
(2004) 02 BOM CK 0065
In the Bombay High Court
Case No : Writ Petition No. 4093 of 2003

Jaikisan Bhaiyya

APPELLANT

Vs

United Western Bank Ltd.

RESPONDENT

Date of Decision : 12-02-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Constitution of India, 1950 — Article 227
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19, 22(1)

Citation : (2004) 5 BomCR 705 : (2004) 2 MhLj 755

Hon'ble Judges : A.S. Oka, J

Bench : Single Bench

Advocate : V.R. Mundra, for the Appellant; Hemant Chandurkar, for the Respondent

Final Decision : Allowed

Judgement

A.S. Oka, J.—By an Order dated 20th January, 2004 it was directed that the present petition shall be decided finally at the admission stage. I had called for the report of the Office for confirming that the present petition pertains to the jurisdiction of the Single Bench. Accordingly, the Office has submitted report. The petition was finally heard and the counsel for the Parties argued at length. The petition is taken up today for dictation of the judgment.

2. This petition under Article 227 of the Constitution of India has been preferred by the petitioner for challenging the order passed by the learned Presiding Officer of the Debts Recovery Tribunal, Nagpur (hereinafter referred to as the Tribunal) and the judgment and Order passed by the learned Chairperson of the Debts Recovery Appellate Tribunal, Mumbai (hereinafter referred to as the Appellate Tribunal).

3. The respondent Bank filed an Original Application No. 413 of 2001 against M/s S. N. K. Overseas Limited and six others including the present petitioner for

recovery of a sum of Rs. 16,57,09,000.88/- with future interest " Rs. 25% p.a. The present petitioner has been impleaded as defendant No. 4 in the said Original Application which was filed u/s 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the said Act of 1993). The petitioner and the defendant No. 7 filed a Joint Written Statement. In the said Written Statement the petitioner contended that there was no cause of action for filing the Original Application against the petitioner and defendant No. 7. It was contended that the petitioner and defendant No. 7 being the Directors of the defendant No. 1 Company were not personally liable for the acts of the Company. It was also contended that the petitioners were not the guarantors for the loan transactions.

4. The petitioner made interlocutory application No. 588/02 in the said Original Application and contended that the petitioner has been unnecessarily impleaded in the said proceedings and the Original Application does not disclose any cause of action against the petitioner. The petitioner pointed out that he was one of the Directors of the defendant No. 1 Company with limited liability. The petitioner relied upon the Memorandums of Association and Articles of Association disclosing that the liability of the Members is limited. The petitioner also contended that he was only a nominal Director and has no share holding in the Company. The said Application was opposed only by the respondent Bank. The contention raised by the respondent Bank is that the defendant No. 1 Company has changed the name from time to time. It was contended that the defendant No. 4 was jointly and severally liable along with the other defendants and hence cannot be discharged from the liability. The said application was heard by the Tribunal, The petitioner filed Written Notes of Arguments. By judgment and Order dated 26th March, 2003, the Tribunal rejected the said application by holding that question of discharging the petitioner will be decided along with the merits of the case and it cannot be decided at preliminary stage. The petitioner was directed to pay costs of Rs. 5000/-. An appeal was preferred by the petitioner against the judgment of the Tribunal. The said appeal was dismissed. While dismissing the appeal, the learned appellate Tribunal held that there was no provision in the said Act of 1993 to decide any point as a preliminary issue and as such the issue raised in the interlocutory application by the petitioner cannot be decided as a preliminary issue and plea can be considered only when the Original Application is decided.

5. The learned counsel appearing for the petitioner relied upon the averments made in the Original Application by the respondent and pointed out that there is no pleading in the said application to indicate that the petitioner is liable to pay the dues payable by defendant No. 1 Company. The learned counsel relied upon the judgment of the Apex Court reported in I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others, . and contended that by invoking the principles incorporated in Order 7, Rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code of 1908), the Tribunal ought to have decided the issue raised on merits. The learned counsel contended that the petitioner was neither

the guarantor nor the signatory to any of the documents executed by or on behalf of the defendant No. 1 Company. The learned counsel also relied upon the judgment of the Apex Court reported in 2003 (2) MLJ 529 : 2003 (5) BCR 454, Saleem Bhai and Ors. v. State of Maharashtra and Ors. and contended that the application made by him ought to have been decided on merits. The learned counsel for the petitioner also relied upon a judgment of the Delhi High Court reported in Indian Overseas Bank Vs. M/s. R.M. Marketing and Services Pvt. Ltd., .

6. The learned counsel for the respondent has supported the impugned Judgments and Orders. The learned counsel for the respondent contended that there was no provision in the said Act of 1993 for deciding any point as a preliminary issue. He submitted that the learned appellate authority was right when it was held that the issue raised was involving a mixed question of law and fact. He submitted that considering the fact that the tribunal established under the said Act of 1993 has been essentially established to ensure speedy disposal of the cases filed by the Financial Institutions it is not permissible to entertain such application at interim stage. The learned counsel relied upon Section 34 of the said Act of 1993 and submitted that the provisions of the said Act of 1993 have overriding effect. The learned counsel therefore, submitted that the reliance cannot be placed upon Order 7, Rule 11 of the said Code of 1908. He submitted that the facts of the case in the judgment relied upon by the petitioner were totally different. He submitted that the reliance cannot be placed on the said decision as the factual situation in the said cases was totally different.

7. I have considered the rival submissions of the parties. It is necessary to deal with the first submission made by the learned counsel for the petitioner based on Section 34 of the Act of 1993. Section 34 of the said Act of 1993 reads thus :

"34. Act to have overriding effect. -- (1) Save as provided under Sub-section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1985 (1 of 1986) and the Small Industries Development Bank of India Act, 1989 (39 of 1989). The learned counsel for the respondent relying upon the said provision contended that Order 7, Rule 11 of the said Code of 1908 will have no application to the proceedings before the Tribunal under the said Act of 1993.

8. Before the effect of the Section 34 is considered, it is necessary to refer to the judgment of the Apex Court relied upon by the petitioner in I.T.C. Limited. The said judgment arises out of a Civil Suit filed by a Bank for Recovery of amount. The said Civil Suit was transferred to a Tribunal which was established under the

said Act of 1993. Before the Tribunal, an Application was filed under Order 7, Rule 11 of the said Code of 1908 for rejection of the plaint on the ground that no cause of action was disclosed in the Plaint against the applicant in the said application. The said application was rejected by the Tribunal by holding that same cannot be entertained at that stage as the same involves a mixed question of law and fact. The said Order was challenged by preferring an appeal which was dismissed by the appellate tribunal. The matter was taken to the Karnataka High Court by filing a Writ petition which was again rejected by the learned Single Judge of the said High Court by holding that the question raised has to be decided at the time of trial. A writ appeal was filed against the said decision before the Division Bench of Karnataka High Court which was dismissed by holding that at the stage of the application under Order 7, Rule 11 in order to find out whether the plaint did not disclose a cause of action, the Court should not look into anything except the plaint. It was also observed that after the issues were framed it was not desirable to consider the said application under Order 7, Rule 11 of the said Code of 1908. The matter was taken to the Apex Court by way of Special Leave Petition. The Apex Court held that :

"We, therefore, hold that the fact that issues have been framed in the suit cannot come in the way of consideration of this application filed by the appellant under Order 7, Rule 11 of the said Code of 1908". After recording the said finding, the Apex Court proceeded to decide the question whether the plaint can be rejected by invoking the provision of Order 7, Rule 11 of the said Code of 1908. Thus, the Apex Court was dealing with the case where application under Order 7, Rule 11 of the said Code of 1908 made in an Original Application pending before the Tribunal at the stage when the issues were already framed. The said application under Order 7, Rule 11 of the said Code of 1908 was rejected by the tribunal on the ground that a mixed question of fact and law was involved and, therefore, such application cannot be entertained. The rejection of the said application by the Tribunal was confirmed by the appellate authority and by the High Court of Karnataka in writ petition as well in writ appeal. The Apex Court considering the provision of Order 7, Rule 11 of the said Code of 1908 held that even if issues are framed, the Application under Order 7, Rule 11 of the said Code of 1908 has to be considered. Rule 1 I(a) of Order 7 of the said Code of 1908 provides that the plaint shall be rejected where it does not disclose the cause of action. Therefore, when a case is made out before the tribunal that the plaint itself does not disclose the cause of action, the Apex Court held that such application should be considered even after the issues are framed obviously because while considering such an application the only thing which is to be seen is the averments made in the plaint. Thus, Apex Court held that when application under Rule 11 of Order 7 is made, it is required to be decided on merits. Therefore, even when the Apex Court in a judgment reported in Azhar Hussain Vs. Rajiv Gandhi, while referring to power under Rule 7 of the Order 11 held that "the whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy

the time of the Court." In the other judgment of the Apex Court relied upon by the learned counsel for the petitioner in a case of Salimbhai the Apex Court has taken a view that the trial Court can exercise power under Order 7, Rule 11 of the said Code of 1908 at any stage before the conclusion of trial. The Apex Court also held that for the purpose of deciding the application under Clause(a) of Rule 1 of Order 7 of the said Code of 1908, the averments in the plaint are germane and the plea taken by the defendant in the Written Statement would be wholly irrelevant. The Apex Court held that a direction given to file Written Statement without deciding the application under Order 7, Rule 11 of the said Code of 1908 was an irregular exercise of jurisdiction.

9. Considering the view taken by the Apex Court especially in a case of I.T.C. Limited, the Tribunal ought to have considered the application of the petitioner on merits. Section 22(1) of the said Act of 1993 provides that the Tribunal shall not be bound by the procedures laid down in the said Code of 1908 but shall be guided by the principles of natural justice. It cannot be said that the Apex Court was not conscious of provision of Section 22(1) while taking the view which has been taken in the case of I.T.C. Limited. If the Apex Court in the case of I.T.C. Ltd. has taken a view that an Application under Order 7 Rule 11 of the said Code of 1908 ought to have been considered, it cannot be said that the tribunal had no power to entertain and decide an Application under Order 7, Rule 11. It cannot be overlooked that the Tribunal is bound by the principles of natural justice. When an application is made by a defendant before the Tribunal in which the contention is raised that no cause of action is disclosed in the plaint or in the Original Application for prosecuting the said proceeding against the defendant, the principles of natural justice require that such application should be heard on merits instead of directing the concerned defendant to face trial. Considering the application made by the petitioner there was no question of framing any preliminary issue as such as the petitioner had not called upon the tribunal to decide any issue. All that the Tribunal was called upon to do was to find out whether any cause of action against the petitioner was disclosed in the Original Application. If the Tribunal was required to go into the defence of the petitioner then the question of deciding preliminary issue would have arisen. Considering the Judgment of the Apex Court in the case of I.T.C. Ltd., the argument based Section 35 of the said Act of 1993 cannot be accepted.

10. In view of this position I have perused the averments made in the Original Application. In the Original Application the respondent has given history regarding the change of name of the defendant No. 1 Company. The application refers to various documents executed by and on behalf of the defendant No. 1 Company. The application gives particulars of the documents executed by the defendant No. 1 by way of security. In paragraph No. 7 under the Heading "Grounds of Relief it is stated that "As the defendants No. 1 to 7 have failed to repay jointly and severally the debts due to the applicant Bank in conformity with the terms and conditions of the Letter of Credit facility, the applicant Bank is entitled for Recovery Certificate and other reliefs as prayed above against the

defendant Nos. 1 to 7". It is further stated that in paragraph No. 7, that "The defendant Nos. 2 to 7 in spite of being Directors of the defendant No. 1 and being jointly and severally liable for repayment of the dues have deliberately neglected to take any positive steps and on the other hand are indulging in the acts of bad faith including disposing of the assets of defendant No. 1 Company and it is apprehended that they are doing the same in respect of their individual assets also."

11. The averments in the original application show that it is not the case of the respondent that the petitioner is a signatory to any documents executed by or on behalf the defendant No. 1 which is a Limited Company. It is not the case of the respondent that the petitioner is a guarantor who has agreed to repay the amount advanced to the defendant No. 1. Nothing is pleaded in the application even to indicate as to how the petitioner is liable jointly and severally with the defendant No. 1 Company for repayment of the amount which was advanced to the defendant No. 1. What stated is that the defendants 2 to 7 are jointly and severally liable for repayment of the dues.

12. There is an averment in the Interlocutory Application No. 588/02 by which the petitioner has stated that he was a nominal Director having no share holding in the Company. Even the said fact is not disputed in the reply filed by the respondent to the said application. Even according to the case of the respondent, the petitioner is neither a borrower nor a guarantor.

13. It is not necessary for the respondent Bank to plead evidence against the petitioner in the Original Application. However, the cause of action against the petitioner has to be disclosed in the sense that the respondent must disclose as to how the petitioner is liable to repay the amount which was advanced to the defendant No. 1 Company by the respondent. A cause of action means a bundle of essential facts which is necessary for the plaintiff to prove before he can succeed. In the Original Application the averments are as regards the default committed by the defendant No. 1 company. Paragraph No. 5.21 of the application reads as under;

"5.21. The applicant submits that in spite of repeated assurances from the defendant No. 1 Company to liquidate the account in due course of time, another letter dated 28th September 2000 was received by the applicant styled as repayment of loan. By the said letter the defendant No. 1 Company shown its willingness to clear off all the dues as early as possible. The said letter is annexed herewith as Exh. No. 70." Paragraph No. 5.24 of the Original Application reads as under :

"The applicant submits that considering the intentions of the defendant No. 1 Company of not paying the huge amount the applicant caused a legal notice through its Counsel on 9th November 2000, which was duly served on defendant No. 1 Company. The defendant No. 1 Company was called upon to liquidate the account within 21 days failing it was made very clear that the applicant may

approach the Court for recovery of its dues along with interest. The postal acknowledgments of the notice are annexed herewith as Exh. Nos. 76 to 81 respectively and postal receipts are annexed herewith as Exh. Nos, 82 to 87. In spite of the fact that the notices were served on the defendants they did not bother to repay the amount nor they replied the said notice. A copy of the said notice is annexed herewith as Exh. No. 88. As such this claim has arisen and the applicant Bank became entitled to approach this Hon"ble Tribunal for various reliefs mentioned hereinafter."

The allegations as regards the execution of the document are only against the defendants 2 and 3.

14. The learned counsel for the respondent stated that the reference to the defendant No. 2 and 3 has been made in the application as per the resolution passed by the Board of Directors. By the said resolution, the defendants 2 and 3 were authorised to sign the documents. The reading of the entire application shows that the entire cause of action which is pleaded is as regards the defendant No. 1 Company. Admittedly the defendant No. 1 Company was the Borrower. There is not even an averment in the application as regards the basis on which the liability of the present petitioner is alleged.

15. The Appellate Tribunal has observed that the Written Statement of the petitioner and defendant No. 7 is totally silent about the said contention. However, the said contention has been clearly raised in paragraph Nos. 33 and 34 of the Written Statement. In any case for dealing with an application under Order 7, Rule 11, the Written Statement was irrelevant. The judgment of the Apex Court in the case of I.T.C. was brought to the notice of the appellate tribunal. However, the appellate tribunal has not considered the same in proper perspective. The tribunal and appellate tribunal have not referred to the averments in the Original Application for ascertaining whether any cause of action is disclosed as against the defendant No. 4 in the said application. Merely because the name of the defendant No. 1 Company has undergone a change cannot be a ground not to consider the plea of the petitioner.

16. As per the case made out in the Original Application, the petitioner is neither a Borrower nor a Guarantor. The defendant No. 1 being a Company incorporated is a separate legal entity and unless a Director of the said Company is a surety or a guarantor, he cannot be fastened with liability to repay the loan advanced to the defendant No. 1 Company. Even assuming that the petitioner is a shareholder of the defendant No. 1 Company, his liability will be only to the extent of balance amount due on the shares held by him and that liability will arise only when call is duly made. The Original Application filed by the respondent does not disclose any cause of action against the petitioner.

17. Therefore, interference is called for in this petition under Article 227 of the Constitution of India as there is no clear illegality in the impugned Judgment.

18. Hence, I pass the following order.

- i) The petition is allowed. No order as to costs.
- ii) The impugned judgments and Orders are quashed and set aside. Interlocutory Application No. 588/2002 stands allowed. The Original Application stands rejected as against the petitioner.
- iii) Certified copy is expedited.