed then the latter must be adopted. If an interpretation is given that the Sick Industrial Companies (Special Provisions) Act, 1985 is to prevail then there would be a clear conflict. However, there would be no conflict if it is held that the 1992 Act is to prevail. On such an interpretation the objects of both would be fulfilled and there would be no conflict. It is clear that the Legislature intended that public monies should be recovered first even from sick companies. Provided the sick company was in a position to first pay back the public money, there would be no difficulty in reconstruction.

In the case of *Life Insurance Corporation of India Vs. D.J. Bahadur and Others*, , an objection was raised before the Tribunal constituted under the L.I.C. Act, that leave of the Company Court u/s 446 of the Companies Act was required as a condition precedent for filing a claim before the Tribunal to recover amounts. Hon''ble Supreme Court rejected the objection holding that for certain cases an Act may be general and certain other purposes it may be special and the Court can not blur a distinction when dealing with the finer points of law. It was further held that in view of Section 41 of the L.I.C. Act, the Company Court has no jurisdiction to entertain and adjudicate upon any matter, which the Tribunal is empowered to decide or determine under the L.I.C. Act.

23. The proposition that a Special Act could also be treated as General Act in certain circumstances, was further reiterated by the Hon''ble Apex Court in the case of *Allahabad Bank (supra)*. It is noteworthy that Hon''ble M/s. *Berhampur Cold Storage v. ICICI Bank (C.R. DASH, J.)* Supreme Court held that the principle of purposive interpretation, which was applied by it is favour of the jurisdiction and powers of the Company Court in the earlier judgment in the case of *Sudarsan Chits (I) Ltd. Vs. O. Sukumaran Pillai and Others*, and other cases, cannot be invoked in the present case against the D.R.T. In view of superior purposes of the R.D.B. Act and the special provisions contained therein. A view was taken upon applying this principle that the process of the Debt Recovery Tribunal was superior, because it intended to provide a speedy and summary remedy for recovery of thousands of crores of rupees, which were due to Banks and Financial Institutions.

24. In resolving the conflict between provisions of two different Acts, a familiar approach in such cases is to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific. The principle is expressed in the maxims *Generalia special bus non derogant*, and *generalibus specialia derogant*.

If a special provision is made on a certain matter, that matter is to be excluded from the general provision. Hon''ble Supreme Court has applied the rule in resolving conflict between different provisions in so many cases and we do not want to burden our judgment by referring to those pronouncements.

25. The Division Bench of Delhi High Court in *Kohinoor Creations and Ors. v. Syndicate Bank* supra on consideration of different judicial pronouncements and provisions of both the Arbitration Act and R.D.B. Act held thus:

25. The legal position that emerges from all this is:

1) That the Debt Recovery Tribunal established under the RDB Act enjoys the exclusive jurisdiction to adjudicate upon and execute the recovery claims of the Banks and other Financial Institutions and the jurisdiction of all Courts and authorities which otherwise enjoyed this jurisdiction is ousted barring that of the Supreme Court and the High Court.

2) That the RDB Act is the special statute catering to the recovery of debts by the Banks and other Financial Institutions and that it was enacted to provide for summary and speedy recovery of crores and crores of rupees of public money.

3) That in case of consistent and conflicting provisions in the two special statutes, the latter statute would prevail over the earlier one provided one of the two statutes is not treated as a general statute qua the other in which case the one surviving as special statute would override, no matter whether it was enacted earlier in point of time.

26. Given regard to all this, we find no difficulty in taking the view that the RDB Act would prevail over the Arbitration Act even though it was the later Act. This is so for variety of reasons. Firstly because if the RDB Act conferred exclusive jurisdiction on the Tribunals established by it to adjudicate upon and execute the recovery claims of the Bank and other financial institutions to the exclusion of all other Courts and authorities except the Supreme Court and the High court, which position is laid down and affirmed by the Supreme Court, then the Arbitrator Assuming this jurisdiction u/s 8 of the Arbitration Act could not be countenanced despite the mandatory nature of its provisions. Otherwise the established exclusiveness of the DRT's justification under the RDB Act would be eroded and compromised which would be contrary to the legislative intent behind the DRB Act because on a simple logic. If the DRT enjoys the exclusive jurisdiction to try the recovery claims of the Banks & Financial Institutions, it so enjoys against all forums established by various statutes which would include the Arbitrator under the Arbitration Act also, the only exception made in this regard being the Supreme Court and the High Court.

27. The exclusiveness of the DRT's jurisdiction is all the more fortified by the provisions of Section 34 of the RDB Act. This Section gives all pervasive overriding effect to the provisions of the RDB Act as against any inconsistent provision in any law for the time being in force. It was amended in 2000 to

exempt several enactments from the purview of the RDB Act. The Arbitration Act of 1996 which was in force at the time of amendment does not figure in this list of statutes which leave no scope for doubt that it was not intended to be so exempted and its inconsequential provisions were intended to be overridden by the provisions of the RDB Act.

28. We are unable to accept the submission that the amendment of 2000 made in Section 34 of RDB Act was inconsequential and that the exclusion of the Arbitration Act, 1996 in the list of exempted statutes through this amendment made no difference. On the contrary this amendment provides a vital clue to the legislative intent that the RDB Act was to prevail upon inconsistent provisions of all laws in force on that date except the statutes enlisted therein.

29. The next question that arises for consideration is whether Arbitration & Conciliation, 1996 which is a later special statute and which consolidates law relating to domestic arbitration, international, commercial arbitration, could be regarded as a general statute vis-à-vis the RDB Act, an earlier statute. We have no doubt that it M/s. Berhampur Cold Storage v. ICICI Bank (C.R.DASH, J.) possesses all the trappings of a general statute vis-à-vis the RDB Act. For one thing it deals with a whole lot of subjects ranging from domestic arbitration to the conciliation. Even under domestic arbitration, it brings within its ambit all sorts of matters exposing its general nature in the process. As against this, the RDB Act is a very special statute conferring exclusive jurisdiction on the Tribunal to adjudicate upon recovery claims of banks and other financial institutions running into crores of rupees and provides its own mechanism for execution of the recovery certificates passed by the DRT. It deals with only one subject and is a self contained code to achieve the object and purpose of huge amount of public money. That being so, it falls within the fine exception carved out by the Supreme Court in its several judgments laying down a same statute could be treated as a special statute vis-à-vis one legislation and a general legislation vis-à-vis another legislation. Though the arbitration is a special statute for matters relating to domestic and international, commercial arbitration and law relating to conciliation on the basis of UNCITRAL model, but it is a general statute vis-à-vis RDB Act, which act empowers adjudication of the recovery claims of banks and financial Institutions by the Tribunals set by it expressly. The RDB Act would, therefore, override the provisions of the Arbitration Act, 1996 even though this act is a later statute.

30. We also do not see any conflict between the non-obstante clause of Section 5 of the Arbitration Act and that of Section 34 of the RDB Act because the range of the former is limited to matters governed by Part-1 of the Arbitration Act. Section 5 of the Arbitration Act provides for minimizing the judicial intervention only in matters falling under Part-1 of the Act. This part comprises of 10 chapters dealing with matters related to domestic arbitration. Even in this, it permits judicial intervention in some situation. In any case provisions of this Section providing for the extent of judicial intervention can't be interpreted to give any

overriding effect to the provisions of the first part of the Act over anything inconsistent contained in the RDB Act. Section 34 of the RDB Act on the other hand, gives an overriding effect to the provisions of the RDB Act. It says that provisions of this Act would have overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force or in any instrument having effect by virtue of any law under this Act. Its Sub-section(2) saves some statutes from the purview of this Act which include the Industrial Finance Corporation Act, the State Financial Corporation Act, the Unit Trust of India, the Industrial Reconstruction Bank of India Ltd. the SICA and the small Industries Development Bank of India Act. But it significantly leaves out the Arbitration Act, 1996 which was in force at the time of amendment in 2009.

26. Learned D.R.T. has relied on the decision of the Delhi High Court in Kohinoor Creations supra in dismissing the claim of the Petitioners. In view of our discussion in this judgment, we do not find any justification to take a different view. Learned Counsel for the Petitioner sought to distinguish the judgment of Delhi High Court in Kohinoor Creations supra on the ground that in the case of Kohinoor Creations unlike the present case, some of the Defendants had not approached the Hon"ble Chief Justice of the said Court u/s 11 of the Arbitration Act and Hon"ble the Chief Justice had not expressed any opinion whatsoever on such a petition. In the present case however, some of the Defendants had moved Hon"ble the Chief Justice in ARBP No. 62 of 2007. No objection by the opposite party Bank regarding lack of jurisdiction by the Arbitrator was raised before Hon"ble the Chief Justice and Hon"ble the Chief Justice passed the following order:

4.1.2008 - It is clear from the perusal of the clause that Petitioner has agreed that all arbitration proceeding shall be subjected to the exclusive jurisdiction of the courts at Mumbai. Since the Petitioner has agreed to the same and it is body"s case that Mumbai courts will have no jurisdiction in the matter, this Court can not appoint an arbitrator to decide the dispute between the parties having regard to the forum selection clause which is a part of the Arbitration Clause. The petition is therefore returned to the Petitioner for taking proper step, if so advised.

Taking clue from the afore-quoted order it is submitted by Mr. Milan Kanungo, learned Counsel for the Petitioner that the opposite party No. 1 Bank having not raised any objection before Hon"ble the Chief Justice regarding the lack of jurisdiction on the part of an arbitrator under the Arbitration Act, can not now take the same plea on the basis of Section 34 of the R.D.B. Act. In order to verify the veracity of the contention so raised, we called for record in ARBP No. 62 of 2007 and on perusal of the said record we found that the said petition u/s 11 of the Arbitration Act was filed by Tara Char an Padhy (Petitioner No. 2 in W.P.(C) No. 9040 of 2009) and the aforesaid order was passed by Hon"ble the Chief Justice at the admission stage without issuing notice to the opposite party No. 1 Bank. In view of such fact, submission of learned Counsel for the Petitioner is out

and out M/s. Berhampur Cold Storage v. ICICI Bank (C.R.DASH, J.) misconceived inasmuch as opposite party No. 1 could not have raised any plea in the aforesaid ARBP No. 62 of 2007 as it had not been noticed to appear. The other plea of learned Counsel for the Petitioner on this score to the effect that the present proceeding before the D.R.T. is hit by the principle of constructive res judicata inasmuch as the opposite party No. 1 Bank had not taken the aforesaid plea before the Hon"ble the Chief Justice is also misconceived for the aforesaid reasons, and for the reason that order passed by Hon"ble the Chief Justice u/s 11 of the Arbitration Act is mere administrative in nature.

27. Learned Counsel for the Petitioner then draws our attention to the conduct of opposite party No. 1 Bank in getting C.S. Nos. 87 and 88 of the 2008 pending in the Court of Civil Judge (Senior Division), Berhampur dismissed in the guise of the Arbitration Clause, i.e., Clause 39 in Annexure-2/A and further conduct of the opposite party No. 1 Bank in calling upon some of the Defendants to furnish names of sole arbitrator and on the basis of such conduct of the opposite party No. 1 Bank it is submitted that the Bank is estopped from instituting the present proceeding before the D.R.T. after having taken the benefit of Clause-39 of Annexure-2/A before the Civil Court.

28. We have already held that the D.R.T. constituted under the R.D.B. Act has got exclusive jurisdiction so far as claim of a Bank or financial institution in excess of rupees ten lakhs is concerned. We have also held that existence of Arbitration Clause vide Clause-39 in Annexure-2/A does not ipso facto take away the jurisdiction of the D.R.T. and for the claim of the present nature the D.R.T. is the obvious and original forum for a Bank or financial institution. It is well settled in law that as against statute, there is no estoppel. The doctrine of estoppel can not be invoked to render invalid a proceeding before a competent forum, which the legislature has, on grounds of public policy vested with such jurisdiction. In view of such settled law the last contention raised by Mr. Milan Kanungo, learned Counsel for the Petitioners merits no consideration.

29. Taking into consideration the aforesaid discussion and the fact that pronouncement of the Delhi High Court in Kohinoor Creations" case supra cannot be distinguished in the fact of the present case and in view of our agreement with what has been held by Delhi High Court in the case of Kohinoor Creations supra we do not have any doubt in our mind that the Arbitration and Conciliation Act, 1996 is a general Act so far as recovery of debts due to Bank and financial institution is concerned, but the R.D.B. Act is a special statute enacted specifically for the specific object by vesting exclusive jurisdiction to the D.R.T. with regard to claims by Banks or financial institutions in excess of rupees ten lakhs. In view of such position, the supposed conflict between the non-obstante clause in Section 5 of the Arbitration Act and Section 34 of the R.D.B. Act is to be resolved by applying the principle expressed in the maxims *generalia specialibus non derogant* and *generalibus specialia derogant* and the Arbitration Act 1996 shall have to give way to the R.D.B. Act, 1993 for primacy.

30. In view of the above, we hold that even if there is a valid arbitration agreement between the parties, the D.R.T., Cuttack would have exclusive jurisdiction over the dispute between the parties irrespective of such agreement in the facts and circumstances of the case presented before us. Accordingly, both the writ petitions are dismissed. Writ petition dismissed.