

(2002) 08 BOM CK 0081

In the Bombay High Court

Case No : Appeal No's. 569 and 570 of 2002

Harshadrai O. Mody

APPELLANT

Vs

Bank of India

RESPONDENT

Date of Decision : 02-08-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13, 44A, 44A(1)
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 22,
22(2), 34

Citation : AIR 2003 Bom 125 : (2002) 4 ALLMR 1 : (2002) 6 BomCR 518 :
(2003) 1 BOMLR 780 : (2003) 115 CompCas 97 : (2002) 4 MhLj 492

Hon'ble Judges : Nishita Mhatre, J;H.L. Gokhale, J

Bench : Division Bench

Advocate : A.J. Rana and Anita Castelina, for the Appellant; Virag Tulzapurkar,
Satish Shetye and Swati Deshpande, for the Respondent

Final Decision : Dismissed

Judgement

H.L. Gokhale, J.—Heard Mr. Rana, the senior counsel for the appellant. Mr. Tulzapurkar and Mr. Shetye appear for the Respondents in both these matters.

2. The first of these two appeals seeks to challenge the order dated 30-4-2002 passed by a learned Single Judge on the Chamber Summons taken out by the appellant for a direction against the 1st respondent-nationalised bank in an execution application moved by the bank against the appellant. The Chamber Summons sought a direction that the execution application filed by the 1st respondent-bank may not be transferred to the Debts Recovery Tribunal. The 1st respondent-bank has taken a decree against the appellant in the High Court of justice, Queen's Bench Division in England for an amount of Rs. 2,47,82,743.40. The Execution Application was filed along with the certified copy on 6th May, 1998. The Debts Recovery Tribunal was constituted on 16-7-1999 under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("the Act"). In view of the passing of the Act and in view of the exclusive jurisdiction granted

to that Tribunal for adjudication and recovery of the debts of Nationalized Banks over certain amount, the execution application was being transferred to the Tribunal. At that stage, this Chamber Summons was taken out to retain the execution in the High Court itself. The Chamber Summons was rejected by the learned Single Judge by the order dated 30-4-2002. Similar was the prayer in the other connected matter between the same parties being Chamber Summons No. 37 of 2002. In view of the finding recorded on Chamber Summons No. 38 of 2002, this Chamber Summons was also rejected by a separate order dated 30-4-2002. Being aggrieved by both these orders these two appeals have been filed.

3. Mr. Rana, the learned counsel appearing for the appellant, principally made two submissions. The first submission was that u/s 44A(1) of the Code of Civil Procedure, 1908, a decree passed by a superior court outside India was treated as a decree passed by a district court in India and was executable only in a district court in its original jurisdiction. He submitted that it was a limited legal fiction under the section and an execution of such a decree by the Debts Recovery Tribunal cannot be read into it. The Debts Recovery Tribunal cannot exercise that power. He further submitted that further consequences and incidences beyond what is specifically provided cannot be created under a legal fiction. In this behalf, the learned Single Judge has referred to and relied upon a judgment of the Privy Council in the case of *East End Dwellings Co. Ltd. v. Finsbury Borough Council* 1952 A.C. PC 109 wherein it is observed - "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it." This view is approved in the case of *American Home Products Corporation Vs. Mac Laboratories Pvt. Ltd. and Another*, . u/s 17(1) read with Section 2(g) and Section 34 of the RDB Act, the Tribunal has the exclusive jurisdiction to recover these debts and, therefore, legal fiction will have to be deemed to have been extended to authorise the execution of a foreign decree by the Tribunal.

4. Mr. Rana relied upon a passage on legal fiction appearing in Chapter-5 of the *Commentary on Principles of Statutory Interpretation*, 8th Edition 2001. The relevant portion of this passage reads as follows :

"In interpreting a provision creating a legal fiction, the Court is to ascertain for what purpose the fiction is created, and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so construing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the language of the section by which it is created. It cannot also be extended by importing another fiction. And a legal fiction in terms enacted for purposes of this Act is normally restricted to that Act and cannot be extended to cover another Act. Legal fictions may not be created only by the Legislature and delegated

legislation may also create such fictions. But it must be remembered that what can be deemed to exist under a legal fiction are facts and not legal consequences which do not flow from the law as it stands."

As commented by the learned author and as culled out by him from different judgments, the Court has to ascertain the purpose for which the fiction is created and after ascertaining the purpose, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. This being the position, as far as the provision u/s 44A(1) of the CPC is concerned, the fiction is to treat the judgment and decree of the superior Court as equivalent to those of District Courts for the purposes of execution in India. We, therefore, do not find that there is any unjustified extension of this fiction in the application made by the 1st respondent-bank that in view of the constitution of the Debts Recovery Tribunal, the jurisdiction gets transferred to the Debts Recovery Tribunal. The Act is a special Act to provide a complete mechanism for adjudication and recovery of certain debts of Nationalized Banks and Section 34 gives it an overriding effect. We are, therefore, not in a position to accept this submission of Mr. Rana that the legal fiction is being unjustifiably extended.

5. The second submission of Mr. Rana was that there is a distinction between sections 38 and 39 of the CPC on one hand and Section 44A on the other. Sections 38 and 39 of the C.P.C. provide for execution of a domestic decree whereas Section 44A provides for execution of a decree passed by a Court in reciprocating territory. Sub-section (3) of Section 44A permits the defences which are available u/s 13 of the Code of Civil Procedure. Thus, in that sense, Section 44A permits going behind a decree. To emphasize the aforesaid distinction between these two sections, Mr. Rana brought to our notice various passages from the judgment of the Apex Court in an Admiralty case of *M.V. Al Quamar Vs. Tsavlis Salvage (International) Ltd. and Others*, . He laid a particular emphasis on paragraphs 47, 49, 56, 57, 59 and 60 of the judgment delivered by Banerjee, J. to submit that as regards the domestic law, Section 44A is to be considered as one of the basic elements of domestic law vis-a-vis foreign judgments that this section gives a new cause of action irrespective of its original character and that it is not a common law right. He also laid emphasis on para 8 of the judgment delivered by Majumdar, J. in that matter which points out that the transferee Court u/s 39 of the CPC cannot go behind the decree whereas u/s 44A that is permitted. Mr. Rana then drew our attention to the observations in Para 12 of the judgment of the Apex Court in the case of *N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others*, which was in the context of Representation of the People Act where the judgment in the case of *Wolverhampton New York Works Co. v. Hawkesford* has been quoted, which states that where a liability not existing at common law is created by a statute the remedy provided by the statute must be followed as it is. Mr. Rana submitted that whereas u/s 44A read with Section 13 in the District Court, the Appellant was entitled to raise its objections as a matter of right when it comes to the

Tribunal, the appellant will have to depend on the discretion to be exercised by the Tribunal under the principles of natural justice as provided in Section 22(1).

6. As against the above submission, what we have to note is that Section 22 which provides for the procedure and powers of the Tribunal came up for consideration before the Apex Court in the case of *The Industrial Credit and Investment Corporation of India Ltd. Vs. Grapco Industries Ltd. and Others*, where in paragraph 11 the Apex Court has clearly observed that Section 22 does not mean that the Tribunal will not have jurisdiction to exercise the powers of a Court as contained in the C.P.C., rather, the Tribunal can travel beyond the CPC. Thus, it is clearly laid down that the Tribunal does have the jurisdiction to exercise the powers of a Court as contained in the CPC which will mean that the defences, which are available when a foreign decree is sought to be executed (those defences being spelt out u/s 13) will be available as defences before the Debts Recovery Tribunal. It only means that there is a change of forum and nothing more than that. The propositions relied upon by Mr. Rana in the Admiralty case as also the one concerning the Representation of the People Act cannot lead us to draw any contrary conclusion in the light of the aforesaid specific observations by the Apex Court in the case of *Industrial Credit and Investment Corporation of India Ltd. (supra)* on Section 22 of the RDB Act, with which we are concerned.

7. The last submission of Mr. Rana was that although the Apex Court has protected the RDB Act under Entry 45 of the List-I (Union List) of the Seventh Schedule to the Constitution in the judgment rendered in the case of *Union of India v. Delhi High Court Bar Association Vol. II (2002) SLT 556* the other entries of the same list, viz., Entry Nos. 10 and 14 are equally relevant. In our view, even so, none of these submissions can lead the appellant to canvass the invalidity of the provisions in any manner whatsoever.

8. For the reasons stated above, we do not find any error in the orders passed by the learned Single Judge in each of the above two Chamber Summonses. Both the appeals are, therefore, dismissed.