

(2004) 07 CAL CK 0028
In the Calcutta High Court
Case No : C.O. No. 349 of 2004

Chanda Engineers (India) Ltd. and Another
Vs

APPELLANT

U.C.O. Bank

RESPONDENT

Date of Decision : 14-07-2004

Acts Referred:

Banking Regulation Act, 1949 — Section 6
Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3
Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 115
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 26, 27

Citation : AIR 2005 Cal 28 : (2005) 125 CompCas 708 : (2004) 2 ILR (Cal) 129

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : Pratik Prakash Banerjee, Nimish Mishra, Vishal Jain, N.K. Saraf and K. Daroka, for the Appellant; A.K. Chatterjee, S. Bhattacharjee and S. Das, for the Respondent

Judgement

Amitava Lala, J.—This is an application under Article 227 of the Constitution of India. This application has arisen out of an order passed by the Debts Recovery Tribunal (D.R.T.) followed by an appellate order passed by the Debts Recovery Appellate Tribunal (D.R.A.T.). Although the parties argued at length in the merit but at the end of the argument Mr. Ajoy Krishna Chatterjee, Learned Senior Counsel, appearing for the respondent Bank, raised a point about the scope and ambit of the Article 227 of the Constitution of India in this respect. Possibly he wanted to see no stone unturned. Even then I am not inclined to give incidental value to such part of the argument because it may ultimately touch the foundation of the jurisdiction of the Court. Articles 226 and 227 are plenary powers of the High Court under the Constitution of India. Such plenary power of the High Court is exhaustive in nature. The same cannot be curtailed. Even then the Writ Court in its wisdom tries to avoid the disputed question of fact having alternative efficacious remedy open. Departure, if any, is the exception but not the rule. A High Court as a whole follows such principle.

2. So far as the power of Article 227 is concerned, in earlier, High Courts hardly got any opportunity to apply the power of superintendence under it over the Lower Courts and Tribunals, Number of litigations were much less. Lower Courts had enough opportunity to go through procedural propriety. There was no mushroom growing of Tribunals. Only few traditional Tribunals were existing. Provision was normally applied where there was neither any scope of appeal nor any scope of usual revision. But since when various Tribunals either by way of Constitutional amendment or under the respective statutes are formed and also revisional Jurisdictions are curtailed by way of amendment of the CPC particularly in respect of the interlocutory matters, number of applications under Article 227 of the Constitution of India have been increased. Therefore, if the totality of the scenario is projected it will be seen that from when several jurisdictions of the High Courts are curtailed number of making applications under Article 227 of the Constitution of India have been increased. If this is the trend then formation of Tribunals for the sake of people is a big question for the legislature. It is high time to think whether the installation of various Tribunals is really minimizing number of disputes or increasing the number of disputes. This discussion is not academic - why not - discussions hereunder will say.

3. Power of superintendence under Article 227 of the Constitution of India is dependant upon various circumstances of individual cases. No straight jacket formula can be applied. In *Vadivelu Vs. Sundaram and Others*, according to me, the judgment supported the order passed by the Learned Single Judge of the High Court under Article 227 of the Constitution of India and the appeal was dismissed. In doing so, the Supreme Court held that when there is an error of jurisdiction or flagrant violation of law laid down by this Court by exercising revisional power, the Court can set aside the order passed by the Tribunal to do justice between the parties. The illegality committed by the Election Tribunal has been corrected by the limited order. There the Counsel appearing for the appellant had argued as follows :

"The powers of the Revisional Court are not as wide as powers of the Appellate Court, and, therefore the Learned Single Judge should not have set aside the order passed by the Election Commission."

4. The Supreme Court held "we do not find any force in this contention". Then the Supreme Court made an explanation in respect of the error of jurisdiction or flagrant violation of the law. Therefore, the question of error of jurisdiction or flagrant violation of law cannot be the principle minus factual aspect of the matter. Secondly, the Court held that the order can be set aside under Article 227 of the Constitution of India. Therefore, such judgment as argued by the respondent is not only distinguishable in nature but also helping the cause of the petitioner in the merit on which they have argued. Similarly, further citation reported in *Chandavarkar Sita Ratna Rao Vs. Ashalata S. Guram*, is not helping the petitioner because the Supreme Court laid down the principle as follows :

"It is well settled that the High Court can set aside or ignore the findings of fact

of an appropriate Court if there was no evidence to justify such a conclusion and if no reasonable person could possibly have come to the conclusion which the Courts below have come or in other words the finding which was perverse in law".

It is further held therein as follows :

".....under Article 227 of the Constitution High Court could go into the question of facts or look into the evidence if justice so required it, if there is any misdirection in law or a view of fact taken in the teeth of preponderance of evidence."

5. Mr. Chatterjee highlighted a part of Paragraph 20 which is as follows :

".....High Court has gone into questions which depended upon appreciation of evidence and indeed the very fact that the Learned Trial Judge came to one conclusion and the Appellate Bench came to another conclusion is indication of the position that two views were possible in this case. In preferring one view to another of factual appreciation of evidence, the High Court transgressed its limits of jurisdiction under Article 227 of the Constitution."

6. According to me, two possible views ipso facto cannot be the principle unless it is backed by the factual analysis otherwise Supreme Court itself would not have passed such order taking one of the views. Thus, such part of the judgment cannot be held to be applicable in this particular case. He further cited judgment reported in Ranjeet Singh Vs. Ravi Prakash, to establish that High Court in setting aside the judgment of the Appellate Court in exercising certiorari jurisdiction committed an error. He further stated that by exercising of supervisory power of the High Court under Article 227 of the Constitution of India the Court also should not indulge in reapprcciation or evaluation of evidence or correcting the error in drawing inferences like a Court of Appeal. But such application was a combined application under Articles 226 and 227 of the Constitution of India. In our High Court we normally do not encourage such type of combined application. One has to come either under Article 226 or under Article 227 of the Constitution of India. I am not concerned with the first part of the judgment which deals with the jurisdiction under Article 226 of the Constitution of India. In the last part where it was also held about Article 227 it followed the ratio of the judgment in re: Surya Dev Rai Vs. Ram Chander Rai and Others, . If I go through such judgment I shall see it supports the exhaustive power of the High Court under Article 227 of Constitution of India but refused to pass in the matter on available circumstances therein which can not have any binding effect herein without being backed by the appropriate fact and circumstances. According to the Supreme Court it is well-settled that the power of superintendence conferred on the High Court under Article 227 is administrative as well as judicial and is capable of being invoked at the instance of any person aggrieved or may even be exercised suo motu. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacle, thereon. But

power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction.

7. Firstly, the writ of certiorari is an exercise of its original jurisdiction by the High Court; exercise of supervisory jurisdiction is not an original jurisdiction and in this sense it is akin to appellate, revisional or corrective jurisdiction. Secondly, in a writ of certiorari, the record of the proceedings having been certified and sent up by the inferior Court or Tribunal to the High Court, the High Court if inclined to exercise its jurisdiction, may simply annul or quash the proceedings and then do no more. In exercise of supervisory jurisdiction, the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, may be, by way of guiding the inferior Court or Tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior court or Tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercised suo motu as well.

8. In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English Courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate Courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate Court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate Court as the Court should have made in the facts and circumstances of the case.

9. Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate Court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction - by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of Justice.

10. On the other hand, supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate Courts within the bounds of their jurisdiction. When a subordinate Court has assumed a jurisdiction which it

does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

11. Despite laying down the broad principles and working rules, the fact remains that the parameters for exercise of jurisdiction under Article 226 or 227 of the Constitution cannot be tied down in a strait-jacket formula or rigid rules.

12. In the instant case, the specific case of the respondent Bank itself is that the proceeding before the D.R.T. cannot be said to be "pending" when certificate has been issued even upon observing the legal position under Sections 26 and 27 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, and the D.R.A.T. had only set it aside leaving everything in the vacuum without resolving the dispute even under said Section 27 itself, the High Court under Article 227 of the Constitution of India has no other alternative but set it right.

13. Thus, I project the factual aspect of the matter hereunder. According to the petitioner, as against the original loan amount of Rs. 21 lac on 19th October, 1984 Bank claimed for an outstanding sum of Rs. 48,22,985.38 paisa. Bank stated in the plaint that cause of action on that date when notice of demand is made on 17th February, 1986. Bank alleged by thumping increase that outstanding amount is Rs. 80,91,331.93 paisa as on 31st December, 1985 i.e. only after about one year from such date. On 29th July, 1986 Bank instituted a mortgage suit in the appropriate Civil Court along with a monetary claim of Rs. 90,62,601.19 p. Bank claimed interest at the rate of 18% while the contractual rate was 12%. The account became non-performing assets (N.P.A.) in 1983. Therefore, according to the borrower/s no interest could be added as a claim by the Bank and the ledger balance could not be shown to be increased on that score. On 26th November, 1990 a preliminary decree was passed by the appropriate Civil Court in absence of the borrower/s/petitioners herein. On 12th April, 1991 Bank filed an application for final decree. In May, 1991 petitioner filed an application. Misc. Case being numbered 12 of 1991, under Order 9 Rule 13 of the CPC for setting aside the preliminary decree. Application for condonation of delay was made. On 24th June, 1993 the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 came into force. On 30th July, 1994 the records were directed to be transferred by the concerned Assistant District Judge to the Debts Recovery Tribunal (D.R.T.). An application was made on 13th September, 1994 in the revisional jurisdiction of the High Court to obtain the stay of the suit which was granted but subsequently vacated on 26th February, 1996 by dismissing the revisional application. However, on 20th September, 1994 D.R.T.-I received the records when the suit was renumbered as T.A. No. 208 of 1994. Time to time the matter was adjourned. On 20th February, 1997 the application for recalling being Misc. Case No, 12 of 1991 was dismissed for default and at the same time final decree was passed based on the above preliminary decree. No notice was served upon the borrowers before passing the final decree nor any

separate date was fixed for final decree. On 17th March, 1997 petitioner filed an application for recalling of the order. On 26th March, 1997 an application was filed for keeping the certificate in abeyance till such application is disposed of. An order was passed by the D.R.T. to deposit 5% of the claim amount with the bank within 15 days as a condition precedent to hearing the application. A revisional application is made from such order in this High Court in April, 1997. The same was dismissed on 9th February, 1999. However, time to make deposit was extended till 28th February, 1998. On 25th February, 1999 petitioner filed an application there to adjust 5% from the fixed deposit lying with the Bank. On 22nd March, 2000 said application was dismissed and the date was fixed for issuance of certificate. On 27th April, 2000 again a revisional application was filed before this High Court when the stay was granted The stay was extended by a further order dated 15th May, 2000. In the mean time on 27th July, 2000 Reserve Bank of India introduced a scheme in the form of guidelines which called as One Time Settlement (O.T.S.). On 29th September, 2000 borrower/s requested for settlement. Suggestion was given to pay of Rs. 40 lac towards final settlement. In November, 2000 Bank forwarded the request in the light of the RBI guidelines to get the sanction for the higher authority. On 8th January, 2001 Bank filed an application to vacate the interim order of stay. On 9th February, 2001 revisional application was taken up for hearing and allowed. .Certificate was kept in abeyance till disposal of the application. Direction for filing affidavits was given. No affidavit was filed by the Bank. On 28th March, 2001 petitioner requested the Bank to furnish information regarding Fixed Deposit Receipts (F.D.Rs.) lying with the Bank. On 20th April, 2001 D.R.T. - II was established by way of notification and all the records of the instant case were transferred there and the main matter was re-numbered as T.A. No. 764 of 2001 and M.A. was re-numbered as 79 of 2002. On 27th April, 2001 Bank had shown his willingness to settle. On 3rd December, 2001 petitioner offered Rs. 40 lac for settlement which was enhanced up to Rs. 45 lac on 27th March, 2002. On 2nd August. 2002 Tribunal, without going into the facts that there was an interim order of stay passed by the Court and amount equivalent to 5% was deposited, was pleased not to go to the controversy of the deposit of 5% and directed to proceed with the Misc. Application on 16th August. 2002 and dismissed. On the very same day certificate was directed to be issued on the basis of the final order dated 20th February. 1997. On 19th August, 2002 certificate was issued. On 26th August, 2002 recovery proceeding was initiated under R.C. No. 35 of 2002. On 3rd September, 2002 petitioner filed an application under Sections 26 and 27 of the Act read with Rule 18 of the relevant Rules made for the purpose in effect for compromise settlement. On 12th September, 2002 Bank filed an application for attachment of hypothecated securities and properties. On 13th September, 2002 Presiding Officer recorded that the petitioner was ready for amicable settlement at Rs. 45 lac. Direction was given upon the Bank to suggest on what amount they were willing to ready to settle. Divisional General Manager of the Bank sought time to get the necessary approval. On 18th September, 2002 the Presiding Officer directed the Chairman to give his remark as to why the account

should not be settled keeping in view the R.B.I, guidelines. Bank proposed the properties could be sold to a company at Rs. 99 lac and at the same time Bank contended the property would fetch not less than Rs. 2.30 crore. On 23rd September, 2002 Chief General Manager of the Bank filed his report before the Tribunal. Bank agreed to settle on certain parameters and suggested Rs. 101 lac approximately as the settlement amount based on the Bank's internal norms for the settlement. The Presiding Officer observed that the Bank had misled the D.R.T. with respect to the valuation of the property. It had sought for explanation from the Bank as to how it moved an application for sale of the property at Rs. 99 lac when as per the report of the approved valuer of the Bank dated 3rd November, 2002, worth of the property is Rs. 2,31,85,000/-. The report was called for from the Chairman or the Executive Director of the Bank. On 24th September, 2002 the Executive Director filed his report whereby it was informed that the property worth was more than Rs. 2 crore and the amount for settlement is Rs. 171 lac. Presiding Officer observed that no basis was explained for arriving at the above figure. Presiding Officer suggested Rs. 72 lac as settlement amount in terms of the formula and methodology adopted by the Bank. Petitioner filed an application for recall or review of the order dated 16th August, 2002 and stay of recovery proceeding which was registered as M.A. No. 42 of 2002. Such application is still pending for adjudication. On 24th September, 2002 such application was heard. Recovery proceeding was stayed until further orders. However, such misc. application was not disposed of till now. Bank filed two appeals being Appeal No. 39 of 2002 and Appeal No. 40 of 2002 against above order dated 24th September, 2002. On 10th October, 2002 both the appeals were dismissed as withdrawn. On 13th November, 2002 Presiding Officer observed that Bank stated different figures on numerous occasions and directed to take positive efforts to arrive at a compromise. On 22nd November, 2002 General Manager (Operation) filed a report of settlement at Rs. 143 lac. On the same day D.R.T.-II formulated the scheme and formula for settlement of amount based on the Bank's own internal norms for N.P.A. Management i.e., 80% of ledger balance. By holding the ledger balance to the claim amount of Rs. 90,62,611/- it was observed that if the petitioner pays the sum of Rs. 72 lac i.e. 80% of ledger balance within one week no interest shall be charged. If payment is delayed interest will be paid on reducing balance within the time of three months. It was directed that the decision of the Board of the Bank be communicated to the D.R.T. through the Chairman and Managing Director. Petitioner filed an appeal contending the illegality as the settlement amount could not be more than 45 lac. On 2nd December, 2002 D.R.A.T. summarily dismissed the said appeal as no finality was arrived at in the impugned order. Against such order SLP was filed before the Supreme Court and was dismissed. On December, 2002 the petitioner wanted to explain the claim of the Bank will be much less than the amount indicated above. On 29th January, 2003, O.T.S.-2003 came in force but on the same day Presiding Officer observed that the Bank had informed that it was agreeable to settle at 80% of the ledger balance but claimed the "present ledger balance" to be Rs. 142.26 lac. On 3rd February, 2003 the

petitioner invoked the said claim under O.T.S.-2003 and filed an application to settle the dues. Petitioner accepted Rs. 72 lac as amount for settlement. Several affidavits were filed. On 6th March, 2003 Bank filed affidavit-in-reply stating that D.R.T. could direct a settlement at Rs. 1,03,28,917.10 and prayed for direction for payment of the above amount together with the further legal charges. On 20th March, 2003 Presiding Officer interpreted the scope and ambit of the ledger balance and norms for N.P.A. and directed the petitioner to pay Rs. 72.50 lac as final settlement amount. Consequential directions were given. Bank filed an appeal. From such order it was registered at No. 21 of 2003. On 14th May, 2003 the part of the amount as per direction of the D.R.T. was deposited. The matter was heard by D.R.A.T. and the order passed by the D.R.T. was set aside. Such order is impugned hereunder.

14. Definition of Non-performing Assets (NPA) is given u/s 2(o) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which is as follows :

"non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss assets, in accordance with the directions or under guidelines relating to assets classifications issued by the Reserve Bank".

15. Learned Chairperson of the concerned D.R.A.T. has proceeded firstly on the question whether in spite of objections by the Bank the D.R.T. had the power and authority to reduce the certificate amount already awarded in favour of the Bank by way of settling the dispute amongst the parties, on the reasoning that the settlement was done in terms of the guidelines laid down by the Reserve Bank of India. Secondly, the Learned Presiding Officers, it would appear, did not take into account the conduct of the respondents, in particular in the light of his above-mentioned observations recorded in the order dated February 20, 1997.

16. According to me, D.R.A.T. has taken the matter lightly and ultimately by the process arrived at a perverse finding. At first the Tribunal and the Appellate Tribunal under the particular Act should remember what is the scheme and the legislative intent of the Act. Previously, either before or after nationalization of Banks, suits were being instituted and disposed of by the Civil Courts. Possibly it was thought legal process therein is circumvent. The legislature found that by the lenient process of bank loan etc. under nationalization public exchequer was siphoned and/or drained substantially which ought to be recovered expeditiously. The Tribunal was formed for the purpose of early recovery of the money. However, the present understanding of law is that not only Tribunals or the Appellate Tribunals remember that public exchequer should not be suffered but also unjust enrichment would not be caused. This balancing factor, if followed with its true spirit by any of the Tribunals or Appellate Tribunals no perversity in finding would be available. Fiscal structure of the country, if tried to be maintained with the true spirit of the legislative intent it will be seen that its desire is to get early disposal following the principle of natural justice and subject

to the Act and Rules framing its own procedure ignoring the binding effect of the Code of Civil Procedure. Therefore, the canons of justice of the Tribunal and the Civil Court are distinct and different. Disposal of the disputes by a Tribunal should not be looked into With the outlook of a Civil Court. The Tribunal can travel beyond the CPC and the only fetter is put on its powers to observe the principles of natural justice as per the ratio of The Industrial Credit and Investment Corporation of India Ltd. Vs. Grapco Industries Ltd. and Others, .

17. Out of the aforesaid two points the second point is based on an individual impression of the chairperson D.R.A.T. about a litigant. Therefore, the same will be dealt with at first. Such individual impression about a litigant will be noted on the available facts and circumstances at the relevant point of time. It is not dependable on a purported past conduct like the criminal or quasi criminal proceedings. Even today when we proceed with recalling or setting aside the earlier decree and order obtained ex parte or order of dismissal, we try to find out sufficiency of the cause at the relevant date and time not on the previous conduct. This is the civil law principle. In a money claim test of bona fide would be dependable upon readiness and willingness of the party at the relevant point of time but not on the previous conduct. Is the claim to be covered by any security having value more than the claim amount? Is the borrower ready and willing to secure any sum as per the claim of the Bank for getting disposal of the proceedings? If any of such tests are fulfilled, a stray comment of the DRT about any past conduct of the borrower should not be counted at the cost of delay. D.R.A.T. could have been tested the bona fide by itself to arrive at a finality u/s 27 of the Act. It is important to remember that conducts and/or undue advantages by any of the borrowers with or without any indulgence of banks is the bad side of bank nationalization. To overreach such situations the Act is introduced. The plinth of formation of the Tribunal is outcome of the Act. Possibly for above reasons D.R.T. and D.R.A.T. are visibly harsh towards the borrowers. But such harshness should not be foundation of civil consequences if one succeeds the test of bona fide at the relevant date and time. In Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., with other matters the Supreme Court recently in discussing with other Act i.e. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 held that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debts Recovery Tribunal. Both are debt laws and element of recovery of money in respect of NPA is also involved hereunder. The Supreme Court in so many words further held that modus would be speedier recovery of the dues declared as NPA and better availability of capital liquidity and resources to help growth of the economy of the country and welfare of the people in general which would subserve in public interest.

18. The Appellate Tribunal totally ignored an important fact that the borrowers have already deposited the amount fixed by the D.R.T. be it outcome of good, bad or indifferent decision. Even before this Court at the time of hearing, an interlocutory application was made and sought time to deposit the rest amount

of claim of the Bank under original certificate. The Bank vehemently opposed the prayer of interim order to make deposit of any amount and prayed for adjudication of the main application under Article 227 of the Constitution of India. Therefore, how the present conduct of the petitioners be overridden by the previous conduct to come to a definite conclusion by the D.R.A.T. is unknown to this Court. D.R.A.T. would have concerned with the recovery of the money but not to prolong the dispute with the individual impression.

19. So far as the first point is concerned, the same is interesting one. In the legal parlance there are two very common words i.e. "closed case" and "open case". One has to make threadbare analysis of reasoning to come to a definite conclusion about the same. By the passage of time the Act was amended substantially. This case was initially filed in a Civil Court as a mortgage suit. but not as a money claim simpliciter. Therefore, a preliminary decree was passed on that score. The suit was transferred and a final decree was passed by the Tribunal long before amendment of the Act in 2000 incorporating mortgage as a "debt" u/s 2(o) of the Act. Neither D.R.T. nor D.R.A.T. applied their minds on that score. As a result whereof pertinent questions whether the decree is a nullity and whether the amendment of the Act has any retroactive operation or not, were unanswered. It touches the root of the jurisdiction of the Tribunal. Element of nullity in passing final decree by the Tribunal cannot be eliminated without proper examination. Therefore, apparently it is an "open case". Certificates either original or amended, have no face value without legally sustainable final order at the relevant point of time. Question of nullity can be raised at any stage of the proceedings including execution. At no point of time prayers of the plaint were considered. A mortgage decree under Order 34, Rule 4 in Form 5A of the Appendix "D" to the First Schedule of the CPC for a sum of Rs. 90,62,601.19 paise with interest was claimed by the Bank in the suit. A final mortgage decree was claimed in terms of such prayer thereof. Money decree for the similar sum was also claimed in respect of such sum. In the case of money claim simpliciter only one decree is required to get by the appropriate party. But in the mortgage suit under Order 34 of the CPC one has to get two decrees i.e. preliminary and final decrees in respect of foreclosure, sale and redemption. Admittedly two decrees were passed herein i.e. preliminary and final by the Civil Court and the Tribunal respectively in respect of sale. The Tribunal, on 20th February, 1997, dismissed the application alike under Order 9, Rule 13 of the CPC made for recalling the preliminary decree obtained by the Bank ex parte from the Civil Court and at the same breath passed final decree. The defendants' ease was, badly handled and the Bank took the advantage of the situation. But Bank failed to discharge their first duty towards the Tribunal in reminding the inherent and incurable defect of the decree and allowed perpetuity of nullity to continue till this day. On the other hand the Tribunal jumped upon the conclusion to pass final decree due to non-appearance of the petitioners herein by overlooking the relevant point of law. Even assuming the defect is curable by the Tribunal by converting the mortgage decree into money decree it could have been clarified

by it instead of passing final decree and directed to issue certificate on the basis of the decree of the Civil Court itself. But neither Tribunal chose to do so nor Bank invited to do so. Therefore, when the very existence of the second decree i.e. final decree passed by the Tribunal dated 20th February, 1997 is under challenge it is far to say about valid existence of certificates out of such decree. The only alternative could have been open for the Tribunal to recall the preliminary decree passed by the Civil Court and pass a fresh decree by treating the Suit as money claim simpliciter. But in absence of the petitioners, Bank tried to take double benefit, one arising out of mortgage and another out of money to bargain the petitioners/borrowers. It arose at the time of hearing of the application before the Tribunal under Sections 26 and 27 of the Act read with Rule 18 of the relevant Rules that no title deed in respect of the mortgage decree was available in the record or with the Bank. Leaving aside the question of disputed title and full right of the borrower/s vis-a-vis partial right, rights of the majors or minors, the question remains why such title deed was not available with the Tribunal, What step the Tribunal took about the same? Bank stated that the same is lying with the Civil Court. Therefore, how they can claim any right in respect of such property? Can it not be said that the Suit was transferred to the Tribunal as a money claim simpliciter as per the then prevailing law and the Bank was aware of the situation but suppressed the material facts? Even in that way the second decree i.e. final decree can be said to be nullity? The D.R.A.T. completely misdirected itself and only banged upon one question whether in spite of the Bank's objection, Certificated amount can be altered or reduced by the D.R.T. or not being forgetful about necessity to judge whether any valid certificate arising out of valid decree exists or not and thereby reached to a perverse finding. The D.R.A.T. is the last fact finding Court. It could have discharged its function as original Tribunal but it did not choose to do so and thereby created vacuum. On the other hand, at least in this case, the D.R.T. tried to resolve the dispute but I should not say the same is also free from ambiguity. Therefore, by a comparative study of effort to resolve the dispute by the D.R.T. and D.R.A.T. I would prefer that the matter should be remitted back to D.R.T. to resolve the dispute once for all within the prescribed time to be given by this Court. The main ambiguity is in respect of compromise and settlement on the part of the Bank. Upon going through the R.B.I. Guidelines as well as NPA Management Policy 2001 of the Bank I have no manner of doubt that principally Bank cannot refuse any compromise and settlement. But here the question is whether Bank arrived at a compromised figure before DRT or not.

20. It is well-known principle that one cannot compel an unwilling party to arrive at a settlement. On the other hand, can it be said that Bank did not show any interest whatsoever to settle? Bank is not an independent person to agree unlike a borrower. The intention of the Bank is to be understood by the Tribunal for its protanto satisfaction. At the time the Tribunal will not be forgetful in taking practical outlook to come to a conclusion on the fact situation.

21. In coming to such conclusion a discussion is required with regard to the

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 read with respective Rules thereunder. According to the Section 22 of the Act the Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 but shall be guided by the principles of natural justice, and subject to the other provisions of the Act and of any Rules the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings. Therefore, from the plain reading of such Section it is crystal clear that the powers of such Tribunal are very much exhaustive. The scheme of the Act is to follow the principle of natural justice. The scheme of the Act is to follow the provisions of the Act and Rules. The scheme of the Act is to regulate Its own procedure inclusive of their sittings. Therefore, It is not simpliciter Civil Court. It is a Court of mediation itself. The very introduction of the Act is to recover the debt without following technicalities of the CPC applicable to Civil Court at the earliest. Narasimhan Committee with the Chairmanship of Shri M. Narasimhan had considered the setting up of the Special Tribunals with special powers for adjudication of such matters and speedy recovery as critical to the successful implementation of the financial sector reforms. The Tiwari Committee headed by Shri T. Tiwari had also suggested setting up of Special Tribunals for recovery of dues of the banks and financial institutions by following a summary procedure. The preamble of the Act says "An Act to provide for the establishment to Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto". D.R.A.T. has completely misdirected itself by taking conservative outlook about the power of the D.R.T. and at the same time held that D.R.T. is empowered to modify, alter or delete any portion of the certificate in accordance with the provisions of Sections 26 and 27 of the Act but become silent without explanation. Therefore reflection of mind under the order appears to be vacillating, erroneous and superficial. Since the application was made by the petitioner under such Section 26 and 27 of the Act read with Rule 18 of the relevant Rules, the Presiding Officer of the DRT was not beyond the competency of power. It has a power to withdraw a certificate. It has a power to cancel a certificate. It has a power to grant payment of certificated amount in instalments. It has a power to correct clerical or arithmetical mistakes in the certificate. All such powers are independent and disjunctive from each other. An argument which has been advanced before this Court that it has only power to correct only clerical or arithmetical mistakes is wholly fallacious. The Court or Tribunal passes a decree or order retain its power to vacate or modify or amend it. Power of the Presiding Officer of D.R.T. being decretal Court cannot be equated with the power of the Recovery Officer being the executing Court. D.R.T. further retains its power to review its decisions as per Act and Rules. It has power to dismiss for default or pass ex parte order and set aside such order of dismissal or order ex parte. Last but not the least it has power to make such orders to give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice.

Therefore, the D.R.T. has acted with the objectives of spirit within its domain. Neither from the plain reading of the order of the D.R.T. nor from the cause papers it could be said that there was no element of compromise or settlement by or between the parties. The Bank had submitted to the jurisdiction of the D.R.T. for the purpose of compromise. Whether DRT arrived at a correct final figure or not is a different question altogether. Once one had submitted to a jurisdiction of the Tribunal for the purpose of settlement of dispute in merit and being failed to accept the final figure cannot subsequently come out and challenge the jurisdiction of the Tribunal by saying that no proceeding was pending before the Tribunal at that stage. Principles of approbate reprobate/ estoppel/ waiver do not permit to say so unless statute comes in the way. Statute never says that parties cannot apply to the Tribunal for such compromise and/or settlement. Failure in merit cannot say failure to jurisdiction . N.P.A. Management Policy 2001, UCO Bank itself provided a clause under the chapter Cash Recovery and Compromise Settlement as follows :

"Compromise" means, the Bank is agreeable to waive a part of "Principal Debt" and/ or Unapplied Interest and expenses incurred on the account including legal expenses". Compromise is permissible in all types of NPAs, even in suit filed or decreed accounts, The bank can also enter into compromise settlement in NPA accounts, where suit has not been filed.

When it is not possible to recover the entire dues from the borrowers either due to non availability of securities having realizable value adequate to recover the debt or its realisability is difficult and/or protracted or likely to be so due to attendant circumstances. Bank may have to accept compromise proposals usually involving sacrifice of principal and/or applied interest/various charges/ and waiver of unapplied interest."

22. Therefore, when Bank had proceeded to settle within the policy and the D.R.T. received the same and tried to proceed with the true spirit of the Act, such proceeding should have been taken as "pending" proceeding. Assuming for the moment Bank succeeded in negotiation in the "said proceeding and the claim resolved as to their protanto satisfaction, could they come and say the settlement or compromise is bad? My answer is "No". Therefore, they have taken chance. If the claim increased no matter. If decreased matters. Bank should not be allowed to take double stand. The Bank filed an affidavit in reply to such proceeding on 6th March, 2003. The relevant part of such affidavit by the party of Chief Manager is as follows :

"I respectfully submit that a sum of Rs. 90,62,601.19 is an outstanding balance as on the date of transfer of the same to the Protested Bill Account/Sticky Advance Account Ledger and applying the- stipulation made in OTS 2003 the plaintiff/Certificate Holder Bank is entitled to recover 100% of the said amount.

In further :

"In the premises as aforesaid I respectfully submit that this Ld. Tribunal be

pleased to direct the defendants/Certificate Debtors to pay the aforesaid sum of Rs. 1,03,28,917.10 together with the further legal charges to be incurred by one time payment in conformity with the OTS 2003."

23. Again on 10th March, 2003 self same department on behalf of the Bank filed a Supplementary affidavit stating as follows :

"In this context, I respectfully submit that the aforesaid credit entries have no relevance in connection with the OTS 2003 as formulated by the Reserve Bank of India and reiterate that under said OTS 2003 the Certificate Debtors are liable to pay Rs. 1,03,28,917.10 along with further legal expenses to be incurred as already mentioned in my affidavit filed before the Ld. Tribunal on 6th March, 2003 on which I crave leave to refer."

24. Therefore, where is the dispute? The scheme of Reserve Bank of India or the concerned Bank is nothing but compromise scheme or formula or package as a matter of policy to recover the appropriate sum at the earliest depending upon the financial position of the country. It is well known that if the recovery by the Bank is kept pending ultimately recoverable amount will be increased. But there is a big gap between recovered amount and recoverable amount. In our legal parlance there is a common word known as "paper" decree. It is not desirable to sustain with "paper" decree ignoring the real recovery. Real battle starts in the Court of law particularly in respect of money claim when decree is passed. Possibly those are the reasons to introduce such policy in respect of recovery of the claims before or after the decree. It is to be remembered that opposing such policy by the Bank itself is debarred because It will ultimately give taxing burden to the general people and relief to the unscrupulous persons. Moreover, there is no scope open for the Bank to oppose such policy legally and also factually after making bargain with the other side about the quantum. If the Bank can bargain as per policy even after decree, it cannot say Tribunal cannot mediate into such bargain having superior power i.e. power of adjudication. There Bank has no locus standi to say that there is no authority of the Tribunal to mediate the bargaining or the case was not "pending". In further, in case of mediation Court/Tribunal possesses greater power than compromise between the parties. In case of compromise, Court/Tribunal under Order 23, Rule 3 of the CPC or under similar principle will have nothing to say but to put its seal and signature after observing the technicalities. But in the case of mediation it has an independent role. Now, the question is whether Tribunal can mediate before decree or after decree. According to me, Tribunal can mediate at any stage of proceeding as because it is a Court of mediation itself as per the scheme of the Act provided no legal impediment stands in the way. In this case, by virtue of the applicability of law in one hand and by virtue of applicability of policy on the other hand it is now open case of mediation by the Tribunal itself which passed the purported decree or final order. Mediation cannot be the restricted power of the Court or Tribunal which passed the decree or final order by itself at any stage when it is called upon to mediate. Mediation cannot be restricted only to reduce the figure or

enhance the figure alone. The Bank took the fullest advantage of the mediation and made the claim on the basis of the ledger balance up to date being forgetful that they have no authority to increase the ledger balance when the matter is before the Tribunal. But when found that the DRT reduced the figure under the final order by applying the same test of ledger balance it turned around and took the point of jurisdiction. Such stand cannot be appreciated. In a judgment reported in Corporation Bank Vs. D.S. Gowda and Another, the Supreme Court held that circular/direction issued by the Reserve Bank of India under Sections 21 and 35 of the Banking Regulation Act, 1949 regarding interest with periodical rates chargeable by the banks from the borrowers are based on a rational policy having statutory force and bank is bound to follow them unless declared to be illegal and unreasonable. Even in a subsequent Judgment reported in Canara Bank Vs. P.R.N. Upadhyaya and Others, the three Judges Bench of the Supreme Court again categorically held that the circulars issued by the Reserve Bank of India under Sections 21 or 35 of the Banking Regulation Act, 1949 are statutory in nature and are required to be complied by the banks is not in any doubt. If the requirement says that certain statutory reduction in calculating the interest are necessary at any stage of the proceeding, D.R.T. scrutinize the same, upon being called, so that illegality, if any, in passing a final order in absence of the petitioners cannot be perpetuated. Nullity is not an abstract theory. If any claim of the Bank is barred as per RBI Guidelines and the Bank is bound to follow the same as a statutory force. If not followed, obviously such claim cannot be sustained, If a Court passes an order without jurisdiction of nullity will be explicit. Similarly, if Court passes an order within the jurisdiction in absence of the contesting party and without considering the statutory mandate the same will also lead to a nullity upon appreciation of facts and law. Here non entitlement of certain claims of the Bank under the statutes leads to nullity which was not considered by the Tribunal at the time of passing the final order in absence of the respondents/petitioners herein. Therefore, the Tribunal is empowered to enquire if it is brought to the notice of it even after passing a final order and issuing certificate. It cannot be said to be functus officio in that way. It is to be remembered that in fiscal law "unjust enrichment" is barred. Therefore, what would be the value of the property purportedly attached by the Bank or whether any purchaser is awaiting behind the veil is immaterial for the D.R.T. or D.R.A.T. in coming to conclusion. The Tribunal is only concerned about the ascertainment of the claim amount, The logic of the Bank that the claim of the Bank may be wrong but as the final order is passed and certificate has been issued by D.R.T. within its jurisdiction question of nullity cannot arise, is wholly erroneous. The Bank contended that it is not a matter whether the account was sticky or dormant but there is no legal embargo upon the Bank to claim amount making the cut of date as the date of the suit. There was no legal embargo at the point of time upon the Bank on that score. The concept of non performing assets (N.P.A.) introduced in 1990 and time to time it was amended. According to me and as also fairly contended by the learned Counsel for the Bank that the theory is, Bank should be vigilant for the purpose of recovery of the loan. If it fails to do

so and ultimately leads to a sticky or dormant account, the Bank can neither show transaction in the ledger balance nor suo motu can claim such amount as a matter of right. Discretion, if any, has to be left open to the Court/Tribunal, who in turn, determine whether Bank will be entitled to such claim or not.

25. From the plaint I find that the Bank stated that cause of action for institution of the suit arose on 19th October, 1984 when the plaintiff served notice of demand through its Advocate. Hence, the contract was said to be terminated on that date. Subsequent demand and proposals are continuation of such demand. No new contract was entered into. Interest, if any, may be capitalized with the principal sum as on the date of the suit. But no jural relationship existed thereafter to maintain a ledger balance even from that stage. Thus, the Bank cannot claim any sum from such date as principal sum as a matter of right. It has to be left for the Tribunal to decide.

26. O.T.S. introduced by the Reserve Bank of India on 29 th January, 2003 in respect of the revised guidelines for the compromise or settlement of chronic non-performing assets (N.P.As.). In the clause of coverage it has been directed that these guidelines will cover the cases on which the Banks have initiated action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and also cases pending before the Courts/D.R.T./B.I.F.R. subject to consent decree being obtained from the Courts/D.R.T./B.I.E.R. The legislative intent of the words "subject to consent" normally means that a consent cannot be varied without a consent. Therefore, a consent cannot be touched. There is no scope of going into further negotiation like a pending case where no finality upon consent has been reached. In The Sathe Biscuits and Chocolates Co. Ltd. and Another Vs. Bank of Maharashtra and Others, it was held that language of the guidelines covers those cases which are "pending before the D.R.T." and which are "subject to consent decree being obtained". The above two phrases leave no room of doubt that they do not apply to cases wherein decrees/orders have already been made and have become final. This was explained for the reason that a decree or order of the Tribunal should be respected by the parties irrespective of the guidelines provided it has reached its finality. On the other hand 5-Judges" Bench of the Supreme Court in Central Bank of India Vs. Ravindra and Others, held that RBI directives have not only statutory flavour, any contravention thereof, or any default in compliance therewith is punishable under sub-section (4) of Section 46 of the Banking Regulation Act, 1949. The Court cannot act on assumption that transactions or dealings have taken place and accounts maintained by Banks in conformity with RBI directives. In both the cases decrees or final orders have already been passed. Therefore, the moot point of the judgment is that when there is no lis pending before the Presiding Officer either by filing an appeal or appeal being decided or other proceedings in accordance with law over an order or decree such guidelines cannot be enforceable. In the instant case, legally sustainable proceeding was available. An appeal was preferred from an order in a legally tenable application under Sections 26 and 27 of the Act read with Rule 18 of the

relevant Rules and the appellate order is impugned hereunder. The ratio of *The Sathe Biscuits and Chocolates Co. Ltd. and Another Vs. Bank of Maharashtra and Others*, cannot be said to be absolute without the ratio of AIR 2001 SC 3095 (supra). The indication of the Supreme Court "Court cannot act on assumption" itself gives power to a Tribunal to eliminate or rectify the element of nullity or illegality in a proper proceeding. The Appellate Tribunal ignored such facts and jumped upon a conclusion that the order impugned cannot be sustainable in view of the finalisation by a decree or order of the D.R.T. The Bank took a defence that interlocutory or incidental applications cannot have any face value in view of dismissal of the appeal. There is no power of the Presiding Officer to review its own order unless it is backed by the law. According to me, an application for review may ultimately open the whole issue and any such application cannot be said to be mere interlocutory or incidental application so to say. Such review may be procedural or may be subjective. The Presiding Officer has power to review its own order in accordance with law. Further, in the said judgment, meaning of the words "pending proceedings" as given by various High. Courts including our High Court, reported in *Bonbehari Roy Vs. Dharendra Nath Roy*, , was referred but distinguished on the fact, situation therein. Even the learned Counsel appearing for the Reserve Bank of India therein did not dispute with such proposition of law and said that "pending proceedings" should be construed liberally. Yet, the Division Bench Judgment of Bombay High Court differed with the Division Bench judgment of Calcutta High Court only on the ground that legally sustainable" order cannot be vitiated by the guidelines of the Reserve Bank of India. There the Reserve Bank of India itself was the respondent unlike in the instant case where under the case is that a nationalized Bank failed to follow the guidelines as alleged. In the instant case, not only the guidelines of the Reserve Bank of India but also own policy of the Bank gave authority to settle or compromise any amount either principal or interest even after the decree and in fact such Bank submitted to a legally drawn up proceeding for the same. Therefore, the Bank is debarred from, taking the point of jurisdiction of the D.R.T. in considering question of compromise or settlement even after passing the decree or final order by their own policy and action. In the Calcutta High Court judgment, reported, *Bonbehari Roy Vs. Dharendra Nath Roy*, it was held that "pending proceeding" should be liberally construed so as to cover not merely execution proceedings but also the decree which has been filed on or before the appointed date of the particular Act to get it attracted. In *Asgarali Nazarali Singaporawalla Vs. The State of Bombay*, it was held that a legal proceeding is "pending" as soon as commenced and until it is concluded, i.e., so long as the Court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein. Similar are the observations of Jessel, M.R. In re : *Clagett's Estate*, *Fordham v. Clagett* (1882) 20 Ch D 637).

"What is the meaning of the word "pending" ? In my opinion, it includes every insolvency in which any proceedings can by any possibility be taken. That, I

think, is the meaning of the word "pending" A cause is said to be pending in a Court of justice when any proceeding can be taken in it. That is the test."

27. Such ratio was followed in Lt. Col. S.K. Kashyap and Another Vs. The State of Rajasthan, .- .

28. We are all aware that the pendency of the proceeding includes appeal, review any connected application in accordance with law and execution arising out of decree or final order. Even today, the law is well settled to the extent that Court has seisin over the lis even after the decree is drawn up, completed, perfected and filed. Therefore, in view of the above discussion of the facts and law the Division Bench judgment, reported in AIR 2004 Bora 101 (supra) is distinguishable in nature.

29. In the order under Sections 26, and 27 of the Act read with Rule 18 of the relevant Rules the Presiding Officer observed as follows ;

".....bank has agreed to settle the matter and to enter into a compromise but the bank has objected to a compromise of Rs. 45 lakhs on the ground that the collateral securities available with the defendants is worth more than Rs. 2 crore and where the securities are available of a higher amount, the compromise at a meagre sum of Rs. 45 lakhs is not acceptable."

30. The Bank recklessly made various statements of the property after passing the purported final order and certificate within very short span of time. Such figures varied from 1 to 2.30 crore. Simultaneously gave various figures of settlement. In these circumstances observation of the DRT is as follows :

"D.R.T. observed that the said property under mortgage belongs to one Mrs. Maya Chanda. She was only party to the suit. It is the admitted position that Mrs. Maya Chanda expired. D.R.T. summoned for the title which was not produced by the Bank saying that the same is lying in the Civil Court at Alipore, 24 Parganas, West Bengal. There is no document for showing that the mortgage was created by Mrs. Maya Chanda, for her own shares or for the shares of her children on the basis of the Power of Attorney or being guardian. Therefore, such mortgaged property cannot be stated to be the property of Mrs. Maya Chanda having sole right. She had no right for mortgaging the shares of other co-owners unless she obtains a lawful right. Therefore, children's property cannot be mortgaged in this manner. She had four children - one son and three daughters. Therefore, if she can be LreaLed to be owner for any portion of the property that is only for 1 /5th share of the same."

31. If this is the position of title of the property can it be said that the claim will be evaluated on the, basis of such property?

32. Lot of arguments were advanced about "consensus ad Idem." What is it? Grammitically it means a meeting of minds. What is the meaning of "consent? Grammatically -it is a concurrence of wills. Therefore, if both the meanings are

clubbed together it will be meaningful to say that there will be meeting of minds for the purpose of concurrence of wills. Therefore, when the first is an attempt or indication the second is finality. Factually it cannot be said that there was not attempt on such score. Legally compromise or settlement, on the part of the Bank is sustainable. Therefore, principally there was meeting of minds to settle the difference but alleged factually there was no concurrence of wills. In *United Bank of India Vs. Ramdas Mahadeo Prashad and Others*, the Supreme Court did not give meaning of the consensus ad idem as available in the Head Note but factually came to conclusion as follows :

"All these correspondences would go to show that the parties failed to arrive at a consensus even" on what were the terms of the MOU. Thus, it is clear that there was no concluded contract nor was there any novation."

33. The word "consensus" has been used by the Supreme Court as a general terminology for not giving effect of the memorandum of understanding (MOU) arrived at by the parties during the pendency of a suit. However, the word "consensus is different from the word "mediation". Grammatically it means connection between the parties not directly but through some other person or thing. In other words, it is intervention for the purpose of reconciling them or for formation of connecting link between them. Such power cannot be equated grammatically with the words "compromise", settlement¹ or "consensus". In the case of mediation two parties are not only involved for the purpose of meeting at a point. In this case, involvement of two parties is to agree principally whether they require "compromise" or "settlement". On this issue the record does not say that there was neither a "compromise" or "settlement" nor the law prohibits. Even today the scope of operation of mediation is engrafted u/s 89 of the CPC with effect from 1st July, 2002 considering its necessity. It is far to take any contrary view about the Court of mediation i.e. DRT if any step is taken to solve the problem within the provision of law. The ratio of AIR 2002 All 96 (M/s. M. M. Accessories v. M/s. U.P. Financial Corporation, Kanpur) is inapplicable hereunder because one of the parties by invoking writ jurisdiction of the High Court under Article 226 of the Constitution of India wanted to compel the other to agree with one time settlement. Writ Court is made for the judicial review. It cannot compel other to accept an offer in respect of a money claim. There are Forums to decide such question particularly whether it is compelling circumstances or voluntary submission. Such Forums, in the appropriate occasion, either arbitrate or conciliate or mediate or settle the matter amongst the parties. In the said judgment the Court was keen to clarify the scope of writ of mandamus. According to it, if there is any scope under the Act then an endeavour can be made. Therefore, Court of mediation has to make an endeavour which has been done hereunder. The only ambiguity lies here whether the Tribunal by way of mediation arrived at a correct figure and independently or on the basis of the consent between the parties. However, mediation is a new concept introduced after delivery of such judgment.

34. Section 89 of the CPC is a special proceeding came into force with effect from 1st July, 2002 giving various modalities of settlement of disputes i.e. arbitration; conciliation; judicial settlement including settlement through Lok Adalat and mediation. Order 23, Rule 3 of the CPC has nothing to in connection with any mediation u/s 89. It has been introduced with a view to follow the alternative measures to do resolve the disputes as early as possible. It can be followed by a Court or Tribunal where the suit or proceeding was initiated Itself or before any alternative Forum. There is a marked distinction in between difference and dispute. The position before the Tribunal was in respect of difference but not in respect of dispute. The law of mediation might have resultant applicability in the case of suits under the CPC as applicable in the Civil Courts following such Section before going into the trial on the principles as laid down in the judgment, reported in Salem Advocate Bar Association Vs. Union of India (UOI), . But when the Court of mediation itself is formed for resolving the banking disputes, strict principle of CPC cannot be applied therein. It has to follow the principle of natural justice and own procedure. Here it appears that in an undefended proceeding the Tribunal did not consider a policy of the Bank or the Bank placed anything as regards the same and the RBI guidelines. Upon being called Bank said as because final order is passed and, certificate¹ has been issued the Tribunal is powerless to adjudicate the same. If the guidelines of the RBI having statutory flavour and policy of the Bank is left undecided by the Tribunal at the time of final order or after issuance of certificate and subsequently cured it cannot be deemed to be the intervention in the due, process of law. All the questions available hereunder are not mere illegality but nullity having binding effect of RBI guidelines and any departure will unjustly enrich the Bank against borrower thereby punishable in nature.

35. The Tribunal observed that the ledger balance can only be the amount claimed in the suit i.e. 90,62,601.19p. Bank had filed their affidavit to contest the application in merit and mentioned with regard to O.T.S. 2003 that the amount was transferred on filing of the suit in July, 1986 to the protested bill amounts. The transfer to the bills cannot itself say that the ledger has come to an end. It is for the purpose of calculation of the interest, if any, i.e., the unapplied interest that entries are made in the memorandum ledger of the Bank. This memorandum ledger cannot be taken as part of the main ledger. Thus, even on admission of the Bank the ledger balance can only be treated in the present circumstances for Rs. 90,62,601.19p. as claimed in the suit. Therefore, if parties have come to a figure for settlement it has to proceed on the basis of the 80% of ledger balance as per the Reserve Bank of India guidelines on that figure alone and not on the basis of the various enhanced or inflated figures or on the basis of the value of the purported mortgaged property. Therefore, by applying test of 80% of the ledger balance D.R.T. arrived at a figure of Rs. 72,50,080.95p. to close the proceedings finally. Whether arriving at such figure is correct and whether arriving at such figure is independent outcome of mediation irrespective of compromise to such figure, those are arguable, points before the Tribunal

within its jurisdiction for which it can be remitted back. But it cannot be said that the Tribunal had no jurisdiction over the matter after issuance of certificate. If it is so what is the necessity of giving powers under Sections 26 and 27 of the Act? What was the necessity of the Bank to submit to such jurisdiction? That apart reading of, the provisions of entire law does not speak DRT is powerless in considering such vital question in resolving an issue as because certificate is issued. A citation as made by the Learned Counsel appearing for the Bank in respect of Rafique Bibi (D) by Lrs. Vs. Sayed Waliuddin (D) by Lrs. and Others, to establish there is a distinction between "nullity" and "illegality".- Nullity touches the very root of the jurisdiction, "therefore, decree or order can be recalled-but "illegality" is a question within the jurisdiction, therefore, decree or order cannot be recalled. Therefore, is it the argument of the Bank that illegality will be perpetuated having knowledge or notice in a properly drawn proceeding before the Tribunal where the Bank submitted (sic) in merit? Learned Counsel appearing for the Bank missed the link of the referred judgment in various ways. The pertinent question therein is that the decree was passed by the High Court which was tried to be recalled in an execution proceeding by the Court below. Upon observing the position Supreme Court made two points very clear. Firstly, the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be "a nullity" and "void" but these terms have no absolute sense; their meaning is relative, depending upon the Courts willingness to grant relief in any particular situation. Secondly, there is a distinction between mere administrative orders and the decrees of Courts, especially a superior Court. The order of a superior Court such as the High Court, must always be obeyed no matter what flaws it may be thought to contain.

36. In further, according to the Supreme Court a decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable by the executing Court; the remedy of a person aggrieved by such a decree is, to have it set aside in a duly constituted legal proceedings or by a superior Court failing which he must obey the command of the decree. .

37. Therefore, the ratio is "nullity" or "without jurisdiction "are relative terms and depending upon the particular situation. Unless the executing Court is absolutely confident it cannot be said that decree is "nullity" or "without jurisdiction" and thereby inexecutable. In the instant case executing Court i.e, Recovery Officer never intended to say that the decree i.e. final order herein passed by the Decretal.Court i.e. Presiding Officer is inexecutable in any collateral or incidental" proceeding. Here the Decretal Court i.e. Presiding Officer itself having power to withdraw or cancel the certificate in the proceeding issued by it on a particular fact-situation passed such order. As because the Presiding Officer has its jurisdiction to do so, it is entitled to take cognizance of the fact whether the final, order derives from any illegality or; nullity. The prime consideration of the Tribunal under the aforesaid Act is to provide expeditious adjudication and recovery of debts due to the Bank.

38. Therefore, taking into totality of the matter I set aside both the orders of D.R.T. and D.R.A.T. and remit the matter back to the D.R.T. as I find the order of the D.R.T. stands on a better reasoning at this occasion and with the true spirit of the Act irrespective of the result, However, D.R.T. will adjudge all the issues relevant for the purpose of due consideration particularly the questionnaires framed as fallen from the Court on condition of deposit of a sum of Rs. 1,03,28,917.10 paisa with the Registrar of D.R.T. in the following manner:

(a) According to the petitioners out of the total deposited amount of Rs. 72,51,000/-, a part being Rs. 18,50,000/- is lying with the appropriate authority under D.R.A.T. Therefore, such authority, under the order of this Court and upon being called by the Registrar D.R.T., return the said sum in his favour as expeditiously as possible to consolidate such figure.

(b) So far as the balance sum of Rs. 30,77,917. 10 is concerned the petitioners will deposit the said sum with the Registrar D.R.T. within a period of fortnight from the date of communication of the order.

(c) Alternatively the Registrar D.R.T. shall call for Bank Guarantee for the said sum immediately from the petitioners and also ascertain from the Bank, as early as possible, the matured value of the amount lying with it as per the order of the High Court in a Civil Revisional Application arising from an interim order of D.R.T. which the D.R.T. made virtually infructuous having been proceeded with the main matter at the instance of the Bank ignoring such order .

(d) Bank Guarantee shall not be discharged without ascertainment of coverage of the said balance sum in the Bank and in case of shortfall, the Bank Guarantee will be encashed to the satisfaction of the remaining balance amount. But in case deposited sum" with accrued interest exceeds the balance, the Registrar D.R.T. will be at liberty to discharge the Bank Guarantee and return the documents in connection thereto,

(e) The Registrar D.R.T. will consolidate the entire sum and deposit in a short term fixed deposit of a Nationalised Bank preferably in the respondent-Bank and direct to renew time to time until and unless an appropriate order is passed by the D.R.T.

39. In case of default, the Bank will be entitled to recover the entire decretal dues. But in case of deposit, issuance of any of the certificates either original or amended or modified or varied be kept in abeyance and subject to the decision of the D.R.T. will operate either as it is or by way of issuance afresh superseding earlier. The aforesaid figure, as fixed, strictly imaginary and only based on the statement of the Bank in its affidavit. Fixing such imaginary figure as condition of hearing will not be construed as determination of final figure by this Court. Hence, the questionnaires are as follows :

(i) Whether the suit is primarily a mortgage suit or a money claim simpliciter?

(ii) If it is a money claim simpliciter, can there be any provision of law to pass

two decrees or final orders i.e. preliminary decree and final decree/order by the Civil Court and D.R.T. respectively?

(iii) If not, can it be said that the decrees particularly second/final decree or order dated 20th February 1997 is sustainable ?

(iv) Whether D.R.T. had jurisdiction to pass the final decree of mortgage on 20th February 1997 when "mortgage" as "debt" was only included in the Act by way of amendment with effect from 17th January, 2000?

(v) Whether any of the certificates arising out of decree or final order dated 20th February 1997 has any face valise?

(vi) In view of the fact of non-availability of title deed either with the Tribunal or with the Bank but with the Civil Court as yet, can an inference be drawn that the suit was physically transferred to the Tribunal as a money claim simpliciter leaving aside the cause of mortgage ?

(vii) If the answer in terms of Clause (VI) is affirmative can a certificate be drawn in terms of preliminary decree of the Civil Court dated 26th November, 1990 by treating the same as sole money decree or order simpliciter after recalling and/or setting aside the second/final, decree or order dated 20th February 1997?

(viii) Even if it is established that the suit/proceeding is money claim simpliciter can the so-called second or final decree dated 20th February, 1997 be sustained ?

(ix) In any of the aforesaid circumstances, only modification or amendment of any certificate will suffice the cause or the same will be withdrawn and/or cancelled ?

(x) To avoid complicated situation is it not proper to recall and/or set aside both the decrees/final order and pass a fresh decree or order ?

(xi) Whether any mediation is possible without recalling and/or setting aside any of the decrees and/or final order ?

(xii) Whether compromise or settlement on principle and/or as a matter of policy of the contesting Bank is sufficient enough for mediation even after the decree and/or final order and issuance of certificate ?

(xiii) Whether the differences can be ultimately resolved by a summary trial at this stage if the compromise or settlement as regards quantum is not arrived at or it can be done by withdrawing or cancelling the certificate in the circumstances for expeditious disposal ?

(xiv) If not, would it be proper to give exhaustive trial on the available documents upon recalling and/or setting aside the decrees and/or final order to avoid any question of violation of principle of natural justice and further fulfilment of the condition of audi alteram partem ?

(xv) Can the purported mortgaged property be the basis of the claim in view of any defective title and disputed right of the title holder ?

(xvi) After an account become sticky or dormant can the jural relationship between Bank and borrower as regards operation of ledger balance exists?

(xvii) Whether Bank can claim any amount by treating the date of institution of the suit or proceeding is the cut-off date and the Tribunal is debarred from taking into account any of such fact ?

(xviii) Can operation of ledger balance by the Bank be said to be existed after institution of the suit or proceeding to bargain for any inflated amount on the basis of 80% of such ledger balance ?

(xix) Whether such action or part of it be treated to be illegality or nullity or mixed up with each other and if it is pointed out in a legally permissible proceeding after issuance of certificate, can the Tribunal be refrained from taking cognizance or withhold itself from passing any order ?

(xx) Is it not proper to apply scheme of RBI on settlement or compromise on 80% ledger balance with its true perspective - so that there should not be any amount of doubt and both the parties can happily arrive at a final figure ?

(xxi) In spite of appropriate determination in terms of RBI guidelines if any Officer of the Bank shows his unwillingness by saying that Bank cannot be compelled by such guidelines more particularly when there is existing policy, can her or she be not punished under sub-section (4) of Section 46 of Banking Regulation Act, 1949 in view of Central Bank of India Vs. Ravindra and Others, ?

40. D.R.T. will proceed as expeditiously as possible, if necessary by giving day-today hearing without allowing unnecessary adjournments preferably within a period of one month from the date of getting information about fulfillment of the condition of deposit. In case of trial of any nature is necessitated then alone only a further period of one month can be extended.

41. No order could be passed by this Court in the connected application being CAN 1512 of 2004 about releasing the charged or mortgaged immovable property on any condition whatsoever in spite of such deposit and personal or other guarantees or charge, if any, but the petitioners will be entitled to raise such issue before the D.R.T. and the D.R.T. will be able to justify such cause and pass appropriate order at any relevant point of time.

42. Thus both the main application and connected application are treated to be disposed of.

43. However, no order is passed as to costs. ,

44. Let an urgent Xeroxed certified copy of this Judgment and order. If applied for, be given to the Learned Advocates for the parties within two weeks from the date of putting the requisites.