

(2012) 06 BOM CK 0115

In the Bombay High Court

Case No : Writ Petition No. 4541 of 2012

Kishan Chhelaram Manik and Manik Engineering Private Limited

APPELLANT

Vs

State Bank of India, Manik Metals and Trading Company Private Limited and Others

RESPONDENT

Date of Decision : 19-06-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 20, Order 5 Rule 5, Order 9 Rule 13
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19(4),
22, 22(2)(g)

Citation : AIR 2012 Bom 127 : (2013) 1 BC 288 : (2012) 4 BomCR 601 : (2012) 114 BOMLR 2619

Hon'ble Judges : V.K. Tahilramani, J;D.D. Sinha, J

Bench : Division Bench

Advocate : Sanjay Jain instructed by Maniar Srivastava Associates, for the Appellant; A.G. Damale with S.J. Bhambhlani, for the Respondent

Final Decision : Dismissed

Judgement

D.D. Sinha, J.—Heard Mr.Jain, the learned counsel for the petitioners and Mr.Damale, the learned counsel for the respondent no.1. This Writ Petition is directed against the order dated 16.4.2012 passed by the Debts Recovery Appellate Tribunal in Misc. Appeal No.295 of 2008 whereby the appeal filed by the petitioners challenging the order dated 18.6.2008 passed by the Debts Recovery Tribunal No.1 in Misc. Application No.34 of 2006 came to be dismissed.

2. The facts involved in the present case are as follows:-

(i) A suit was filed by the respondent no.1 bearing no.198 of 1986 against the petitioners and the respondent nos.2, 4 & 5 and one Challaram Assandas Manik for recovery of a sum of Rs.1,91,32,997.96. The petitioners were sued in their capacity as guarantors in the said suit. The respondent no.2 was the principal debtor.

(ii) The respondent no.1 had filed a suit bearing no.197 of 1986 against the petitioners (original defendants) for recovery of its outstanding dues. The petitioners were sued in their capacity as the principal debtors in the other suit. The petitioners contested both the aforesaid suits. The petitioners had appointed one M/s.Sanjeev Kanchan & Co., Advocates to act and plead on their behalf in both the suits.

(iii) During the pendency of the suit, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the "Act") came into force. Both the suits filed by the respondent no.1 on the Original Side of this Court stood transferred to the Debts Recovery Tribunal. The suit was registered as Original Application. The other suit which was filed by the respondent no.1 where the petitioners were the principal debtors was registered as Original Application No.271 of 2001.

(iv) The suit was transferred to the DRT on or about 27.7.2001. On 2.8.2001, the order for issuance of transfer notice in the Original Application was passed. The summonses were dispatched at the addresses mentioned in the cause title. The packets addressed to the petitioners were returned by the postal department with the remark "Left".

(v) On 7.6.2002 the respondent no.1 Bank filed an application for substituted service by way of publication against the petitioners. The said application was allowed by the Tribunal on the same day. Summonses were served upon the petitioners by publication in the local newspaper dated 24.7.2002. On 14.10.2005 ex parte order was passed against the petitioners. The ex parte order passed by the DRT was challenged by filing an application for setting aside the ex parte order by the petitioners. The said application was rejected by the Tribunal vide order dated 18.6.2008. The petitioners being aggrieved by the same filed a Misc. Civil Appeal before the DRAT which was dismissed by the DRAT vide order dated 16.4.2012. The petitioners being aggrieved by the same filed the present Writ Petition.

3. Mr.Jain, the learned counsel for the petitioners, has submitted that the impugned order has been challenged by the petitioners primarily on the grounds that after the suit was transferred from the Original Side of this Court to the Debts Recovery Tribunal, Mumbai, in view of the provisions of section 19(4) & (5) of the Act and rule 11 of the Debts Recovery Tribunal (Procedure) Rules, 1993 (hereinafter referred to as the "Rules") and Regulation 17, 18 & 19 of the Debts Recovery Tribunal Regulation of Practice, 1997, it was incumbent upon the respondent no.1 Bank to serve transfer notice upon the petitioners.

4. It is contended that the Tribunal ought to have taken into consideration the following aspects before passing the order for substituted service. Those are: (i) the person on whom notice is sought to be served is deliberately keeping himself away to avoid service, or (ii) for some other reason, it is impossible to serve in the normal course/ordinary way. It is contended that the Tribunal or the Court

has to satisfy itself that the aforesaid pre-requisites exist for passing such order. In the absence thereof, in view of Order V Rule 20 of the C.P.C., the Tribunal is not legally entitled to pass an order for substituted service. In the instant case, the order dated 7.6.2002 passed by the Tribunal is not in conformity with Order V Rule 20 of the C.P.C. and, therefore, the same is bad in law and the petitioners cannot be treated to be duly served in law in view of the publication of summons in the local newspapers, pursuant to the order dated 7.6.2002 which itself was bad in law being violative of Order V Rule 20.

5. The learned counsel for the petitioners has submitted that there was nothing on record to show that the petitioners were deliberately keeping themselves away to avoid service of notice nor there was any other material on record to demonstrate that it was impossible to serve the petitioners in the normal course. In the absence thereof, the order dated 7.6.2002 passed by the Tribunal for substituted service of notice is unsustainable in law and, therefore, the DRAT ought to have allowed the appeal filed by the petitioners and ought to have quashed and set aside the ex parte order passed by the DRT. The learned counsel for the petitioners further contended that since the order for substituted service passed by the DRT itself being bad in law, it can safely be presumed that the petitioners cannot be said to be served with the summons on publication in local newspapers and, therefore, the ex parte order passed by the Tribunal is not in conformity with the principles of natural justice which is the requirement of law. Since the order impugned is in violation of the principles of natural justice, it cannot be sustained in law and, therefore, liable to be quashed and set aside.

6. The learned counsel for the petitioners, in order to substantiate his contentions, placed reliance on the decision of the Supreme Court in *Sri Naresh Chandra Agarwal Vs. Bank of Baroda and Others*, and the decision of this Court in *Hamida v. Khairunnisa* (2009 (5) Mh.L.J. 673). The counsel for the petitioners further contended that in the facts and circumstances of the present case, the decision of the Supreme Court in *Sunil Poddar and Others Vs. Union Bank of India*, is not attracted and, therefore, the law declared by the Supreme Court in the said case does not further the case of the respondent no.1-Bank.

7. Mr.Damale, the learned counsel for the respondent no.1, has submitted that the petitioners have challenged the validity of the impugned order only on the ground that they had no knowledge about the transfer of the suit from the Original Side of this Court to the Tribunal and that the summons effected by substituted service cannot be treated to be a valid service since the order dated 7.6.2002 passed by the Tribunal itself was bad in law, the impugned order is not challenged by the petitioners on any other ground. It is contended that the entire controversy is covered by the decision of the Apex Court in the case of *Sunil Poddar* (supra) and, therefore, the impugned order passed by the DRT based on the law declared by the Apex Court in *Sunil Poddar*'s case is sustainable in law and the petition is liable to be dismissed.

8. We have considered the contentions canvassed by the counsel for the

petitioners as well as the respondent no.1, perused the impugned order. In the instant case, the main thrust of the arguments advanced by the counsel for the petitioners questioning the validity of the impugned order passed by the DRAT is based on the provisions of Order V Rule 20 of the C.P.C. which deals with substituted service. It is the case of the petitioners that the order dated 7.6.2002 passed by the DRT whereby the Tribunal ordered the summons to be served on the petitioners by publication in the local newspaper itself being bad in law, since such an order cannot be passed by the Court unless it is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way. It is contended that in the instant case, in the absence of any material to show that the petitioners (defendants) were keeping out of the way for the purpose of avoiding service or for any other reason the summons could not be served in the ordinary way, the DRT was not legally entitled to pass an order of substituted service as per the scheme of Order V Rule 20 of the C.P.C. and, therefore, there was no valid service of notice to the petitioners. Consequently, the order impugned is unsustainable in law.

9. At this stage, it will be appropriate to take into consideration the law laid down by the Apex Court in Sunil Poddar's case (supra). In the case of Sunil Poddar, the facts involved were more or less similar to the facts and circumstances involved in the present case. The contentions of the appellants in the case of Sunil Poddar were that they were not informed about the transfer of the case from the Civil Court to the DRT and no summonses were served upon them. According to the appellants, they had changed their addresses and new addresses were available with the Bank. In spite of that, with mala fide intention and oblique motives, summonses were sought to be served upon the appellants at an old address, but the appellants were not served because of the change of address. It is further contended that the summonses were then published in the Hindi newspaper which did not have wide circulation. In the said case, the appellants contended that the DRT failed to consider all the above referred material facts and rejected the application of the petitioners for setting aside the ex parte order u/s 22(2)(g) of the Act. The order was confirmed by the DRAT as well as by the High Court. An appeal was filed before the Apex Court against the order of the High Court. The Apex Court, in view of these facts and circumstances, in paragraph 15 of the judgement has observed thus:-

15. Having heard the learned counsel for the parties, in our opinion, the appellants have not made out any ground on the basis of which the order passed by the DRT, confirmed by the DRAT and by the High Court can be set aside. From the record, it is clearly established that the suit was instituted by the plaintiff Bank as early as in August, 1993. The appellants who were Defendant 7 to 9 were aware of the proceedings before the civil court. They appeared before the court, engaged an advocate and filed a written statement. They raised preliminary objections as also objections on merits. They filed applications requesting the court to raise certain issues and try them as preliminary issues. It

was, therefore, obligatory on their part to appear before the DRT, Jabalpur when the matter was transferred under the Act. The appellants, however, failed to do so. We are not impressed by the argument of the learned counsel for the appellants that they were not aware of the proceedings before the DRT and summonses could not be said to have been duly served. As is clear, summonses were issued earlier and on the same address, summonses were sought to be served again after the case was transferred to DRT. There is substance in the submission of the learned counsel for the respondent Bank that the appellants had avoided service of summons as they wanted to delay the proceedings.

It is evident that the facts of the instant case are similar to the one involved in the case of Sunil Poddar. The respondent no.1-Bank filed a civil suit against the petitioners in the year 1986. The said suit was transferred to the DRT, Mumbai, in the year 2001. In pursuance of the directions of the Registrar of the DRT, Mumbai, the summons were dispatched to the petitioners on the addresses mentioned in the cause title which were returned with the remark "Left". The DRT, in the circumstances, passed an order for substituted service on 7.6.2002. The summons were served upon the petitioners by publication in the newspaper. In these circumstances, the observations made by the Apex Court in paragraph 15 of the judgement in Sunil Poddar's case are attracted. The Apex Court in paragraph 16 of its judgement in Sunil Poddar's case has observed thus:-

16. We are also inclined to uphold the argument of learned counsel for the Bank that in view of the fact that the appellants were appearing before the civil court, it was not necessary for the Bank to get summonses published in a newspaper after the matter was transferred in accordance with law to DRT, Jabalpur. But even that step was taken by the respondent Bank. In Nav Bharat Times, a Hindi newspaper having wide circulation in Bombay and Raipur, summonses were published. It cannot be argued successfully that the appellants were not the subscribers of the said newspaper and were not reading Nav Bharat Times, Hindi edition. But even otherwise, such contention is wholly irrelevant. As to bills said to have been produced from the newspaper agent, to us, both the Tribunals were right in observing that such a bill can be obtained at any time and no implicit reliance can be placed on that evidence. It is immaterial whether appellants were subscribers of the said newspaper and whether they were reading it. Once a summons is published in a newspaper having wide circulation in the locality, it does not lie in the mouth of the person sought to be served that he was not aware of such publication as he was not reading the said newspaper. That ground also, therefore, does not impress us and was rightly rejected by the Tribunals.

10. In the instant case, the petitioners were defendants in the civil suit which was pending before the Original Side of this Court prior to transfer thereof to the DRT and were represented by a lawyer and, therefore, it was not necessary for the respondent no.1-Bank to get the summons published in the newspaper after the suit was transferred to the DRT, Mumbai. However, the respondent no.1-Bank published the summons in the newspaper Free Press Journal and, therefore, in

view of the observations of the Apex Court in paragraph 16, it does not lie in the mouth of the petitioners who were served with the summonses through publication that they were not aware of either of pendency of proceedings before the DRT or not served with the notice. The Apex Court in paragraph 18 of its judgement in Sunil Poddar's case has observed thus:-

18. But the fundamental objection which had been raised by the respondent Bank and upheld by the Tribunals is legally well founded. In the application filed by the appellants before the DRT, Jabalpur u/s 22(2)(g) of the Act, there is no murmur that the applicants were the defendants in the suit instituted in civil court; they were served and they appeared through an advocate and also filed a written statement and other applications requesting the court to try certain issues as preliminary issues. It was expected of the appellants to disclose all those facts. Apart from suppression of fact as to service of summons and appearance of the defendants before the court, even on legal grounds, it was not obligatory that the appellants should have been served once again.

Similarly, in paragraph 23 of the judgment, the Apex Court has observed thus:-

23. It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order 5 of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non-service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order 9 of the Code. Since the said provision applies to Debts Recovery Tribunals and Appellate Tribunals under the Act in view of Section 22(2)(g) of the Act, both the Tribunals were right in observing that the ground raised by the appellants could not be upheld. It is not even contended by the appellants that though they had knowledge of the proceedings before the DRT, they had no sufficient time to appear and answer the claim of the plaintiff Bank and on that ground, ex parte order deserves to be set aside.

11. In the instant case, the respondent no.1-Bank after obtaining order of substituted service, published the summons in the daily newspaper and, therefore, the petitioners cannot contend that they were unaware about the proceedings pending before the DRT after transfer of the civil suit. Similarly, it is also not the case of the petitioners that they did not have sufficient time to appear and answer the claim of the respondent no.1- Bank. In these circumstances and in view of the observations made by the Apex Court in paragraph 23 of the judgement, the ex parte order passed by the DRT and confirmed by the DRAT cannot be set aside, even if it is established that there

was some irregularity in the service of the summons. In paragraph 24 of the judgement, the Apex Court has observed thus:-

24. In our opinion, the Tribunals were also right in commenting on the conduct of the appellant-defendants that they were appearing before civil court through an advocate, had filed written statement as also applications requesting the court to treat and try certain issues as preliminary issues. All those facts were material facts. It was, therefore, incumbent upon the appellants to disclose such facts in an application u/s 22(2)(g) of the Act when they requested DRT to set aside ex parte order passed against them. The appellants deliberately and intentionally concealed those facts. There was no whisper in the said application indicating that before the civil court they were present and were also represented by an advocate. An impression was sought to be created by the appellant-defendants as if for the first time they came to know in December 2000 that an ex parte order had been passed against them and immediately thereafter they had approached the DRT. The Debts Recovery Tribunal, Jabalpur, therefore, in our opinion was right in dismissing the said application.

12. In the present case, the main ground raised by the petitioners in their application for setting aside the ex parte order was that after the transfer of Civil Suit No.198 of 1986 from the Original Side of this Court to the DRT, transfer notice was not duly served on the petitioners and they had no knowledge about the transfer of the suit to the DRT. In view of the observations of the Apex Court referred to hereinabove as well as in view of the fact that the summons were published in the newspaper by the respondent no.1-Bank, it does not lie in the mouth of the petitioners to contend that they had no knowledge about the transfer of the suit to the DRT for want of service of notice and, therefore, the application filed by the petitioners for setting aside the ex parte order was rightly rejected by the DRT and was rightly affirmed by the DRAT.

13. Insofar as the contention canvassed by the petitioners in respect of the validity of the order dated 7.6.2002 passed by the DRT of substituted service is concerned, as per the scheme of section 22 of the Act, the Tribunal is not bound by the procedure laid down in the CPC under Order V Rule 20 and has power to regulate its own procedure. However, it does not mean that the Tribunal will not have jurisdiction to exercise powers of the Court as contained in the Code of Civil Procedure. On the other hand, the Tribunal can travel beyond the C.P.C., provided it observes the principles of natural justice. Considering the objective of the scheme of section 22 of the Act, it is evident that the Legislature has thought it fit to empower the Tribunal to regulate its own procedure, including the places at which it shall have its sittings, provided it observes the principles of natural justice. At the same time, there is no bar for the Tribunal to take recourse to the procedure laid down by the C.P.C., though it is not bound by the procedure laid down in the C.P.C. On the back-drop of this legal position, the orders passed by the Tribunal cannot be held to be invalid in law on the ground that the same are not in conformity with the procedure stipulated under the C.P.C., merely because

the Tribunal has been clothed with the power of civil Court and is entitled to take recourse to the procedure laid down in the Code of Civil Procedure.

14. In the instant case, it is not possible for us to turn the Nelson's eye to the fact that the respondent no.1 had filed a civil suit for recovery of the amount way back in the year 1986 on the Original Side of this Court against the petitioners. Advocate was appointed by the petitioners to act and plead on their behalf in the said suit. Though a reasonable opportunity of hearing was afforded to the petitioners in view of the publication of summons in the newspaper, the petitioners failed to appear before the DRT in order to delay the proceedings and, therefore, it is not open for the petitioners now to contend that the procedure adopted by the Tribunal is violative of the principles of natural justice.

15. Insofar as the decision of the Apex Court in Naresh Chandra Agarwal's case cited by the petitioners is concerned, the facts and circumstances involved in the said case are entirely different than the one involved in the present case and, therefore, the said decision of the Apex Court is of no help to the petitioners. The Division Bench decision of this Court in Hamida's case cited by the learned counsel for the petitioners also does not further the case of the petitioners since the Tribunal is not bound by the procedure stipulated in Order V of the C.P.C. which deals with the issue of service of summonses and, therefore, the contention canvassed by the learned counsel for the petitioners, based on the procedure stipulated in Order V of the C.P.C. cannot hold water, firstly, because the Tribunal is not bound by the same and, secondly, the publication of summonses in the newspaper by the respondent no.1 is sufficient to hold that the petitioners were duly served which fulfills the requirements of the principles of natural justice. As against these decisions, the judgement of the Apex Court in Sunil Poddar's case is squarely applicable in the present case and the controversy in question is totally covered by the law declared by the Apex Court in Sunil Poddar's case and, therefore, the impugned orders are maintainable in law.

16. In the instant case, in view of the above referred facts and circumstances, it is difficult for us to hold that the Tribunal has not followed the procedure stipulated in section 19(4) of the Act. Similar is the situation insofar as regulation 17 of the Debts Recovery Tribunal Regulation is concerned. In the present case, the Tribunal had ordered service by advertisement in newspaper. It is not the case of the petitioners that the advertisement was published by the respondent no.1 in the newspaper which did not have wide circulation and, hence, the contention canvassed by the learned counsel for the petitioners in this regard lacks merit.

17. We want to observe that the Act has been introduced to provide speedy remedy for recovery of debts. The Legislature, therefore, in its wisdom thought it expedient to provide special remedy for recovery of debts of more than Rs.10 lakhs. The prime object of the establishment of the Debts Recovery Tribunal is to provide expeditious adjudication of recovery of debts due to banks and financial

institutions. It is a special law which has been enacted with the object of expeditious adjudication of disputes relating to recovery of debts due to Banks and financial institutions and, therefore, section 22 of the Act has clothed the Tribunal with the power to regulate its own procedure guided by the principles of natural justice and other provisions of the Act and the Rules and is not bound by the procedure laid down by the C.P.C. The Tribunal is required to conclude the debt recovery proceedings as expeditiously as possible, otherwise, the primary objective of the Act will be frustrated. For the reasons stated hereinabove, the Petition suffers from lack of merit and the same is dismissed. No order as to costs.