(2004) 11 PAT CK 0027

In the Patna High Court

Case No : L.P.A. No''s. 309 and 313 of 2004

Durga Hotel Complex APPELLANT

Vs

The Reserve Bank of India and Others RESPONDENT

Date of Decision : 23-11-2004

Acts Referred:

Banking Regulation Act, 1949 — Section 35A
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 2, 31

Citation : AIR 2005 Patna 126 : (2005) 1 PLJR 51

Hon'ble Judges : Nagendra Rai, Acting C.J.;S.N. Hussain, J

Bench : Division Bench

Advocate : Chitranjan Sinha, Ram Balak Mahto, Ganesh Pd. Singh, Alok Kumar Agrawal and Tuhin Shankar, for the Appellant; Seema Ali Khan, for the Respondent

Final Decision : Dismissed

Judgement

1. Both the appeals have been heard together and are being disposedby this common order.

2. Both the appeals arise out of common order dated 23-1-2004 passed by the learned single Judge, whereby he has set aside the award dated 30-3-2002 passed by the Banking Ombudsman on the ground that the relief granted by him is beyond the power vested In him. Two writ applications were filed before the learned single Judge. C.W.J.C. No. 10756 of 2002 was filed by the appellant M/s. Durga Hotel Complex against the respondent State Bank of India to carry out the directions given by the Banking Ombudsman by his order dated 30th March. 2002. C.W.J.C. No. 1882 of 2003 was filed by the Respondent State Bank of India challenging the aforesaid award.

3. Learned single Judge heard both the matters together and dismissed the writ application filed by the appellant and allowed the writ application filed by the Bank. L.P.A. No. 313 of 2004 arises out of an order passed In C.W.J.C. No. 1882

of 2003 and L.P.A. No. 309 of 2004 arises out of an order passed In C.W.J.C. No. 10756 of 2002. 4. Admitted fact Is that the appellant; a partnership firm, approached the State Bank of India for grant of loan In the year 1995 for construction of hotel-cum-shopping complex with the total project cost of Rs. 33. 13 lacs. The Zonal Office of the Bank rejected the said proposal. The appellant there-after resubmitted the proposal with necessary amendments and the Zonal Office of the Bank sanctioned Rs. 15 lacs on.24.4-1997. After the appellant complied with requisite formalities, a sum of Rs. 11,58,750/ was advanced to him till December, 1998 when the Bank decided to call back the loan and stopped further advancement of loan. These decisions were taken by the Bank on the grounds that there was diversion of fund and unilateral enlargement of project size with material deviations in the parameter of construction. The appellant thereafter submitted another revised project of Rs. 75 lacs. The Advisory Committee of the Bank recommended the case of the appellant favourably. However, the Respondent Bank having considered the entire matter including its past conduct and other defects decided not to advance loan to the appellant and call back the loan and it further decided to Initiate a proceeding for recovery 61 the loan and the said order was communicated to the appellant on 28-6-1999. The Bank later on served legal notice recalling the loan with interest of Rs. 14.30.876/-. The Bank also filed Case No. 157 of 2000 before the Debt Recovery Tribunal under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, hereinafter referred to as the ''Act'', which is pending. The appellant also filed Complaint Case No. 88 of 2000 before the Banking Ombuds- man created u/s 35A of the Banking Regulation Act, who by the impugned order allowed the claim of the appellant and issued directions as follows :--

(1) Balance amount of Rs. 3,41,250/- as sanctioned earlier as a loan be disbursed.

(2) The recommendation of the Committee regarding revised project proposal of Rs. 75 lacs be honoured,

(3) Financial ratio 75:25 be maintained between the Bank and the complainant.

(4) Repayment is to be made within seven years excluding one year moratorium.

(5) The period of moratorium be enhanced according to the Rules arid interest be charged strictly in accordance with guidelines issued by the Reserve Bank of India.

5. The Bank thereafter referred the matter to the Reserve Bank of India for guidelines regarding implementation of the award of the learned Ombudsman. The Reserve Bank of India permitted the respondent Bank to challenge the award and thereafter the Bank filed the case. In the meantime, the appellant also filed writ application for implementation of the award, as stated above.

6. The appellant filed the complaint under Clause 16 of the Banking Ombudsman

Scheme, 1995, hereinafter referred to as the Scheme'' claiming following reliefs :--

(1) The Bank should further credit the remaining sanctioned loan proceed approximately Rs. 3.5 lacs to their account so that the project can be completed.

(2) As the Bank suo motu not credited the proceed to their Account and project has been stopped so total interest of the period should be exempted.

(3) Due to delay of implementation of the project by Bank the appellant has been put a loss of establishment cost for Rs. 5 lacs interest of their investment approx. 5.9 lacs and loss of project profit as per their own appraisal and projection by technical cell of L.H.O. due to delay in implementation approx. 6 lacs, Bank is accountable for the loss of Rs. 16.9 lacs.

7. The appellant again filed supplementary complaint petition making further reliefs which are as follows :--

(1) The disbursement with the new limit should be done immediately.

(2) Their equity margin should be 25% as Tourism has been declared as industry (as per State Government Notification No. 148 dated 21st January, 1987).

(3) Rescheduling of repayment as per industrial finance repayment schedule should be done so that they can start the payment after the start of hotel.

(4) As the Bank has intentionally delated the project, so the interest amount of the period should be waived.

(5) Full compensation for financial loss as claimed be given.

8. The Bank appeared and denied the allegation. The Banking Ombudsman made recommendation and thereafter passed final award as stated above.

9. Learned single Judge has given two grounds for setting aside the award. Firstly, he has held that the directions issued by the Banking Ombudsman are beyond the power vested in him under the Scheme and secondly that once the proceeding was pending under the Act, the proceeding before the Banking Ombudsman was not maintainable in view of the provisions contained under Clause 16 (d) of the Scheme.

10. Learned counsel appearing for the appellant assailed both the reasons. He sub mitted that, the application before the D.R.D.A. under the Act was filed on MI-2000 by the Bank whereas complaint under the Scheme was filed on 1 1-4-2000 and as such no proceeding was pending when the complaint was filed and thus the bar under Clause 16(d) of the Scheme will not apply. Secondly, he submitted that the directions issued by the Banking Ombudsman fall within the authority of the Banking Ombudsman as per Clause 13 of the Scheme.

11. Learned counsel appearing for the respondent Bank, on the other hand, combated both the submissions and stated that admittedly when the matter was

being decided the proceeding was pending and as such even if the same was filed later on, It does not make any difference and the proceeding before the Banking Ombudsman was not maintainable. He further submitted that authority was given to consider the matter in accordance with the provisions of the Scheme as enumerated therein and none of the directions is covered by the power vested in the learned Banking Ombudsman.

12 The Act has been enacted to provide for establishment of tribunals for expeditious adjudication and recovery of dues due to Dank and Financial Institutions and for matters connected therewith and incidental thereto. Debt has been defined u/s 2(g) of the Act which runs as follows :--

"2 (g) "debt" means any liability (inclusive of Interest) which is alleged as due from any person by a bank or a financial Institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or whether payable under a decree or order of any Civil Court or otherwise and subsisting on, and legally recoverable on the date of the application."

13. Section 17 of the Act deals with the jurisdiction, powers and authority of Tribunals, according to which a Tribunal shall exercise, on and from the appointed day, the Jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial Institutions.

14. Section 18 of the Act provides that on and from the appointed day, no Court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority in relation to the matters specified in Section 17. However, the said bar will not apply in case of the Supreme Court and the High Court.

15. Section 31 of the Act provides that every suit or other proceeding pending before any Court immediately before the date of establishment of a Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment within the jurisdiction of such tribunal, shall stand transferred that date to such Tribunal.

16. Thus, the combined reading of the aforesaid provisions show that with regard to the recovery of debt as defined under the Act, the proceeding will lie before the Tribunal after the Act came into force and no other Court except High Court and Supreme Court shall have power to entertain the proceeding pending before the Tribunal.

17. Under the provisions of Section 35A of the Banking Regulation Act, the Banking Ombudsman Scheme, 1995 has been framed. The said Scheme has been framed In public interest and in the interest of banking policy to provide for a system of Banking Ombudsman for redressal of grievances against deficiency in banking services concerning loans and advances and other specified matters.

The relevant provisions for the purpose of this case are Clauses 12.13 and 16 and they are reproduced below :--

12. General.-- The Banking Ombudsman''s powers and duties will be :--

(a) to receive complaints relating to the provision of banking services.

(b) to consider such complaints and facilitate their satisfaction, or settlement by agreement, by making a recommendation, or Award in accordance with this Scheme.

13. Specific Ambit of Authroity -- As regards services, the Banking Ombudsman''s authority will include :--

(a) all complaints concerning deficiency in service such as :--

(i) non-payment/inordinate delay in the payment or collection of cheques, drafts/ bill etc.;

(ii) non-acceptance, without sufficient cause, of small denomination notes tendered for any purpose, and for charging of commission in respect thereof;

(iii) non-issue of drafts to customers and others;

(iv) non-adherence to prescribed working hours by branches:

(v) failure to honour guarantee/letter of credit commitments by banks;

(vl) claims in respect of unauthorised or fraudulent withdrawals from deposit accounts; etc.;

(vii) complaints pertaining to the operations in any savings, current or any other account maintained with a bank, such as delays, non-credit of proceeds to parties accounts, non-payment of deposit or non-observance of the Reserve Bank directives, if any, applicable to rate of interest on deposit;

(viii) complaints from exporters in India such as delays in receipt of export proceeds, handling of export bills, collection of bills, etc. provided the said complaints pertain to the bank''s operations in India, and

(ix) complaints from Non-Resident Indians having accounts in India in relation to their remittances from abroad deposits and other bank-related matters.

(b) Complaints concerning loans and advances only insofar as they relate to :--

(i) non-observance of Reserve Bank directives on interest rates;

(ii) delays in sanction/non-observance of prescribed time schedule of disposal of loan application; and

(iii) non-observation of any other directions or instructions of the Reserve Bank, as may be specified for this purpose, time to time.

(c) Such other matters as may be specified by the Reserve Bank from time to time in this behalf.

16. Complaint.-- (1) Any person who has a grievance against a bank, may himself or through an authorised representative make a complaint in writing to the Banking Ombudsman within whose jurisdiction the branch or office of the bank complained against is located.

(2) The complaint shall be in writing duly signed by the complainant or his authorised representative and shall state clearly the name and address of the complainant, the '' name and address of the branch or office of the bank against which the complaint is made, the facts giving rise to the complaint supported by documents, if any, relied on by the complainant, the nature and extent of the loss caused to the complainant and the relief sought from the Banking Ombudsman and a statement about the compliance of the conditions referred to in Sub-clause (3) of this Clause (3) No complaint to the Banking Ombudsman shall lie unless :

(a) the complainant had before making a complaint to the Banking Ombudsman made a written representation to the bank named in the complaint and either the bank had rejected the complaint or the complainant had not received any reply within a period of two months after the bank concerned received his representation or the complainant is not satisfied with the reply given to him by the bank.

(b) The complaint is made "not later than one year after the bank had rejected the representation or sent its final reply on the representation of the complainant.

(c) The complaint is not in respect of the same subject-matter which was settled through the office of the Banking Ombudsman in any previous proceedings whether received from the same complainant or any one or more of the parties concerned with the subject-matter.

(d) The complaint is not the same subject-matter for which any proceedings before any Court, tribunal or arbitrator or any other forum is pending or a decree or award or order of dismissal has already been passed by any such Court, tribunal, arbitrator or forum.

(e) The complaint is not frivolous or vexatious in nature.

18. According to Clause 12 of the Scheme the Banking Ombudsman has to receive complaints relating to the provisions of banking services and to consider such complaints and facilitate their satisfaction, or settlement by agreement, by making a recommendation, or Award in accordance with this Scheme. The authority of the Banking Ombudsman is dealt with in Clause 13 of he Scheme. So far complaints regarding loans and advances are concerned, it is stated in Sub-clause (b) that the complaints regarding loans and advances shall be confined only to non-observance of Reserve Bank directives on interest rates, delay in sanction/ non-observance of prescribed time schedule of disposal of loan application and non-observation of any other directions or instruction of the

Reserve Bank, as may be specified for this purpose, from time to time. Clause 16 deals with the complaint and its Sub-clause (3) says that no complaint to the Banking Ombudsman shall lie with regard to the matters enumerated in Sub-Clauses (a), (b), (c), (d) and (e). Sub-clause (d) is relevant for this case, according to which the complaint to the Banking Ombudsman shall not lie with regard to the same subject-matter for which any proceeding before any Court, tribunal or arbitrator or any other forum is pending or a decree or award or order of dismissal has already been passed by any such Court, tribunal, arbitrator or forum. Thus, if the subject-matter before any Court or tribunal and the learned Banking Ombudsman is the same and the matter is pending before the Tribunal or Arbitrator or any other forum, then the complaint is not to be entertained. As stated above, under the scheme of the Act, if the matter is covered by the Scheme and the proceeding is pending before any tribunal, then the proceeding has to be transferred. Thus, if it is found that the subject-matter of the proceeding before the Tribunal under the Act and the subject-matter in the complaint is the same, then in view of the provisions of Clause 16 (3)(d) as well as under the provisions of the Act as indicated above, it is only the Debt Recovery .Tribunal which has to consider the matter and not the learned Banking Ombudsman. However, if the subject-matter is different then the case would be otherwise. Subject-matter is not defined under the Scheme but the subject-matter ordinarily means the matter of dispute between the parties. In this case, the matter of dispute between the parties is the question of non-sanction of loan and the dispute connected therewith. Thus, the main subject-matter is the loan about which the parties are in dispute. Their claims may be different. One may claim that the parties are wrong in not advancing the loan for which project was delayed and the Bank''s case may be that they have done everything but it was the fault of the complainant, but the subject-matter is the same, i.e. question of advancement of loan about which different stand have been taken by different parties, and as such we fully agree with the view taken by the learned single Judge that the subject-matter is the same in both the cases and as such the proceeding before the learned Banking Ombudsman, was not maintainable. Even assuming that, the proceeding is maintainable, even then the appellant cannot get any relief in this matter. The scheme has been formulated for redressal of grievances against deficiency in banking services concerning loans and advances and other specified matters and Clause 13 (a) provides authority to Banking Ombudsman with regard to all complaints concerning deficiency in service and Sub-clause (d) confines with regard to complaints concerning loans and advances but very limited jurisdiction is vested in the Banking Ombudsman. Only in case where there is non-observance of Reserve Bank directives on interest rates or delay in sanction/non-observance of prescribed time schedule of disposal of loan applications of any other directions or instructions of the Reserve Bank, Banking Ombudsman has power to interfere and issue necessary direction. It has not been shown that any direction has been issued by the Reserve Bank that Banking Ombudsman has power to change the entire terms of grant of loan and issue directions contrary to the terms agreed between the parties. No doubt if there is delay in sanction of loan or that is not being granted on irrelevant grounds, Banking Ombudsman has power to consider and issue direction as provided under the aforesaid provisions of the Scheme, but he cannot issue direction creating new obligations as has been done by him. Accordingly, the view taken by the learned single Judge on this point also does not suffer from any illegality or infirmity.

19. In the result, both the appeals are dismissed.