

(2005) 12 BOM CK 0087

In the Bombay High Court

Case No : Writ Petition No's. 4646 of 2004 and 4007 and 4008 of 2005

Gangaram Biseshwar Agrawal

APPELLANT

Vs

Canara Bank

RESPONDENT

Date of Decision : 12-12-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 7
Constitution of India, 1950 — Article 226, 227
Consumer Protection Act, 1986 — Section 13(4)
Debts Recovery Tribunal Act, 1993 — Section 20, 21, 22(2)
Foreign Exchange Regulation Act, 1973 — Section 53
Motor Vehicles Act, 1988 — Section 169
Railway Claims Tribunal (Procedure) Rules, 1989 — Rule 18, 32
Railway Claims Tribunal Act, 1987 — Section 18(3)
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 17(2), 19(6), 20, 20(1)

Citation : (2010) 2 BC 463 : (2006) 6 BomCR 436 : (2006) 3 MhLj 13

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : V.V. Bhangde, in W.P. Nos. 4007 and 4008 of 2005 and 4646 of 2004, for the Appellant; M. Naik in W.P. No. 4007 of 2005, C.S. Samudra in W.P. No. 4008 of 2005 and A. Kumar in W.P. No. 4646 of 2004, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—Canara Bank, respondent in Writ Petition 4007/2005; filed Special Civil Suit 186/1996 against Shri Hari Ganga Cement Ltd. and five others in the Court of Civil Judge, Senior Division, Nagpur for recovery of Rs. 28045225.32/- only which was later on transferred to Debts Recovery Tribunal, Nagpur (DRT) and came to be numbered as OA 172/2001. Similarly Union Bank of India, respondent in Writ Petition 4008/2005; had filed Special Civil Suit 150/1996 against Shri Hari Ganga Cement Ltd. and five others for recovery of Rs. 25465110/- only which upon transfer to Debts Recovery Tribunal, Nagpur came to be numbered as OA 210/2001. State Bank of India, respondent in Writ Petition 4646/2005; had also filed Special Civil Suit numbered 222/1996 for

recovery of Rs. 31811607.90/- only against Shri Hari Ganga Cement Ltd. and five others which upon transfer to Debts Recovery Tribunal, Nagpur came to be numbered as OA 173/2001. Present petitioner was defendant No. 2 in all these cases. Grievance made by petitioner in all these cases is that on 9-7-2004 DRT had fixed only interlocutory applications for hearing and in spite of that, after dismissing those interlocutory applications (1 each in three cases) it also considered main case i.e. Original Application in all three cases and allowed it. When he pointed out the mistake by moving Review Application in each O.A., DRT dismissed his review applications also. The three Banks mentioned above have raised preliminary objection by pointing out that the remedy of filing appeals before Appellate Tribunal i.e. DRAT is available to the petitioners.

2. The facts in the matter are more or less identical. The impugned order dated 6-7-2005 rejecting review in all three matters is common and DRT has passed final judgment on 9-7-2004. The review application moved by petitioner in all these cases is filed on 8-9-2004. It appears that the final arguments of respective Banks were heard by DRT on 24-9-2003 and thereafter the matter was fixed for final arguments of defendants and was adjourned from time to time between 21-1-2004 to 6-7-2004. In all these matters, on 6-7-2004 petitioner filed interlocutory Application seeking production of alleged equitable mortgage as mentioned by respective Banks in their plaints. The said application was fixed for hearing on 9-7-2004 in all three matters and it came to be rejected. After its rejection, DRT also passed final orders in respective Original Applications of three Banks and allowed the same. Contending that Original Applications could not have been considered for final decision on 9-7-2004 and complaining of denial of opportunity of arguments, petitioner filed applications for review u/s 22(2)(e) of DRT Act and on 6-7-2005, DRT dismissed all these 3 applications for review. Adv. V.V. Bhangade, learned Counsel appearing for petitioner in all 3 matters contended that when Original Application was not fixed on 9-7-2004 for final arguments by petitioner, DRT could not have disposed of it finally. He states that order refusing review is erroneous and deserves to be quashed and set aside. In order to show that the remedy of appeal u/s 20 of DRT Act is not available he has placed reliance upon judgment of Delhi Debts Recovery Appellate Tribunal in case between Hemender Sharma v. Indian Overseas Bank reported at II (2001) BC 81. He also pointed out order dated 24-2-2004 in Writ Petition No. 802/2004 of this Bench. He also relied upon the judgment reported at Kalpataru Agroforest Enterprises Vs. Union of India, .

3. The respective counsel Adv. Mrs. Naik, Adv. Samudra and Adv. Anilkumar, appearing for respective Banks/respondents invited attention of Court to the fact that final arguments of Banks in their respective Original Application were over in September, 2003 itself and thereafter matter was fixed for final arguments of present petitioner/defendants. They state that upto 6-7-2004, original defendants obtained adjournments on one count or the other and on 9-7-2004 came up with interlocutory applications. According to them these applications were belated and filed only to delay final disposal of Original Applications on

merit. They invite attention to observations made by DRT in impugned order dated 6-7-2005 and argue that the DRT was right in refusing to interfere in review jurisdiction. They argue that the remedy of appeal u/s 20 of DRT Act is available and before filing appeal, petitioner has to deposit 75% of the amount awarded by DRT in view of requirement of Section 21. They state that this provision for appeal cannot be allowed to be defeated by entertaining writ petition directly. They also argue that if DRAT finds that condition of deposit is to be relaxed, that jurisdiction is available to it. They have placed reliance upon judgment of Hon. Apex Court reported at Punjab National Bank Vs. O.C. Krishnan and Others, and orders dated 10-2-2005 passed by me in the Writ Petition 5185/2004 dismissing it in motion hearing. They contend that appeal can be filed against order in review and in support rely upon judgment of Debts Recovery Appellate Tribunal, Mumbai between Syndicate Bank v. Dr. B.V. Ramlinga Setty reported at II (2000) BC 36. They have also relied upon the judgment of Patna High Court reported at Kavita Pigments and Chemicals (Pvt.) Ltd. and Others Vs. Allahabad Bank and Others, to argue that appeals can be filed against all orders of DRT and writ petitions should not be entertained.

4. In Punjab National Bank Vs. O.C. Krishnan and Others, , Hon. Apex Court has led down that the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 i.e. DRT Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal u/s 20 against order passed by Debt Recovery Tribunal (DRT) directing sale of mortgaged property and this fast track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. The High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the party to take recourse to the appeal mechanism provided by the Act. The orders dated 10-2-2005 passed by me in the Writ Petition 5185/2004 while dismissing it in motion hearing cannot be used as precedent but the above referred Apex Court judgment has been followed therein. The learned Counsel appearing for respective Banks have contended that petitioner can challenge order dated 6-7-2005 in appeal while the learned Counsel appearing for petitioner had urged that said remedy is not available to him. It is thus clear that this Court has to first find out whether the remedy of filing appeal u/s 20 is available to present petitioner or not and if such remedy is available, then the petitioner will have to file appeal accordingly and this Court will not be in position to entertain his writ petition.

5. In Kavita Pigments and Chemicals (Pvt.) Ltd. and Others Vs. Allahabad Bank and Others, , it has been held that appeal u/s 20 or Section 17 is maintainable

even against interlocutory order and writ petition challenging such interlocutory orders is not maintainable in view of a availability of alternative efficacious remedy. However Division Bench of this Court has taken a view that appeal against the procedural orders (of interlocutory nature) is not provided for and is not maintainable and therefore in appropriate cases such orders can be interfered with directly in writ petitions. Here the review filed by petitioner is finally rejected and as such there is no such controversy. Debts Recovery Appellate Tribunal, Mumbai has in case between Syndicate Bank v. Dr. B.V. Ramlinga Setty reported at II (2000) BC 36 taken a view that appeal filed by Bank against the final order of dismissal of review petition was maintainable in law. However, except this sentence appearing in para 14 of the report there is no other discussion on the point in this judgment as there was no occasion for the same. Delhi Debts Recovery Appellate Tribunal in case between Hemender Sharma v. Indian Overseas Bank reported at II (2001) BC 81 has in paragraph 6 held that it is settled law that an order passed on an application for review is not appealable. It is further observed that power to review flows from Section 22(2) and said power is not analogous to power of review vested in a Civil Court under the Code of Civil Procedure, 1908. According to learned Delhi Appellate Tribunal this power is to be regulated in accordance with the provisions of CPC and when appeal does not lie against an order passed by a Civil Court on review application, the Appellate Tribunal under the DRT Act should not, in principle, permit appellants to challenge an order passed by DRT on review application. Learned advocate for petitioner has also pointed out order dated 24-2-2004 in Writ Petition No. 802/2004 of this Bench. However, it is only an order issuing notice before admission and hence, of no assistance. He also relied upon the judgment reported at Kalpataru Agroforest Enterprises Vs. Union of India, . In this case, Hon. Apex Court has considered maintainability of a review petition before the Tribunal against an appealable order passed by Tribunal under the provisions of Section 18(3)(f) of Railway Claims Tribunal Act, 1987. Rule 32 of Railway Claims Tribunal (Procedure) Rules, 1989 was held to be ultra-vires because it restricted the scope of review as provided in Section 18(3)(f). Thus the controversy considered therein is entirely different. However, petitioner has invited attention to paragraph 12 of this judgment wherein it is observed that against the appealable orders of the Tribunal from which an appeal lies but no appeal is filed, the review petition is maintainable before the Tribunal. Here, none of the respondent Banks have challenged maintainability of review before DRT. Question involved is whether appeal will lie against the decision in review by DRT before DRAT. The ruling of Hon. Apex Court therefore has got no bearing on the issue.

6. Provisions of Sections 20 and 17 Recovery of Debts Due to Banks and Financial Institutions Act (51 of 1993) assume importance. The same are as under:

Section 17. Jurisdiction, powers and authority of Tribunals. - (1) 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.

(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act. Section 20. Appeal to the Appellate Tribunal (1) Save as provided in Sub-section (2), any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter.

(2) No appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties.

(3) Every appeal under Sub-section (1) shall be filed within a period of forty five days from the date on which a copy of the order made, or deemed to have been made by the Tribunal is received by him and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under Sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Tribunal.

(6) The appeal filed before the Appellate Tribunal under Sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

7. Patna High Court has in Kavita Pigments and Chemicals (Pvt.) Ltd. and Others Vs. Allahabad Bank and Others, observed about these provisions as under:

14. A perusal of the aforesaid Section 17 of the said Act shows establishment of two types of Tribunals, namely, (a) A Tribunal and (b) An Appellate Tribunal and it is further made clear in Sub-section (2) of Section 17 of the said Act that an Appellate Tribunal can exercise jurisdiction, power and authority to entertaining appeals against any order made or deemed to have been made by a "Tribunal" under the said Act. Thus Section 17(2) of the said Act makes it abundantly clear that even an interlocutory order passed by the Tribunal is appealable before the Appellate Tribunal. Here the expression "any" must mean "all" and "every".

15. Reference in this connection may be to the Division Bench judgment of Patna High Court in the case of Ashiq Hasan Khan and Others Vs. Sub Divisional Officer

and Others, of the said judgment, the learned Judge of the Division Bench of this Court had occasion to construe the word "any". In doing so, the learned Judges referred to Stroud's Judicial Dictionary (3rd Edition, page 150), and an old English decision in the case of Liddy v. Kennedy reported in (1871) 5 HL 134. The expression "any" in the context was interpreted to mean "all", "every".

16. Following the aforesaid ratio in the case of. Ashiq Hasan Khan and Others Vs. Sub Divisional Officer and Others, this Court is also of the opinion that the word "any" occurring in Sub-section (2) of Section 17(2) of the said Act would mean in the context "all" and "every". Apart from the provisions of Section 20 of the said Act where the right of appeal is conferred also makes the position also clear.

8. In this respect, Division Bench ruling of this High Court between Central Bank of India Vs. Shri Kurian Babu and Others, can be conveniently looked into. Division Bench has considered provisions of Section 20(1) of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and have concluded that purely procedural orders which do not affect the substantive right of parties are not appealable under it. The appeal filed by Central Bank of India before Appellate Tribunal challenging the order of DRT permitting respondent to lead secondary evidence was held to be not maintainable. The Division Bench has relied upon the judgment of Hon. Apex Court in case between Central Bank of India Vs. Shri Gokal Chand, , Shankarlal Aggarwal and Others Vs. Shankarlal Poddar and Others, and Bant Singh Gill Vs. Shanti Devi and Others, . It is to be noted that Division Bench has relied upon the declaration of law in this respect by Hon. Apex Court that though words "every order of the Controller made under this Act" are very wide, they do not include interlocutory orders. The Hon. Apex Court observed that in the pending proceeding, the Controller may pass many interlocutory orders under Sections 36 and 37, such as orders regarding the summoning of witnesses, discovery, production and inspection of documents, issue of a commission for examination of witnesses, inspection of premises, fixing the date of hearing and the admissibility of document of the relevancy of question. All these interlocutory orders are steps taken towards the final adjudication and for assisting the parties in the prosecution of their case in pending proceeding; they regulate the procedure only and do not affect any right or liability of the parties. The legislature could not have intended that the parties would be harassed with endless expenses and delay by appeals from such procedural orders. It is open to any party to set forth the error, defect or irregularity, if any, in such an order as a ground of objection in his appeal from the final order in the main proceeding. This position of law is not pointed out to Hon'ble Patna High Court and has not been considered by learned Single Judge in Kavita Pigments and Chemicals (P) Ltd. v. Allahabad Bank. The said ruling putting wide interpretation upon provisions of Section 20(1) or Section 17 therefore, to that extent, is not binding on this Court. However, it is apparent that every order of DRT which affects the substantive rights of parties is appealable before DRAT. The order rejecting review application is not an interlocutory order and it also affects substantive right of party seeking review. It

is thus apparent that appeal against such order is maintainable.

9. Provisions of Order XLVII Rule 7, CPC do not permit filing of appeal against order rejecting review and view taken by Delhi DRAT Hemender Sharma v. Indian Overseas Bank reported at II (2001) BC 81 (supra) is on that account. But provisions of Section 22 of DRT Act are peculiar. Section 22 of Recovery of Debts Due to Banks and Financial Institutions Act (51 of 1993) is considered by Hon. Apex Court in Allahabad Bank, Calcutta Vs. Radha Krishna Maity and Others, . Section 22 reads as follows:

Section 22 : Procedure and Powers of the Tribunal and the Appellate Tribunal -

(1) The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this 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;

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) reviewing its decisions;
- (f) dismissing an application for default or deciding in ex parte;
- (g) setting aside any order of dismissal of any application for default or any order passed by it ex parte;
- (h) any other matter which may be prescribed.

Hon"ble Apex Court has relied on its earlier view in The Industrial Credit and Investment Corporation of India Ltd. Vs. Grapco Industries Ltd. and Others, and in para 9 observed:

9. The scope and the extent of the powers of the Tribunal are mainly referred to in Sub-clause (1) of Section 22 of the Act which says that the Tribunal shall not be bound by the procedure laid down by the CPC but shall be guided by principles of natural justice. As stated in Grapco by this Court, the Tribunal can exercise powers contained in the CPC and can even go beyond the Code as long

as it passes orders in conformity with principles of natural justice. We may add that Section 19(6) does not in any manner limit the generality of the powers of the Tribunal u/s 22(1). It merely states that certain types of injunction or stay orders may be passed by the Tribunal. It is to be noticed that Sub-clause (6) of Section 19 starts with the words - "The Tribunal may make an interim order...". The provision is an enabling provision and merely states that certain types of injunction or stay orders mentioned therein can be passed by the Tribunal but such an enumeration cannot, in our opinion, be deemed to be exhaustive nor restricting the Tribunal's powers only to those types of injunction or stay orders. The width and amplitude of the powers are to be gathered from Section 22(1) as stated in *Grapco*. In addition, Rule 18 enables the Tribunal to pass orders to secure the ends of justice.

10. In above judgment, the Hon. Apex Court has considered its earlier judgment reported at *The Industrial Credit and Investment Corporation of India Ltd. Vs. Grapco Industries Ltd. and Others*, . In earlier judgment, the Hon. Apex Court has compared similar provisions in other enactments like Motor Vehicles Act, 1988, Consumer Protection Act, Foreign Exchange Regulation Act, 1979. The relevant observations are:

10. High Court, in its judgment which is quite interminable considered the provisions of the Act and the Rules framed therein and came to the conclusion that grant of ad interim or ex parte order of injunction or stay would be against the principles of natural justice and is not contemplated by the Act and the Rules. Reference was made to Section 22 of the Act which provides that the Tribunal shall not be bound by procedure laid down by the CPC but shall be guided by the principles of natural justice and subject to other provisions of the Act and the Rules. High Court was of the view that grant of ex parte order was very antithesis of the principle of natural justice.

11. We, however, do not agree with the reasoning adopted by the High Court. When Section 22 of the Act says that the Tribunal shall not be bound by the procedure laid by the Code of Civil Procedure, it does not mean that it will not have jurisdiction to exercise powers of a Court of Civil Procedure. Rather, the Tribunal can travel beyond the CPC and the only fetter that is put on its powers is to observe the principles of natural justice. Contrast Section 22 of the Act with Section 13(4) of the Consumer Protection Act, 1986 which vests certain powers on the authorities under the Act:

(4) For the purposes of this section the District Forum shall have the same powers as are vested in Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely, -

(i) the summoning and enforcing attendance of any defendant or witness and examining the witness on oath;

(ii) the discovery and production of any document or other material object producible as evidence;

- (iii) the reception of evidence on affidavits;
- (iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
- (v) issuing of any commission for the examination of any witness; and
- (vi) any other matter which may be prescribed.

12. We may also have a look at Section 53 of the Foreign Exchange Regulation Act, 1973, which is as under:

53. Power of the adjudicating officer and the Appellate Board to summon witnesses, etc. - (1) Without prejudice to any other provision contained in this Act, the adjudicating officer and the Appellate Board shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), which trying a suit, in respect of the following matters, namely:

- (a) summoning and enforcing the attendance of witness;
- (b) requiring the discovery and production of any document;
- (c) requisitioning any public record or copy thereof from any Court or office;
- (d) receiving evidence on affidavits; and
- (e) issuing commissions for the examination of witnesses or documents.

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Similarly, Section 169 of the Motor Vehicles Act, 1988 provides for procedure and powers of Claims Tribunals, says that in holding an inquiry, the Claims Tribunal may, subject to any rules follow such summary procedure as it thinks fit and that the Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the production of documents and material objects and such other purposes as may be prescribed. It will, thus, be seen that while there are no limitations on the powers of the Tribunal under the Act, the legislature has thought fit to restrict the powers of the authorities under various enactments while exercising certain powers under those enactments. We have to give meaning to Section 22 of the Act as here the Tribunal is exercising powers of a Civil Court while trying a money suit. Further, when power is given to the Tribunal to make interim order by way of injunction or stay, it inheres in it the power to grant that order even ex parte, if it is so in the interest of justice and as per the requirements as spelt out in the judgment of this Court in Morgan's case which has been quoted above.

11. In Hemender Sharma v. Indian Overseas Bank reported at II (2001) BC 81 (supra) restriction on powers of DRAT worked out on account of provisions of CPC does not appear to be correct. Neither Tribunal (DRT) nor Appellate Tribunal (DRAT) are bound by the limitations imposed by CPC and as such, this view in 11

(2001) BC 81 (supra) cannot be accepted. In fact language of Section 20 of the DRT Act is wide and it provides appeal against an order made or deemed to have been made under the Act. In the above background the apparent legislative intent cannot be curtailed by recourse to provisions of Civil Procedure Code. It will have to be therefore held that remedy of filing appeal u/s 20 of DRT Act is available to present petitioners. In view of Punjab National Bank Vs. O.C. Krishnan and Others, , as alternate remedy prescribed by statute is available to petitioners, I am not inclined to interfere in writ petition. The writ petitions are therefore dismissed with no order as to costs.

12. At this stage Advocate Shri Bhangde, for petitioner makes a request for continuation of interim order for further period of eight weeks to enable the petitioner to take appropriate steps in the matter. The request is opposed by Advocate Shri Samudra for respondent-Bank, who contends that the petitioner is only want to kill the time. However, in some of the matters interim order has been in operation since about one year. Hence, in the interest of justice the said interim orders are continued for a period of six weeks more to enable the petitioner to take further appropriate steps in the matter. The order shall cease to operate automatically after six weeks.