

(2015) 01 BOM CK 0104

In the Bombay High Court

Case No : Notice of Motion No. 2078 of 2012 in Suit No. 771 of 2002, Notice of Motion No. 1663 of 2013 in Suit No. 771 of 2002, Notice of Motion No. 163 of 2012 in Suit No. 918 of 2002 and Suit Nos. 876 and 4373 of 2001, 1314 of 2002, 941, 1138 and 2332 of 2003 and

ICICI Bank Limited

APPELLANT

Vs

Unimers India Ltd.

RESPONDENT

Date of Decision : 06-01-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Companies Act, 1956 — Section 4-A
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 2(g), 2(h)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 2(zd), 2(zd)(iii), 2(zf), 3, 4

Citation : (2015) 3 ABR 258 : (2016) 1 BC 282 : (2015) 4 BomCR 786

Hon'ble Judges : K.R. Shriram, J.

Bench : Single Bench

Advocate : Venkatesh Dhond, Senior Advocate and Gargi Bhagwat i/b Divekar Bhagwat and Co. and Sushrut Desai a/w. L.A. Rubens, Sujit S. Suryawanshi i/b Vigil Juris, for the Appellant; Vinod Kothari instructed by Apex Law Partners, Advocates for the Respondent

Judgement

K.R. Shriram, J.—This is a cluster of matters where the issue that requires to be decided is whether this Court has jurisdiction to receive, try and dispose of the suit? For the sake of convenience, I am taking the brief facts from suit No. 771 of 2002.

2. The plaintiff is a public limited company incorporated under the Indian Companies Act, 1913 (VII of 1913) and a Financial Institution within the meaning of Section 4-A of the Companies Act, 1956. Defendant no.1, is a company within the meaning of the Companies Act, 1956 (1 of 1956) and inter-alia carrying on business of manufacturing, producing, distributing, importing, exporting, buying, selling and dealing in all types of goods and products based on rubber and/or

plastics for domestic and industrial use and such other ancillary products. Defendant nos.2 to 10 are necessary parties inasmuch as they may have interest in the properties of defendant no.1 that are charged/mortgaged to the plaintiff.

3. This suit is filed by the plaintiffs as debenture trustees for the debenture holders in respect of debentures issued by defendant no.1. Defendant no.1 had executed a declaration of trust, i.e., a trust deed in favour of the plaintiff for the benefit of the debenture holders. The trust deed recorded the terms and conditions of this trusteeship including the remuneration therefor.

4. The applicant who is defendant no.1 has taken out Notice of Motion No. 2078 of 2012 in Suit No. 771 of 2002 raising the preliminary issue of jurisdiction. The applicant is seeking rejection of plaint under Order VII, Rule 11 of the Code of Civil Procedure, 1908 or in the alternative return the plaint to be presented in the Debt Recovery Tribunal. It was submitted that this suit was filed for recovery of amounts above Rs.10 lakhs allegedly due to the debenture holders and the plaintiff and other defendants are bankers and financial institutions and hence the suit was barred and the plaintiff should be directed to approach the Debt Recovery Tribunal under the provisions of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDB Act).

5. The facts in this case are almost identical to the facts in the judgment of a Division Bench of this Court in the matter of Krishna Filaments Ltd. Vs. Industrial Development Bank of India and Others, . The submissions of Mr. Dhond, counsel for the plaintiff were also similar to the submissions made on behalf of the banks/financial institutions in that suit. In short, what the plaintiff submitted was that the cause of action leading to the filing of the present suit is arising out of the breach or violation of the provisions of the trust deed by defendant no.1 in its capacity as a trustee for the debenture holders. It is not a suit by a bank or a financial institution for recovery of the debt due to it for which purpose a separate jurisdiction is created in favour of the Tribunals under Section 17 of the RDB Act and the cognizance of such suits by the other courts is barred under Section 18 of the RDB Act. In the case of Krishna Filaments Ltd. (supra), the Court came to a conclusion that the plaintiff or the bank acted as a trustee for the subscribers to the debentures of the defendant company and the suit filed was in that capacity to recover the amounts payable to the debenture holders. As the amount claimed, except a small amount of remuneration, was meant not for the plaintiff bank/financial institutions but was due to the subscribers of the debentures, the claim of the bank/financial institutions cannot be said to be for recovery of a debt due to a financial institution within the meaning of the term "debt" under the RDB Act. Therefore, the Court concluded that it cannot be held that the suit for recovery of these amounts would amount to an application for recovery of debts due to a financial institution under Section 17 of the RDB Act or that this Court will have no jurisdiction to receive try and dispose the suit.

6. In 2010, a Division bench of this Court in the matter of Alpha and Omega Diagnostics India Ltd. Vs. Asset Reconstruction Company (I) Ltd. and Others,

held that the view taken in the case of Krishna Filaments Ltd. (supra) no longer prevails. Mr. Dhond submitted that the facts in Alpha and Omega Diagnostics India Ltd. (supra) were totally different. I would agree to that extent with Mr. Dhond. There Asset Reconstruction Company (I) Ltd. (Arcil)-the respondent had applied for amendment of the original OA that was pending in the DRT on the ground that Oriental Bank of Commerce that had filed the OA for recovery of certain money had assigned all the financial assistance granted by the said bank to the petitioners/original defendants together with all underlying security, interest and all its right title in favour of Arcil. It was stated that pursuant to the said assignment, Arcil is deemed to have acquired all rights, privileges and powers of the original applicant bank under existing contracts, arrangements, security documents etc. Such being the nature of the assignment, pending proceedings initiated by Oriental bank of Commerce can be continued by Arcil. That application came to be allowed.

7. Thereafter, Arcil filed an application contending that assignment in favour of Arcil was also as a sole Trustee. Therefore, leave be granted to mention that Arcil is acting in its capacity as sole Trustee of Arcil-SBPS- 024-I Trust. The petitioner/original defendant, namely Alpha and Omega Diagnostics India Ltd., opposed the application of Arcil on various grounds and finally the DRT and later DRAT held that respondents, i.e., Arcil were acting both as Trustees and Managers of the Trust and as a Trustee, the legal owner of the financial assets and qualified institutional buyers are beneficial owners of the same. The application of Arcil was allowed. Therefore, the facts were different.

8. At the same time, the Division Bench, after analyzing the provisions of the RDB Act and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Securitisation Act), disagreed with the submissions of the petitioner/original defendant. The counsel for the petitioners had submitted that it is only when the banks and financial institutions are recovering amounts due to them, that they can approach the DRT and not otherwise and in that case, when Arcil was substituting itself as a trustee of a trust then, it could not have invoked the jurisdiction of the DRT.

It was submitted that it was only managing and administering the affairs as a Trustee and there being no debt due to it, which it could recover, then, the application for amendment, could not have been allowed in law. In other words, when the jurisdiction of the Tribunal could not have been exercised nor had the Tribunal any power or authority in that case, then, allowing the application for amendment would mean conferring jurisdiction on a Tribunal which it does not possess in law. Petitioner/original defendant had strongly relied on the judgment in the Krishna Filaments Ltd. case (supra) and submitted that merely because Arcil claims to be a reconstruction company and a secured creditor does not mean that it is entitled to invoke the jurisdiction of the DRT even if it is suing in its capacity as a Trustee and the remedy of Arcil would be in suing in a jurisdiction other than the DRT.

9. The Division Bench, however, held in paragraph 28, 29 and 30 as under :

28 Section 5 of the Securitisation Act has been reproduced by us precisely with this intent. Sub-section 1 thereof opens with a non obstante clause and, therefore, any agreement or law notwithstanding, the securitisation company or re-construction company may acquire financial assets of any bank or financial institutions in the manner set out therein. It is then provided that if bank is a lender in any financial assets acquired by the securitisation company or reconstruction company, then, such company shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institutions shall vest in the securitisation and re-construction company in relation to such financial assets. Sub-section 3 of section 5 deals with the all contracts, deeds, agreements etc. Sub-section 4 of section 5 enumerates further consequences of acquisition of financial assets under section 5(1). The consequence is that any suit, appeal or other proceedings of whatever nature relating to the financial assets, if pending by or against the bank or financial institution, the same does not abate nor is discontinued. It is in no way prejudicially affected, by reason of acquisition of financial assets by securitisation or reconstruction company, as the case may be, but it shall continue and can be prosecuted and enforced by or against securitisation company or re-construction company as the case may be. Therefore, the acquisition of rights or interest in financial assets with their legal effect and consequences is provided by section 5 of the Securitisation Act. It is with the object of giving effect to section 5 and particularly subsections 3 and 4 thereof that the definition of the term "financial institution" in section 2(h) of the RDB Act has been amended. Therefore, while enacting Securitisation Act the Legislature made amendment to the RDB Act simultaneously as is clear from the statements of objects and reasons and the relevant provisions of the RDB Amendment Act 30 of 2004 reproduced above. It is not as if the provisions are one sided. While it is permissible for the Securitisation or Reconstruction Company to acquire rights or interest in financial assets, the Legislature has taken care that the suits or proceedings instituted by the Bank or Financial institutions would not abate. At the same time, proceedings against the bank or financial institutions will not abate and can be continued against the securitisation or reconstruction company, as the case may be. If we do not give full effect to the legal provisions as noticed, then, we would be taking a narrow and restricted view thereof, although, they are widely worded. Once, the words are plain and clear, then, there is no scope for interpretation. It would be the duty of the Court to give effect to the words when their meaning is plain, unambiguous and clear. If this wide phraseology is ignored, we would be acting contrary to the object and purpose sought to be achieved by both enactments. Considering that they are enacted in public interest and for expeditious recovery of public dues, we cannot ignore the said statutory Mandate, and are, therefore, unable to accept the narrow and restricted interpretation placed by the petitioners herein. For this very reason, we reject the contentions of Mr. Samdani to the contrary.

29 Reliance placed by the petitioners on the decision of Krishna Filaments (supra) and particularly paras 23 to 26 thereof is misconceived. Therein, the Division Bench held that the bank IDBI acted as a Trustee for the subscribers to the debentures of the appellant company. The entire claim was on behalf of the debenture holders for the amounts that they have subscribed to the debentures. The Amount claimed was not of IDBI but the dues was of the subscribers of the debentures. It is only in the light of this factual position that the division bench concluded that the debt is not that of IDBI but was due and payable to the subscribers of the debentures. It is only in the light of this factual position that the division bench concluded that the debt is not that of IDBI but it has recovered it in Trust for the debenture holders. Therefore, the suit is maintainable on the original side of this Court. In other words, the civil court's jurisdiction is not ousted by the RDB Act, is the conclusion based on this unassailable and undisputed factual position.

30 In the view that we have taken and finding that the law laid down in Krishna Filaments cannot be said to be any longer valid and good in the light of the statutory provisions that the further issue, about correctness of the conclusions recorded by Division Bench in paras 25 and 26 and the interpretation placed on the definition of the word "debt", need not be considered. Now, the bank or financial institution as an assignee can proceed under the Securitisation Act, so also under the RDB Act. The term "debt" as appearing in section 2(g) would have to be considered in the light of the broad interpretation that we have placed on the provisions of the Securitisation Act. The distinction that is drawn by Mr. Samdani is no longer valid. Even if the bank or financial institution is acting as a Trustee as suggested, it can take recourse to the RDB Act. That is clear from a reading of the definition of the term "secured Creditor" as defined in section 2(zd) of the Securitisation Act. That term includes debenture trustee appointed by the Bank or financial institution or securitisation company or reconstruction company, where acting as such or managing a trust set up by such securitisation company or reconstruction company for securitisation or reconstruction company as the case may be or any other trustee as contemplated by section 2(zd)(iii). The term security interest is defined in section 2(zf) of the Securitisation Act and it means right, title and interest of any kind whatsoever of property created in favour of any secured creditor and includes any mortgage, charge, hypothecation and assignment. Therefore, when the bank or financial institution as in the case of Krishna Filaments is acting as a debenture Trustee, then, it will not be required to approach the ordinary civil court but can take recourse to the Securitisation Act and consequently, as permissible therein, the RDB Act as well. If the arguments to the contrary are accepted that would mean ignoring and brushing aside the inclusive definitions as noticed by us. Therefore, we are of the view that in the present case, considering the definition of the term "debt" and "financial institution" appearing in the RDB Act, 1993 and the relevant provisions of Securitisation Act so also to give full effect to the same, it will have to be held that it was permissible for parties such as Arcil to apply for amendments to the

Original Application No. 89 of 2005.

(emphasis supplied)

10. During the course of the arguments, this Court was informed by Mr. Dhond that in a similar matter namely ICICI Bank Vs. Official Liquidator for DSJ Financial Corporation Ltd. and Ors., Notice of Motion No. 2883 of 2011 in Suit No. 5237 of 1998 passed on 26th November 2014 a single Judge of this Court has taken a view that this Court will have jurisdiction. In other words, the Court has held that for a suit of this nature filed by a Bank as debenture trustee, this Court would have jurisdiction. I have considered the said order dated 26th November 2014 passed in the said matter. It does appear that the parties have not placed before the Court, the judgments of the Division Bench of this Court in the Krishna Filaments Ltd. matter (supra) and Alpha and Omega Diagnostics India Ltd. (supra).

The Apex Court in its judgment in the matter of the Municipal Corporation of Delhi Vs. Gurnam Kaur, has held as under :

11 Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. With all respect to the learned Judge who passed the order in Jamna Das" case and to the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavement or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the Court on the question or not whether any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a PG NO 939 pavement squatter. Professor P.J. Fitzgerald, editor of the Salmond on Jurisprudence, 12th edn. explains the concept of sub silentio at p. 153 in these words:

"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."

(emphasis supplied)

11. A Division Bench of this Court in the matter of Vidyasagar s/o Babarao Ashtake Vs. State of Maharashtra and Ors. 2005 (3) ALL MR 548 has held as under:

8 The ratio of a decision cannot be understood by referring to one or two sentences from the judgment. In order to understand the ratio of a judgment, it is not sufficient to read merely the concluding para of the judgment but it is necessary to read the same along with the facts of the case, the points for determination which were before the Court, the contentions raised in relation to such points, analysis of the said contentions, reasoning and conclusions arrived at in the decision. It is well-settled that the ratio decidendi of a decision is to be understood the reading of a judgment as a whole in the light of the question involved in the case and not by picking words and sentences therefrom divorced from the context, (vide: Union of India (UOI) and Others Vs. Dhanwanti Devi and Others, ; H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another, and Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd., and Mehboob Dawood Shaikh Vs. State of Maharashtra, . The Full Bench has reiterated this position in law in para 15 of its judgment. The Apex Court in Union of India Vs. Amritlal Manchanda and another, reported in (2004) 3 SCC has ruled that "Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context". In case of reference of an issue for the determination by a larger bench, it would be necessary to ascertain the ratio of the decision in the reference case. It is only the ratio decidendi of the decision that forms binding precedent. At the same time, it is also to be noted that there are certain exceptions to the rule of precedent. Some of the exceptions thereto are covered by the rule of per incuriam, the decision passed sub silentio or the decision being over-ruled by the Apex Court, directly or indirectly or by virtue of subsequent decision of the Apex Court having declared the law contrary to such decision of the Full Bench, etc. In the words of Lord Denning "Precedent should follow only so far as it marks the part of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches."

9 When the Court decides the matter without perceiving the relevant point involved in the matter, then such decision is said to pass sub silentio in respect of the said relevant point and therefore cannot be treated as an authority on that point. In relation to the rule of sub silentio, Prof. P.J. Fitzgerald has explained the concept in Salmond on Jurisprudence as under :

"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not

have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."

12. Therefore, the learned Judge has not had the benefit of considering the judgments in Krishna Filaments Ltd. case (supra) and Alpha and Omega Diagnostics India Ltd. (supra), while deciding the ICICI Bank (supra) case. In view thereof, the decision in the ICICI Bank case has been passed sub silentio in respect of the relevant point. With all due respect to the learned Judge, I do not consider the said order as an authority on the issue as to whether debenture trustee can maintain an action in this Court.

13. In my view, since a Division Bench of this Court has categorically stated that the law laid down in Krishna Filaments Ltd. (supra) cannot be said to be any longer valid and good and when the bank or financial institution as in the case of Krishna Filaments is acting as a debenture Trustee, then, it will not be required to approach the ordinary civil court but can take recourse to the Securitisation Act and consequently, as permissible therein, the RDB Act as well, this Court will not have jurisdiction. Therefore, the plaint in all the above suits be returned to the respective plaintiffs to be presented before the DRT.

14. In view of the facts and circumstances of this case, no order as to costs.