
(2013) 09 AHC CK 0176

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 69668 of 2011

Kotak Mahindra Bank Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 20-09-2013

Acts Referred:

Citation : (2013) 9 ADJ 712 : (2013) 101 ALR 806 : (2014) 2 BC 58 : (2013) 121 RD 328

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Advocate : M.K. Gupta, R.N. Singh and Sudeep Harkauli, for the Appellant; Ashok Mehta, Manish Goyal, Manish Trivedi, O.P. Mishra, Pratik J. Nagar, R.L. Arora, P.N. Tripathi and S.P. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Tarun Agarwala, J.—In 1981, a loan of Rs. 500 lacs was sanctioned by the ICICI Bank in favour of U.P. State Cement Corporation Ltd. (hereinafter referred to as UPSCCL), which is a corporation incorporated under the Companies Act and which was also a Government of Uttar Pradesh undertaking. In 1983, the State of Uttar Pradesh gave an unconditional guarantee for repayment of the loan. Subsequently, this Company became a sick industry and eventually, in the year 1997, BIFR recommended winding up of this Company. An appeal was filed and AIFR maintained the order of the BIFR. Eventually, the High Court issued a winding up order and appointed the Official Liquidator to liquidate the assets of the Company. In the year 2001, ICICI Bank filed an original application u/s 19 of the Recovery of Debts Due to Banks and Financial Institution Act, 1993 (hereinafter referred to as the Act of 1993) against UPSCCL and the State of Uttar Pradesh for recovery of Rs. 56.41 Crores. During its pendency, ICICI Bank assigned its rights for recovery of the amount to Kotak Mahindra Bank Ltd., who were accordingly, substituted. It transpires that inspite of a notice being issued, the State of Uttar Pradesh did not contest the matter and the Debts Recovery

Tribunal proceeded ex parte against the State of Uttar Pradesh. On 6th December, 2006, the Debts Recovery Tribunal allowed original application directing recovery of the amount from UPSCCL. For facility, the operative portion of the order is extracted hereunder:

It is therefore, ordered:

That the original application No. 291 of 2001 of the applicants-ICICI Ltd. and Kotak Mahindra Bank Ltd., for issuance of recovery certificate to the tune of Rs. 56,41,37,770.00 (Rs. Fifty Six Crores Forty One Lacs Thirty seven Thousand Seven Hundred Seventy only) together with pendente lite and future interest @ 12% per annum with half yearly rest is allowed with cost on contest against the defendant No. 1 now represented by the Official Liquidator and dismissed on contest against defendant No. 4 (IFCI), defendant No. 6 (Allahabad Bank) and defendant No. 7 (State Bank of India) and disposed of ex parte against the defendant No. 2 and dismissed against defendant No. 3 (IDBI) and defendant No. 5 (LIC). The applicant bank is entitled the said interest from the date of filing of the application till the full recovery is made through the Official Liquidator appointed by the order of the Hon"ble High Court.

2. In the year 2007, the Official Liquidator made certain recoveries and handed over a sum of Rs. 33.93 Crores to the bank. After 18 months from the date of the order of the Debts Recovery Tribunal, the bank filed an application dated 7th July, 2008 for correction of the order of the Debts Recovery Tribunal dated 6th December, 2006 contending that there was a clerical error which requires rectification. The Debts Recovery Tribunal, without issuing any notice, allowed the application on the same date and modified the operative portion of the order by including the recovery of the amount not only against UPSCCL but also against the State of Uttar Pradesh on the ground that the liability was joint and several. This order dated 7th July, 2008 was purportedly passed by the Debts Recovery Tribunal exercising its powers u/s 26(2) of the Recovery of Debts Due to Banks and Financial Institution Act, 1993 read with Section 152 of the Code of Civil Procedure. By the said order, the Tribunal also directed necessary amendment/correction in the recovery certificate, which had already been issued.

3. The State of Uttar Pradesh upon coming to know of this order, filed a recall application on 26th September, 2008 for the recall of the order dated 6th December, 2006 and 7th July, 2008. This application was also accompanied by an application u/s 5 of the Limitation Act. The Debts Recovery Tribunal, after considering all aspects of the matter, rejected the application of the State of Uttar Pradesh for the recall of its order by passing an order dated 27th May, 2009 holding that the delay in filing the recall application had not been properly explained. The Tribunal further found that the State of Uttar Pradesh had knowledge of the proceedings but chose not to appear before the Debts Recovery Tribunal.

4. The State of Uttar Pradesh, being aggrieved by the order of the Debts

Recovery Tribunal, filed an appeal before the Debts Recovery Appellate Tribunal. It transpires that the bank also filed an appeal before the appellate Tribunal against certain observations made by the Debts Recovery Tribunal in its order. The appellate Tribunal, by an order dated 6th May, 2011 allowed the appeal of the State of Uttar Pradesh and dismissed the appeal of the bank. The appellate Tribunal held that the Debts Recovery Tribunal, while passing the order dated 7th July, 2008 had adopted an illegal procedure, inasmuch as the said application was filed after a period of 18 months without furnishing any explanation for condoning the delay. Further, no notice was issued to the opposite parties, and further, the procedure adopted was contrary to Rule 5-A of the Debts Recovery Tribunal (Procedure) Rules, 1993 (hereinafter referred to as the Rules of 1993). The appellate Tribunal further found that the contention of the State of U.P. that they came to know of the order for the first time on 25th September, 2008 was not denied by the bank in their objection and, therefore, held that the application for recall was not barred by limitation. The appellate Tribunal, consequently, while allowing the appeal quashed the order dated 7th July, 2008 and 27th May, 2009 passed by the Debts Recovery Tribunal. The appellate Tribunal further remitted the matter to the Debts Recovery Tribunal to consider the application for recall of the order dated 6th December, 2006 filed by the State of Uttar Pradesh and also consider the bank's application for correction of its order dated 6th December, 2006. The bank, being aggrieved by the said order has filed the present writ petition.

5. The Court has heard Sri R.N. Singh, the learned Senior Counsel assisted by Sri Sudip Harkauli, the learned counsel for the petitioner, Sri S.P. Gupta, the learned Advocate General of the State of U.P. assisted by Sri Sachindra Upadhyay, the learned counsel and Sri Pratik J. Nagar, the learned counsel for respondent No. 6.

6. Sri R.N. Singh, the learned Senior Counsel submitted that the entire exercise initiated by the State of U.P. was an exercise in futility, inasmuch as the State of U.P. was under an obligation to pay the debt due that was fastened upon UPSCCL and that the State of U.P. could not escape this liability. The learned Senior Counsel stressed that in proceedings before the Debts Recovery Tribunal u/s 19 of the Act of 1993 notices were duly served and in spite of knowledge of the proceedings, the State of U.P. chose not to contest the proceedings. The order of the Debts Recovery Tribunal dated 6th December, 2006 was clear, inasmuch as the order of recovery was not only against the UPSCCL but also against the State of U.P. and that there was no necessity to seek a clarification or correction of that order.

7. The learned Senior Counsel submitted that the order of the Tribunal dated 7th July, 2008 correcting its order was perfectly justified for which no notice or hearing was required to be given to any of the parties. Further, the said order was known to the State of U.P. and, therefore, the recall application was patently erroneous and was an exercise in futility to delay the matter as far as possible. In any case, the application was filed without providing any plausible explanation

for the delay. The learned Senior Counsel submitted that the Debts Recovery Tribunal was justified in rejecting the application of the State of U.P. and that the appellate Tribunal committed a manifest error of law in allowing the appeal of the State of U.P.

8. On the other hand, the learned Advocate General submitted that the State of U.P. was totally oblivious of the order dated 7th July, 2008, which was an ex parte order and which was passed without issuing any notice to any of the parties. The learned Advocate General submitted that once an order has been passed, the Tribunal became functus officio and, therefore, had no power to pass such an order. Assuming that a rectification application could be entertained, the Tribunal was obliged to issue notices to the respondents and was obliged in inviting objections, if any, before passing any order on the said application. The Learned Advocate General contended that in the instant case, no notice was issued by the Tribunal on the rectification application, inasmuch as the application was filed by the bank on 7th July, 2008 and the same was allowed on the same date i.e. 7th July, 2008. The learned Advocate General submitted that the order of the Debts Recovery Tribunal dated 7th July, 2008 was only made known to the State of U.P. on 25th September, 2008, upon which the files were examined, and certified copies were obtained and thereafter, the recall application was filed on the next date i.e. on 26th September, 2008 alongwith a Section 5 application by way of abundant precaution.

9. The learned Advocate General further submitted that the application of the bank dated 7th July, 2008 purportedly to have been filed u/s 26(2) of the Act of 1993 read with Section 152 of the CPC for the purpose of correction of an arithmetical, clerical or accidental error could not be exercised in the given circumstances, inasmuch such correction modifies the decree and makes the State of U.P. liable for the recovery, which cannot be done under this provision. The learned Advocate General submitted that if the bank was aggrieved by the order of the Tribunal, it could take recourse to filing a review application under Rule 5-A of the Rules of 1993 or appeal to a higher forum but the said modification would not be done in the garb of a correction application.

10. In support of his submission, the learned Advocate General placed reliance upon a series of judgments in M/s. Plasto Pack, Mumbai and Another Vs. Ratnakar Bank Ltd., , K. Rajamouli Vs. A.V.K.N. Swamy, , The Deputy Director, Land Acquisition Vs. Malla Atchinaidu and Others, , Polavarapu Ankinnedu Vs. Sri Bavaji Mutt, Singarayapalam, and Raja Harish Chandra Raj Singh Vs. The Deputy Land Acquisition Officer and Another, , on the question as to whether in the given circumstances a decree could be modified under the garb of a correction application.

11. Having heard the learned counsel for the parties, the Court finds that there is nothing to indicate that the State of U.P. had knowledge or had gained knowledge of the order of the Debts Recovery Tribunal dated 7th July, 2008. Admittedly, the said order was an ex parte order without notice to any of the

respondents including the State of U.P., inasmuch as the said order was passed on the same date when the application was moved by the bank. Further, there is nothing to indicate that upon the passing of the order dated 7th July, 2008, the said order was ever served or communicated to the State of U.P. There is nothing to indicate that the State of U.P. came to know of the said order either actually or constructively.

12. In *Raja Harish Chandra Raj Singh Vs. The Deputy Land Acquisition Officer and Another*, , the Supreme Court held that the knowledge of the party affected by the award either actually or constructively being an essential requirement of fair play and natural justice, the expression "the date of the award" as used in the proviso means the date when the award is either communicated to the party or is known either actually or constructively.

13. In the instant case, the Court finds that there is no evidence which has come on record to indicate that the State of U.P. came to know of the order of the Tribunal dated 7th July, 2008 either actually or constructively or that the said order was ever communicated.

14. The contention of the learned Advocate General that the application of the bank for modification of the order of the Tribunal dated 6th December, 2006 could not be corrected since there were no arithmetical or accidental or clerical error in the said order nor was the Tribunal empowered u/s 26(2) of the Act of 1993 read with Section 152 of the CPC to correct a decree and the exercise, if any, could be done by filing a review application under Rule 5-A of the Rules of 1993. This moot point, in the opinion of the Court, is required to be considered by the Debts Recovery Tribunal and it would not be appropriate for this Court to delve on this question at this stage as any observation made by this Court would have a bearing on the application filed by the bank before the Tribunal.

15. In the light of the aforesaid, the Court is of the opinion that the Tribunal committed a manifest error in rejecting the recall application. The appellate Tribunal was justified in setting aside the order of the Tribunal. For the reasons stated aforesaid, the writ petition fails and is dismissed with the observation that the application of the petitioner-bank for rectification of the order dated 6th December, 2006 as well as the application of the State of U.P. for recall of the order dated 6th December, 2006 shall be decided by the Debts Recovery Tribunal within three months from the date of production of a certified copy of this order after hearing all parties concerned.