
(2014) 06 KAR CK 0075

In the Karnataka High Court

Case No : W.P. Nos. 23806/14-23810/2014 and W.P. No. 23811/2014 (GM-DRT)

IDEB Projects Pvt. Ltd.

APPELLANT

Vs

HDFC Bank Ltd.

RESPONDENT

Date of Decision : 23-06-2014

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 32
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 22
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 20

Citation : (2014) 4 AKR 118 : (2015) 1 BC 683 : (2014) ILR 3937 : (2014) 6 KarLJ 385 : (2014) 4 KCCR 3061

Hon'ble Judges : D.H. Waghela, C.J.; H.G. Ramesh, J

Bench : Division Bench

Advocate : Ajesh Kumar S., Advocate for AKS Law Associates, Advocate for the Appellant; Sreevatsa, Sr. Advocate for Sudheer H.M., Advocate for Wadia Ghandy and Co, Advocate for the Respondent

Final Decision : Dismissed

Judgement

D.H. Waghela, C.J.—The petitioners have invoked Article 227 of the Constitution to call into question the order dated 06.03.2014 of Debts Recovery Appellate Tribunal at Chennai ("DRAT" for short) in MA No. 3/2014. That MA No. 3/2014 was preferred from the order dated 07.11.2013 of learned Presiding Officer, Debts Recovery Tribunal ("DRT" for short), Bangalore, and that order of DRT was an order made on Interim Application No. 4835/2012 seeking to cross-examine A.W. 1. The Interim Application No. 4835/2012 was made by the original defendants who are petitioners before this Court and that application was allowed by DRT only on the basis that the contentions of learned counsel for the petitioners herein appeared to be containing higher degree of probabilities. Earlier to that decisive part of the order, only the contentions of learned counsel for the petitioners herein were recorded and that order came to be challenged by the respondent herein before DRAT. The aforesaid order of DRT permitting cross-

examination of a witness of the respondent herein has been set aside by the impugned order of DRAT practically by recording the reason that, "It is seen that as per the statement made by the Appellant Bank all relevant documents are already available before the Tribunal below and therefore the question examination of the bank's witness does not arise." It is also observed by DRAT while allowing the appeal of the respondent herein that the petitioners can base their submissions on the documents already available, and therefore, the order of DRT was liable to be set aside.

2. Upon appearance of learned senior counsel Mr. Sreevatsa for the respondent-bank herein, on caveat, the petitioners were heard in extenso for final disposal at the admission stage.

3. Learned counsel Mr. Ajesh Kumar Shankar appearing for the petitioners vehemently agued that, as was successfully argued before DRT, the petitioners had raised serious disputes regarding the sale of machineries by the respondent-bank and appropriation of the sale proceeds from such sales. He further submitted that DRT was of the opinion that cross-examination of the witness of the bank would help to have a clearer picture regarding controversies in question and if the respondent-bank had no intention of suppressing material facts or cover up its own misdeeds, it ought not to have opposed the application of the petitioners for cross-examination of the witness. He also submitted that it would be denial of fairness, fair-play and principles of natural justice, if the witness of the bank who deposed before DRT by filing an affidavit were not allowed to be cross-examined.

4. Learned counsel for the petitioners relied upon an earlier order dated 24.01.2013 of learned single Judge of this Court in respect of the same proceedings before DRT wherein, the petition of the present petitioners was dismissed when an amendment to the pleadings before DRT were called into question. That was cited as a precedent for the proposition that the petition was entertained on merits. He also relied upon a Division Bench judgment of the Bombay High Court in Sonu Textiles and others v. Punjab National Bank (2008(3) Bom CR 889), for the observation made therein to the effect that while exercising the powers of the Tribunal under Rule 12(6) of the Debts Recovery Tribunal (Procedure) Rules, 1993 ("DRT Rules" for short), it has to be kept in mind that the purpose of cross-examination is normally to test the veracity of the witness and to bring true and correct facts on record. These are primarily matters relating to procedural law which should be enforced objectively and with clear intent to serve the ends of justice. It is also observed in that judgment that the Tribunal has to determine the issues fully and finally, while affording proper opportunity to the parties to lead their evidence, of course, in compliance to the provisions of Rule 12(6). The Bombay High Court has emphasized that the words " necessary to do so" appearing in Rule 12(6) are of great significance and the most essential condition which should be satisfied before the application for cross-examination could be allowed. It was on that basis submitted that the present

case of the petitioners was a fit case where the request for cross-examination of a witness was required to be allowed and was in fact allowed by DRT to completely and fully determine and decide the claim of the bank and the defence of the petitioners.

5. Learned senior counsel appearing for the respondent submitted that recent clarification of law on the point of entertainment of petitions under Article 226 or 227 bars the remedy sought to be availed by the petitioners, and that the order of DRAT was just and proper. Learned senior counsel relied upon recent decision of the Apex Court in T.P. Vishnu Kumar Vs. Canara Bank P.N. Road, Tiruppur and Others, , for the following propositions;

"9. Powers of the High Court under Article 226 cannot be invoked in the matter of recovery of dues under the Act, unless there is any statutory violation resulting in prejudice to the party or where such proceedings or action is wholly arbitrary, unreasonable and unfair. When the Act itself provides for a mechanism, by an appeal u/s 20 of the Act, in our view, the High Court is not justified in invoking jurisdiction under Article 226 of the Constitution of India to examine that the rejection of the applications by the tribunal was correct or not. The Petitioner and the contesting Respondents have no case that either the bank or the tribunal had violated any statutory provisions by rejecting their applications.

10. Writ Petition was preferred against the rejection of applications and the same were entertained by the learned Single Judge and decided on merits and which in our view is impermissible while exercising its jurisdiction under Article 226 of the Constitution. If the correctness or otherwise of each and every interim order passed by the Tribunal, is going to be tested in a writ court, it will only defeat the object and purpose of establishing such tribunal. We already noticed that due to the intervention of the writ court, the matter got delayed for four years defeating the very purpose and object of the Act. We, therefore, find no merit in these petitions and the same are dismissed."

6. It was also submitted, relying upon the earlier decision of the Apex Court in Union of India and Another Vs. Delhi High Court Bar Association and Others, clarifying the law on the subject by an elaborate discussion as under;

"23. In other words, the Tribunal has the power to require any particular fact to be proved by affidavit, or it may order the affidavit of any witness may be read at the hearing. While passing such an order, it must record sufficient reasons for the same. The proviso to R. 12(6) would certainly apply only where the Tribunal chooses to issue a direction, on its own, for any particular fact to be proved by affidavit or the affidavit of a witness being read at the hearing. The said proviso refers to the desire of an applicant or defendant for the production of a witness for cross-examination. In the setting in which the said proviso occurs, it would appear to us that once the parties have filed affidavits in support of their respective cases, it is only thereafter that the desire for a witness to be cross-examined can legitimately arise. It is at that time, if it appears to the Tribunal,

that such a witness can be produced and it is necessary to do so and there is no desire to prolong the case that it shall require the witness to be present for cross-examination and in the event of his not appearing, then the affidavit shall not be taken into evidence. When the High Courts and the Supreme Court in exercise of their jurisdiction under Art. 226 and Art. 32 can decide questions of fact as well as law merely on the basis of documents and affidavits filed before it ordinarily, there should be no reason as to why a Tribunal, likewise, should not be able to decide the case merely on the basis of documents and affidavits before it. It is common knowledge that hardly any transaction with the Bank would be oral and without proper documentation, whether in the form of letters or formal agreements. In such an event the bona fide need for the oral examination of a witness should rarely arise. There has to be a very good reason to hold that affidavits, in such a case, would not be sufficient."

7. Delving in to the relevant facts of the present proceeding, learned counsel for the respondent referred to the affidavit of the claim of the respondent wherein, the Constituted Attorney and Recovery Manager of the bank had, in effect, only deposed that the claim of the bank was based upon part of the records maintained by the bank in the ordinary and regular course of business. Along with such affidavit, the documents, numbering about 68, were submitted. As against that, an application with the affidavit of the Managing Director of the petitioner-company was submitted with a prayer to permit the petitioners herein to cross-examine the Manager/Authorised representative of the respondent-bank. The main contention in the affidavit of the petitioners herein was that the respondent-bank had pleaded that the petitioners had sold the Plant and Machinery, whereas the contention of the petitioners was that the Plant and Machinery were sold by the bank without following the procedure prescribed under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act" for short). It was specifically contended on behalf of the petitioners herein that "in order to establish the contentions of the respondent Company as well as to bring clarity to the issue of the quantum of monies recovered by the Applicant Bank from the sale of pledged Plant and Machinery, the Respondent Company would prefer to cross-examine the Manager, Mr. Sandesh Prabhu of the Applicant Bank."

8. With that background of facts, it was submitted for the respondent-bank that the petitioners were dragging the proceedings since the year 2011 by raising such issues and controversies with not only an intention of prolonging the recovery proceedings, but by way of an attempt to prove their case by evidence to be extracted from the oral testimony of a witness as against the volume of documentary evidence exclusively relied upon by the bank for proving its case.

9. There is no dispute about the legal position that the original application of the petitioners herein was made under the provisions of Rule 12 of DRT Rules. The relevant part of Rule 12 may be extracted as under;

"12. Filing of reply and other documents by the defendant.

(1) to (5).....

(6) The Tribunal may at any time for sufficient reason order that any particular fact or facts shall be proved by affidavit, or that the affidavit of any witness shall be read at the hearing, on such conditions as the Tribunal thinks reasonable:

Provided that after filing of the affidavits by the respective parties where it appears to the Tribunal that either the applicant or the defendant desires the production of a witness for cross examination and that such witness can be produced and it is necessary to do so, the Tribunal shall for sufficient reasons to be recorded, order the witness to be present for cross examination, and in the event of the witness not appearing for cross examination, then, the affidavit shall not be taken into evidence and further that no oral evidence other than that given in this proviso will be permitted.

(7) If the defendant denies his liability to pay the claim made by the applicant, the Tribunal may act upon the affidavit of the applicant who is acquainted with the facts of the case or who has on verification of the record sworn the affidavit in respect of the contents of application and the documents as evidence.

(8) Provisions contained in section 4 of the Bankers' Books Evidence Act, 1891 (18 of 1891) shall apply to a certified copy of any entry in a banker's book furnished along with the application filed under sub-section (1) of section 19 by the applicant."

It is clear from the scheme of the above Rule and the provisions of Section 22 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, that the DRT and the Appellate Tribunal are not bound by the procedure laid down by the Code of Civil Procedure, 1908, and subject to the relevant legal provisions and the rules, the Tribunals have the powers to regulate their own procedure. Under such scheme, the normal mode of proving facts before the Tribunal is by affidavit and production of documents subject to the provisions regarding affidavit of any witness being read on such condition that the Tribunal may impose. By way of a special provision, made in the proviso to sub-rule (6) of Rule 12, it is prescribed that, where it appears to the Tribunal that the party desires production of a witness for cross-examination and such witness could be produced and it is necessary to do so, the Tribunal shall, for sufficient reasons to be recorded, order the witness to be present for cross examination. After such order being made, if the witness does not appear for cross-examination, the affidavit already placed on record shall not be taken into evidence. Thus, satisfaction of the Tribunal about necessity of examination of a witness is crucial to making an order for cross-examination of a witness and non-compliance with such order has serious consequence for the parties. It is in this context that the Rule not only requires satisfaction of the Tribunal as to the necessity to do so, but also requires recording of sufficient reasons for ordering the witness to be present for cross-examination.

10. In the facts of the present case, as noted earlier, the original order of DRT

hardly records any reason for allowing the application of the petitioners. Merely recording the contentions of learned counsel for the parties and then stating that "contention of learned counsel for defendants appears to be containing higher degree of probabilities" could not be regarded as recording of reasons. In such circumstances, when the bank approached the DRAT against the order in substance as above, the Appellate Tribunal had no option but to interfere. However, while interfering with the order of DRT by the order impugned herein, the Appellate Tribunal also recorded its own reason on merits of the original application of the petitioners by stating that "It is seen that as per the statement made by the Appellant Bank, all relevant documents are already available before the Tribunal below and therefore, the question of examination of the bank's witness does not arise."

11. In view of the facts and the legal position recorded hereinabove, it is obvious that the present petitions are neither maintainable under Article 227 of the Constitution nor can they be entertained on merits, in view of the lapses on the part of the DRT in exercising its powers under Rule 12(6) of DRT Rules.

12. Under the circumstances, the petitions are dismissed, with no order as to cost, even as learned counsel for the respondent has submitted that the interlocutory proceedings and appeals therefrom have been responsible for inordinate delay in hearing before the DRT. We hope and expect that now the original proceedings pending before the DRT shall be expeditiously proceeded with and the parties shall co-operate in earliest practicable hearing and disposal of the original OA No. 393/2011 before the DRT, Bangalore.